



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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IN THE MATTER OF)
)
CHEMSOLV, INC., formerly)
trading as Chemicals and)
Solvents, Inc.)
)
and)
)
AUSTIN HOLDINGS-VA, L.L.C.,)
)
RESPONDENTS)

DOCKET NO. RCRA-03-2011-0068

**ORDER ON COMPLAINANT'S MOTION TO COMPEL OR IN THE ALTERNATIVE,
MOTION IN LIMINE**

On January 26, 2012, Complainant filed a Motion to Compel or in the Alternative, Motion in Limine ("Motion" or "Mot."), arguing that Respondents have failed to abide by the Prehearing Order issued May 31, 2011, and requesting the issuance of either: 1) an order requiring Respondents to provide Complainant with "written notice, on the record, as to whether it intends to take the position that it is unable to pay the penalty proposed by Complainant in this matter or that payment of such penalty will have an adverse impact on its ability to continue in business" along with specified supporting documentation, or 2) an order "precluding each Respondent from introducing any evidence in support of [such] a claim." Mot. at 2.

On February 9, 2012, Respondents submitted a Response to Complainant's Motion to Compel or in the Alternative, Motion in Limine ("Response" or "Resp."). In their Response, Respondents argue that, contrary to Complainant's reading of the May 31, 2011, Prehearing Order, Respondents are only required to produce documents related to their individual or collective ability to pay if one or both Respondents intend to raise the issue at hearing. Resp. at physical page 3 (Response not paginated). In addition, Respondents state explicitly that "[a]t present, neither of the Respondents intend to raise an inability to pay defense at the hearing in this matter." *Id.*^{1/} Complainant did

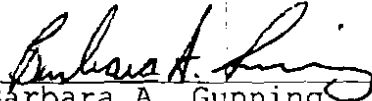
^{1/} However, Respondents reserve the right to supplement their Prehearing Exchange, in accordance with 40 C.F.R. § 22.22(a)(1), "in the event that the Respondents' financial circumstances should
(continued...)

2

not, before the deadline, file a reply or a statement that no reply would be filed.

The language in the May 31, 2011, Prehearing Order requires a Respondent to produce supporting documentation only if it intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business. Respondents have not raised this defense. Therefore, Respondents are not in violation of the Prehearing Order.

As Complainant notes, 40 C.F.R. § 22.19(a) precludes the introduction of evidence at hearing that was not included in the prehearing exchange. However, this provision is subject to 40 C.F.R. § 22.22(a), which allows the Administrative Law Judge to admit lately proffered evidence for good cause shown. As neither Respondent has raised the issue of ability to pay, it may be deemed to have waived this defense at hearing if it fails to timely exchange all documentation or proposed testimony on which it plans to rely. 40 C.F.R. § 22.22(a)(1); see generally *New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994); *Carroll Oil Co.*, 10 E.A.D. 635 (EAB 2002). Because Respondents state affirmatively that they do not, at this time, intend to raise this defense, the Motion is deemed premature and is therefore **DENIED** with leave to renew any objection at hearing.


Barbara A. Gunning
Administrative Law Judge

Dated: February 22, 2012
Washington, DC

^{1/} (...continued)
change after the date of this Response." Resp. at 4.

**In the Matter of *Chemsolv, Inc., formerly trading as Chemicals and Solvents, Inc., and Austin Holdings-VA, LLC*, Respondent.
Docket No. RCRA-03-2011-0068**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this **Order on Complainant's Motion to Compel or in the Alternative, Motion in Limine**, issued by Barbara A. Gunning, Administrative Law Judge, dated February 22, 2012, in Docket No. RCRA-03-2011-0068, was sent to the following parties on this 22nd day of February 2012, in the manner indicated:



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**Dated: February 22, 2012
Washington, DC**