

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

RECEIVED
2012 FEB 17 AM 11:40
REGIONAL HEARING CLERK
EPA REGION III, PHILA. PA

In the Matter of:)
)
CHEM-SOLV, INC., formerly trading as)
Chemicals and Solvents, Inc.)
)
and)
)
AUSTIN HOLDINGS-VA, L.L.C.)
)
)
)
Respondents.)
)
Chem-Solv, Inc.)
1111 Industry Avenue, S.E.)
1140 Industry Avenue, S.E.)
Roanoke, VA 24013,)
)
)
Facility.)

U.S. EPA Docket Number
RCRA-03-2011-0068

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

**REPLY BRIEF IN SUPPORT OF RESPONDENTS' MOTION
TO SUPPLEMENT RESPONDENTS' PREHEARING EXCHANGE**

COME NOW Respondents, Chem-Solv, Inc. ("Chem-Solv") and Austin Holdings-VA, L.L.C. ("Austin Holdings") (collectively, the "Respondents"), by counsel, pursuant to 40 C.F.R. § 22.16(b), and file this Reply Brief in Support of Respondents' Motion to Supplement Respondents' Prehearing Exchange.

I. BACKGROUND

On February 2, 2012, Respondents filed a Motion to Supplement Respondents' Prehearing Exchange (the "Motion to Supplement"), under Sections 22.19(f) and 22.22(a) of the Consolidated Rules of Practice (40 C.F.R. §§ 22.19(f) and 22.22(a)). In their Motion, the

Respondents seek leave to supplement Respondents' Initial Prehearing Exchange by adding certain exhibits and identifying an additional witness, Robert W. List.

A. Respondents' Proposed Witness Robert W. List Would Testify Concerning Matters Contained in the Complainant's Initial Prehearing Exchange.

In its Motion to Supplement, the Respondents identify Robert W. List, a licensed geologist and environmental consultant with Faulkner & Flynn, Inc., as an additional witness. In their Motion to Supplement, the Respondents provide the following summary of Mr. List's anticipated testimony:

Mr. List will testify about his inspection of the Facility and explain his findings and records. It appears the Virginia Department of Environmental Quality and now the U.S. Environmental Protection Agency have relied and will rely upon Mr. List's work product.

(Resp't Mot. to Supplement Prehearing Exchange 2.)

In its response to the Respondents' Motion to Supplement Respondents' Prehearing Exchange, the Complainant objects to the identification of Mr. List as an additional witness on the grounds that Respondents' Motion allegedly contains insufficient information concerning Mr. List's expected testimony. (Complainant's Resp. Resp't Mot. Supplement Prehearing Exchange 1-2.) The Respondents respectfully disagree with the Complainant's assessment of the summary of Mr. List's anticipated testimony set forth in the Respondents' Motion.

As stated in Respondents' Motion, it appears that the Complainant will rely upon Mr. List's work product at the hearing in this matter. As the Complainant notes in its Response to Respondents' Motion, Complainant's Exhibit 35 is a letter written by Mr. List in February 2003 summarizing his observations concerning an incident at Chem-Solv's facility. If the Complainant intends to use Complainant's Exhibit 35 at the hearing in this matter, the Respondent reserves the right to call Mr. List as a witness. If he is called as a witness at the

hearing, Mr. List will testify about his observations concerning the 2003 incident at Chem-Solv's facility summarized in his letter of February 12, 2003.

Additionally, the Complainant apparently does not realize that it identified another document authored by Mr. List in the Complainant's Prehearing Exchange. Complainant's Exhibit 45 is a copy of certain field notes prepared by Mr. List during a site visit to Chem-Solv's facility on March 22, 2006. The Complainant incorrectly describes Exhibit 45 in its Initial Prehearing Exchange as Virginia Department of Environmental Quality ("VA DEQ") field notes. If Complainant intends to use Complainant's Exhibit 45 at the hearing in this matter, the Respondents reserve the right to call Mr. List as a witness to testify concerning his observations during his March 22, 2006 site visit to the Respondents' facility.

The summary of Mr. List's anticipated testimony set forth in Respondents' Motion, is accurate and sufficient. Section 22.19(f) of the Consolidated Rules of Practice (40 C.F.R. § 22.19(f)) requires a party who has made an information exchange to promptly supplement or correct its exchange when the party learns that the information exchanged is incomplete, inaccurate or outdated, and the additional information has not otherwise been disclosed to the other party. Moreover, Section 22.22(a)(1) of the Consolidated Rules of Practice provides, in pertinent part, that the Court should admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable or of little probative value; provided that such evidence has been exchanged under Section 22.19(a), (e) or (f) at least fifteen (15) days before the hearing date. Thus, pursuant to Sections 22.19(f) and § 22.22(a) of the Consolidated Rules of Practice (40 C.F.R. §§ 22.19(f) and 22.22(a)), this Court should grant Respondents' Motion and allow Respondents to supplement their Initial Prehearing Exchange by adding Robert W. List as a potential witness in this matter.

B. Respondents' Exhibit 38 Contains Copies of Photographs Contained in the VA DEQ's Files Concerning Chem-Solv's Facility.


In its Response to the Respondents' Motion, the Complainant also objects to the inclusion of pictures contained in Exhibit 38 in Respondents' Initial Prehearing Exchange because of the poor quality of such pictures. The Respondents' witness Scott E. Perkins, P.E. obtained the pictures contained in Respondents' Exhibit 38 from the VA DEQ in December 2005 in response to a request submitted to the VA DEQ under the Freedom of Information Act ("FOIA"). The pictures contained in Exhibit 38 are copies of copies of the original photographs contained in the VA DEQ's file for Chem-Solv's facility. Unfortunately, Respondents are not in possession of better quality copies of such photographs. Regardless of the quality of such pictures, they are relevant to the issue of liability in this case, have probative value, and they are not repetitious. Based on the Complainant's Response to the Respondents' Motion, the Respondents understand that the Complainant does not object to the supplementation of the Respondents' Prehearing Exchange to include Respondents' Exhibits 36, 37 and 39. Accordingly, the Respondents request that this Court grant its Motion for Leave to Supplement its Prehearing Exchange including all of the exhibits attached thereto, including Exhibit 38.

II. CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents Chem-Solv, Inc. and Austin Holdings-VA, Inc. respectfully request that this Court grant their Motion to Supplement Respondents' Prehearing Exchange, and grant the Respondents' such other and further relief as this Court deems just and proper.

Dated: February 16, 2012

Chemsolv, Inc. and Austin Holdings-VA, L.L.C.

By 
Of Counsel

Charles L. Williams (VSB No. 1145)
Maxwell H. Wiegard (VSB No. 68787)
GENTRY LOCKE RAKES & MOORE
10 Franklin Road, SE, Suite 800, Roanoke, VA 24011
P. O. Box 40013, Roanoke, VA 24022-0013
Telephone: 540-983-9300
Facsimile: 540-983-9400

