



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

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November 29, 2011

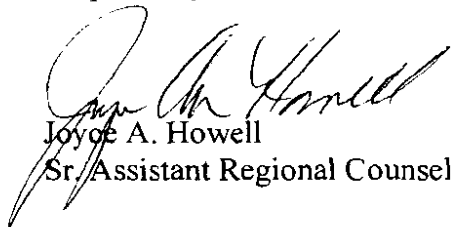
Hon. Barbara A. Gunning, A.L.J.
EPA Office of Administrative Law Judges
1099 14th Street, N.W.
Suite 350 Franklin Court
Washington, D.C. 20005

Re: IMO Chemsolv, Inc. and Austin Holdings-VA, L.L.C.
EPA Docket No. RCRA-03-2011-0068

Dear Jude Gunning:

Enclosed please find Complainant's Motion for Partial Accelerated Decision, Memorandum, Declarations of Kenneth Cox and Peggy Zawodny, together with a proposed form of Order.

Respectfully,


Joyce A. Howell
Sr. Assistant Regional Counsel

Enclosures

cc: Lydia Guy, Regional Hearing Clerk

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

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**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III**

In the Matter of:

CHEMSOLV, INC., formerly trading as
Chemicals and Solvents, Inc.

and

AUSTIN HOLDINGS-VA, L.L.C.

Respondents,

Chemsolv, Inc.
1111 Industrial Avenue, S.E
1140 Industrial Avenue, S.E
Roanoke, Virginia 24013

Facility.

COMPLAINANT'S MOTION FOR
PARTIAL ACCELERATED DECISION
AS TO LIABILITY

EPA Docket No. RCRA-03-200066

Proceeding under Section 3008(a)
of the Resource Conservation and
Recovery Act, as amended, 42 U.S.C.
Section 6928(a)

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Complainant herewith respectfully moves this Court, pursuant to 40 C.F.R.
§§ 22.20 and 22.16(a), for an order for finding Respondent Chemsolv, Inc. liable for the
allegations contained in Counts III - VII of the Administrative Complaint.

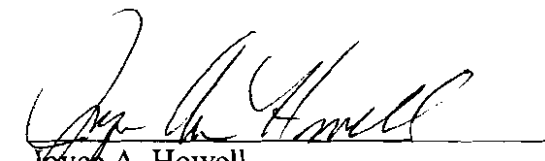
The basis for this Motion for Partial Accelerated Decision as to Liability is that there are
no genuine material facts as to Respondent Chemsolv Inc.'s liability for the violations alleged in
Counts III - VII of the Administrative Complaint. In support of this Motion, Complainant
avers as follows:

This matter was commenced by the filing of an Administrative Complaint, Compliance Order and Notice of Opportunity for a Hearing ("Complaint") on March 31, 2011. The Complaint alleges that the Respondents violated Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939e, and the Commonwealth of Virginia's federally authorized hazardous waste management program. More specifically, the Administrative Complaint alleges, in pertinent part that: Count III: Respondent Chemsolv failed to have secondary containment for a hazardous waste storage tank; Count IV): Respondent Chemsolv failed to obtain a tank assessment for a hazardous waste storage tank; Count V): Respondent Chemsolv failed to conduct and/or document inspection of a hazardous waste storage tank in the facility operating records; Count VI): Respondent Chemsolv failed to comply with Subpart CC standards for Tanks; and Count VII): Respondent Chemsolv failed to comply with the closure requirements for a hazardous waste tank. Respondents subsequently filed a timely Answer to the Complaint essentially denying the substantive allegations to the complaint. This matter is presently scheduled for Hearing on January 18, 2012.

WHEREFORE, Complainant requests that the Court issue an Order against Respondent Chemsolv, Inc., finding Respondent liable for the violations alleged in Counts III – VII of the Administrative Complaint, and impose any such further relief to which this Court determines that Complainant is entitled, via execution of the proposed Order that is annexed hereto.

Respectfully submitted,

Dated: Nov. 29, 2011


Joyce A. Howell
Sr. Assistant Regional Counsel (3RC30)
U.S. Environmental Protection Agency, Region III

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III**

In the Matter of:

CHEMSOLV, INC., formerly trading as
Chemicals and Solvents, Inc.

and

AUSTIN HOLDINGS-VA, L.L.C.

Respondents,

Chemsolv, Inc.
1111 Industrial Avenue, S.E
1140 Industrial Avenue, S.E
Roanoke, Virginia 24013

Facility.

EPA Docket No. RCRA-03-2000-0008

Proceeding under Section 3008(a)
of the Resource Conservation and
Recovery Act, as amended, 42 U.S.C.
Section 6928(a)

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ORDER

This matter having been opened to the Court upon Complainant's Motion for Partial Accelerated Decision as to Liability for Counts III through VII of the Administrative Complaint, and the Court having considered the argument of counsel and for good cause shown, it is hereby:

ORDERED that Respondent Chemsolv is liable for the allegations contained in Counts III through VII of the Administrative Complaint, to wit:

1. Respondent Chemsolv is a person as defined in Section 1004(15) of RCRA, 42 U.S.C. Section 6903(15), and 9 VAC 20-60-260.A, which incorporates by reference 40 C.F.R. § 260.10 with exceptions not relevant herein.

2. Respondent Chemsolv is and, at all times relevant to the violations alleged in Counts III through VII of the Administrative Complaint, was the "owner" and "operator" of a "facility" located on Tax Parcel 4240104 of the City of Roanoke which constitutes a portion of the Facility located at 1111 and 1140 Industry Avenue, S.E., in Roanoke, Virginia ("the Facility"), as those terms are defined in 9 VAC 20-60-260.A, which incorporates by reference 40 C.F.R. § 260.10 with exceptions not relevant herein.
3. Respondent Chemsolv is, and was at all times relevant to this Complaint, a "generator" of "hazardous waste," as described below, at the Facility, as those terms are defined at 9 VAC 20-60-260.A which incorporates by reference 40 C.F.R. § 260.10 with exceptions not relevant herein.
4. Until sometime on or about March 27, 2008, Respondent Chemsolv owned and operated a subgrade hazardous waste storage tank at the Facility known as the "Pit."
5. The Pit is a "new tank system" as that term is defined at 9 VAC 20-60-260A, which incorporates by reference 40 C.F.R. § 260.10.
6. Complainant's representatives took samples of water and solids contained in the Pit on May 23, 2007 at the Chemsolv Facility.
7. The analysis of the May 23, 2007 Pit water sample, using the Toxicity Characteristic Leaching Procedure ("TCLP") described in 40 C.F.R. § 261.24 (incorporated by reference in 9 VAC 20-60-261), indicated the Pit water contained 6.1 mg/L chloroform.
8. Solid waste with a concentration of 6.0 mg/L chloroform or greater is a hazardous waste (D022) pursuant to 9 VAC 20-60-261, which incorporates by reference 40 C.F.R. § 261.24 with exceptions not relevant herein, because it exhibits the characteristic of "toxicity" for chloroform.
9. The analysis of the May 23, 2007 Pit solids sample, using the TCLP described in 40 C.F.R. § 261.24 (incorporated by reference in 9 VAC 20-60-261), indicated the Pit sludge contained 457 mg/L tetrachloroethene and 15.5 mg/L trichloroethene.
10. Solid waste with a concentration of .7 mg/L tetrachloroethene or greater is a hazardous waste (D039) pursuant to 9 VAC 20-60-261.A, which incorporates by reference 40 C.F.R. § 261.24 with exceptions not relevant herein, because it exhibits the characteristic of "toxicity" for tetrachloroethene.
11. Solid waste with a concentration of .5 mg/L or greater trichloroethene is a hazardous waste (D040) pursuant to 9 VAC 20-60-261.A, which incorporates by reference 40 C.F.R. § 261.24 with exceptions not relevant herein, because it exhibits the characteristic of "toxicity" for trichloroethene.
12. The analysis of the May 23, 2007 Pit sludge sample indicated the Pit sludge contained a volatile organic ("VO") concentration of greater than 500 parts per million by weight.

13. Respondent Chemsolv cleaned out the Pit on or around February 1, 2008, removed the Pit, a single-walled subgrade tank constructed of carbon steel with a ceramic interior coating, and filled the opening with gravel on or about March 27, 2008.

14. The Pit water and Pit solids referred to above, are and were, at the time of the EPA and VADEQ inspections referred to above, "solid wastes" as that term is defined at 9 VAC 20-60-260.A, which incorporates by reference 40 C.F.R. § 260.10, and thus "hazardous wastes" as that term is defined at 9 VAC 20-60-260.A, which incorporates by reference 40 C.F.R. § 260.10.

15. Respondent accumulated 7,924 kilograms (17,500 lbs.) of hazardous waste at the Facility at one time from March 23, 2007 through and including February 20, 2008.

16. From at least May 23, 2007 until approximately February 1, 2008, Respondent Chemsolv violated 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.193(a), (d) and (e), with exceptions not relevant herein, by failing to provide secondary containment for the Pit which met the requirements of 40 C.F.R. § 264.193(1)(a), (d) and (e).

