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August 30, 2012

Via Federal Express Overnight Delivery

Lydia Guy
Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

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

Dear Ms. Guy:

Enclosed for filing in the above-styled matter is an original and one copy of the Respondents' Initial Post-Hearing Brief.

Please let us know if you have any questions concerning the enclosed document. We appreciate your assistance in this matter.

Very truly yours,

GENTRY LOCKE RAKES & MOORE, LLP



Maxwell H. Wiegard

MHW:ccm
Enclosures

cc: The Honorable Susan L. Biro (*via Fed Ex Overnight Delivery*)
A.J. D'Angelo, Esq., Sr. Assistant Regional Counsel (*via Fed Ex Overnight Delivery*)
Charles L. Williams, Esq. (*via e-mail*)
Mr. Jamison G. Austin (*via e-mail*)

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August 30, 2012

VIA FEDERAL EXPRESS
OVERNIGHT DELIVERY

The Honorable Susan L. Biro
EPA Office of Administrative Law Judges
1099 14th Street, NW
Suite 350 Franklin Court
Washington, DC 20005

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

Dear Judge Biro:

Please find enclosed a copy of Respondents' Initial Post-Hearing Brief. The original and one copy of the enclosed Brief was filed today with the U.S. EPA Regional Hearing Clerk and additional copies have been served today upon Complainant's counsel in the manner set forth in the attached Certificate of Service.

Please let us know if you have any questions concerning the enclosed document.

Very truly yours,

GENTRY LOCKE RAKES & MOORE, LLP



Maxwell H. Wiegard

MHW:ccm
Enclosure

cc: A.J. D'Angelo, Esq., Senior Assistant Regional Counsel (*via Fed Ex Overnight Delivery*)
Ms. Lydia Guy, Regional Hearing Clerk (*via Fed Ex Overnight Delivery*)
Mr. Jamison G. Austin (*via e-mail*)
Charles L. Williams, Esq. (*via e-mail*)

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

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In the Matter of:)

CHEM-SOLV, INC., formerly trading as)
Chemicals and Solvents, Inc.)

and)

AUSTIN HOLDINGS-VA, L.L.C.)

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

Respondents.)

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

Chem-Solv, Inc.)
1111 Industry Avenue, S.E.)
1140 Industry Avenue, S.E.)
Roanoke, VA 24013,)

Facility.)

RESPONDENTS' INITIAL POST-HEARING BRIEF

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In re: Asbestos Specialists, 1993 EPA App. LEXIS 7, 17-18 & n.20 (E.A.B. Oct. 6, 1993)

In re: Lazarus, Inc., 1997 EPA App. LEXIS, 27, 29 n.25 (E.A.B. Sept. 30, 1997)

2008 EPA App. LEXIS 30 (Ea.B. June 20, 2008)

STATUTES

Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921-6939

REGULATIONS

Rule 22.6 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and Revocation/Termination or Suspension of Permits – 40 C.F.R. § 22.6

40 C.F.R. Part 22

40 C.F.R. § 22.14

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Hazardous Waste Management System, 45 F.R. 72,024 (Oct. 30, 1980) (Codified at 40 C.F.R. § 261.4)

