UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Chem-Solv, Inc., formerly trading as Chemicals and Solvents, Inc.	)	
	)	
and	)	**Docket No. RCRA-03-2011-0068**
	)	
Austin Holdings-VA, L.L.C.	)	
	)	
Respondents.	)	

COMPLAINANT'S

POST-HEARING REPLY BRIEF

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RO 14089 (June 3, 1997)(Letter from Elizabeth A. Cotsworth, Office of Solid Waste to Mr. Mitchell L. Press, DuPont Engineering)

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 22.26 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (hereinafter, "*Consolidated Rules*") and the schedule set forth in this Court's June 12, 2012 Order on Motion to Modify Briefing Schedule, Complainant, the Division Director of the Land and Chemicals Division, United States Environmental Protection Agency, Region III ("EPA" or the "Agency"), respectfully submits Complainant's Post-Hearing Reply Brief (or "Reply"), in the above-captioned matter. This Reply addresses those relevant issues that are raised and presented by Respondent Chem-Solv, Inc. ("Chem-Solv") and Respondent Austin Holdings-VA, L.L.C. ("Austin Holdings") in Respondents' Initial Post-Hearing Brief (hereinafter cited as "Respondents' Brief at __"), dated August 30, 2012. Complainant's Reply further incorporates, by reference, the background information and arguments previously set

forth in Complainant's Initial Post-Hearing Brief (hereinafter cited as "Complainant's Initial Brief at __") of June 29, 2012.

II. CROSS-CUTTING ISSUES

A. Credibility of Respondents' Witnesses

Respondents' Brief makes the surprising argument that Complainant may not use evidence admitted into the record in this matter to impeach Mr. Austin's credibility as a witness unless Mr. Austin was specifically confronted with the admitted evidence while on the witness stand. Respondents' Brief at 19. Respondents, however, cite no authority whatsoever for this proposition, and in fact there is no authority for such a position.

Complainant is attacking Mr. Austin's credibility on the basis of statements in the record in this matter and admitted into evidence. Under the Federal Rules of Evidence (which do not explicitly apply in proceedings under the *Consolidated Rules*), there are indeed limitations on the admissibility of extrinsic evidence of a witness's prior inconsistent statements, but these limitations do not apply in the case of a party witness. Even for a non-party witness, Rule 613(b) of the Federal Rules of Evidence allows the admission of impeaching prior statements "if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires."

Rule 613(d) states explicitly that the limitation in that section does not apply to an opposing party's statement under Rule 801(d)(2). There can be no question but that Mr. Austin's out-of-court statements on behalf of his own company fall under Rule 801(d)(2) as being "made by a person whom the party authorized to make a statement on the subject," and "made by the party's agent or employee on a matter within the scope of that relationship and while it existed."

Rule 613(b) would not, in any case, bar the use of the prior inconsistent statements in this case because Mr. Austin was present and available to deny or explain any prior statements in the record. Rule 613(b) does not in any way require that witnesses be confronted with the inconsistencies *while on the witness stand.* The Rule, instead, only requires that the witness be "given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it." That most certainly was the case here, where Mr. Austin was present at the Hearing and took the stand himself. It was up to Mr. Austin and his attorneys to know what prior inconsistent statements were in the case record and, if possible, to offer an explanation.

Mr. Austin had ample opportunity to address prior inconsistencies at the Hearing while on direct examination by his own attorney, but he did not to do so. There is no reason why Mr. Austin would have been unaware of his previous statements regarding flushing of lines. Nor would Mr. Austin or the Respondents have been unaware of Mr. Lester's prior statements, which were set out in an inspection report in the case record. CX 19 at EPA 374. If Mr. Austin had an explanation for the inconsistent statements, there was nothing to prevent him from providing an explanation for those inconsistencies to the Presiding Officer at the Hearing. Complainant has no obligation to actively solicit such an explanation from a witness who chooses not to offer one on his own.

Similarly, Mr. Austin should have been well aware that he had earlier provided a sworn affidavit claiming that he personally observed the EPA sampling of the Pit (RX 2 at CS 004 – 005), and Mr. Austin was in the courtroom when Ms. Lohman contradicted this affidavit by testifying that Mr. Austin was not in fact present at the sampling event. However, when he himself took the witness stand at the Hearing, he did not choose to rebut Ms. Lohman's

testimony. Instead, as Respondents admit in their Brief, Mr. Austin "offered no testimony at all as to his observations of sampling." Respondents' Brief at 18. He thus chose to say nothing at all to rebut Ms. Lohman's testimony that he was not present. Mr. Austin most certainly had an *opportunity* to rebut Ms. Lohman's testimony by insisting that he was present, and to explain how he could have been present without Ms. Lohman seeing him, but he and his attorneys chose not to avail themselves of this opportunity.

With regard to the trench drain issue, Mr. Austin, in his testimony, did make an attempt to explain his prior statements, but this explanation is not convincing, as discussed in Complainant's Initial Brief at 26-30. Respondents attempt to argue that the inspectors should have tested the drain, Respondents' Brief at 20, but of course there would have been no reason for the inspectors to do so because both Mr. Austin and Mr. Lester confirmed for the inspectors that the trench drain led to the Pit. By the time Respondents first claimed that the drain was capped, Chem-Solv had paved over the drain.

Where, as here, Mr. Austin's prior statements were properly admitted into the record and were inconsistent with both his trial testimony and other prior statements, it is proper and logical to infer that Mr. Austin is not a credible witness.

B. <u>Level of Solids in the Pit</u>

With regard to the level of solids in the Pit, Respondents' Brief initially appears to disagree with Complainant's argument. Yet Respondents conclude their argument on the level of Pit solids by *confirming* Complainant's position that the solids removed from the Pit prior to the Respondents' removal of the Pit from the ground included the 17,500 pounds of solids, shipped off-site in drums, *in addition* to the two feet of sand placed into a "hopper" by Mr. Tickle.

Respondents begin their argument by stating that "[a]pproximatley two feet of solids settled to the bottom of the Pit." Respondents' Brief at 20, citing Mr. Tickle's testimony at TR3 at 144, that there was two feet of solids that he "removed from the tank, right before [he] removed the tank from the ground." Although Respondents' Brief does not say so at this point, it should be noted that Mr. Tickle testified that the solids he removed consisted of "sand." TR3 at 140. Respondents' Brief then claims that this two feet of solids "were containerized in 32 individual steel drums," Respondents' Brief at 20, but this is in fact inconsistent with Mr. Tickle's testimony that the material he removed from the Pit was not placed into drums, but was instead placed into a "hopper."

Respondents then change their story in the middle of their Brief, arguing that Mr. Tickle was *not* involved in the removal of settled solids into the steel drums, but was instead involved only in the removal of the sand inside the Pit, which occurred "after the cleanout of settled solids." Respondents' Brief at 21-22. This is *precisely* Complainant's point. Mr. Tickle testified that there were two feet of solids that he shoveled into a hopper before the tank was pulled from the ground. Since this solids removal occurred "after the cleanout of settled solids," these two feet of solids had to have been *in addition to* the 17,500 pounds of solids removed from the Pit and placed into drums. Thus, the level of solids before the removal of 32 steel drums of solids had to have been considerably greater than the 2 feet of sand left after this initial removal. Respondents conclude their discussion of the solids removal by confirming Complainant's point that "the sand was shoveled only into the hopper and never made it to the

steel drums," Respondents' Brief at 22, thus confirming that the two feet of sand was in addition to the solids removed from the Pit and placed in the 32 steel drums.[1]

There can be no doubt but that the sand removed from the bottom of the tank was a hazardous waste. As explained at length in Complainant's Initial Brief, the levels of tetrachloroethene and trichloroethene in the Pit solids were so high that there can be no doubt as to the hazardous character of the solids. Complainant's expert chemist, Dr. Lowry, was very clear that the tetrachloroethene in the tank exceeded its solubility limit, and thus would exist as droplets which would tend to settle toward the bottom of the tank.[2] TR2 at 95-96. Thus the level of tetrachloroethene would increase the further down one went in the tank. TR2 at 96. Respondent attempted unsuccessfully to get Dr. Lowry to change his opinion on cross-examination, but presented no evidence of its own to rebut Dr. Lowry's clear and persuasive expert testimony on this point.

C. Credibility of Elizabeth Lohman

Respondent attempts to argue that Elizabeth Lohman was a biased witness, based on (1) Ms. Lohman's use of the word "revoked" to describe the circumstances under which Chem-Solv's POTW discharge privileges were terminated, (2) Ms. Lohman's testimony that she had concerns about a report by a contractor hired by Chem-Solv which identified an opening in the lining of the Pit, and (3) the fact that Ms. Lohman's testimony "echoes" statements made by Cary Lester during his tenure as Chem-Solv's Operations Manager. Respondents' Brief at 23-26. This argument is not at all persuasive. Ms. Lohman did no more than present facts based upon

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[1] In addition, it should be noted, three plastic drums of solids had been removed from the Pit in June, 2007, and were shipped offsite as hazardous waste along with the 32 drums removed in January, 2008. *See* Complainant's Initial Brief at 33 – 34, CX 23 at 1083, 1127, First Set of Stipulations at ¶ 28.

[2] Dr. Lowry also testified that the level of trichloroethene in the Pit solids was below the solubility limit, and thus would likely not vary within the Pit solids, although there was a possibility that the levels would be higher lower down in the tank if some trichloroethene had dissolved in the liquid tetrachloroethene droplets. TR2 at 96-99.

her observations, documents provided to her by Chem-Solv, and statements (often conflicting) made to her by Chem-Solv employees. It is Ms. Lohman's job to be concerned about the environment and the integrity of the RCRA regulatory program, and her actions and observations with regard to Chem-Solv were consistent with those legitimate concerns. Her testimony and inspection reports revealed her to be a thorough and principled inspector, who diligently attempted to gather all of the relevant facts even when Chem-Solv was less than cooperative in providing information.

D. Use of Cary Lester's Testimony

Respondents also attempt to argue that it was improper for Ms. Lohman to rely on "hearsay" statements made by Cary Lester, and argue that little weight should be given to Mr. Lester's out-of-court statements. Respondents' Brief at 26-27. This argument conveniently ignores the fact that Mr. Lester's statements are party-opponent statements, one of the most routine types of acceptable evidence. In fact, such statements are not hearsay at all under the Federal Rules of Evidence. Under Rule 801(d)(2)(C) and (D), a statement is not hearsay if it is "offered against an opposing party" and it "was made by a person whom the party authorized to make a statement on the subject" or "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Mr. Lester's statements clearly fall under the scope of Rule 801(d)(2)(C) and (D). Mr. Lester served as "Operations Manager" for the Chem-Solv Facility. *See* Complainant's Ex. 21 at EPA 657, ¶ 4.e. His job description, provided by Chem-Solv to EPA in an Information Request Response, Complainant's Ex. 21 at EPA 657, ¶ 4.d. and EPA 993-994, describes very broad duties with regard to the operation of the Facility, including specific authority to "[l]iaise with local, state and Federal government agencies to ensure ChemSolv compliances with regulations."