17. From at least May 23, 2007 until approximately February 1, 2008, Respondent Chemsolv did not obtain and/or keep on file at the Facility written statements by those persons required to certify the design of the tank system and supervise the installation of the tank system in accordance with the requirements of 40 C.F.R. § 264.192(b) - (f) for the Pit, as required by 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.192(a) and (g).

18. From at least May 23, 2007 until February 1, 2008, including all "operating days" within the meaning of 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.195(b) and (d) with exceptions not relevant herein, Respondent Chemsolv did not inspect and/or document the inspections of the aboveground portions of the Pit, in violation of the requirements of 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.195(b) and (d).

19. From at least May 23, 2007 until February 1, 2008 Respondent Chemsolv violated 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.1082(b) and 1084(b), by failing to control air pollutant emissions from the Pit in accordance with the Tank Level 1 or 2 controls specified in 40 C.F.R. § 264.1084(c) or (d).

20. Respondent Chemsolv violated 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.197, by failing to comply with the closure requirements of 40 C.F.R. Part 264, Subparts G and H.

WHEREAS, IT IS FURTHER ORDERED:

21. Pursuant to the authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Respondent Chemsolv is hereby ordered to perform the Compliance Task listed in Paragraph 21 of this Order. Respondent Chemsolv shall certify completion of the Compliance Task in accordance with Paragraph 24 below. "Days" as used herein shall mean calendar days unless specified otherwise.

22. Respondent Chemsolv shall, within sixty (60) days of the date of this Complaint, submit a closure plan prepared pursuant to 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.112 and .197 with exceptions not relevant herein, for the area where the Pit was located at the Facility and submit such plan to the Virginia Department of Environmental Quality, and implement the same upon approval of the Virginia Department of Environmental Quality.

23. Any notice, report, certification, data presentation, or other document submitted by either Respondent pursuant to this Compliance Order which discusses, describes, demonstrates, supports any finding or makes any representation concerning such Respondent's compliance or noncompliance with any requirements of this Compliance Order shall be certified by a responsible corporate officer of such Respondent. A responsible corporate officer means: (1) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation; or (2) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25 million (in second quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

The certification of the responsible corporate officer required above shall be in the following form:

I certify that the information contained in or accompanying this [type of submission] is true, accurate and complete. As to [the/those] identified portions of this [type of submission] for which I cannot personally verify [its/their] accuracy, I certify under penalty of law that this [type of submission] and all attachments were prepared in accordance with a system designed to assure the qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

Signature: _____
Name: _____
Title: _____

Any notifications or submissions required by this Compliance Order to be submitted to EPA, including, but not limited to, the aforementioned certification, shall be sent via certified mail/return receipt requested or overnight mail commercial delivery service to the attention of the following persons:

Kenneth J. Cox (3LC70)
Land and Chemicals Division
United States Environmental Protection Agency - Region III

1650 Arch Street
Philadelphia, Pennsylvania 19103-2029; and

Joyce A. Howell, Esq. (3RC30)
Senior Assistant Regional Counsel
Land and Chemicals Division
United States Environmental Protection Agency - Region III
1650 Arch Street
Philadelphia, PA 19103-2029

SO ORDERED.

Hon. Barbara A. Gunning, A.L. J.

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III**

In the Matter of:

CHEMSOLV, INC., formerly trading as
Chemicals and Solvents, Inc.

and

AUSTIN HOLDINGS-VA, L.L.C.

Respondents,

Chemsolv, Inc.
1111 Industrial Avenue, S.E
1140 Industrial Avenue, S.E
Roanoke, Virginia 24013

Facility.

EPA Docket No. RCRA-03-2006

Proceeding under Section 3008
of the Resource Conservation and
Recovery Act, as amended, 42 U.S.C.
Section 6928(a)

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**COMPLAINANT'S MEMORANDUM IN SUPPORT OF THE MOTION FOR PARTIAL
ACCELERATED DECISION AS TO LIABILITY**

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I. Procedural History

This matter was commenced by the filing of an Administrative Complaint, Compliance Order and Notice of Opportunity for a Hearing (“Complaint”) on March 31, 2011. The Complaint alleges that the Respondents Chemsolv, Inc, and Austin Holdings – VA., L.L.C. violated Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939e, and the Commonwealth of Virginia’s federally authorized hazardous waste management program. More specifically, the Administrative Complaint alleges Respondent Chemsolv violated RCRA in Counts III- VII. Specifically that: Count III: Respondent Chemsolv failed to have secondary containment for a hazardous waste storage tank; Count IV): Respondent Chemsolv failed to obtain a tank assessment for a hazardous waste storage tank; Count V): Respondent Chemsolv failed to conduct and/or document inspection of a hazardous waste storage tank in the facility operating records; Count VI): Respondent Chemsolv failed to comply with Subpart CC standards for Tanks; and, Count VII): Respondent Chemsolv failed to comply with the closure requirements for a hazardous waste tank. Respondents subsequently filed a timely Answer to the Complaint and denied the substantive allegations to the Administrative Complaint.

By Order of this Court, the parties have each filed an Initial Pre-Hearing Exchange. The Hearing in this matter is presently scheduled to begin on January 18, 2012. Complainant now brings this motion for Partial Accelerated Decision as to Respondent Chemsolv, Inc.’s liability as to Counts III - VII of the Administrative Complaint. Complainant respectfully requests that the Court enter an Order finding Respondent Chemsolv liable for the allegations contained in Counts III – VII of the Administrative Complaint. As grounds for this motion, Complainant avers that no

genuine issue of material fact exists as to Counts III - VII of the Administrative Complaint, as demonstrated by the Declarations of Kenneth Cox and Peggy Zawodny and the facts and argument set forth below.

II. Statement of Facts

1. Respondent Chemsolv operates a chemical distribution business on certain real property located in Roanoke, Virginia known as Tax Parcel 4240104 and with street addresses 1111 and 1140 Industrial Avenue S.E., Roanoke, Virginia. (Respondents' Answer, ¶ 3).

2. The United States Environmental Protection Agency ("EPA") and the Virginia Department of Environmental Quality ("VADEQ") conducted an inspection at Respondents' property on May 15, 2007. (Respondents' Answer, ¶ 6).

3. Representatives of VADEQ conducted inspections of Respondents' property on May 15, 18 and 23, 2007. (Respondents' Answer, ¶ 8).

4. EPA took certain samples during its inspection of Respondents' property on May 23, 2007. (Complainant Exhibit 18, EPA 333 – 335, see also Respondents' Answer ¶ 7)

5. On November 16, 2007, EPA sent Respondent Chemsolv an Information Request Letter pursuant to Section 3007(a) of RCRA, 42 U.S.C. § 6927(a). Respondent Chemsolv replied to this Information Request by letter dated December 10, 2007. (Admitted in Respondents' Answer ¶ 9).

6. On February 4, 2008, EPA sent Respondent Chemsolv an Information Request Letter pursuant to Section 3007(a) of RCRA, 42 U.S.C. § 6927(a). Respondent Chemsolv replied to this Information Request by letter February 6, 2008. (Admitted in Respondents' Answer ¶ 10).

7. On April 1, 2008, EPA sent Respondent Chemsolv an Information Request Letter

pursuant to Section 3007(a) of RCRA, 42 U.S.C. § 6927(a). Respondent Chemsolv replied to this Information Request by letter dated April 4, 2008. (Admitted in Respondents' Answer ¶ 11).

8. A subgrade tank was located on the Tax Parcel 4240104 portion of the Respondents' property from at least May 23, 2007 until February 1, 2008. (See Respondents' Answer ¶ 14; Complainant Exhibit 21, Information Request Letter Response dated December 10, 2007, Response 7(d), EPA 658; Complainant Exhibit 23, Information Request Letter Response dated February 4, 2008, Attachment 17e, EPA 1139).

9. The subgrade tank located on the Tax Parcel 4240104 portion of the Respondents' property was installed after July 1986. Complainant Exhibit 23, Information Request Letter Response 18(e), EPA 1083. (Question: "What is the date of the construction of the Pit?" Answer: "Approximately 198 – 1990") Id.

10. The subgrade tank located on the Tax Parcel 4240104 portion of the Respondents' property was identified by Respondent Chemsolv as the "Pit" ("Pit"). Complainant Exhibit 21, Information Request Letter Response dated December 10, 2007, Response 1(b) and (c); Response 7(c) and (d), EPA 650 – 654; EPA 658.

11. EPA took both water and settled solids samples from the Pit on May 23, 2007. (Complainant Exhibit 18, EPA 333 – 335, Admitted in Respondents' Answer ¶¶ 14 and 16).

11. The analysis of the May 23, 2007 Pit water sample taken by EPA was performed using the Toxicity Characteristic Leaching Procedure, "TCLP" described in 40 C.F.R. § 261.24 (incorporated by reference in 9 VAC 20-60-261). Declaration of Peggy Zawodny ¶ 4.