40 C.F.R. § 261.4

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40 C.F.R. § 261.22

40 C.F.R. § 262.11

40 C.F.R. § 262.34

40 C.F.R. Part 264, Subpart J

40 C.F.R. §§ 264.31

40 C.F.R. § 264.192

40 C.F.R. § 264.193

40 C.F.R. § 264.195

40 C.F.R. §§ 264.197

40 C.F.R. §§ 264.1060

40 C.F.R. §§ 264.1080

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OTHER

Webster's Third New International Dictionary 1378

LEGAL

Warren & Perkinson, RCRA/Superfund

INTRODUCTION

COME NOW respondents Chem-Solv, Inc. (“Chem-Solv”) and Austin Holdings-VA, LLC (“Austin Holdings”) (collectively, the “Respondents”), by counsel, in accordance with the Court’s June 12, 2012 Order granting the Motion to Modify Briefing Schedule filed by the Complainant, the Division Director of the Land and Chemicals Division of the United States Environmental Protection Agency, Region III (the “Complainant”) and Rule 22.6 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and Revocation/Termination or Suspension of Permits (the “Consolidated Rules”) (40 C.F.R. § 22.6), and file this their Initial Post-Hearing Brief summarizing the exhibits entered into evidence and the testimony presented by witnesses called by the parties during the Administrative Hearing held in Roanoke, Virginia from March 20, 2012 through March 24, 2012 in the above-styled matter. Because the Court is familiar with the Complainant’s allegations and the Respondents’ defenses from prior briefing, the Respondents will briefly summarize the facts established by the evidence offered by the parties at the hearing and the Respondents’ defenses to the violations alleged in the Complainant’s Complaint.

I. Summary of Proceedings at the March 2012 Administrative Hearing

An Administrative Hearing was held in this matter in Roanoke, Virginia beginning on March 20, 2012 and ending on March 24, 2012 (the “Hearing”). The Complainant called for fact witnesses and one expert witness during the hearing. Fact witnesses Elizabeth A. Lohman, George Houghton, Peggy Zawodny and Kenneth J. Cox testified for the Complainant. Expert witness Dr. Joe Lowery also testified on behalf of the Complainant.

The Respondents called two fact witnesses and one expert witness to testify during the Hearing. Fact witnesses Donald Tickle and Jamison G. Austin testified for the Respondents. Expert witness Scott E. Perkins, P.E. also testified on behalf of the Respondents.

The EPA Regional Hearing Clerk received a five volume transcript of testimony given during the Hearing on April 19, 2012.¹

Pursuant to the terms of a Post-Hearing Scheduling Order issued by the Court on May 10, 2012, the Complainant filed a Motion to Conform Hearing Transcript on May 23, 2012. The Respondents filed their own Motion to Conform Hearing Transcript on May 24, 2012. On June 26, 2012, the Court issued an Order Ruling on the Parties' Motions to Conform the Transcript, in which the Court rejected and modified some of the amendments proposed by the parties.

II. Summary of Jurisdictional Facts

Chem-Solv is the "owner" and "operator" of a "facility" located at 1111 and 1140 Industry Avenue, S.E., Roanoke, Virginia (collectively, the "Property"). (First Set of Stipulations at 2, ¶¶ 9-10.). Austin Holdings owns a portion of the real property on which the Chem-Solv facility is located. (First Set of Stipulations at 2, ¶ 11.)

The United States Environmental Protection Agency (the "EPA") inspected the Property beginning on May 15, 2007 (the "Inspection") and collected samples of certain materials found during a site visit to the Property on May 23, 2007 (the "Sampling Event"). (First Set of Stipulations at 3, ¶ 14-15, 24.) During the Sampling Event, the EPA took samples of rinsewater and settled solids contained in a subgrade rinsewater holding tank sometimes referred to as the "Pit" (the "Pit") located on a portion of the Respondents' real property. (First Set of Stipulations at 3, ¶ 24.) Based upon the EPA's Inspection and its analysis of the samples collected during the Sampling Event, the

¹ Each of the five volumes of the Hearing transcript corresponds to a particular date of the Hearing held in this matter. For ease of reference and the Court's convenience, as the Complainant did in its Initial Post-Hearing Brief, the Respondents cite to the Hearing transcript by volume number, rather than by date, in the following manner:

<u>Hearing Date</u>	<u>Transcript Volume</u>	<u>Citation</u>
March 20, 2012	Volume 1	TR1
March 21, 2012	Volume 2	TR2
March 22, 2012	Volume 3	TR3
March 23, 2012	Volume 4	TR4
March 24, 2012	Volume 5	TR5

Complainant generally alleges that Chem-Solv is a “generator” of “hazardous waste” as those terms are defined in 40 C.F.R. § 260.10. (Compl. Br. at ¶ 5.)

The Complainant claims that the analysis of the sample of rinsewater collected by the EPA during the Sampling Event indicated that such rinsewater contained 6.1 mg/L chloroform. (TR2 at 33; C X 16 at EPA 285.) Accordingly, the Complainant alleges that such rinsewater is a hazardous waste, under 40 C.F.R. § 261.24, because it is a “solid waste” with a concentration of chloroform greater than 6.0 mg/L. (Compl. Br. at ¶ 15.)