Mr. Lester's statements with regard to environmental compliance were thus explicitly within the scope of his employment, and he was specifically authorized to make statements to governmental authorities about regulatory issues. In fact, when EPA and VADEQ inspected the Chem-Solv Facility on May 15, 2007, Mr. Lester was not in the office, and Mr. Austin thus asked if the inspectors could return later on another day when Mr. Lester was available. TR1 at 85. The May 15, 2007 inspection proceeded without Mr. Lester, but after lunch Mr. Austin asked that the inspection be ended and resumed at a later date when Mr. Lester would be available to meet with the inspectors. TR1 at 93. It is thus clear that Mr. Lester was not only *authorized* to make statements on Chem-Solv's behalf, but he was in fact the company's *preferred* spokesperson.

Mr. Lester's statements to State and federal inspectors are thus clearly admissible evidence, not only under the "rules of this administrative proceeding," Respondents' Brief at 27, but in any federal court. Where Mr. Lester, as Chem-Solv's designated spokesperson, made statements contrary to the company's current claims in this litigation, it is appropriate for the Presiding Officer to give great weight to those statements.

III. RESPONDENT'S "ARGUMENT" SECTION

A. Manufacturing Process Exemption Defense

Respondents have attempted to establish, as an affirmative defense, that the Pit was exempt from regulation under RCRA as a "raw material storage tank" and/or "manufacturing process unit," as set forth in 40 C.F.R. § 261.4(c). This defense is based upon alleged facts which are highly disputed. However, the defense fails regardless of the version of the facts which is believed.

In analyzing and responding to the Respondents' stated defense, it is helpful to use three different assumptions as to the truth of supposed facts claimed by Respondents. At the first level, Complainant will analyze the defense based on the assumption, supported by the weight of the evidence, that the claimed re-use of Pit water and incorporation of Pit water into Freeze-Con simply did not occur. At the second level, Complainant will assume, for the sake of argument, that the re-use of Pit water occurred, but will also assume that the admitted neutralization of highly caustic water in the Pit was at times necessary before the Pit water could be re-used. At the third level, Complainant will assume the facts exactly as claimed in Respondents' Brief, *i.e.* that the Pit water was re-used, that it was not necessary to neutralize the Pit water before re-using it, and that the Pit water was neutralized in the Pit only after a decision was made to dispose of some of the water in the Pit. Respondents' defense fails at all three levels of analysis.

At the first level, the weight of the evidence indicates that Respondents have failed to establish the basic facts upon which their entire defense is based. Respondents' defense is based upon an attempt to establish that water in the Pit was re-used several times to rinse drums before eventually being discarded, and was also on occasion used as a raw material in the manufacture of "Freeze-Con," a coal anti-freeze product. Respondents' Brief at 14-16. As discussed at length in Complainant's Initial Brief at 78-87, these factual claims (1) are offered by witnesses with significant credibility problems, (2) are based upon a claimed recycling procedure which is highly implausible and internally inconsistent, and (3) are inconsistent with the contemporaneous explanation of the Pit's operation as explained to EPA and VADEQ by Cary Lester, who was Chem-Solv's Operations Manager at the time of the discussions, and was specifically designated by Chem-Solv as the person to whom EPA and VADEQ should address questions. Mr. Lester, at the time of the violations at issue, made clear that Chem-Solv had been looking into the re-use

of water in the Pit, but had not been able to find any such uses, and was thus dealing with Pit water by disposing of it off-site. *See* Complainant's Initial Brief at 87, citing TR1 at 107-108.

At the second level, even if we are to accept as true Respondents' claims that Pit water was at some point re-used for spraying drums and/or incorporated into Freeze-Con, Respondents' defense still fails. The supposed incorporation of Pit water into Freeze-Con cannot under any circumstances succeed in removing the Pit water from the realm of solid waste. Quite the opposite, the incorporation, if it occurred, succeeded only in making Freeze-Con itself into a solid waste. Secondary material incorporated into a fuel which is to be burned continues to be a solid waste, as is any fuel which incorporates such material. 40 C.F.R. § 261.2(c)(2)(B).

With regard to the claimed re-use of Pit water for spraying down drums on the Acid Pad, the evidence is clear that the Pit water was sometimes highly caustic (pH below 2.0 or above 12.5), TR1 at 97-98, CX 19 at EPA 375, and thus was neutralized, either in the Pit or elsewhere. TR1 at 97-98. TR3 at 139. CX 19 at EPA 375. Respondents claim that this neutralization only occurred in the Pit, and only occurred when the water was going to be disposed of. Respondents' Brief at 41. However, there is no testimony anywhere in the record to the effect that the neutralization did not occur prior to re-use, so Respondent has not met its burden of proof for the facts necessary to its defense.

Further, it is not reasonable to believe that neutralization could be necessary for disposal but not for re-use. Respondents' vice-president, Mr. Austin, described the rinsing operations at the Acid Pad as involving the use of an "industrial strength or commercial grade power washer . . . not unlike you would see at a large car wash type deal." TR4 at 200. It is simply not believable that Respondent would or could re-use highly caustic liquid – with a pH of below 2 or above 12.5 -- to clean drums using a high-powered industrial power washer in an open area. An

examination of a photo of the Acid Pad, CX 18 at EPA 359, taken shortly after drum washing occurred, TR1 at 256, shows the close quarters in which the power-washing of drums occurs and shows the puddles of rinse water left behind by the process. It is inconceivable that highly acidic or highly basic liquid could have been safely used in such a power washing operation, particularly under the conditions shown in this photograph. Accepting for the sake of argument the claim that the Pit water was sometimes re-used as rinse water in a power sprayer operation, it is inconceivable that this re-use could have occurred prior to neutralization of the Pit water on those admitted occasions when the Pit water was highly caustic.

Because the rinse water, at least on occasion, had to be neutralized prior to the alleged re-use, the rinse water in the Pit was on those occasions a material which had been used, and could no longer serve the purpose for which it was produced without processing. Thus the water was, at least on occasion, a "spent material," as that term is defined in 40 C.F.R. § 261.1(c)(1).[3] As such, the spent rinse water in the Pit was a solid waste, not a raw material, even if it was eventually re-used after reclamation. *See* 40 C.F.R. § 261.2(c)(3). *See, also* 50 *Fed. Reg.* 614, 633 (January 4, 1985)("If the material is to be put to use after it has been reclaimed, it is still a solid waste until reclamation has been completed . . .the fact that wastes may be used after being reclaimed does not affect their status as wastes before and while being reclaimed").

At the third level, even if the operations at the Pit were exactly as claimed in Respondents' Brief, Respondents' defense would still not succeed. In Respondents' Initial Post-

[3] Respondents Brief correctly notes that the two documents cited by Complainant on Page 90 of Complainant's Initial Brief do not specifically mention the word "corrosivity" as a form of contamination within the definition of "spent material." The language of Complainant's Initial Brief could be read as incorrectly implying that those documents explicitly addressed corrosivity, and Complainant apologizes for this use of imprecise language. Complainant meant only to note that those documents indicated that the Agency took a very broad view of the type of contamination which could cause a material to be considered a spent material. This broad view would seem to clearly apply to tap water which has become highly corrosive as a result of contamination during its use in a washing operation. Highly acidic or highly basic water is not normally used as a substitute for tap water without processing, and cannot safely be used in an open-area power washing operation without processing to remove the hazards posed by the corrosivity of the used rinsewater.

Hearing Brief, Respondents unequivocally confirmed two aspects of their operations that together remove the waste in the Pit from the scope of the raw material storage/manufacturing process unit exemption (together referred to as the "MPU exemption"). First, Respondents stated that as rinsewater remained in the Pit, Respondents would, from time to time, decide that some rinsewater was not going to be recycled and was going to be disposed. Respondents' Brief at 41. Second, after Respondents determined that some rinsewater that was being stored in the Pit was waste water to be disposed and not re-used, Respondents would, at times, engage in treatment of that waste by neutralization while the material remained in the Pit. Respondents' Brief at 40.

The MPU exemption provisions are found in 40 C.F.R. § 261.4(c). As Respondents point out in their brief, the MPU exemption attaches to several different types of units. Respondents' Brief at 34. Of these types, the Pit could potentially only qualify as a "raw material storage tank." The Pit does not function as a step in any manufacturing process at Respondents' facility. The "manufacturing" that Respondents point to as occurring at its facility is the "business of making drums suitable for re-packaging and distributing a variety of chemicals." Respondents' Brief at 39. However, the washing of the drums occurs on the nearby Acid Pad; it is undisputed that the washing of drums does not occur in the Pit.

Respondents attempt to rely on a May 1986 RCRA Hotline summary document to support an argument that the Pit is in fact a manufacturing process unit. Respondents' Brief at 35. However, the document Respondents cite, 530R86113, determined that a particular solvent part washer qualified for the MPU exemption because the parts washer was a containerized unit wherein both the washing (*i.e.*, manufacturing) and the solvent retention occurred in a single unit. Respondents' claimed system – an outdoor acid pad, a drain system to the Pit, piping from

the Pit to the above-ground tank, and pumping from the above-ground tank through a power washer -- are in no way analogous to the self-contained solvent part washer cited in the Hotline document. Moreover, Respondents note another EPA document regarding parts washers, RCRA Online ("RO") 12790 (December 1986)(RCRA/Superfund Monthly Summary, "Wastes Generated in Process Units," RPPC No. 9441.1986(96)), but fails to mention that EPA in that document reversed its conclusion regarding *the very same parts washers addressed in 530R86113*. This conclusion was reached upon further study, 6 months later, revealing that the drums of solvent and the actual parts washing units were connected but distinct units.[4] So, EPA has determined that the very parts washers that Respondents refer to as "favorably analogous" to the Pit are not in fact manufacturing process units.