12. The analysis of the May 23, 2007 Pit water sample taken by EPA, indicated the Pit water contained 6.1 mg/L chloroform. Declaration of Peggy Zawodny ¶ 5.

13. The analysis of the May 23, 2007 Pit settled solids sample taken by EPA was performed using the TCLP described in 40 C.F.R. § 261.24 (incorporated by reference in 9 VAC 20-60-261). Declaration of Peggy Zawodny ¶ 6.

14. The analysis of the May 23, 2007 Pit settled solids sample indicated the Pit settled solids contained 457 mg/L Tetrachloroethene and 15.5 mg/L Trichloroethene. Declaration of Peggy Zawodny ¶ 7.

15. Tetrachloroethene and Trichloroethene are volatile organic (“VO”) compounds. Declaration of Peggy Zawodny ¶ 8.

16. The analysis of the May 23, 2007 Pit settled solids sample indicated the Pit settled solids contained twenty-eight different volatile organic compounds. Declaration of Peggy Zawodny ¶ 9.

17. The analysis of the May 23, 2007 Pit settled solids sample indicated the Pit settled solids contained a VO concentration of greater than 500 parts per million by weight. Declaration of Peggy Zawodny ¶ 11.

18. The concentration of Tetrachloroethene in the Pit solids indicated that the volume of Tetrachloroethene in the Pit settled solids was approximately 71 gallons. Declaration of Kenneth Cox ¶ 29.

19. The concentration of Trichloroethene in the Pit indicated that the volume of Trichloroethene in the Pit settled solids was approximately 1.5 gallons. Declaration of Kenneth Cox ¶ 30.

20. The subgrade tank (Pit) was a single-walled tank constructed of carbon steel with a ceramic interior coating. (Admitted as to construction of carbon steel and ceramic interior coating, see Respondents' Answer ¶ 20). Declaration of Kenneth Cox, ¶ 7.

21. Respondent Chemsolv, removed the Pit on or about March 27, 2008. (Admitted Respondents' Answer ¶ 20).

22. Chemsolv owns the real property where the Pit was located. Complainant Exhibit 12, EPA 235.

23. Chemsolv operated the Pit at all times relative to the allegations in the Complaint. Admitted, Respondents' Answer ¶ 3).

24. The Chemsolv chemical distribution business located at 1111 and 1140 Industrial Avenue S.E., Roanoke, Virginia is a Facility within the meaning of 9 VAC 20-60-260.A, which 40 C.F.R. § 260.10. Declaration of Kenneth Cox, ¶ 9.

25. Respondent Chemsolv accumulated 1,000 kilograms (2,200 lbs.) at one time of hazardous waste or more at the Facility from March 23, 2007 through and including February 20, 2008. Declaration of Kenneth Cox, ¶ 26.

26. Respondent Chemsolv accumulated 6,000 kilograms (13,200 lbs.) at one time of hazardous waste or more at the Facility from March 23, 2007 through and including February 20, 2008. Declaration of Kenneth Cox, ¶ 26.

III. Argument

A. The Standard for Accelerated Decision

Motions for Accelerated Decision are governed by the standard set forth in 40 C.F.R.

§ 22.20(a) of the Consolidated Rules of Practice, which provides, in pertinent part, that:

The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a).

A long line of decisions by the Office of Administrative Law Judges and the Environmental Appeals Board has recognized that the language provided in 40 C.F.R. § 22.20(a) concerning motions for accelerated decision mirrors that provided for motions for summary judgment as set forth in Rule 56 of the Federal Rules of Civil Procedure ("F.R.C.P.") and that, therefore, judicial rulings concerning F.R.C.P. 56 provide useful guidance for Presiding Officers to consider in ruling upon motions for accelerated decision. *See, e.g., In re: BWX Technologies, Inc.*, 2000 EPA App. LEXIS 9, *34 (E.A.B. April 5, 2000); *In re: Clarksburg Casket Co.*, 1999 EPA App. LEXIS 23, *15 (E.A.B., July 16, 1999); *In the Matter of Vemco, Inc., d/b/a Venture Grand Rapids*, 2003 EPA ALJ LEXIS 29 (April 23, 2003); and *In the Matter of: Spring Crest Fuel Co., Inc.*, 2000 EPA ALJ LEXIS 55, *12 (June 28, 2000).

Initially, the burden of showing the absence of any genuine issue of material fact rests with the party moving for accelerated decision. *BWX Technologies, Inc.*, 2000 EPA App. LEXIS at

*38; Spring Crest Fuel Co., Inc., 2000 EPA ALJ LEXIS at *12; and In the Matter of: Puerto Rico Aqueduct and Sewer Authority, 2000 EPA ALJ LEXIS 2, *5-6 (January 4, 2000), *citing*, Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once this burden has been satisfied, the burden of production shifts to the non-movant to identify specific facts from which a fact-finder, applying the appropriate evidentiary standard (i.e., preponderance of the evidence in matters governed by the Consolidated Rules of Practice), can reasonably find in favor of the non-movant. BWX Technologies, Inc., 2000 EPA App. LEXIS at *39, *citing*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1985).

More specifically, in order to defeat a Motion for Accelerated Decision, the non-moving party must demonstrate that a "genuine" issue as to a "material" fact exists in the case. BWX Technologies, Inc., 2000 EPA App. LEXIS at *35, *citing*, Anderson, 477 U.S. at 248. A fact is deemed to be "material" if, under the law governing a proceeding, it might affect the outcome of the proceeding. BWX Technologies, Inc., 2000 EPA App. LEXIS at *35-36; and Puerto Rico Aqueduct and Sewer Authority, 2000 EPA ALJ LEXIS at *6-7. An issue or dispute concerning a material fact is deemed to be "genuine" if, in the estimation of a court or Presiding Officer, a jury or other fact-finder could reasonably find for the non-moving party. BWX Technologies, Inc., 2000 EPA App. LEXIS at *36; and Puerto Rico Aqueduct and Sewer Authority, 2000 EPA ALJ LEXIS at *6-7.

In opposing a motion for accelerated decision, "bare assertions, conclusory allegations or suspicions" are not sufficient to raise a genuine issue of material fact and defeat the motion. Spring Crest Fuel Co., Inc., 2000 EPA ALJ LEXIS at *13. *See also*, BWX Technologies, Inc., 2000 EPA App. LEXIS at *38, *citing* 11 JAMES W. MOORE ET AL., Moore's Federal Practice §

56.13[1], [2] (3d ed. 1999). To avoid the summary judgment motion being granted, the nonmovant must provide "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." In the Matter of: Vemco, Inc., d/b/a Venture Grand Rapids, 2003 EPA ALJ LEXIS 29, *6-7 (April 23, 2003), *citing* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). It is not sufficient if the non-moving party's evidence is "merely colorable" or "not significantly probative." Vemco, Inc., 2003 EPA ALJ LEXIS at *7, *again citing* Anderson, at 477 U.S. at 249-150.

Summary disposition may not be avoided merely by alleging that a factual dispute may exist, or that future proceedings may turn something up. In re: Green Thumb Nursery, Inc., 6 E.A.D. 782 n. 23, 1997 EPA App. Lexis 4 (EAB 1997); Vemco, Inc., 2003 EPA ALJ LEXIS at *7.

Ultimately, if the evidence viewed in the light most favorable to the non-moving party is such that no reasonable decision-maker could find for the non-moving party, an order granting a motion for accelerated decision is appropriate. In re: BWX Technologies, Inc., 2000 EPA App. LEXIS at *36, *citing* Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970).¹

B. Prima Facie Case

To establish liability for Counts III – VII of the Administrative Complaint, Complainant must demonstrate that: 1) the Pit water and/or Pit settled solids are solid wastes; 2) the Pit water

¹The EAB in BWX Technologies did note the following important distinction between a judge ruling upon a motion for summary judgment filed in a civil matter with a jury acting as the fact-finder and a Presiding Officer ruling upon a motion for accelerated decision in an administrative proceeding in which the Presiding Officer is the ultimate fact-finder (i.e., the equivalent of a bench trial):

"There is no jury in an administrative proceeding under 40 C.F.R. Part 22. The fact-finding function is performed by the administrative law judge in a manner akin to that of a district court judge who performs the fact-finding function in a bench trial. This latter point is noteworthy because it may be possible for the judge [or Presiding Officer], in appropriate circumstances, to resolve disputed issues of fact on cross-motions for summary judgment if it is clear that there is no further evidence to be developed. See Nunex v. Superior Oil Co., 572 F.2d 1119, 1123-24 (5th Cir. 1978)." BWX Technologies, 2000 EPA App. LEXIS at*37, n19.

and/or Pit settled solids are hazardous wastes;² 3) Chemsolv is a generator of the hazardous wastes; and 4) the Pit is a regulated hazardous waste storage tank.