The Complainant also claims that the analysis of the sample of settled solids collected by the EPA during the Sampling event indicated that such settled solids contained 457 mg/L tetrachloroethene and 15.5 mg/L of trichloroethene. (TR2 at 33; C X 16 at EPA 285.) Consequently, the Complainant alleges that such settled solids were “hazardous wastes”, under 40 C.F.R. §261.24, because they were a “solid waste” with a concentration of tetrachloroethene greater than 0.7 mg/L and concentration of trichloroethene greater than 0.5 mg/L. (Compl. Br. at ¶¶ 17-18.)

For the foregoing reasons, the Complainant argues that the rinsewater and settled solids contained in the Pit at the time of the Inspection and the Sampling Event were “solid wastes” and “hazardous wastes” as such terms are defined in 40 C.F.R. § 260.10. (Compl. Br. at ¶ 21.) The Complainant additionally argues, based on its analysis of the sample of settled solids collected during the Sampling event, that the settled solids contained in the Pit contained a volatile organic compound (“VOC”) concentration greater than 500 parts per million by weight. (See Compl. ¶ 19.)

The Complainant also claims that Chem-Solv accumulated at least 1,000 kilograms (2,200 lbs.) of hazardous waste at the Property from May 15, 2007 through February 20, 2008. (See Compl. ¶ 25.) The Respondents dispute this claim because the evidence presented by the parties at the hearing establishes that no measurement of weight was taken and that the Complainant has not established this claim by a preponderance of the evidence.

III. Summary of Violations Alleged by the Complainant

In its Complaint, the Complainant alleges that Chem-Solv and Austin Holdings violated Subtitle C of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6921-6939e, in the following respects:

A. Count I - Operating a Hazardous Waste Storage Facility Without a Permit or Interim Status.

In Count I of the Complaint, the Complainant alleges that, from May 23, 2007 until February 1, 2008, Respondents owned and operated a hazardous waste storage facility without a permit or interim status, in violation of 40 C.F.R. Part 270 and Section 3005(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6925(a). (See Compl. ¶ 37.) This conclusion is based on the following incorrect assertions:

- (1) Respondents stored a drum of sodium hydrosulfide at the Property from at least May 23, 2007 until February 20, 2008, when the Complainant alleges that Respondents shipped it off-site for disposal after 273 days of storage. Complainant further alleges such sodium hydrosulfide was a “hazardous waste”, under 40 C.F.R. § 261.22(b) and 23(b), because it exhibited characteristics of corrosivity and reactivity. (See Compl. ¶ 30.)
- (2) Respondents stored “hazardous waste”, including the settled solids referenced above, in the Pit, from May 23, 2007 until February 20, 2008, when it shipped such settled solids off-site for disposal after storing it on site for 273 days. See Compl. ¶¶ 31-32.)
- (3) Respondents did not properly inspect the Pit from May 23, 2007 until February 1, 2008. See Compl. ¶ 33.)
- (4) Respondents have never had a permit or interim status, pursuant to 40 C.F.R. Part 270 and Section 3005 (a) and (e) of RCRA, 42 U.S.C. § 6925 (a) and (e), for its chemical distribution business located on the Property. See Compl. ¶ 34.)
- (5) Respondents failed to qualify for the “less than 180 day” generator accumulation exemption set forth in 40 C.F.R. § 262.34(d), with respect to the alleged storage of the 55 gallon drum of sodium hydrosulfide and the settled solids allegedly stored in Rinsewater Tank No. 1, from May 23, 2007 until February 1, 2008 by failing to satisfy the conditions for such exemption. (See Compl. ¶ 36.)

The evidence presented by the Respondents at the hearing in this matter establishes that these assumptions upon which Count I is based are incorrect.