Since the Pit is not part of the claimed manufacturing process, it cannot qualify for the MPU exemption as a manufacturing process unit. This leaves Respondents' defense to turn solely on whether the Pit can be considered a raw material storage tank. If all of Respondents' claims are to be believed, the rinsewater management practices described in their brief would indicate that the Pit does, *on occasion*, store rinse water which could be re-used to rinse drums. However, on occasion the Pit performs a very different function, that of a waste treatment unit, and thus cannot qualify for the raw material storage tank prong of the MPU exemption.

The MPU exemption is EPA's means of setting out a line between manufacturing units and waste management units, to determine which units are regulated under the RCRA program. Where a particular unit is dedicated to legitimate manufacturing activities, wastes generated in the unit may be exempt from certain RCRA requirements. Such waste is a solid waste while in the unit, but is not subject to the full RCRA requirements until it is removed from that unit. This

[4] RCRA Online in fact lists 530R86113 as "superceded."

exemption is based on the idea that a unit is dedicated to manufacturing activities, including raw material storage, is not part of the waste management problem.

However, this rationale does not apply when a unit is sometimes used for raw material storage and sometimes used for waste management activities. Such a unit is most certainly implicated in waste management. It would make no sense to exempt such a unit from the requirements to which all waste managers are subject, basic "good practice" legal requirements such as the requirement for secondary containment, the requirement for an engineering assessment, and the requirement for closure (which includes an investigation for possible spills and other releases) merely because the unit is sometimes used for raw material storage. It would frustrate the purpose of the RCRA regulatory scheme if a manufacturing facility was able to avoid the protections of RCRA regulation of waste management for a unit being used for waste management a significant portion of the time, simply by using the same unit for manufacturing purposes a small portion of the time. The MPU exemption only makes sense if it is interpreted to apply only to units which are *dedicated* to the type of operations that the Agency indicated are not drawn into the waste management regulatory program.

In similar situations EPA has interpreted the MPU exemption to require that the exempt unit be dedicated to the activity giving rise to the exemption. For example, in RO 13790 (December 19, 1986)(Letter from Joseph E. Carra, Acting Director, Waste management Division to Mr. Hadley Bedbury, Senior Environmental Engineer, Diamond Shamrock Chemcials Company), the Agency was asked about the status of process transfer equipment that was normally used both for production and for hazardous waste. EPA concluded that "any process transfer equipment, even if normally used for production purposes, that is also used to transfer hazardous waste residue during equipment washout/cleanout procedures to a hazardous waste

storage/treatment tank, would be considered part of a hazardous waste tank system and thus subject to the standards for such." RO 13790 at 2. EPA reaffirmed this position in RO 14469 (May 26, 2000)(Memorandum from Elizabeth A. Cotsworth, Director, Office of Solid Waste ro George E. Pavlou, Director, Office of Enforcement and Compliance Assurance, EPA region I; "Kodak Claim for a Manufacturing Process unit Exemption to RCRA Subpart BB Air Emission Requirements"), finding that equipment was not exempt under the MPU exemption if it at times handled hazardous waste.

The Agency has also interpreted other exemptions to apply only when the units involved are solely dedicated to the purpose specified in the exemption. *See*, 53 *Fed. Reg.* 34079, 34080 (Sept 2, 1988) (wastewater treatment unit exemption applies only to unit that is dedicated to on-site wastewater treatment, while units intermittently used for other purposes are not exempt); RO 14089[5] (closed-loop recycling exclusion is not applicable if less than 100% of the material generated is returned to the manufacturing process).

Even when taking all of Respondents' claims as true, Respondents cannot show that the Pit was a unit dedicated to non-waste storage or manufacturing activities. To the contrary, Respondents' arguments demonstrate that the Pit was, at least on occasion, being used a hazardous waste treatment unit. Neutralization is specifically listed in 40 C.F.R. § 260.10 as an example of "treatment" of a hazardous waste. Respondents admit that the evidence shows that the water in the Pit needed to be neutralized on occasion, and Respondents' own witness, Mr. Tickle, insisted that this neutralization occurred in the Pit. TR3 at 139. Respondents argue that such neutralization "was only a concern prior to off-site shipment of rinsewater, in the event that Chem-Solv decided to dispose of some rinsewater." Respondents' Brief at 41. Respondents'

[5] (June 3, 1997)(Letter from Elizabeth A. Cotsworth, Office of Solid Waste to Mr. Mitchell L. Press, DuPont Engineering).

argument, therefore, is that when Chem-Solv *decided* to dispose of rinsewater in the Pit (and many thousands of gallons of such rinsewater was disposed of during the period of the violations in this case, *see* Complainant's Exhibit 21 at EPA 652, 654) Respondent would, when necessary, neutralize the caustic rinsewater in the Pit. Thus, by its own admission, Chem-Solv would make a *decision* to discard the rinsewater. *After* making such a decision, Chem-Solv did not immediately remove the water from the Pit, but instead, actively treated the discarded rinsewater in Pit. When this occurred, the Pit was not serving as a raw material storage tank or a manufacturing process unit, but was instead serving as a hazardous waste treatment unit.

In addition, Respondents' MPU exemption argument is undercut by the fact that the amount of rinsewater entering the Pit exceeded the amount of rinsewater which Respondents could re-use. Respondents claimed that the disposal of the rinsewater in the Pit occurred when the amount of rinsewater being generated exceeded the holding capacity of Pit and the associated aboveground tank.[6] TR4 at 204. TR3 at 196. At least some of the rinsewater entering the Pit was thus destined from the beginning for disposal, even if some of it was destined to be re-used. Again, the Pit was at best a dual-purpose unit, holding both raw material to be re-used and waste material which was going to be discarded regardless of its suitability for further rinsing.

Finally, Respondents have not even attempted to counter the very strong inference that the Pit, at least at the time of the violations alleged, was holding listed hazardous wastes consisting of discarded commercial chemical products. *See* Complainant's Initial Brief at 73-78. There is simply no other explanation for the presence of the hazardous constituents found in EPA's analysis of the material in the Pit, particularly the extremely high levels of

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[6] As discussed in Complainant's Initial Brief, Respondents' claim that a high degree of rinsewater usage would exceed the capacity of the two tanks would make no sense if rinsewater was in fact being recirculated, and Respondents' claims to that effect are thus a major hole in the factual story Respondent attempts to present. Complainant's Initial Brief at 78-81. However, at this point in Complainant's Reply Brief Complainant is assuming for the sake of argument that Respondents' factual claims are true, no matter how implausible.

tetrachloroethene and trichloroethene. Respondents have not and cannot offer any alternative explanation for the presence of these contaminants in the Pit. These listed discarded commercial chemical products became hazardous wastes at the point where they were spilled, *prior to* being conveyed to the Pit, and thus the MPU exemption does not apply to such wastes because the wastes were not generated in the Pit. Further, once hazardous wastes listed as U210 and U228 were introduced into the Pit and mixed with the other contents, the entire contents of the Pit would be considered a hazardous waste pursuant to 40 C.F.R. § 261.3(a)(2)(iv).

B. Drum of Sodium Hydrosulfide

As explained in detail in Complainant's Initial Brief, Respondents stored sodium hydrosulfide in a leaking drum under physical conditions which indicated that it was discarded material, Complainant's Initial Brief at 132-139, without documentation normally associated with inventoried products. Complainant's Initial Brief at 127-130. In response, Respondents' Brief contains a number of arguments, but none of these arguments is supported by the weight of the evidence.

First, Respondents argue that the drum of sodium hydrosulfide at issue was "in Chem-Solv's inventory" at the time of the violations. Respondent' Brief at 44. The sole evidence cited by Respondents for this claim was the testimony of Mr. Austin as to his "best . . . recollection" that Chem-Solv had three partial drums of sodium hydrosulfide at the Facility. *See* TR4 at 192; Respondents' Brief at 44. Mr. Austin did not actually say that the sodium hydrosulfide was listed on a formal inventory, and Respondents provided absolutely no documentation as to any such formal inventory. The failure to come forward with any such inventory records is certainly a factor in inferring that the drums in question were discarded material. *See, In Re Bil-Dry Corporation*, 9 E.A.D. 575, 603-604 (EAB 2001). The evidence indicates that the three drums

of sodium hydrosulfide at the Facility were not leftover inventoried product but were, in fact, material "returned" to Chem-Solv's Roanoke, Virginia Facility (which may or may not have originated in Roanoke) by customers as part of the Facility's "Return Material Authorized" (or "RMA") Program. *See* Complainant's Initial Brief at 118 – 120.

Respondents also argue that the partial drum of sodium hydrosulfide in question was a "useable product." Respondents' Brief at 44. Despite the conditions of storage and the manner of transport and management which indicate otherwise, the only evidence Respondents can point to in support of this argument is evidence that two other partial drums of sodium hydrosulfide were "sold" to a customer. Respondents' Brief at 44. This evidence has nothing to do with the leaking drum identified by the inspectors; Chem-Solv admitted in response to an EPA information request that this drum was shipped off-site as hazardous waste. *See.* Complainant's Initial Brief at 121-122. The eventual disposal of stored material as a hazardous waste is a legitimate factor to consider in determining that the material was a waste while being stored. *Bil-Dry*, 9 E.A.D. at 604-605. Moreover, the evidence shows that the two additional drums of sodium hydrosulfide were not sold but were instead transferred to Chem-Solv's "customer" at no charge. *See* Complainant's Initial Brief at 124-126.

Respondents attempt to argue that "it makes no difference that the sodium hydrosulfide was stored in a container that was less than pristine," Respondents' Brief at 46, but cite no authority for this illogical proposition. It seems intuitive that a deteriorating container is evidence that the contents of that container is not being treated as a usable and valuable material, and the EAB affirmed exactly that position in *Bil-Dry,* 9 E.A.D. at 602-604.

Respondents also try to argue that "it makes no difference that the ultimate Bill of Lading suggests that there was no charge to CH Patrick" for the drums shipped in October, 2008,

arguing that CH Patrick "presumably" had "a credit arrangement with Chem-Solv." Respondents' Brief at 46. Respondents presented no evidence of any such "credit arrangement." Moreover, the document in question is not in fact a bill of lading, but is labeled, in the upper left-hand corner, as an "INVOICE." This invoice does not merely show a zero balance, it lists a unit price of "0.0000" and contains a notation of "No Charge" instead of a customer order number. A "credit arrangement" might affect the terms under which the price for the product would be paid, but there is no logical reason why it would lead to a zero unit price or a notation that the transaction is "no charge."