1. The Pit Water and Pit Settled Solids are Solid Wastes.

Solid waste is defined under 9 VAC 20-60-261, which incorporates by reference 40 C.F.R. § 261.2,³ as any discarded material that is not otherwise excluded.⁴ Discarded material is further defined as any material which is abandoned, or recycled, or inherently waste-like or a military munition. See 40 C.F.R. 261.2(i).

At the time of the May 15, 2007 EPA inspection, the EPA inspector notes that the Pit “accumulated rinsewater from the hoses and equipment at the site. The water is transferred to a storage tank and neutralized before being shipped as non hazardous wastewater.” Complainant Exhibit 17, EPA 297.

Likewise, the contemporaneous observation of the VADEQ inspectors recited:

DEQ inspectors asked Mr. Lester to describe how the facility adjusts pH of the “Pit” wastewater. The wastewater is collected in a sub-grade tank the facility calls the “Pit.” The wastewater is transferred from the Pit to a 4,000 gallon above ground storage tank for temporary storage. From the AST, the Pit water is transferred to a tanker truck. The pH is adjusted in the tanker by adding acid or caustic as needed as the Pit water is transferred from the AST to the tanker. Mr. Lester explained they measure and record the pH on every tanker truck load after they neutralize the waste water. When asked about the pH of the Pit water prior to pH adjustment, Mr. Lester stated that some of the Pit water may have a pH of less than 2.0 or above 12.5.

Complainant Exhibit 19, p.4, EPA 375.

² With regard to Count VI, EPA must also show that Chemsolv is the owner and/or operator of the Pit and a hazardous waste in the Pit had a VO of greater than 500 parts per million by weight.

³ Because the authorized Virginia Hazardous Waste Management Program incorporates by reference the federal regulations set forth at 40 C.F.R. Parts 260 - 279, citations used in this document will give the parallel citations, without repeating the phrase “which incorporates by reference” except where the Virginia Code varies in substance from the federal regulations.

⁴ Under 40 C.F.R. 261.4(a), excluded by variance under 40 C.F.R. §§ 260.30, 260.31 and 34.

Chemsolv's sworn statement in response to EPA's November 16, 2007 information request letter is consistent with the EPA and VADEQ's recorded observations noted above, in that Chemsolv acknowledged that wash water was accumulated in the Pit was destined for disposal. In response to the November 16, 2007 EPA Information Request Letter question "How often is the Pit cleaned out?" (Complainant Exhibit. 20, Information Request 7(c), EPA 643) Chemsolv stated: "Wash water is pumped from the Pit into a storage tank adjacent to acid pad when full and tested for pH prior to shipment to a processing facility." (Complainant Exhibit 21, Information Request Letter Response 7(c), EPA 658).

In this same response, Chemsolv's sworn statement refers to the Pit water as "wastewater." See Complainant Exhibit 21, Information Request Letter Response 7(d), EPA 658; Information Request Letter Response 9(b), EPA 660. Shipments of Pit water are referred to by Chemsolv as "D002 waste." Complainant Exhibit 21, Information Request Letter Response 8(d), EPA 658. Notably, the manifests supplied by Chemsolv as proof of the Pit water's disposal use the words "wastewater", "Pit water" and "acid pad wash water" as synonyms describing the same discarded material: water from the Pit. See Complainant Exhibit 21, EPA 686 – 852.

Likewise, the settled solids were discarded by Chemsolv. Chemsolv's sworn statement describes how the settled solids were bled into the Pit water in order to be shipped off site as waste:

The wastewater from the Pit typically contains a solid content 10 – 30% by volume. These solids, generated from hydroxide precipitation, are characteristically light and easily conveyed with routine wastewater removal and have been profiled as apart [sic] of the wastewater stream; therefore, sludge removal is only required in frequently [sic].

Complainant Exhibit 21, Information Request Letter Response 7(d) EPA 658.

There is not a marked difference between "pit solids" and "pit sludge." The wash water from the pit typically contains a solid content of 10 – 30% by volume. These solids, generated from hydroxide precipitation, are characteristically light and easily conveyed

with routine washwater removal and have been profiled as part of the wash water stream. These “solids” are typically conveyed with wash water shipments.

Complainant Exhibit 23, Information Request Letter Response 14(g) EPA 1081.

Chemsolv has used the services of W.E.L, Inc. to remove the heavier, bottom sediments on two occasions. A composite sample of the first removal was sent to ProChem Analytical for hazard characterization in May 2006. The sample was checked for corrosivity, ignitability and reactivity. The Total [sic] Characteristic Leaching Procedure was run for RCRA metals, semi volatiles and volatiles. All constituents were below regulatory levels. The material was shipped to Shamrock Environmental Services, Inc. on April 23, 2007.

Complainant Exhibit 21, Information Request Letter Response 9(b), EPA 660⁵

As further indication that the Pit was used to accumulate waste, a floor trench from a blending room was connected through underground piping to the Pit. Complainant Exhibit 17, p.2, EPA 297, 312, Declaration of Kenneth Cox, ¶ 14.

Thus, as of December 10, 2007, the date of Chemsolv’s response under oath to EPA’s Information Request, and less than three months prior to the Pit’s removal, it was Chemsolv’s sworn testimony that the Pit water and settled solids were discarded.

2. The Pit Water and Pit Settled Solids are Hazardous Wastes.

On May 23, 2007, EPA took samples of the Pit water and Pit settled solids. These materials were forwarded to EPA’s lab located at Fort Meade, Maryland for analysis. The analysis found three substances which are considered hazardous wastes, as summarized in the table below:

⁵ It is not clear where the material Chemsolv had tested was from. Chemsolv described the waste tested as “waste generated from periodic removal of accumulated sediments from the facility retention basin. The sediments are moved by sheet flow precipitation runoff from the paved parking lot to the facilities production area.” Chemsolv described the source of the sample as precipitation, silt, dirt and clay absorbent. See Complainant Exhibit 21, Information Request Letter Response 9(b), EPA 660, EPA 1016 - 1021. In other words, stormwater and spill cleanup debris. Declaration of Kenneth Cox ¶ 36.

Substance	Hazardous Constituent Analytical Result	Basis for Hazardous Classification
Pit water	Chloroform, 6.1 mg/L	Solid waste with a concentration of 6.0 mg/L chloroform or greater is a hazardous waste (D022) because it exhibits the characteristic of "toxicity" for chloroform. 9 VAC 20-60-261, 40 C.F.R. § 261.24.
Pit settled solids	Tetrachloroethene 457 mg/L	Solid waste with a concentration of .7 mg/L tetrachloroethene or greater is a hazardous waste (D039) because it exhibits the characteristic of "toxicity" for tetrachloroethene. 9 VAC 20-60-261.A, 40 C.F.R. § 261.24.
Pit settled solids	15.5 mg/L trichloroethene	Solid waste with a concentration of .5 mg/L or greater trichloroethene is a hazardous waste (D040), because it exhibits the characteristic of "toxicity" for trichloroethene. 9 VAC 20-60-261.A, 40 C.F.R. § 261.24

. 9 VAC 20-60-261, 40 C.F.R. § 261.24, Declaration of Peggy Zawodny, ¶¶ 5 and 7.

It has been established from Chemsolv's sworn statements that the Pit water and Pit settled solids were discarded, in that these materials were stored on site until such time as enough water/solids had accumulated to be trucked off site for disposal. It is noteworthy that from the time of the inspection in May 2007, to the time of the Chemsolv's sworn responses to EPA's response in December 2007, Chemsolv made no other representation to the government officials as to the fate of the Pit Water and Pit Settled solids other than that these materials were discarded. By definition, a discarded material is solid waste. 9 VAC 20-60-261, 40 C.F.R. § 261.2.

A solid waste is a hazardous waste if it exhibits any of the characteristics, identified in 9 VAC 20-60-261, 40 C.F.R. Part 261 Subpart C. Toxicity is a hazardous characteristic. 9 VAC 20-60-261, 40 C.F.R. § 261.24. The analysis of the samples taken from the Pit water and Pit settled solids indicated that the Pit water and Pit settled both were hazardous wastes because they demonstrated the characteristic of toxicity. There is no question that the analytical results of the samples obtained by EPA on May 23, 2007 from the Pit show that the Pit contained hazardous waste. 9 VAC 20-60-261.A, 40 C.F.R. § 261.24.

3. Chemsolv is a Generator of Hazardous Waste.

Chemsolv, a corporation organized under the laws of the Commonwealth of Virginia, is a “person” within the meaning of 42 U.S.C. § 1004(15)(The term “person” means, *inter alia*, [a] corporation.) (see Complainant Exhibit 10, EPA 222 – 233). As a “Person” whose act or process at a site produced hazardous waste identified or listed in 9 VAC 20-60-261, 40 C.F.R. Part 261, Chemsolv is a generator of hazardous waste, as that term is defined in 9 VAC 20–16-14, 40 C.F.R. § 260.10.