B. Count II - Failure to Make Waste Determinations.

In Count II of the Complaint, the Complainant claims that Chem-Solv violated 40 C.F.R. § 262.11 by failing to perform a hazardous waste determination on “solid waste” allegedly generated at Chem-Solv’s chemical distribution business located on the Property. (See Compl. ¶¶ 45-46.) This conclusion is based on the following assumptions:

- (1) Chem-Solv stored and/or disposed of “hazardous wastes”, including the rinsewater and settled solids referenced above, from May 23, 2007 until February 1, 2008, without performing a hazardous waste determination on such alleged “hazardous wastes” in accordance with 40 C.F.R. § 262.11. (See Compl. ¶¶ 40-42.)
- (2) Chem-Solv treated, stored and/or disposed of “solid waste”, including used aerosol cans, without performing a hazardous waste determination, in accordance with 40 C.F.R. § 262.11, on such alleged “solid waste”. (See Compl. ¶¶ 43-44.)

The evidence presented to the Court at the hearing shows that these assumptions are not based in fact and the establishes the inapplicability of the regulatory requirements upon which the violations alleged in Count II are based in the factual context of this matter.

C. Count III – Failure to Have Secondary Containment for Regulated Hazardous Waste Storage Tank.

In Count III of the Complaint, the Complainant claims that Chem-Solv violated 40 C.F.R. § 264.193(a), (d) and (e), by failing to provide secondary containment for the Pit, which the Complainant alleges qualifies as a regulated “new tank system” under 40 C.F.R. § 264.193(a), (d) and (e). (See Compl. ¶¶ 48-50, 52.) This claim is based on the following assumptions:

- (1) The Pit was a “new tank system” regulated under 40 C.F.R. § 264.193(a), (d) and (e). (See Compl. ¶¶ 48-50.)

- (2) Chem-Solv did not design or install an external liner secondary containment device in accordance with 40 C.F.R. § 264.193(d), from May 23, 2007 until February 1, 2008. (See Compl. ¶ 51.)

The Respondents offered evidence to the Court at the hearing challenging the validity of these assumptions and the applicability of the regulatory requirements upon which Count III is based under the circumstances of this case.

D. Count IV - Failure to Obtain Tank Assessments for Regulated Hazardous Waste Storage Tanks.

In Count IV of the Complaint, the Complainant claims that Chem-Solv violated 40 C.F.R. § 264.192(a) and (g) by allegedly failing to obtain a written certification of the design of the Pit in accordance with the requirements of 40 C.F.R. § 264.192(b)-(f). (See Compl. ¶ 56-57.) This claim is based upon the following assumptions:

- (1) The Pit was installed at the Property after July 14, 1986. (See Compl. ¶ 54.)
- (2) Rinsewater Tank No. 1 was a “new tank system” within the meaning of 40 C.F.R. §§ 260.10 and 264.192(a). (See Compl. ¶ 55.)

Respondents’ evidence at the hearing establishes that the regulatory requirements upon which Count IV is based do not apply to the Pit.

E. Count V - Failure to Conduct and Document Inspections of Regulated Hazardous Waste Storage Tanks.

In Count V of the Complaint, the Complainant claims that Chem-Solv violated 40 C.F.R. § 264.195(b) and (d), by allegedly failing to inspect the aboveground portions of the Pit each operating day. (See Compl. ¶¶ 50-60, 62.) This conclusion is based upon the assumption that Chem-Solv did not inspect the aboveground portions of the Pit on all “operating days” occurring between May 23, 2007 and February 1, 2008, in accordance with 40 C.F.R. § 264.195(b) and (d). (See Compl. ¶ 61.) The evidence offered to the Court by Respondents at the hearing establishes that the regulations upon which Count V is based do not apply in the factual context of this matter.

F. Count VI - Failure to Comply with Air Pollutant Emissions Standards Applicable to Regulated Hazardous Waste Storage Tanks Under RCRA Subpart CC.

In Count VI of the Complaint, the Complainant claims that Chem-Solv violated 40 C.F.R. §§ 264.1082(b) and 1084(b), by allegedly failing to control air pollutant emissions from the Pit in accordance with 40 C.F.R. § 264.1084(c) or (d). (See Compl. ¶¶ 64, 68-71.) This claim is based upon the following assumptions:

- (1) The sample of settled solids taken from the Pit by the EPA during the Sampling Event indicated that such settled solids contained a VOC concentration greater than 500 parts per million. (See Compl. ¶ 67.)
- (2) The Pit was a hazardous waste storage tank subject to the requirements of 40 C.F.R. Part 264, Subpart J at the time of the Sampling Event. (See Compl. ¶ 65.)
- (3) The Pit was not exempted from regulation under 40 C.F.R. § 264.1080 pursuant to 40 C.F.R. § 264.1060(b) or exempt from the standards in 40 C.F.R. § 264.1084-1087 pursuant to 40 C.F.R. § 1084(c). (See Compl. ¶ 66.)