C. Discarded Aerosol Cans

Respondents argue that they are not liable for failing to perform waste determinations on discarded aerosol cans by claiming that the cans were "empty," as defined in 40 C.F.R. § 261.7. Respondents' Brief at 47. Respondents' claim that Chem-Solv employees were instructed that there was a company policy to only dispose of "empty" aerosol cans, Respondents' Brief at 47. Respondents' sole citation for this proposition is testimony by Mr. Austin, TR4 at 249-250, which in fact deals only with the company's efforts to control the use of spray point and says nothing at all about emptying cans. Mr. Perkins, Respondents' compliance consultant, testified that the company had a policy "to only throw out the empty cans which they deemed to be non-hazardous."[7] However, Mr. Perkins provided no details as to this purported policy. Further, he did not work for Respondents at the time of the violations, *see*, TR4 at 107-108, and thus had no personal knowledge of the practices at the company at that time. Mr. Perkins admitted that any such policy was unwritten, TR4 at 131-132, and neither Mr. Perkins nor Mr. Austin provided any

[7] Mr. Perkins did agree with Complainant that non-empty aerosol cans are likely to be hazardous waste. TR3 at 184.

testimony or other documentation as to when and how this supposed policy was communicated to Chem-Solv employees.

There is no documentation at all as to the substance of the alleged communications to company employees, who would be unlikely to understand the nuances of performing a "RCRA empty" determination on their own. Respondents' Brief, at 47, implies that the communication said something about "depressing the spray nozzle until no additional material comes out," but cites no evidence that such a statement was included in the alleged communication to employees. Moreover, even such an instruction would not ensure that employees would render an aerosol can non-hazardous. For a can of spray paint, most employees would logically assume that the "no additional material comes out" means "no additional *paint* comes out," and would not necessarily understand that the can must be purged of all propellant and pressurized air.

Complainant's argument contains many details, as discussed in Complainant's Initial Brief, but ultimately boils down to this: (1) discarded aerosol cans are likely to be hazardous as a result of the product in the can, the propellant in the can and the pressure in the can; (2) Respondents were asked for information about aerosol can waste determinations prior to the filing of this case, but provided no evidence that any such waste determinations were performed; (3) Respondents sole argument against liability is that a specific waste determination was not necessary because its aerosol cans were "empty;" and (4) Respondents' have presented no evidence that its aerosol cans were "RCRA empty" or that waste determinations were performed on aerosol can waste streams at the Facility. Rather, the Respondents have only *claimed* that certain unnamed Facility employees were provided, at some undocumented time, with verbal instruction, by one or more unnamed individuals, as to an unwritten company policy, the details and content of which have never been provided to EPA or the Presiding Officer.

IV. COMPLAINANT'S RESPONSIVE VIEWS ON THE PROPOSED PENALTY

The *Consolidated Rules* provide that the dollar amount of the proposed civil penalty in an administrative complaint "shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.14(c). The *Consolidated Rules* further direct that:

> If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act.

40 C.F. R. § 22.27(b). In this proceeding, Complainant has based its proposed penalty upon a consideration of the statutory penalty factors set forth in Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3). The factors include the "seriousness of the violation" and "any good faith efforts to comply with the applicable requirements." Complainant applied these and other appropriate factors to the particular facts and circumstances of this case with specific reference to the applicable civil penalty guidelines that EPA has promulgated based upon Section 3008 of RCRA, 42 U.S.C. § 6928. These guidelines include EPA's October, 1990 RCRA Civil Penalty Policy, as revised in June, 2003 ("*RCPP*").[8]

A. Complainant's Use and Application of RCRA Civil Penalty Policy Guidance is Appropriate in this Proceeding

Respondents correctly note that the RCRA Civil Penalty Policy ("RCPP") utilized by the Complainant in its calculation of the penalty proposed in this proceeding is a guidance document and "not statutory or regulatory mandate." Respondents' Brief at 50. In this respect, the Environmental Appeals Board ("EAB") has reminded litigants that because Penalty Policies are

[8] The RCPP reflects the appropriate *Adjustment of Civil Monetary Penalties for Inflation,* pursuant to 40 C.F.R. Part 19 and the September 21, 2004 memorandum by Acting EPA Assistant Administrator Thomas V. Skinner entitled, *Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule* (" Skinner Memorandum").

not regulations promulgated pursuant to the Administrative Procedures Act, they serve as guidelines only and "there is no mandate that they be rigidly followed." *In re: James C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, 599 (EAB 1994), citing *In re Great Lakes Division of National Steel Corp.*, EPCRA Appeal No. 93-3, at 23-24 (EAB 1994).

While highlighting the fact that the RCPP is "clearly not binding" upon the Presiding Officer in this proceeding, the Respondents acknowledge that the RCPP is "viewed as instructive by most courts." Respondents' Brief at 50. In this regard, the EAB has often expressed its own finding that penalty policies do indeed facilitate the application of statutory penalty criteria. *In re: James C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, 599 (EAB 1994), citing *In re Great Lakes Division of National Steel Corp.*, EPCRA Appeal No. 93-3, at 23-24 (EAB 1994). The EAB has also repeatedly affirmed and sanctioned the use of EPA penalty guidelines in determining the appropriateness of a penalties in administrative enforcement actions, stating that ". . . there are good reasons to apply a penalty policy whenever possible. Such policies assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner." *In Re M.A. Bruder & Sons, Inc. D/B/A M.A.B. Paints, Inc.,* 10 E.A.D. 598, 599 (EAB 2002). *See, In Re Titan Wheel Corporation of Iowa,* 10 E.A.D. 526, 556 (EAB 2002), *aff'd, Titan Wheel Corporation of Iowa v. U.S. EPA*, 291 F. Supp. 2d 899, citing *In re Everwood Treatment Co.*, 6 E.A.D. 589, 594 (EAB 1996), *aff'd, Everwood Treatment Co. v. EPA,* No. 96-1159-RV-M, 1998 WL 1674543 (S.D. Ala., Jan. 21, 1998) (stating that the RCPP implements the requirement in RCRA that in assessing a civil penalty, the Agency take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements). *See also, In re: Employers Insurance of Wausau and Group Eight Technology, Inc.*, 6 E.A.D. 735, 737 (EAB 1997) (Region acted permissibly in offering to show reliance upon

Penalty Policy to establish that its recommended penalty had taken each of the statutorily prescribed penalty factors 'into account").

In order to ensure that it has properly taken each of the prescribed RCRA Section 3008(a)(3) penalty factors into account and in order to assure that its penalty proposal is consistent and fair, Complainant similarly has utilized and relied upon the RCPP in developing its civil penalty proposal in the present case. *See*, Complainant's Initial Brief at 235 – 247. Upon consideration of the RCPP, the Presiding Officer may adopt the proposed penalty that Complainant has developed in accordance with that Policy. The Presiding Officer also may deviate from such proposed penalty --- so long as the deviation is explained and the penalty assessed reflects the applicable statutory criteria. *See, e.g., In re Rogers Corp.*,9 E.A.D. 534, 569 (EAB 2000); *In re Chempace Corp.*, 9 E.A.D. 119, 142; *In re Employers Ins. of Wausau*, 6 E.A.D. at 759-62 (EAB 1997); *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995). Complainant believes that the facts and evidence in the record provide good reason and ample support for the Presiding Officer's adoption of the penalty proposed by Complainant in this proceeding.

Respondents attempt to minimize the seriousness of and potential risks posed by their violations. As set forth below, Respondent believes that the violations are far more serious than Respondents would have the Court believe.

B. Penalty Considerations Pertaining to the Respondents' Numerous Regulatory Violations at the Acid Pit

The various regulatory violations stemming from the Respondents' lengthy and improper hazardous waste tank storage violations at the Facility's Acid Pit clearly warrant a high penalty due to a variety of factors, including: (i) the large volume of hazardous waste liquids and solids improperly stored in that unit; (ii) the lengthy duration of such storage in an open tank, with prior

indications of deterioration and leaks, which lacked basic safeguards such as required secondary containment; (iii) the Respondents' non-compliance with RCRA air emission regulatory requirements; (iv) the significant potential for harm associated with open hazardous waste storage immediately adjacent and proximity to areas of the Facility where workers were present daily; (v) the harm to the State and federal RCRA Programs from the Respondents' repeated failure to perform required and repeatedly requested hazardous waste determinations, which effectively undermined the statutory and regulatory purposes and procedures necessary for implementation of the RCRA Program. Such recalcitrant conduct caused significant environmental risk and significant harm to the State and federal RCRA Programs through the additional time, effort and resource expenditures that VADEQ and EPA needed to devote to the investigation and prosecution of this matter. Such resource expenditures became necessary to identify and remedy violations and to ensure Facility compliance in accord with the fundamental RCRA goal that hazardous wastes are to be handled in a safe and responsible manner. *See* RCPP at 14.

The programmatic harm caused by the Respondents is particularly egregious in this case. Respondents repeatedly failed to comply with basic generator requirements which are fundamental to the implementation of the RCRA Program. *See* RCPP at 14. Respondents additionally chose not to comply with numerous State requests to: (i) perform routine and regular pre-treatment pH sampling of the liquid stored in the Acid Pit; (ii) perform a full RCRA hazard analyses Acid Pit's contents; and (iii) provide VADEQ with the results of such sampling and analysis. TR1 at 25-26, 41, 55-56, 58, 96, 103, 114-115, 116-117, 121. These facts notwithstanding, the Respondents have not been dissuaded from almost comedically asserting that the hazardous waste storage and associated other violations they engaged in at the Facility

Acid Pit were "unintentional," and "voluntarily corrected. Respondent's Brief at 53. To the contrary, it was the Respondents' determined recalcitrance and its repeated failure to perform and provide requested waste characterizations and sampling/analytical results to the State that prompted VADEQ to refer this matter to EPA for further investigation and action. TR1 at 25 – 27. Respondents' actions undermined RCRA regulatory requirements and procedures and their actions ultimately required State and EPA RCRA Program personnel to expend significant time, effort and resources to conduct and perform the inspection, sampling, laboratory analysis and waste determinations that the Respondents regularly and routinely should have performed thermselves. Respondent's subsequent lack of cooperation caused both the State and EPA RCRA Programs to expend further significant resources in the investigation, case development and prosecution of this matter in order to obtain and achieve the fundamental goal RCRA compliance at the Facility --- which has not yet been achieved. Such additional programmatic harm, and potential hum and environmental harm, have resulted from the Respondents' refusal to perform a proper RCRA closure of the Acid Pit tank system and to engage in appropriate post-closure care at the Facility.