Significant to the status of generator is the quantity of hazardous waste produced, since many of the requirements of the Virginia Hazardous Waste Management Program do not apply to generators of very small quantities of hazardous waste, specifically, those generators who generate less than 100 kilograms (220 pounds) of hazardous waste in a month, 9 VAC 20-60-261.A, 40 C.F.R. § 261.5, provided however, such generators make hazardous waste determinations in accordance with 9 VAC 20-60-262.A, 40 C.F.R. § 262.11. *Id.* This particularized hazardous waste generator status is known as a “Conditionally Exempt Small Quantity Generator” (“CESQG”). *Id.* Should a CESQG at any time accumulate more than 1000 kilograms (2,200 pounds) of hazardous waste, the generator’s status will change and the generator will be subject to the bulk of the RCRA regulatory scheme. As set forth in 9 VAC 20-60-261.A, 40 C.F.R. § 261.5(g)(2), where a CESQG accumulates at any time 1,000 kilograms of hazardous wastes, all of those accumulated wastes are subject to regulation under the special provisions of 40 C.F.R Part 262 applicable to generators of greater than 100 kg and less than 1000 kg of hazardous waste in a calendar month (“small quantity generator” (SQG) as well as the requirements of 40 C.F.R. Parts 263 through 268, and 40 C.F.R. Parts 270 and 124, and the applicable notification requirements of

to Section 3010 of RCRA, 42 U.S.C. § 6930). The requirement will apply as soon as the 1,000 kilogram threshold is reached. 9 VAC 20-60-261.A, 40 C.F.R. § 261.5(g)(2).

Chemsolv was not a CESQG from at least May 15, 2007 through February 1, 2008 because it stored over 7954 kilograms of hazardous waste onsite during that time. The Pit was observed by EPA and VADEQ inspectors on May 15, 2007. The Pit was then sampled by EPA shortly thereafter on May 23, 2007. Chemsolv's sworn statement related that the settled solids in the Pit that had been the subject of EPA sampling were cleaned out of the Pit in June 2007 and disposed on February 20, 2008. Complainant Exhibit 23, Information Request Letter Response 17, EPA 1083 and 1127, see also Complainant Exhibit 63, EPA 1791 - 1801.

The hazardous waste manifest submitted by Chemsolv as proof of disposal for the Pit solids it cleaned out of the Pit in June 2007 indicates the hazardous waste Pit solids weighed a total of 7954 kilograms (17,500 pounds) EPA 1127, Declaration of Kenneth Cox ¶ 26. See also EPA Exhibit 63, EPA 1800 – 1801. Chemsolv did not perform a hazardous waste determination on these Pit solids, but instead opted to wait for the EPA analysis of the samples taken from this material. Complainant Exhibit 21, Information Request Letter Response 7(d) EPA 658: (Question: How often is the Pit cleaned out? Response: "The second removal occurred June 2007. This material is stored at Chemsolv awaiting analytical work being performed by EPA.")

Chemsolv thus was obligated to comply with the RCRA regulatory scheme for two reasons: Chemsolv accumulated 1000 kilograms and more of hazardous waste on site; and, 2) Chemsolv did not perform a waste determination of the Pit solids, a prerequisite for CESEQ status. 9 VAC 20-60-261.A, 40 C.F.R. § 261.5, which references 9 VAC 20-60-262.A, 40 C.F.R. § 262.11.

4. Chemsolv is liable for the violations alleged in Counts III – VII of the Administrative

Complaint

Having established that the Pit water and Pit solids are hazardous waste, and, 2) Chemsolv, as generator of hazardous waste, was subject to the requirements of the Virginia Hazardous Waste Management Program from at least May 15, 2007 through February 1, 2008, was Chemsolv in compliance with the RCRA regulatory requirements? No, it was not.

a. Count III: Chemsolv failed to have Secondary Containment for the Pit

Secondary containment is required for all hazardous waste storage tanks. 9 VAC 20-60-264.A 40 C.F.R. § 264.193(a). Such secondary containment must include one (or more) of the following: 1) a liner external to the tank; 2) a vault; 3) a double-walled tank; or 4) an equivalent device as approved by the Director, VADEQ. 9 VAC 20-60-264.A, 40 C.F.R. § 264.193(d). EPA asked Chemsolv if the Pit had secondary containment:

Question: Is the Pit lined either internally or externally with an impermeable liner?

Complainant Exhibit 22, Information Request 18(c), EPA 1069.

Answer: The tank is ceramic lined carbon steel.

Complainant Exhibit 23, Information Request Letter Response 18(e), EPA 1083. See also

Complainant Exhibit 25, EPA 1163, 1164.

A ceramic internal liner does not satisfy the secondary containment requirements of 9 VAC 20-60-264.A 40 C.F.R. § 264.193. Declaration of Kenneth Cox ¶ 17. It is respectfully submitted there is no genuine issue of material fact as to Chemsolv's noncompliance from at least May 23, 2007 until February 1, 2008 with 9 VAC 20-60-264.A, 40 C.F.R. § 264.193(a),(d) and

(e). Chemsolv had not designed and installed secondary containment for the Pit and as such was in violation of Virginia Hazardous Waste Management Program and RCRA from at least May 23, 2007 until February 1, 2008. Chemsolv violated 9 VAC 20-60-264.A, 40 C.F.R. § 264.193(a), (d) and (e), from at least May 23, 2007 until February 1, 2008 by failing to provide secondary containment for the Pit which met the requirements of 40 C.F.R. § 264. 193(1)(a), (d), and (e).

b. Count IV: Chemsolv failed to Obtain a Tank Assessment for the Pit

The Pit is a “new tank system” within the meaning of 9 VAC 20-60-260.A, 40 C.F.R. § 260.10 and § 264.192(a) because it was installed after July 1986. Complainant Exhibit 23, Information Request Letter Response 18(e) EPA 1083. (Question: What is the date of the construction of the Pit? Answer: Approximately 1989 – 1990). Id.

Owners and operators of new tank systems and components must obtain and keep on file at the facility written statements by those persons required to certify the design of the tank system and supervise the installation of the tank system in accordance with the requirements of 40 C.F.R. § 264.192(b) - (f). These required statements must attest that the tank system was properly designed and installed and that repairs pursuant to 40 C.F.R. § 264.192(b) - (f) were performed. These required statement must be written, and must also include the certification statement pursuant to 40 C.F.R. § 270. 11(d). EPA asked Chemsolv to submit any certifications on file for the Pit:

Question: Regarding the Pit at the acid transfer /container wash station: (g) Submit any certifications on file.

Complainant Exhibit 22, Information Request 18(g), EPA 1069.

Answer: Plans for construction were produced and stamped approved by a professional engineer.

Complainant Exhibit 23, Information Request Letter Response 18(g), EPA 1083. See also

Partial line drawing submitted in response to Information Request 18(d), Complainant Exhibit 23, EPA 1139.

The statement that the plans for construction of the Pit “were stamped approved by a professional engineer” does not meet the specific, detailed professional engineer certification requirements for hazardous waste storage tanks, set forth in the rules, most notably the requirement that the tank system has sufficient structural integrity and is acceptable for storing and treating of hazardous waste.⁶ 40 C.F.R. §264.192 (a), Declaration of Kenneth Cox ¶¶ 33 and 34.

It is respectfully submitted there is no genuine issue of material fact as to Chemsolv’s noncompliance with the applicable Tank Assessment and regulatory requirements from at least May 23, 2007 until February 1, 2008, in that Chemsolv did not obtain and/or keep on file at the Facility written statements by those persons required to certify the design of the tank system and supervise the installation of the tank system in accordance with the requirements of 40 C.F.R. § 264.192(b) - (f) for the Pit, as required by 9 VAC 20-60-264.A, 40 C.F.R. § 264.192(a) and (g).

c. Count V:Chemsolv failed to Conduct and/or Document Inspections of the Pit

Owners or operators of hazardous waste storage tanks must document in the facility operating record inspections of the aboveground portions of the tank system. 9 VAC 20-60-264.A, 40 C.F.R. § 264.195(b) and (h). These inspections must be conducted at least once

⁶ This rule requires the certifying professional engineer use the specific language of 40 C.F.R. § 270.11(d)(1): I certify under penalty of law that this document and all attachments were prepared under my direction or supervision according to a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

each operating day. 9 VAC 20-60-264.A, 40 C.F.R. § 264.195(b). EPA asked Chemsolv for the Pit inspection records required by 9 VAC 20-60-264.A, 40 C.F.R. § 264.195(h).

Question: Regarding the Pit at the acid transfer /container wash station: (f) Submit any and all inspection records for the Pit.

Complainant Exhibit 22, Information Request 18(f), EPA 1069.

Answer: Tank was visually inspected each time the water was pumped and during both solids removals. Management recorded no defects or deviations from normal operation at any time. Any defect, leak or otherwise would be noted and submitted to management as per normal with any vessel. Plans for construction were produced and stamped approved by a professional engineer.

Complainant Exhibit 23, Information Request Letter Response 18(f), EPA 1083.