The Respondents' evidence at the hearing in this proceeding shows that the above-noted assumptions upon which Count IV is based are incorrect.

G. Count VII – Failure to Comply With Closure Requirements Applicable to Hazardous Waste Storage Tanks.

In Count VII of the Complaint, the Complainant alleges that Chem-Solv violated 40 C.F.R. § 264.197 by failing to comply with the closure requirements applicable to hazardous waste storage tanks under 40 C.F.R. Part 264, Subparts G and H. (See Compl. ¶¶ 73-77, 84.) This claim is based upon the following assumptions:

- (1) The Pit was a hazardous waste storage tank system that did not have secondary containment that met the requirements of 40 C.F.R. § 264.193(b) and (c) and had not been granted a variance pursuant to 40 C.F.R. § 264.193(g). (See Compl. ¶ 78.)
- (2) Chem-Solv removed the Pit from the ground on or about February 1, 2008. (See Compl. ¶ 80.)

- (3) Chem-Solv took samples of the soil surrounding the Pit but did not analyze such soil samples. (See Compl. ¶ 81.)
- (4) Chem-Solv did not remove or decontaminate all waste residues or potentially contaminated components, soils or other materials associated with the Pit and manage them as hazardous waste following the closure of the Pit. (See Compl. ¶ 82.)
- (5) Chem-Solv did not have a closure plan meeting the requirements specified in 40 C.F.R. Part 264, Subparts G and H. (See Compl. ¶ 83.)

The evidence offered by the Respondents at the hearing in this matter establishes that the regulatory requirements upon which Count VII is based do not apply in this context of the underlying facts.

IV. Statement of Pertinent Facts

A. Chem-Solv's Drum Rinsing Operations.

Until 1999, Chem-Solv rinsed the inside of polyethylene drums and totes instead of sending them off site for reconditioning. (TR4 at 195.) At that time, the Pit was connected to the City of Roanoke's POTW system and the water from Chem-Solv's drum rinsing operations collected in the Pit and was discharged directly to the City Sewer. (TR4 at 195.) Chem-Solv discontinued this practice in 1999. (TR4 at 196.) At that time, Chem-Solv voluntarily stopped discharging to the City POTW because the local water authority's reporting limits for zinc increased. (TR4 at 196-197.)

At the time of the EPA's Inspection and Sampling Event in May of 2007, Jamison G. Austin testified, the Pit was used to collect rinsewater used to wash the outside of drums and totes that were going to be filled or had been filled on the acid pad prior to shipping them to a customer. (TR4 at 199.) Mr. Tickle's testimony corroborates this point. (TR3 at 127-129.) Chem-Solv rinsed the outside of containers as part of its packaging and distribution process because its customers required clean containers. (TR4 at 199-200.)

As Mr. Austin and Mr. Tickle testified, Chem-Solv regularly reused the rinsewater that collected in the Pit for the purpose of rinsing the outside of other drums and totes prior to shipment of

FreezeCon. (TR4 at 200; TR3 at 127-129, 133.) In fact, Chem-Solv reused such rinsewater multiple times in an effort to maximize its cost savings. (See TR4 at 202, 205.) Rinsewater used to rinse the outside of drums and totes on the acid pad drained into a drum on the acid pad that flowed through PVC pipe into the Pit. (TR4 at 202-203.) From the Pit, the rinsewater was pumped into a 6,200 gallon above ground storage tank (the "AST") that Chem-Solv installed adjacent to the Pit after it stopped discharging water to the POTW. (TR4 at 203.) Mr. Tickle's testimony corroborates Mr. Austin's testimony on this subject. (TR3 at 130.)

The Pit was an approximately 1,800 gallon capacity below ground tank with an opening at the top that was approximately 6 feet wide. (TR4 at 203; TR3 at 129.) The Pit was approximately 7.5 feet deep. (TR3 at 129.) According to Mr. Austin and Mr. Tickle, the Pit had a wall that was between three and four feet high around the top. (TR3 at 129; TR4 at 203.)