In addition to the Respondents' documented instances of regulatory non-compliance and recalcitrance, the Respondents have gone to great lengths throughout this proceeding to mischaracterize the evidence in the record and to hide and obfuscate the truth. These efforts were not "unintentional" by any stretch of the imagination. The Respondents repeatedly failed to test or otherwise legitimately characterize the liquid and the settled solids stored in the Acid Pit for a reason. The resulting willful ignorance enabled the Respondents to claim surprise when hazardous levels of trichloroethene and tetrachloroethene were found to be present, at high concentrations, in the Acid Pit solids and hazardous levels of chloroform were found in the Acid

Pit liquid (with the test results biased low due to the rapid and certain volatilization that resulted from storage in the open Acid Pit).

Respondents have claimed that the "generator knowledge" that they possessed gave them no reason to believe that the wastes in the Acid Pit were RCRA hazardous and that they had no reason to suspect that they were storing any amounts of trichloroethene, tetrachloroethene or chloroform in the Acid Pit. Yet the Respondents made no effort to explain the process and rationale that they used to apply "generator knowledge" -- in fact, Respondents did not even identify the individual or individuals who made the supposed "generator knowledge" determination at the time that the wastes were generated.

Respondents claim that EPA failed to promptly share its own Acid Pit sampling and analytical results with them and that certain violations "could have been avoided by simple disclosure." Respondents' Brief at 52. They further assert that multi-day penalties should not be imposed in the "spirit of fundamental fairness." *Id.* In fact, multi-day penalties are particularly appropriate where, as here, the Respondents have engaged in a long-term and well-documented failure and refusal to comply with RCRA hazardous waste determination, tank storage, secondary containment, air emission, closure, post-closure care and other RCRA regulatory requirements applicable to the Acid Pit at the Facility. The Respondents repeatedly failed to cooperate and comply with VADEQ waste characterization requests regarding the Acid Pit's waste contents. Respondents made continued efforts to hide and obscure information from EPA during and subsequent to its Facility inspection activities. Their actions, their failures to act and their demonstrated determination to avoid their own RCRA regulatory responsibilities and obligations made it necessary for EPA to initiate its own Acid Pit sampling and analytical activities in order for Complainant to confirm the Respondents' illegal Acid Pit hazardous waste

storage activities. Respondents have repeatedly changed their story during the course of these proceedings and have not hesitated to deny, modify or amend prior sworn statements of fact in the service of their own self-interest. Complainant suggests that "fundamental fairness" mandates a penalty that is certain to discourage future such conduct on the part of the Respondents.

Contrary to their assertions, Respondents have by no means corrected the Acid Pit violations at the Facility --- "voluntarily" or otherwise. Respondents have refused to take any of the necessary steps toward the implementation of required 40 C.F.R. § 264.197 closure and post-closure care requirements that apply to the former Acid Pad tank system.

Finally, Complainant will merely point to the Respondents failure to find any citation in the record that would even marginally support their claim of having made "a good faith effort to comply" with the applicable RCRA regulations, as that phrase is used within the RCPP. Respondents' Brief at 53. As Mr. Cox explained at the Hearing, the "[p]otential for harm measures or is an attempt to put a value on the potential for environmental or human health harm and also includes harm to the RCRA program. The RCRA program by nature is a preventative statute to prevent mismanagement of waste so, doing things that may[be] didn't harm the environment but were against the requirements of the RCRA program would be taken in as what's captured here as harm." TR3 at 32. In that respect, the Respondents' demonstrated lack of cooperation with VADEQ, their concerted efforts to deny, disregard, hide and obfuscate the truth and the resulting harm to the respective State and federal RCRA Programs should, if anything, lead to an increase in the penalties proposed by EPA against the Respondents for the various RCRA regulatory violations involving the Acid Pit at the Facility.

C. Penalty Considerations Regarding the Waste Sodium Hydrosulfide

Respondents penalty argument with regard to the waste sodium hydrosulfide is simply to claim that there is no violation, a claim which Complainant has already rebutted. Once again, the Respondents have engaged in their habitual pattern of changing and revising their story during the course of these proceedings, contradicting prior sworn statements as to the disposition of the sodium hydrosulfide waste at issue and ignoring the true facts and the relevant, documented evidence. *See*, CX 23 at EPA 1078, ¶¶ 11.a. and b. and CX 23 at EPA 1127. *Cf.* TR1 at 18; TR4 at 272. Respondents improper and lengthy storage of this hazardous waste was a significant deviation from the regulatory requirements. Respondents' lack of candor and cooperation and its further efforts to hide and obfuscate the truth, have once again undermined basic RCRA requirements, caused harm to the State and federal RCRA Programs and required VADEQ and EPA to expend significant time, effort and resources investigating and prosecuting this matter. The associated penalty, likewise, should be significant so as to fully and properly dissuade the Respondents from further engaging in any such activities and/or misconduct.

D. Penalty Considerations Regarding the Failure to Perform Hazardous Waste Determinations for Spent Aerosol Can Waste Streams

As with the waste sodium hydrosulfide, Respondents' penalty argument with regard to spent aerosol cans is simply to deny liability. The evidence supports the finding that Respondents in fact failed take reasonable steps to determine if aerosol cans were hazardous waste and to ensure that those cans which were hazardous waste were properly handled. Respondents, therefore, very clearly deviated from the RCRA regulatory requirements in failing to make hazardous waste determinations with respect to the Facility's various aerosol can waste streams. While the aerosol can waste streams generated at the Facility did not appear to be voluminous in nature, they had the potential to be reactive or ignitable and were discarded in

solid waste trash containers that contained other readily combustible materials and were located in or near employee work areas. *See* CX 19 at EPA 529 – 530. As a result, the Respondents' actions did result in the real potential for human and environmental harm.

Complainant additionally notes that during the course of EPA's investigation of the Facility's aerosol can waste characterization and disposal practices, Respondents once again provided EPA with conflicting information as to the manner in which spent aerosol cans were handled, processed and disposed at the Facility. *See,* Complainant's Initial Brief at 189 – 193. Such conflicting information required EPA's expenditure of additional investigative resources that resulted in further harm to the federal RCRA Program. While Complainant has not sought a separate and independent penalty as to each specific waste stream for which the Respondents failed to perform a proper RCRA hazardous waste determination, it does seek a collective penalty -- for all such violations – that: (i) reflects the Respondents' repeated and significant deviations from the applicable regulatory requirements; (ii) sufficiently recognizes the full nature, extent and duration of the real and potential harm that these violations caused to human health, the environment and to the State and federal RCRA Programs; and (iii) is of sufficient size to dissuade each of the Respondents from any and all such future non-compliant and non-cooperative conduct.

E. Prior Violative History

At the Hearing, Respondents detailed a long history of violations of numerous state and local requirements, while claiming that all of these violations had been resolved to the satisfaction of the state and local officials. Complainant does not see how the resolution of numerous violations is at all a mitigating factor, although the *failure* to resolve other violations would perhaps be grounds for a further enhancement of the penalties in this case. Moreover,

Respondents provided no documentation or other evidence that State and/or local violations were satisfactorily resolved other than their own witnesses' self-serving statements.

Complainant cannot evaluate Respondents' claims to have satisfactorily resolved violations of local codes, because no local officials were called as witnesses. Complainant will point out, however, that Respondents are simply incorrect in stating that "Ms. Lohman confirmed that the DEQ considered its earlier warnings to have been resolved to the satisfaction of DEQ at that time." Respondents' Brief at 52. In the transcript passage cited by Respondents, Ms. Lohman agreed that the 1999 notice of violation appeared to be resolved, but stated that, in general, VADEQ did not feel that Chem-Solv had followed through on the measures it promised: any "resolution" of the earlier notices was "[w]ith the understanding, we gave the facility good faith that they were going to follow through on their commitments to do certain things. In the end they didn't do that." TR1 at 185. The violations identified in VADEQ's 2005 Facility inspections were not even tentatively resolved. Rather, they prompted VADEQ to seek EPA assistance in addressing the outstanding compliance issues at the Chem-Solv Facility, ultimately resulting in the instant case currently before the Presiding Officer. TR1 at 186.

F. Conclusion

For the reasons stated in Complainant's Initial Brief and herein, Complainant respectfully submits that Complainant has properly applied and considered each of the RCRA Section 3008(a)(3) penalty assessment factors through its reasonable and appropriate application of the guidance set forth in the applicable Penalty Policies to the facts and evidence of this case. Complainant therefore submits that the Presiding Officer should adopt the penalty proposed herein by Complainant and assess Respondents Chem-Solv and Austin Holdings a joint and

several civil penalty of no less than $ 619,339.00 for the violations alleged in Counts I through VII of the Complaint.

V. COMPLAINANT'S MOTION TO AMEND THE COMPLAINT TO CONFORM THE PLEADINGS TO THE FACTS AND EVIDENCE SHOULD BE GRANTED

A. Introduction

Respondents argue that the Presiding Officer "should deny the Complainant's request to amend the Complaint to seek joint and several liability against Respondent Chem-Solv and Respondent Austin Holdings [-Va], L.L.C. on Counts II through VII." Respondents' Brief at 53. Respondents offer no legitimate reason why the Complaint should not be amended to conform to judicial admissions made by the Respondents in post-Complaint pleadings filed by them. Respondents make no reference to their own prior pleadings, which contain factual admissions forming the impetus and the basis for, as well as illustrating the appropriateness of, the relief timely requested by Complainant.

For the reasons set forth below, and to the extent that formal amendment of the pleadings in the Complaint is deemed necessary and/or appropriate by the Presiding Officer in order to conform to the admitted facts and to the evidence now in the record, Complainant renews its Motion to Amend the Complaint and asks that the Presiding Officer grant its request to amend the pleadings therein to reflect that: (1) the violations alleged in each of the Complaint's seven counts are being alleged jointly as against each of the Respondents (*i.e.*, against Respondent Austin Holdings - Va., L.L.C. as the "owner" of the Facility and against Respondent Chem-Solv as the "operator" of the Facility); and (2) a joint and several liability theory --- and a joint and several penalty proposal --- are being pursued by the Complainant.

B. Background

1. The Complaint and Answer

Complainant originally alleged that Respondent Chem-Solv was the owner and the operator of that portion of the 1111 and 1140 Industry Avenue, S.E., Roanoke, Virginia "Facility" identified as Tax Parcel 4240104. Complaint at 2, ¶ 3. Complainant further alleged that Respondent Austin Holdings Va – L.L.C. (hereinafter, "Austin Holdings") was the owner of those portions of the Facility identified as Tax Parcels 4170102 and 4240103. Complaint at 3, ¶ 4. These allegations were based upon a City of Roanoke, Virginia tax map which was not completely clear.