Chemsolv's sworn statement admits that the required inspections did not occur each operating day. Cf. Complainant Exhibit 23, Information Request Letter Response 18(f), EPA 1083 (stating what event triggered an inspection of the Pit) with Complainant Exhibit 21 Information Request Letter Response 7(c) (wash water is pumped from the pit into a storage tank adjacent to the acid pad *when* full.")(indicating no set time interval for inspection of the Pit)(emphasis added).

Moreover, as indicated by Chemsolv's response to EPA's request for inspection records of the Pit, no such documentation exists. Complainant Exhibit 23, Information Request Letter Response 18(f), EPA 1083., Declaration of Kenneth Cox, ¶ 32. Chemsolv did not document in the Facility operating record any inspections for the items specified in 9 VAC 20-60-264.A, 40 C.F.R. § 264.195 (a), (overfill controls), (b) (monitoring and leak detection equipment) , and (c) (corrosion or releases of waste, construction materials and the area immediately surrounding the externally accessible portion of the tank system to detect erosion or signs of releases of hazardous waste.

It is respectfully submitted there is no genuine issue of material fact as to Chemsolv's noncompliance from at least May 23, 2007 until February 1, 2008, of the regulatory requirement to inspect and/or document the inspections of the aboveground portions of the Pit.⁷ Chemsolv violated the hazardous waste storage tank inspection requirement contained in 9 VAC 20-60-264.A, 40 C.F.R. § 264.195.

d. Count VI: Chemsolv failed to comply with Subpart CC standards for Tanks

The Pit, as a hazardous waste storage tank, was subject to the requirements of 9 VAC 20-60-264.A, 40 C.F.R. Part 264, Subpart J, including the requirement that all hazardous waste placed in a tank be managed in accordance with the applicable requirements of 40 C.F.R. Subparts AA, BB and CC. 40 C.F.R. § 264.200.

9 VAC 20-60-264.A, 40 C.F.R. § 264.1082(b), provides that the owner and operator of a tank shall control air pollutant emissions from a hazardous waste storage tank in accordance with the standards specified in 40 C.F.R. § 264.1084 - .108 unless such tank is exempt. Chemsolv was the owner and operator of the Pit. Declaration of Kenneth Cox ¶ 38. The Pit was not exempt from the RCRA Subpart CC requirements. Declaration of Kenneth Cox ¶ 38

At the time of the May 23, 2007 EPA inspection, EPA took samples of the settled solids stored in the Pit. The analysis of the May 23, 2007 Pit solids sample indicated the settled solids stored in the Pit contained a VO concentration of greater than the regulatory threshold of 500 ppm by weight.

To control air pollutant emissions from a hazardous waste storage tank, the owner or operator of the tank must implement certain controls, known as "Tank Level 1" or "Tank Level 2"

⁷ Including all "operating days" within the meaning of 9 VAC 20-60-264.A, 40 C.F.R. § 264.195(b) and (d).

Controls. See 9 VAC 20-60-264.A , 40 C.F.R. § 264. 1084(a)(1). Generally, Tank Level 1 Controls pertain to tanks with fixed-roof covers only. Id. Tank Level 2 Controls include such items as: 1) fixed-roof tanks equipped with an internal floating roof; 2) tanks equipped with an external floating roof; 3) a tank vented through a closed-vent system to a control device; 4) a pressure tank, and 5) tanks located inside an enclosure that is vented through a closed-vent system to an enclosed combustion control device.

A detailed discussion of the Tank Level 1 and 2 Controls is unnecessary since Chemsolv did not have any air emissions controls for the Pit. Declaration of Kenneth Cox ¶ 39. An examination of the partial drawing for the tank installation as well as the photographs of the tank upon its removal show that it did not have a cover which could conceivably be construed as a control device contemplated by the rule. Declaration of Kevin Cox . ¶39, Complainant Exhibit 17, EPA 313; Complainant Exhibit 19, EPA 408, Complainant Exhibit 23, EPA 1139; Complainant Exhibit 25, EPA 1163 – 1164.

It is respectfully submitted there is no genuine issue as to Chemsolv's noncompliance from at least May 23, 2007 until February 1, 2008 with the regulatory requirement contained in 9 VAC 20-60-264.A, 40 C.F.R. § 264.1082(b) and.1084(b), to control air pollutant emissions from the Pit in accordance with the Tank Level 1 or 2 controls specified in 40 C.F.R. § 264.1084(c) or (d).

e. Count VII: Chemsolv failed to comply with the closure requirements for the Pit

When a hazardous waste storage tank is removed from the ground, a regulatory protocol dictates the manner in which it is removed. The specific regulatory requirements for closure of a hazardous waste tank system require the owner or operator to remove or decontaminate all waste residues, contaminated containment system components (liners, etc.), contaminated soils, and

structures and equipment contaminated with waste, and manage them as hazardous waste.⁸ The closure plan and closure activities for tank systems must meet all of the requirements specified in 40 C.F.R. Part 264, Subpart G. 9 VAC 20-60-264.A, 40 C.F.R. § 264.197(a),⁹

If an owner or operator has a tank system that does not have secondary containment that meets the requirements of §264.193(b) through (f) and has not been granted a variance from the secondary containment requirements in accordance with 40 C.F.R. § 264.193(g), then: (1) the closure plan for the tank system must include both a plan for complying with 40 C.F.R. § 264.197(a) and a contingent plan for complying with 40 C.F.R. § 264.197(b).

As demonstrated above, the Pit was a hazardous waste storage tank system which did not have secondary containment that met the requirements of 40 C.F.R. § 264.193(b) and (c) and had not been granted a variance pursuant to 40 C.F.R. § 264.193(g).

Chemsolv closed the Pit and removed the carbon steel tank which constituted the "Pit" from the ground on or about February 1 2008. (Admitted Respondents' Answer ¶ 20). EPA asked Chemsolv to describe the Pit's removal:

Question: During the site visit of March 27, 2008, the inspectors observed the "Pit" area at the acid transfer area was covered with gravel and reportedly the tank had been removed.
a. Submit all documentation of the removal of the tank. Submit picture, copy of the contract [sic, contract], etc.

Complainant Exhibit 24, Information Request 4(a) EPA 1142.

Answer: Tank removal photos are in attachment 4a.

⁸ Unless such materials are no longer solid waste as describe in 40 C.F.R. § 261.3(d).

⁹ Moreover, if the owner or operator demonstrates that not all contaminated soils can be practicably removed or decontaminated as required in 40 C.F.R. § 264.197(a), then the owner or operator must close the tank system and perform post-closure care in accordance with the closure and post-closure care requirements that apply to landfills (40 C.F.R. § 264.310). In addition, for the purposes of closure, post-closure, and financial responsibility, such a tank system is then considered to be a landfill, and the owner or operator must meet all of the requirements for landfills specified in subparts G and H of 40 C.F.R. Part 264. 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.197(b),

Complainant Exhibit 25, Information Request Letter Response 4(a) EPA 1147.

Question: Submit disposal records for the “pit water” and the “pit sludge” removed prior to removal of the tank.

Complainant Exhibit 24, Information Request 4(b) EPA 1142.

Answer: These records were attached to the response to EPA Request for Information date February 4, 2008 as attachment 17e. A duplicate copy of this information is attached in this response to Attachment 4b.

Complainant Exhibit 25, Information Request Letter Response 4(b) EPA 1147.

Attachment 4b to Chemsolv’s April 4, 2008 Information Request Letter Response is Hazardous Waste Manifest 004172818 JJK dated February 20, 2008, showing the disposal of 35 drums of hazardous waste. Complainant Exhibit 23, EPA 1151 – 1162.

Question: Submit disposal records for the tank itself.

Complainant Exhibit 24, Information Request 4(c) EPA 1142.

Answer: N/A – Tank was observed by EPA & DEQ personnel during visit on March 27, 2008. Photos 1 & 2 can be seen in attachment 4c.

Complainant Exhibit 25, Information Request Letter Response 4(c) EPA 1148.

Question: Were samples taken of the surrounding soil? If so submit all analytical results.

Complainant Exhibit 24, Information Request 4(d) EPA 1142.

Answer: A soil sample was taken with no analytical results.

Complainant Exhibit 24, Information Request Letter Response 4(d) EPA 1148.

This series of responses to EPA questions, submitted under oath by Chemsolv, demonstrates Chemsolv’s awareness that the Pit contained hazardous waste, since the Pit’s cleaned out contents were disposed as hazardous waste by Chemsolv. Complainant Exhibit 23, EPA 1151 – 1162. Nonetheless, Chemsolv pulled the Pit out of the ground in disregard of all

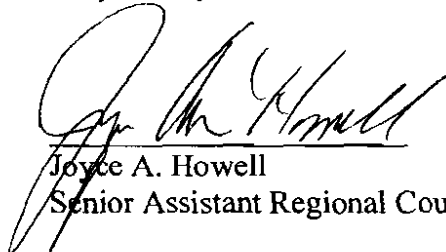
regulatory protocols, without a closure plan, without an analysis of the soil that surrounded the Pit, and without a demonstration of financial responsibility that Chemsolv had sufficient resources to clean up any potential contamination from the Pit. Declaration of Kenneth Cox, ¶¶ 42, 43 and 44.