As Mr. Austin testified, when the rinsewater that collected in the Pit reached a certain level, Chem-Solv would pump it into the 6,200 gallon AST. (TR4 at 204.) Chem-Solv employees then would pump the rinsewater from the AST using a commercial grade power washer unit and use it for rinsing additional drums on the acid pad. (TR4 at 200, 204.) From there, the rinsewater again would flow through the drain in the acid pad into the Pit. (TR4 at 204.) When the Pit filled up again, Chem-Solv's employees would pump this reused rinsewater into the AST. (TR4 at 204.) Chem-Solv occasionally pumped rinsewater from the AST into totes for future reuse of the rinsewater. (TR4 at 204.)

B. Chem-Solv's FreezeCon Production Process

As Mr. Austin and Mr. Tickle testified, Chem-Solv also reused the rinsewater that collected in the Pit as a raw material in the production of a freeze conditioning agent known as FreezeCon. (TR4 at 204; TR3 at 134-137.) Mr. Tickle testified that her personally used rinsewater that had collected in the Pit to make FreezeCon. (TR3 at 134-137; R X 3 at CS032, CS035.) The evidence

presented to the Court during the Hearing included Chem-Solv sales records for FreezeCon and Chem-Solv batch tickets for FreezeCon, some of which establish that rinsewater was used as a raw material in the production of FreezeCon. (TR4 at 210-214; TR3 at 136-137; RX 4 at CS123-CS127; RX 3 at CS032, CS035.) The Pit and the appearance of the rinsewater was irrelevant to the usefulness of rinsewater as a raw material in the production of FreezeCon. (TR 4 at 223.)

C. Chem-Solv's Disposal of Rinsewater

Mr. Austin testified that Chem-Solv reused rinsewater in an effort to control costs. (TR4 at 205.) Specifically, Chem-Solv's cost per gallon of water decreased as the number of times it reused rinsewater increased. (TR4 at 205.) Thus, Chem-Solv preferred to reuse rinsewater instead of paying to have it removed for disposal. (TR4 at 205.)

Although Chem-Solv attempted to maximize its reuse of rinsewater, Chem-Solv occasionally shipped rinsewater off site for disposal. (TR4 at 215-216; TR4 at 219-220.) Prior to doing so, Chem-Solv employees adjusted the pH of rinsewater designated for disposal by Chem-Solv in the Pit. (TR4 at 203-224; TR3 at 139.) Chem-Solv had no reason to believe that Trichloroethene or Tetrachloroethene would be contained in the rinsewater or settled solids contained in the Pit. (See TR4 at 248.)

V. Respondents' Response to Cross-Cutting Issues Identified by Complainant

The Complainant attacks the Respondents' case by pointing to perceived inconsistencies in the record. These inconsistencies, the Complainant submits, purportedly diminish witness credibility and show how the Respondents have changed their story over time to evade liability. The Complainant, however, has contrived these inconsistencies by cherry-picking statements from the record and then stripping them of context. In so doing, the Complainant not only obscures key facts but also reveals an insecurity as to the soundness of its legal position.

More damaging, the Complainant attempts to impeach on brief in abstentia after making no effort to do so at trial. The effect of this tactic is to deprive the Respondents of an opportunity to respond in open court in the presence of the judge. The Complainant thus deprived the judge of an essential metric in gauging witness credibility – a witness’ demeanor on the stand when confronted with past perceived inconsistencies. This court should make no credibility determinations based on impeachment developed in the Complainant’s brief yet not explored at trial.

At least two examples of this prejudicial tactic appear in the Complainant’s assembly of cross-cutting issues. The first involves the “flushing of lines” and apparent discrepancies regarding when this procedure ceased. The Complainant contrasts a statement made by Jamie Austin in his affidavit with (i) statements by Cary Lester to inspectors in May 2007; and (ii) statements by Jamie Austin in December 2007, in response to EPA’s information request. (Complainant’s Br. at 25-26.) The Complainant contends that Chem-Solv could not have stopped flushing lines as early as Jamie Austin stated in his affidavit if it was still doing so as of the May 2007 inspection and the December 2007 response to EPA information requests. The Complainant, however, never confronted Jamie Austin about these apparent discrepancies on the witness stand.