Complainant thereafter alleged that the subgrade tank -- generally referred to in this proceeding as the "Pit," the "Acid Pit" and "Rinsewater Holding Tank No. 1" -- was located on the Tax Parcel 4240104 portion of the Facility. Complainant at 3, ¶ 14. Based upon this same information and the fact that the Count II through VII allegations pertained to activities concerning the Acid Pit, located on the Tax Parcel 4240104 portion of the Facility, Complainant limited its allegations against Respondent Austin Holdings to those set forth in Count I of the Complaint (*i.e.*, owning/operating a hazardous waste storage facility without interim status or a permit).

In its Answer to the Complaint, Respondents admitted that "Respondent Chem[-S]olv operates a chemical distribution business on certain real property located in Roanoke, Virginia known as Tax Parcel 4240104 and with street addresses of 1111 and 1140 Industry Avenue, S.E., Roanoke, Virginia." Answer at 2, ¶ 4. Respondents also admitted that "Austin Holdings owns certain real property located in Roanoke, Virginia known as Tax Parcels 4170102 and 4240103." Answer at 2, ¶ 5. Respondents further admitted that the "rinsewater holding tank [is] located on

Tax Parcel 4240104. Answer at 2, ¶ 15. Respondents otherwise generally denied all other allegations set forth in paragraphs 3, 4 and 14 of the Complaint. *See*, Answer at 2-3, ¶ 4, 5 and 15. As a result, the Respondents effectively *denied* that Chem-Solv is the owner of the Tax Parcel 4240104 --- the portion of the Facility where the Acid Pad was located --- without explaining the basis for its denial (which, as later revealed, was that Austin Holdings was, in fact, also the actual owner of that remaining portion of the Facility).

Complainant did not know that Austin Holdings was the owner of the Tax Parcel 4240104, and of the entire Facility, at the time that the Complaint and Answer in this proceeding were filed.[9] The information then in Complainant's possession and the allegations in the Complaint reflect that lack of knowledge.

2. The Motion for Partial Accelerated Decision, Response and Reply

On November 29, 2011, Complainant filed a Motion seeking partial accelerated decision as to liability on the allegations set forth in Counts III – VII of the Complaint" (hereinafter, "Acc. Dec. Motion"). Complainant's accompanying Memorandum (hereinafter, "Acc. Dec. Memo") included the following Statement of Facts and supporting citation: "Chem[-S]olv owns the real property where the Pit was located. Complainant Exhibit 12, EPA 235." Acc. Dec. Memo at 7, ¶ 22 (Nov. 29, 2011). The Respondents thereupon filed responsive pleadings which contained the following response to the paragraph 22 factual statement set forth in Complainant's Acc. Dec. Memo:

> Respondents deny that Chem-Solv owns the real property on which Rinsewater Tank No. 1 is located. Austin Holdings is the owner of the real property on which Rinsewater Tank. No. 1 is located. (Austin Second Aff. ¶ 8.) Chem-Solv leases such real property from Austin Holdings. Id.

[9] As the Respondents readily admit, "no survey evidence of the Pit exists and graphic evidence in the record is inconclusive." Respondents' Initial Post-hearing Brief at 54.

Respondents' Response to Complainant's Motion for Partial Accelerated Decision as to Liability (hereinafter, "Acc. Dec. Resp.") at 10, ¶ 22. As Exhibit A to the Acc. Dec. Resp., Respondents annexed the Second Affidavit of Jamison G. Austin (hereinafter, "2nd Austin Aff'd."). Mr. Jamision G. Austin is Chem-Solv's Vice President and General Manager and he specifically states and explains in his sworn 2nd Austin Aff'd. that:

> Mr. Cox states in Paragraph 12 of his Declaration that "Chem-Solv is the owner of the portion of the Chem[-S]olv Facility where the Pit was located." This is not correct. Chem-Solv leases and has leased the property on which Rinsewater Tank No. 1 was located from its owner, Austin Holdings – Va, L.L.C.

2nd Austin Aff'd. at 2-3, ¶ 8.

Complainant immediately recognized and acknowledged the Respondents' admissions as to Austin Holdings' ownership of that portion of the Facility on which the Acid Pit was located (and of the entire Facility) and accordingly sought to amend its prior pleadings. In a December 22, 2011 reply, Complainant therein made the following assertions, motion and supporting statement of facts:

> Complainant does not dispute Respondent's ¶ 22 Statement of Facts. Second Affidavit of Jamison Austin ¶ 8. Accordingly, **Complainant respectfully requests the Court enter an Order** granting Accelerated Decision as to Partial Liability on Counts III- VII of the Administrative Complaint **conforming the pleadings to the facts as against both Respondents Chemsolv and Austin Holdings – VA. – L.L.C. Based on the admission of Mr. Austin**, Vice President and General Manager of Chemsolv, Chemsolv is liable as an operator of the Facility. **Austin Holdings, L.L.C. - VA. is liable as an owner of the Facility**. A revised form of Order is included with Complainant's Reply Brief.

Complainant's Reply Brief in Further Support of Complainant's Motion for Accelerated Decision (hereinafter "Acc. Dec. Reply") at 4, ¶ 22 (Dec. 22, 2011) (Emphasis supplied); *see also* the proposed form of Order annexed thereto.

3. The Ruling on Complainant's Motion for Partial Accelerated Decision

In an Order dated February 7, 2012, the former Presiding Officer in this proceeding denied Complainant's Acc. Dec. Motion, finding that "issues of fact" and "practical considerations" remained such that "granting the Motion will not eliminate the need for substantial testimony at the hearing." Order on Complainant's Motion for Partial Accelerated Decision as to Liability (hereinafter, "Acc. Dec. Order") at 10 – 11 (Feb. 7, 2012). The effect of the former Presiding Officer's February 7, 2012 Acc. Dec. Order was simply to defer any substantive ruling on the matters raised and the relief requested by Complainant in order to further "allow the case to be developed fully at trial." Acc. Dec. Order at 11. This ruling appeared very clearly to turn on issues regarding the alleged RCRA violations and had nothing to do with Respondents' admission that Austin Holdings owned all of the land where violations alleged in this matter occurred. Nowhere in the Acc. Dec. Order did the former Presiding Officer deny the Complainant's motion for leave to amend the Complaint and conform its pleadings to the facts, as is erroneously asserted by Respondents. *See* Respondents' Brief at 54.

C. The Ruling at Hearing on Respondents' Motion to Dismiss Austin Holdings and Complainant's Motion to Pursue Joint and Several Liability and Penalty

Subsequent to the Acc. Dec. Order, Complainant remained committed to pursuing its outstanding request for leave to amend the Complaint to conform to those facts admitted by the Respondents subsequent to the full development of the case at the Hearing. Based upon: (1) the December 13, 2011 pleadings in which Respondents clearly and openly admitted that Austin Holdings is the owner of the entire Facility, including that portion of the Facility upon which the Acid Pad was located[10]; (2) the liberal stance that has been ratified in the federal courts with

[10] *See* Section V.E.1, *infra*, for a discussion of the effect of judicial admissions.

respect to allowing the amendment of pleadings[11] and (3) the interest of fostering an accurate decision on the merits, Complainant had every reason to believe that it remained entitled to a favorable ruling on its outstanding motion.

Complainant believed that the appropriate time to renew its motion to amend the Complaint would be subsequent to the conclusion of the Hearing, after the case had been "fully developed" and record in this proceeding was complete. Complainant's belief was based upon: (1) the former Presiding Officer's finding as to the need for "substantial testimony" in order to resolve disputed facts and ensure the full development of this case at trial, Acc. Dec. Order at 10, 11, and; (2) the Respondents' identification of Mr. Glenn Austin as a witness they anticipated calling at the Hearing to testify regarding the history of the Respondents' businesses and the corporate relationship between them. Respondents' Initial Prehearing Exchange ("Resp. PHE") at 2, ¶ A.1.[12]

Respondents, however, sought to raise the extent of Austin Holdings' potential liability and penalty exposure prior to the conclusion of the Hearing through an oral Motion to Dismiss Austin Holdings from this proceeding ("Motion to Dismiss").[13] TR3 at 105, 115 - 117. Complainant's counsel objected to the Respondents' Motion to Dismiss. TR3 at 118. Counsel

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[11] *See* Section V.E.3, *infra*, for a discussion of the liberal stance that has been ratified in the federal courts as toward allowing the amendment of pleadings.

[12] In their Initial Prehearing Exchange ("Resp. PHE"), the Respondents identified Mr. Glenn Austin as "the President, a shareholder of, and founder of Chem-Solv, Inc., and Austin Holdings-V[a], L.L.C." and summarized his expected testimony to include information "concerning the history of the businesses and the corporate relationship between the Respondents." Resp. PHE at 2, ¶ A.1. Based upon the vague testimony summary therein provided by the Respondents, and given Mr. Glen Austin's identification as a principal in the businesses of each of the two Respondents, Complainant anticipated that Respondents might call Mr. Glenn Austin as a witness who would testify to matters including Facility ownership.

[13] Respondents proffered such Motion to Dismiss orally, on day three (March 22, 2012) of the Hearing, at the conclusion of the Complainant's case in chief. Respondents specifically sought leave to have Austin Holdings dismissed from this proceeding, the allegations set forth in Count I of the Complaint, and from exposure to the joint and several penalty sought by the Complainant against both Respondents for each of the violations alleged in Counts I through VII of the Complaint.

provided the basis for Complainant's objection by referring the Presiding Officer to the "ownership" admission set forth in Paragraph 22 of Respondents' Acc. Dec. Resp. and to the annexed 2nd Austin Aff'd. TR3 at 118. Complainant's counsel particularly noted that:

> . . . With regard to Austin Holdings, this is interesting. In the answer to the complaint, Respondents admitted that Austin Holdings owns the facility that is called the warehouse, that is across the street ... I don't remember if that was [1140 or] 1111 [Industry Avenue, S.E.], I do not remember which one is which. **In response to Complainant[']s Accelerated Decision motions, in a filed pleading in this case, Respondents states** "Mr. Cox states in paragraph 12 of his declaration that CHEMSOLV was the owner of the portion of the CHEMSOLV facility where the pit is located. This is not correct. **CHEMSOLV leases and has leased the property on which [rinsewater] tank number one is located from it[]s owner Austin Holdings[-Va,] LLC." On this basis, Complainant decided not to calculate a separate penalty for Austin Holdings and believes Austin Holdings is responsible for all of the violations in this case. Not only the violations that are subject to the warehouse**.

TR3 at 118 [Emphasis supplied].