It is respectfully submitted that there is no genuine issue of material fact that Chemsolv has never had a closure plan for the Pit meeting all of the requirements specified in 40 C.F.R. Part 264 Subparts G and H, that Chemsolv did not remove or decontaminate all waste residues, contaminated containment system components (liners, etc.), contaminated soils, and structures and equipment contaminated with waste, and manage them as hazardous waste with respect to the closure of the Pit and that such failure violated 9 VAC 20-60-264.A 40 C.F.R. § 264. 197.

IV. Conclusion

It is respectfully submitted that Complainant has established a prima facie case. To which there is no genuine issue of material fact, establishing Chemsolv's liability for the allegations contained in Counts III through VII of the Complaint, and as such, an Accelerated Decision as to Counts III through VII should be entered in favor of Complainant and against Respondent Chemsolv.

Respectfully submitted,



Joyce A. Howell
Senior Assistant Regional Counsel

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III**

In the Matter of:

CHEMSOLV, INC., formerly trading as
Chemicals and Solvents, Inc.

and

AUSTIN HOLDINGS-VA, L.L.C.

Respondents,

Chemsolv, Inc.
1111 Industrial Avenue, S.E
1140 Industrial Avenue, S.E
Roanoke, Virginia 24013

Facility.

EPA Docket No. RCRA-03-2011-068

Proceeding under Section 3008(a)
of the Resource Conservation and
Recovery Act, as amended, 42 U.S.C.
Section 6928(a)

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**DECLARATION OF PEGGY ZAWODNY IN SUPPORT OF
COMPLAINANT'S MOTION FOR ACCELERATED DECISION**

I, Peggy Zawodny declare that:

1. I am employed by the United States Environmental Protection Agency as an Environmental Scientist in the Laboratory Branch of the Environmental Assessment & Innovation Division (EAID), located at the EPA Regional Laboratory located in Ft. Meade, Maryland. I have been employed by EPA since December 1986. I have been at the Ft. Meade Regional Laboratory the entire 25 years of my employment with EPA.
2. My primary duties are Volatile Organic analysis. I have been in this position for approximately the last 15 years. Previously, I worked in other areas of the laboratory (Inorganic analysis, Microbiology) as well as in the former Quality Assurance section as Quality Control Officer for the laboratory.

3. I performed the analysis of the samples taken by EPA on May 23, 2007 from the Chemsolv facility, including the samples taken from the Pit.
4. The analysis of the May 23, 2007 Pit water sample taken by EPA was performed using the Toxicity Characteristic Leaching Procedure, "TCLP" described in 40 C.F.R. § 261.24
5. The analysis of the May 23, 2007 Pit water sample taken by EPA, indicated the Pit water contained 6.1 mg/L chloroform.
6. The analysis of the May 23, 2007 Pit settled solids sample taken by EPA was performed using the TCLP described in 40 C.F.R. § 261.
7. The analysis of the May 23, 2007 Pit settled solids sample indicated the Pit settled solids contained 457 mg/L tetrachloroethene and 15.5 mg/L trichloroethene.
8. Chloroform, Tetrachloroethene and Trichloroethene are volatile organic ("VO") compounds.
9. The analysis of the May 23, 2007 Pit settled solids sample indicated the Pit settled solids contained twenty-eight different volatile organic compounds.
10. The analysis of the May 23, 2007 Pit water solids sample indicated the Pit water solids contained nineteen different volatile organic compounds.
11. The analysis of the May 23, 2007 Pit settled solids sample indicated the Pit settled solids contained a VO concentration of greater than 500 parts per million by weight.
12. The Pit water sample contained nineteen VO compounds totaling 19 ppm (0.0019%).
13. The Pit settled solids sample twenty - eight VO compounds totaling 38,394 ppm (3.8%) of which 37,100 ppm (3.7%) was Tetrachloroethene.
14. The copies of the two Final Analytical Reports attached to Complainant's Prehearing Exchange as Exhibits 15, EPA 241 - 283 and 16, EPA 284 - 294 are true and correct copies of the original reports.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on: Nov. 28, 2011

Name:

Peggy Zawodny
Peggy Zawodny

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III**

In the Matter of:

CHEMSOLV, INC., formerly trading as
Chemicals and Solvents, Inc.

and

AUSTIN HOLDINGS-VA, L.L.C.

Respondents,

Chemsolv, Inc.
1111 Industrial Avenue, S.E
1140 Industrial Avenue, S.E
Roanoke, Virginia 24013

Facility.

EPA Docket No. RCRA-03-2006

Proceeding under Section 3008(a)
of the Resource Conservation and
Recovery Act, as amended, 42 U.S.C.
Section 6928(a)

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**DECLARATION OF KENNETH COX IN SUPPORT OF
COMPLAINANT'S MOTION FOR ACCELERATED DECISION**

Kenneth J. Cox, hereby declare that:

1. From 1985 to the present, I have held the position of Environmental Engineer in the United States Environmental Protection Agency ("EPA"). I have held the position of Team Leader for Subtitle C of the Resource Conservation and Recovery Act, 42 U.S.C. Sections 6921 *et seq.* (hereinafter "RCRA") Regulatory Enforcement in the Land and Chemicals Division, Office of Land Enforcement, EPA Region III since 1995.
2. My responsibilities as Team Leader for RCRA Subchapter C Regulatory Enforcement are to conduct investigations, including on-site inspections, of facilities subject to EPA statutes and regulations; analyze technical information obtained from EPA inspections, EPA technical manuals and reports, and from other sources, determine compliance with requirements of, including the federal hazardous waste management regulations

promulgated thereunder and state hazardous waste management regulations promulgated by states authorized by EPA to administer a state hazardous waste management program in lieu of the federal hazardous waste management program established under RCRA Subtitle C, 42 U.S.C. §§ 6921-6939e that have been authorized by EPA pursuant to RCRA Section 3006, 42 U.S.C. § 6926, prepare or assist in the preparation of inspection reports, administrative orders and agreements and other agency documents; and review, comment and concur on inspection reports, administrative orders and agreements and other agency documents prepared by others.

3. I have had primary responsibility for the investigation of Respondents Chemsolv, Inc. and Austin Holdings, LLC. As such, I am personally familiar with the facts set forth herein.
4. I inspected the Chemsolv Facility located at 1140 Industrial Avenue S.E., Roanoke, Virginia on May 15, 2007. No inspection was conducted of 1111 Industrial Avenue S.E. because Mr. Jamie Austin, Vice President and General Manager of Chemsolv, terminated the inspection. My observations as well as the photographs I made of the Facility at that time are set forth in Complainant's Exhibit 17, EPA 295 – 330.
5. I conducted another site visit of the Chemsolv Facility at 1111 and 1140 Industrial Avenue S.E., Roanoke, Virginia on March 27, 2008.
6. I visited the area of the Facility again on October 21, 2008, but remained outside the Chemsolv Facility fence line.
7. I drafted the Information Request Letters sent to Chemsolv pursuant to Section 3007(a) of RCRA, 42 U.S.C. § 6927(a) on November 16, 2007, (Complainant Exhibit 20, EPA 641A – 649), February 4, 2008 (Complainant Exhibit 22, EPA 1065 – 1074) and April 1, 2008 (Complainant Exhibit 24, EPA 1140 – 1144) and reviewed Respondent Chemsolv's responses to the same. Complainant Exhibit 21, EPA 650 – 1064; Complainant Exhibit 23, EPA 1075 - 1139; Complainant Exhibit 25, EPA 1145 - 1164.
8. I have examined the responses and documents submitted by Chemsolv in response to the EPA Information Request Letters described in ¶ 7, above.
9. Chemsolv is in the business of purchasing, blending and repackaging chemicals at the Facility. Respondent Chemsolv then sells and distributes chemicals, chemical intermediaries, and solvents.
10. The Chemsolv chemical distribution business located at 1111 and 1140 Industrial Avenue S.E., Roanoke, Virginia is a Facility within the meaning of 9 VAC 20-60-260.A, 40 C.F.R. § 260.10.
11. On May 15, 2007, I observed a subgrade tank at the Facility which Chemsolv identified as the "Pit." According to Chemsolv, the Pit was used to accumulate rinsewater generated when hoses and equipment at the Facility acid transfer site are flushed between

uses.