Upon hearing the arguments of the Parties, the Presiding Officer ruled as follows:

> THE COURT: Okay. **On the issue of Austin Holdings, as Mr. Fields cited in their Answer and in the Stipulations, the party's stipulated that the action concerns CHEMSOLV and Austin Holdings chemical distribution business, located in a facility in Roanoke, Virginia. It associated both companies as co[-]owners and operators of the facility.** So, even though no penalty is requested separately, my understanding is that they are going for a joint and several penalty or no penalty?
>
> MR. FIELDS: Joint and several penalty. Yes.
>
> THE COURT: **They are going for a joint and several penalty against CHEMSOLV and Austin Holdings, and on the basis, both the evidentiary Admissions and the Stipulations, Austin Holdings is in this case and the Motion to Dismiss Austin Holdings is denied.**

TR3 at 122 – 123. [Emphasis supplied].

D. <u>The Law of the Case</u>

The prior ruling of the Presiding Officer at the Hearing is the law of this case and may not be re-litigated in subsequent stages of this proceeding except to prevent "plain error," defined as an error "so obvious and substantial that failure to correct it would infringe a party's due

process rights and damage the integrity of the judicial process." *See, e.g.*, Black's Law Dictionary 563 (7th ed. 1999); *See, e.g., J.V. Peters & Co.*, 7 E.A.D. 77, 93 (EAB 1997), *aff'd sub nom. Shillman v. United States*,1:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part*, 221 F.3d 1336 (6th Cir. 2000), cert. denied sub nom. *J.V. Peters & Co. v. United States*, 69 U.S.L.W. 3269 (Jan. 8, 2001) (citing JAMES W. MOORE, MOORE'S FEDERAL PRACTICE PP 404[1] & 404[10](2d ed. 1991)) (a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation); *Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 482 (EAB 1999); *Lyon County Landfill*, 2002 EPA App. LEXIS 4, *27 , 2002 EPA App. LEXIS 4 (EAB 2002); *Rogers Corporation*, 2000 EPA App. LEXIS 28, * , 2000 EPA App. LEXIS 28 (EAB 2000); *Bethenergy*, 1992 EPA App. LEXIS 74, *7; 3 E.A.D. 802 (EAB 1992) (while the doctrine of the law of the case is a heavy deterrent to vacillation on arguable issues, it is not designed to prevent the correction of plain error) citing 1B Moore's Federal Practice § 0.404[1] (2nd Ed. 1991). The Respondents' opposition to Complainant's Motion to Amend the Complaint is a back door effort to re-visit the Presiding Officer's correct and appropriate ruling at the Hearing through an attempt to re-frame the issues previously argued and ruled upon.

Respondents correctly state that the "[t]he Court's 'recognition' at trial that the Complainant now seeks joint and several liability is not the same as granting leave to amend." Respondents' Brief at 54, citing TR3 at 123 and Complainant's Initial Brief at 9 & n.2. However, the Respondents conveniently disregard the effect of the Presiding Officer's prior ruling --- which did not *merely* recognize that Complainant was "seeking" joint and several liability. Upon considering the evidence cited by Complainant and listening to Complainant's counsel argue that ownership admissions made by the Respondents in their Acc. Dec. Resp. had inescapably led Complainant to "believe[that] Austin Holdings is responsible for all of the violations in this case [and n]ot only the violations

that are subject to the warehouse", TR3 at 118, the Presiding Officer additionally determined that the Respondents were, in fact, "co[-]owners and operators of the facility" that each remained "in this case" and subject to potential joint and several liability and penalty. TR3 at 122 – 123.

E. The Presiding Officer Should Grant Complainant's Motion to Amend the Complaint to Conform the Pleadings to the Facts and the Evidence

Based upon Respondents' December 13, 2011 judicial admissions as to Facility ownership, Complainant's prompt efforts in seeking leave to amend its pleadings to reflect the same, the Presiding Officer's prior ruling as to the Respondents' joint ownership/operation of the Facility and resulting joint and several liability and penalty exposure, and for each of the additional reasons set forth below, Complainant renews its outstanding Motion to Amend the Complaint and requests that such Motion be granted in the interests of fairness, justice and the promotion of an accurate and proper decision on the merits.

1. Respondents are Bound by their Admissions of Facility Ownership

Three and one-half months prior to the March 20 – 24, 2012 Hearing, Respondents filed a pleading, supported by a sworn affidavit, in which they affirmatively argued that Austin Holdings was the owner of that portion of the Facility upon which the Acid Pit (that is the subject the violations alleged in Counts II through VII of the Complaint) was located (and of the entire Facility).[14] Acc. Dec. Resp. at 10, ¶ 22; 2nd Austin Aff'd, at 2-3, ¶8. At the Hearing, the Respondents made no effort to amend, withdraw or modify their prior admissions as to Austin Holdings' ownership of the Facility.[15]

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[14] *See also* Complaint at 3, ¶ 4 (alleging Austin Holdings to be the owner of the other two tax parcels comprising the Facility property) and Answer at 2, ¶ 5 (in which the Respondents admit this allegation).

[15] Respondents did identify Mr. Glenn Austin, the President, a shareholder of, and founder of Chem-Solv and Austin Holdings, as a witness who was prepared to testify "concerning the history of the businesses and the corporate relationship between the Respondents." Respondents' initial Prehearing Exchange at 2, ¶ A.1. However, Mr. Glenn Austin was not called by the Respondents as a witness and did not testify at the hearing.

It is a generally accepted federal rule that a party is bound by the admissions in his pleadings. *Jones v. Morehead*, 68 U.S. 155 (1863). *See also*, *State Farm Mutual Automobile Ins. Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968).[16] Numerous Courts specifically have held that factual assertions in pleadings and pretrial orders normally will be considered to be judicial admissions conclusively binding on the party who made them. *Meyers v. Manchester Insurance & Indemnity Co.*, 572 F2d 134 (5th Cir. 1978); *State Farm Mutual Automobile Ins. Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968); *Mull v. Ford Motor Co.*, 368 F.2d 713, 716 (2d. Cir. 1966).[17] Courts also have routinely have held that "'[A] party's assertion of fact in a pleading is a judicial admission by which it is normally bound throughout the course of the proceeding.'" *Schott v. Motorcycle Supply Inc. v. American Honda Motor Co.*, 976 F2d. 58, 61 (1st Cir 1992). Respondents, therefore, remain bound by the Facility "ownership" admissions made in their own pleadings. Such judicial admissions are also binding upon this Tribunal.

2. Complainant's Motion is Based Upon Interests of Fairness and Justice

The facts and evidence that drive the Complainant's Motion to Amend the Complaint were first divulged and made known to the Complainant in a December 13, 2011 filing of the

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[16] *See also Giannone v. United States Steel Corp.*, 238 F.2d 544, 547 (3d Cir. 1956); *Hill v. FTC*, 124 F.2d 104, 106 (5th Cir. 1941); *Seven-Up Bottling Co. v. Seven-Up Co.*, 420 F. Supp. 1246, 1250-51 (E.D.Mo. 1976), *aff'd* 561 F.2d 1275 (8th Cir. 1977); *Consolidated Rail Corp. v. Providence & Worcester Co.*, 540 F. Supp. 1210, 1220 (D.Dela. 1982); *Giles v. St. Paul Fire & Marine Insurance Co.*, 405 F. Supp. 719, 725 n. 2 (N.D.Ala. 1975).

[17] *See Barnes et. al. v. Owens-Corning Fiberglass*, 201 F.3d 815, 829 (6th Cir. 2000) (quoting *American Title Ins. Co. v. Lacelaw Corp.*, 861 F2d. 224, 226 (9th Cir. 1988), *citing Ferguson v. Neighborhood Housing Services*, 780 F2d 549, 551 (6th Cir. 1986) (Under federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court and on appeal.); *In re Fordson Engineering Corp.*, 25 B.R. 506, 509 (Bankr. E.D. Mich. 1982) (Judicial admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact), and *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983) (Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them). *See also*, *Hill v. FTC*, 124 F.2d 104, 106 (5th Cir. 1941). *See also, Holiday Inns, Inc. v. Alberding*, 683 F.2d 931, 935 (11th Cir. 1982) (judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them).

Respondents.[18] Complainant promptly sought to amend the Complaint to conform its pleadings to newly revealed facts and evidence in timely and appropriate fashion.[19] In the interests of fairness and justice, Complainant should be allowed to amend the findings, conclusions, allegations and penalty proposal in the Complaint, as deemed necessary and appropriate by the Presiding Officer, to conform to the admitted facts,[20] the evidence adduced, established and admitted into the record at the Hearing, and; the Presiding Officer's prior rulings.

3. Motions to Amend Pleadings are Governed by a "Liberal Standard" Applied on a Case-By-Case Basis

This proceeding is governed by the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (the "*Consolidated Rules*"), 40 C.F.R. §§ 22.1-22.32 and 22.37. Section 22.14(c) of the *Consolidated Rules* allows the complainant to amend its complaint once as a matter of right at any time before the answer is filed, and otherwise "only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). The *Consolidated Rules* do not, however, instruct or indicate when an amendment of the complaint is to be considered appropriate or inappropriate. In the absence of administrative rules on this subject, the Environmental Appeals Board ("EAB") has offered guidance by consulting the Federal Rules of Civil Procedure ("FRCP") and their

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[18] *See* Acc. Dec. Resp. at 10, ¶ 22; 2nd Austin Aff'd. at 2-3, ¶ 8. Respondents initially identified and admitted that "Austin Holdings is the owner of the real property on which Rinsewater Tank. No. 1 is located" and that "Chem-Solv leases such real property from Austin Holdings" in a December 13, 2001 pleading. This admission not only contradicted prior erroneous information previously relied upon by Complainant in making the "ownership" allegations in paragraph 3 of the Complaint (i.e., that "Respondent Chem[-S]olv is and, at all times relevant to the violations alleged in this Complaint, was the "owner" . . . of [the Facility]"), but further established that Austin Holdings was and is the true owner of each parcel of real estate comprising the entirety of the Facility.

[19] See Acc. Dec. Reply, filed on December 22, 2011.

[20] The admitted facts establish that: (1) the ownership allegations set forth in paragraph 3 of the Complaint are incorrect and require correction; (2) Austin Holdings owns the entire – and not just a portion of the -- Facility; and (3) Austin Holdings and Chem-Solv have potential joint and several liability for each of the violations alleged in Counts I through VII of the Complaint in their respective capacities as "owner" (Austin Holdings) and "operator" (Chem-Solv) of the Facility.

application in analogous situations. *In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 n. 20 (October 6, 1993); *In re Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, 2002 EPA App. LEXIS 14 at *35 (EAB, July 31, 2002).

The FRCP adopt a liberal stance toward amending pleadings, stating that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).[21] The Supreme Court has ratified the liberal interpretation of Rule 15(a), finding that "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). In considering a motion to amend under Rule 15(a), the Supreme Court has held that leave to amend shall be freely given in the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment. *Id.* at 182; accord *Carroll Oil*, 2002 EPA App. LEXIS 14 at *37; see also *Yaffe Iron and Metal Co. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985) (administrative pleadings should be "liberally construed" and "easily amended"). The EAB similarly has found that a complainant should be given leave to freely amend a complaint in EPA proceedings in accordance with the liberal

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[21] FRCP Rule 15(b) additionally provides that:

> AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

policy of FRCP 15(a), as it promotes accurate decisions on the merits of each case. *In the Matter of Asbestos Specialists, Inc.*, 4 E.A.D. at 830; *In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company*, MPRSA Appeal No. 91-1, 4 E.A.D. 170, 205 (EAB, August 5, 1992).

In short, Rule 15(a) provides the Court both with discretion to allow, and direction in allowing, the amendment of pleadings. It instructs the Court to determine the propriety of amendment on a case by case basis, using the following generous standard:

> In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. --- the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

4. Complainant's Motion Should be Granted Upon Consideration of the Facts and Circumstances of this Case

Through its Motion, Complainant seeks to amend its pleadings to conform to judicially admitted facts and evidence which bear directly upon the issues of Facility ownership, liability and penalty. Such facts and evidence were unknown to Complainant when the Complaint and Answer were filed and Complainant timely sought appropriate relief upon learning of them. Complainant has not been afforded the prior opportunity to correct its pleadings and the relief it requests is not based upon any dilatory motives or reasons of bad faith. Rather, by seeking leave to amend its pleadings to conform to judicially admitted facts and evidence that bear directly upon issues of Facility ownership, liability and associated penalty, Complainant seeks to facilitate a proper decision on the merits. *See In re Wego Chemical &Mineral Corp.*, 4 E.A.D. 513, 525 (EAB 1993) (A recognized purpose of pleading is to facilitate a proper decision on the merits).

a. Complainant's Motion is Not Made in Bad Faith or for Dilatory Motive, But to Promote an Accurate Decision on the Merits

Complainant's Motion to Amend the Complaint is not improperly motivated. Complainant does not seek to delay these proceedings in any way and the Respondents have not identified or even suggested that there is any improper or illicit motivation on Complainant's part. Rather, Complainant properly seeks to conform its pleadings to facts and evidence pertaining to Facility ownership and related liability/penalty issues that were only revealed to Complainant in a post-Complaint/Answer pleading and affidavit filed by the Respondents in on December 13, 2011. Complainant initially – and timely – requested relief in a responsive pleading filed only nine (9) days thereafter. However, there was no pre-trial ruling on Complainant's Motion to Amend.[22]

Complainant now properly renews its Motion post-hearing and seeks leave to amend its Complaint to conform the pleadings to the facts and evidence in Respondent's December 13, 2011 pleading. The judicially admitted facts and associated evidence clearly establish Austin Holdings' ownership of the entire Facility (including that portion of the Facility that has been identified as Tax Parcel 4240104 and upon which the "Acid Pit" is located) and the Respondents' potential joint and several liability for each of the Count I through VII allegations set forth in the Complaint (based upon Austin Holdings' ownership and Chem-Solv's operation of the Facility). Complainant has not previously been afforded with an opportunity to cure the deficiencies in its Complaint by this Tribunal and the effect of granting Complainant's renewed Motion to Amend the Complaint to conform to the facts and evidence adduced in subsequent pleadings and admitted into evidence at the Hearing will be to facilitate and foster an accurate and proper decision on the merits.

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[22] *See* Order on Complainant's Motion for Partial Accelerated Decision as to Liability (Feb. 7, 2012).

b. Granting Complainant's Motion Will Neither Delay These Proceedings Nor Cause Undue Prejudice or Harm to Either Respondent

Respondents acknowledge that the FRCP and, by analogy and application, the *Consolidated Rules* adopt a "permissive stance toward amending pleadings" and that the decision to grant a motion to amend is within the Presiding Officer's discretion. Respondents' Brief at 55. Respondents, however, then cite to in *In Re Carroll Oil Company,* 10 E.A.D. 635 (2002) (holding that an Administrative Law Judge does not abuse his or her discretion in denying a motion to amend where delay in amending the complaint would unduly prejudice the opposing party) and perfunctorily claim that additional fact-finding would be required and Austin Holdings would be prejudiced if Complainant's Motion were granted. Respondents' Brief at 56. Respondents claim that prejudice would arise because Austin Holdings has had "no reason or opportunity to prepare individualized responses to Counts II through VII" and because "Complainant's new claims would require additional fact-finding, which is unfeasible in this post-hearing phase." *Id.*

Complainant, like the Respondents, finds the *Carroll Oil Company* case to be "particularly instructive".[23] In that case, the EAB upheld an ALJ's order denying Complainant's motion to amend a complaint where: complainant sought to add new parties, including an individual, as respondents; the proposed amendment constituted, in effect, substantive new claims that would have required additional fact-finding, investigation and the development of new legal theories causing potential prejudice to the existing respondent; the motion was filed only one month before trial; and the new respondents were deemed to have insufficient time to prepare appropriate defenses. *Carroll Oil Company* at 650. The facts and circumstances of the present matter, however, differ markedly from those in *Carroll Oil Company.* In the present

[23] *See* Respondents' Brief at 56.

matter, Complainant does not seek to add any "new party" to the proceeding, but to amend the facts and certain allegations so as to apply to an existing party who made relevant judicial admissions in pleadings filed subsequent to the filing of the Complaint and Answer. Complainant's request also does not result in any substantive new claims that require additional fact-finding, investigation, the development of new legal theories or the preparation of additional defenses by either Respondent. Rather, these are existing claims that are sought to be applied as against an existing party that has fully participated in the entirety of the fact-finding, investigation, and legal development phases of this proceeding. As previously noted by this Tribunal (in a finding of the former Presiding Officer), ". . . Respondent Chem[-S]olv and Respondent Austin Holdings-VA, L.L.C. . . . are jointly represented by counsel and have jointly filed and responded to motions . . ." throughout this proceeding, Acc. Dec. Order at 2, fn. 1, such that Respondents unsupported and unfounded assertions of "prejudice" ring very hollow.

Legitimate indications of potential prejudice that courts often consider in determining whether to allow the amendment of pleadings include: unfair surprise (*i.e.*, a lack of adequate notice and opportunity to respond); the need for significant new discovery and/or trial preparation; or the need for further inquiry into factual issues. *In re: Lazarus, Inc.* 7 E.A.D. 318, 322 (1997). In the present matter it is the movant, rather than any respondent, who has been surprised by the Respondents' jointly filed pleading and judicial admission as to Austin Holdings' Facility ownership. Nevertheless, Complainant responded by seeking immediate permission to amend its own pleadings to comport with the newly tendered and judicially admitted facts, *see* Acc. Dec. Reply, and Respondents made no responsive effort to oppose that request. Moreover, the facts which underly Complainant's Motion to Amend take the form of binding judicial admissions made by the Respondents some three and one-half months prior to

the Hearing. There is no legitimate basis for the Respondents to assert that issues *raised by them* well in advance of Hearing *now require* further factual inquiry, new discovery and/or additional preparation time *on their part*.

F. Conclusion

Based upon their own admissions, which identify Austin Holdings as the "owner" and Chem-Solv as the "operator" of the Facility," each Respondent is subject to full (*i.e.*, joint and several) liability for each of the violations alleged in the Complaint. Respondents cite to no administrative or judicial decisions, regulations, or guidance regarding the authority of the Presiding Officer to "set aside" or ignore a voluntarily filed pleading containing a judicial admission that has become part of the record in a case. Nor have the Respondents made any allegation or demonstration of any "clear error," "obvious error of law," or "a mistake of law or fact" that would result from granting the relief requested by Complainant. Complainant's Motion to Amend the Complainant to conform the pleadings to the facts and evidence in the record was filed timely and for the legitimate purpose of fostering an accurate decision on the merits. Complainant's request to amend the Complaint is therefore reasonable, appropriate and proper under the circumstances of this case. The requested relief is within the discretion of the Presiding Officer, will not cause any delay in these proceedings or any undue prejudice to either Respondent and will foster an accurate and proper decision on the merits. For each of these reasons, Complainant requests that the Presiding Officer grant Complainant's Motion to Amend the Complaint to conform the pleadings to the facts and evidence in the record.

VI. CONCLUSION

For each of the reasons stated in Complainant's Initial Brief and herein, Complainant respectfully requests that the Presiding Officer grant Complainant's Motion to Amend the Complainant to conform the pleadings to the facts and evidence in the record and submits that Respondents Chem-Solv and Austin Holdings should be found jointly and severally liable for the violations alleged in *each* of Counts I through VII of the Complaint. Complainant further requests and submits that, upon a proper consideration of the RCRA Section 3008(a)(3) penalty assessment factors, and a reasonable and proper application of the guidance set forth in the applicable Penalty Policies, the Presiding Officer, at a minimum: (i) adopt the penalty proposed herein by Complainant; (ii) assess against Respondents Chem-Solv and Austin Holdings a joint and several civil penalty of no less than $ 619,339.00; and (iii) issue to the Respondents an Order requiring them to implement and perform all 40 C.F.R. Part 264, Subpart G, and 40 C.F.R. § 264.197 closure and post-closure care requirements applicable to the Acid Pit tank system in a timely and appropriate manner.

Respectfully Submitted,

10/1/2012
DATE

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Chem-Solv, Inc., formerly trading as	)	
Chemicals and Solvents, Inc.	)	
	)	
and	)	Docket No. RCRA-03-2011-0068
	)	
Austin Holdings-VA, L.L.C.	)	
	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused to be hand-delivered to Ms. Lydia Guy, Regional Hearing Clerk (3RC00), U.S. EPA Region III, 1650 Arch Street, 5th Floor, Philadelphia, PA 19103-2029, the original and one copy of *Complainant's Post-Hearing Reply Brief* in the above-captioned matter.

I further certify that on the date set forth below, I caused true and correct copies of the same to be mailed via United Parcel Service, Next Day Air delivery, to the following persons at the following addresses:

Hon. Susan L. Biro
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