12. Chemsolv is the owner of the portion of the Chemsolv Facility where the Pit was located.
13. Chemsolv is the operator of the entire Facility.
14. On May 15, 2007, I observed a grated trench drain located below the floor inside a building identified by Chemsolv as the "Blend Room." The Blend Room was located adjacent to the Pit. Jamie Austin, Vice President and General Manager of Chemsolv, stated that trench inside the blend room was connected to the Pit. At the time of the May 15, 2007 inspection, the trench contained a wet black sludge.
15. A partial line drawing of the Pit supplied by Chemsolv recites that a trench is connected to the Pit. Complainant Exhibit 23, Information Request Letter Response 18d, EPA 1139.
16. By December, 2007 the grated tank drain had been cemented over by Chemsolv. Complainant Exhibit 17, EPA 297, 312; Complainant Exhibit 21, Information Request Letter Response 7, EPA 657.
17. Based on my personal observation of the Pit, as well as my review of the Information Request Letter Responses and documents submitted by Chemsolv, the Pit is single-walled tank constructed of carbon steel with a ceramic interior coating. Chemsolv did not have a vault, external liner or other device approved by the Director of VADEQ as secondary containment for the Pit.
18. The Pit was sampled by EPA on May 23, 2007.
19. The Pit held 1,872 gallons. Complainant Exhibit 23, Information Request Letter Response 18(b), EPA 1083.
20. In June 2007, Chemsolv did a partial clean out of the Pit settled solids from the Pit which had been the subject of the EPA May 23 sampling. Complainant Exhibit 23, Information Request Letter Response 17c, EPA 1083.
21. The Pit settled solids cleaned out from the Pit in June 2007 were stored at the Chemsolv facility on site. Complainant Exhibit 21, Information Request Letter Response 7d, EPA 658.
22. The remainder of the material in the Pit was cleaned out on January 30, 31, and February 1, 2008. Complainant Exhibit 23, Information Request Letter Response 17c, EPA 1083.
23. The Pit settled solids that had been sampled on May 23, 2007 were finally disposed by Chemsolv as hazardous waste on February 20, 2008. Complainant Exhibit 23, EPA 1127 – 1137.
24. Chemsolv did not immediately dispose of the Pit settled solids because Chemsolv stated

it was waiting for the EPA analytical results for the May 23, 2007 samples. Complainant Exhibit 21, Information Request Letter Response 7(d), EPA 658.

25. Chemsolv shipped thirty-five containers of hazardous waste for disposal to the Michigan Disposal Waste Treatment Plant on February 20, 2008. The manifest for these containers indicated that the total weight shipped was 17,500 pounds. Complainant Exhibit 23, EPA 1127 - 1137, Complainant Exhibit 63, EPA 1791 - 1801.
26. From my review of the hazardous waste manifest for the hazardous waste material removed from the Pit in June, 2007, along with the Information Request Letter Response from the Michigan Disposal Waste Treatment Plant (Complainant Exhibit 63, EPA 1791 - 1801), I determined the waste material Chemsolv removed from the Pit in June 2007 and January-February 2008 weighed 7954 kilograms (17,500 pounds). See also Complainant Exhibit 63, EPA 1800 - 1801.
27. Chemsolv did not have a permit of interim status to store hazardous waste as required by VAC 20-60-270.A, 40 C.F.R. Part 270, and Section 3005(a) and (e) of RCRA, 42 U.S.C. § 6925(a) and (e).
28. Because Chemsolv accumulated over 6000 kilograms of hazardous waste on site between May 23, 2007 and February 1, 2008, Chemsolv was not a Conditionally Exempt Small Quantity Generator (9 VAC 20-60-261.A, 40 C.F.R. § 261.5), nor did Chemsolv qualify as a small quantity generator (9 VAC 20-60-262.A, 40 C.F.R. § 262.34(d)), and was obligated to comply with the entire RCRA regulatory scheme, as applicable to Chemsolv's operation.
29. The shipment of the waste material cleaned out from the Pit by Chemsolv in June 2007 and January-February 2008 (and which EPA's May 23, 2007 samples had determined to be hazardous waste), indicates the hazardous waste from the Pit contained 71.23 gallons Tetrachloroethene. $35 \text{ drums (55gal)(3.7\%)} = 71.23 \text{ gallons of Tetrachloroethene.}$
30. The shipment of the waste material cleaned out from the Pit by Chemsolv in June 2007 and January-February 2008 (and which EPA's May 23, 2007 samples had determined to be hazardous waste), indicates the hazardous waste from the Pit contained 1.5 gallons Trichloroethene. $35 \text{ drums (55gal)(.0835\%)} = 1.6 \text{ gallons of Trichloroethene.}$
31. The sample that Chemsolv took prior to disposal found 9 VOC's totaling 4,531 ppm of which 2,100 ppm was Tetrachloroethene, or over four times the regulatory threshold of 500 ppm for the application of the requirements set forth in 40 C.F.R. 264 Subpart CC. Complainant Exhibit 63, EPA 1791 - 1801.
32. Chemsolv has never produced any written records documenting inspections of the Pit in the facility operating record, as required by 9 VAC 20-60-264.A, 40 C.F.R. § 264.195(h).
33. Chemsolv has never shown EPA copies of the written statements with regard to the

design and installation of the Pit as required by 9 VAC 20-60-264.A, 40 C.F.R. § 264.192(g).

34. Chemsolv has never shown EPA written statements with regard to the design and installation of the Pit as required by 9 VAC 20-60-264.A, 40 C.F.R. § 264.192(g) with the certification required in 40 C.F.R. § 270.11(d).
35. Chemsolv's Information Request Letter Response stated it had obtained a sample analysis for the Pit settled solids, using the "The Total [sic] Characteristic Leaching Procedure" for "RCRA metals, semi volatiles and volatiles." Complainant Exhibit 21, Information Request Letter Response 9(b), EPA 660.
36. From my review of the documents supplied by Chemsolv in support of Information Request Letter Response 9(b), noted above, it is not clear the sample was taken from the Pit. Complainant Exhibit 21, Information Request Letter Response 9(b), EPA 660, EPA 1016 – 1021. Upon review of the documentation for the sample submitted to EPA by Chemsolv, it appears the sample was taken from a retention basin which collected stormwater runoff and that the actual material Chemsolv had tested consisted of sediment from stormwater runoff and spill cleanups.
37. The material from the Pit had a VO concentration that exceeded 500 ppm. As such, the Pit, as a hazardous waste storage tank, was subject to the requirements of 9 VAC 20-60-264.A, 40 C.F.R. Part 264, Subpart J, including the requirement that all hazardous waste placed in a tank be managed in accordance with the applicable requirements of 40 C.F.R. Subparts AA, BB and CC. 40 C.F.R. § 264.200.e.
38. 9 VAC 20-60-264.A, 40 C.F.R. § 264.1082(b), provides that the owner and operator of a tank shall control air pollutant emissions from a hazardous waste storage tank in accordance with the standards specified in 40 C.F.R. § 264.1084 - .1085 unless such tank is exempt. Chemsolv was the owner and operator of the Pit. The Pit was not exempt for the RCRA Subpart CC requirements because it had an open top with no air emission controls.
39. From my personal observation, together with my review of the partial line drawing submitted by Chemsolv and the photographs of the Pit when it was removed, also submitted by Chemsolv, I have concluded that Chemsolv did not have any Tank Level I or Tank Level II controls in place with regard to the Pit.
40. I observed that the Pit had been closed by Chemsolv during my site visit of the Facility on March 27, 2008.
41. Since the Pit contained hazardous waste and did not have secondary containment, Chemsolv was obligated to have a closure plan for the Pit.
42. Chemsolv has never shown EPA a closure plan for the Pit.

43. Chemsolv has never shown EPA an analysis of the soil that surrounded the Pit.
44. Chemsolv has never demonstrated financial responsibility that it has sufficient resources to clean up any potential contamination from the Pit to EPA.
45. Complainant Exhibits 17, 18, 19, 20, 22, 24, and 63 attached to Complainant's Prehearing Exchange are true and correct copies of the original documents.
46. Complainant Exhibits 21, 23, and 25 attached to Complainant's Prehearing Exchange are true and correct copies of the Information Request Letter Responses submitted to EPA by Respondent Chemsolv.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on: 11/29/11 Name: Kenneth J. Cox
Kenneth J. Cox

**THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III**

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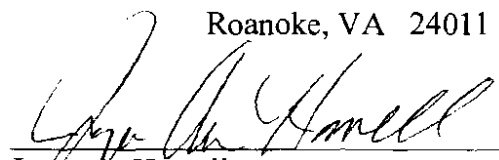
CERTIFICATE OF SERVICE

I certify that I sent by UPS, next day delivery, a copy of Complainant's Motion for Partial Accelerated Decision, Memorandum, Declarations of Kenneth Cox and Peggy Zawodny, together with a proposed form of Order to the addressees listed below. The original and one copy of the Complainant's Motion for Partial Accelerated Decision, Memorandum, Declarations of Kenneth Cox and Peggy Zawodny, together with a proposed form of Order were hand-delivered to the Regional Hearing Clerk, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103-2029.

Hon. Barbara A. Gunning, A.L.J.
EPA Office of Administrative Law Judges
1099 14th Street, N.W.
Suite 350 Franklin Court
Washington, D.C. 20005

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800 Sun Trust Plaza
10 Franklin Road
Roanoke, VA 24011

Dated: Nov. 29, 2011


Joyce A. Howell
Senior Assistant Regional Counsel