The evidence is that Chem-Solv ceased flushing pumps and product-filling hoses into the Pit at approximately the time it ceased discharging to the POTW. (2nd Austin Affidavit at 2, ¶7). At the time of the May 2007 inspection, all chemical storage tanks located in the acid pad area were gravity-fed; Chem-Solv did not use pumps, meters, or other equipment to package drums in that area, and therefore had no need to flush equipment in that area. (2nd Austin Affidavit at 2, ¶7). Discharge to the POTW ceased in 1999, years before the 2007 inspection. (TR1 at 195-198.)

The other example pertains to whether Jamie Austin witnessed the “sampling event” during the EPA inspection of May 23, 2007. (Complainant’s Br. at 30.) Jamie Austin stated in an affidavit that he personally observed the EPA inspector’s collection of samples of rinsewater and settled solids. (RX 2 at CS 004, ¶16.) The Complainant contrasts this with Beth Lohman’s trial testimony that she encountered Jamie Austin only once that day. (TR1 at 147-149.) The Complainant, however, made no effort to question Jamie Austin about whether he observed the sampling event. Instead, the Complainant argues that, because Jamie Austin’s affidavit conflicts with Beth Lohman’s live testimony, the court should disregard any observations Jamie Austin set forth in that affidavit regarding the sampling event.

Jamie Austin’s affidavit is both credible and persuasive as to his presence at and observations of the sampling event. If the Complainant wanted to explore Jamie Austin’s credibility on these factual issues, it was free to do so in open court. The integrity of the sampling event has long been an issue in this case, and the Complainant was free to ask Jamie Austin about what he observed or prior statements. Because the Complainant chose not to pursue that line of questioning at trial, this Court should put little weight on attempts to impeach his statements on brief. It should be recalled that at trial, Jamie Austin offered no testimony as to his observations of sampling but rather relied on the first-hand testimony of the EPA samplers. Further, Ms. Lohman testified that she was an observer of this event in the late afternoon of May 23, 2007, that she was talking with Mr. Lester, and she did not see everything (TR1 at 147-149.) Other inconsistencies described in the Complainant’s brief are not inconsistencies at all. Rather, they are isolated statements selected from the record. When restored to full context, the perceived inconsistencies disappear and actually bolster the Respondent’s position.

The Complainant points to inconsistencies regarding the blend room drain. At trial, Mr. Austin testified that the drain was capped at the time of the 2007 EPA and state inspections. (TR4 at 206-207.) The Complainant contends this testimony is inconsistent with Mr. Austin's statements to inspectors that the drain connected the blend room to the pit. (Complainant's Br. at 26.) These statements can be reconciled, and at trial Mr. Austin did just that:

[I]t was asked of me what is this trench drain and I was asked if it drained to the pit ... and my response was yes, it led to the pit and at one time was used to convey water that was used to wash out tanks in the blend from into the pit tank, but that was no longer occurring and that connection, the piping, had been capped.

(TR4 at 206.) (emphasis added). Mr. Austin further testified that at the time of the inspection in 2007,

Physically the trench was there but it was not physically possible for anything that would pour in the trench or that may inadvertently get into the trench to drain into the ... subgrade rinse tank.

(TR4 at 206.) Testimony by Mr. Tickle corroborates that the trench was capped, as early as 2004. (TR3 at 146.) Mr. Tickle has worked for Chem-Solv for over eight years, since March 13, 2004. (TR3 at 126.)

The Complainant argues that a photograph taken during the inspection confirms that the drain was operational. (Complainant's Br. at 27; CX 17 at EPA 312.) The photograph portrays quite the opposite: water has accumulated beneath the grate rather than drained anywhere, indicating that the drain was capped and was by no mean was emptying into the Pit. The Complainant's own witness, Ms. Lohman, confirmed this fact by stating that the trench drain had water accumulated in it. (TR1 at 175.) The Complainant offers other ways that Chem-Solv could have plugged the trench, but these speculations invade the regulated community's discretion on the manner of complying. Furthermore, these speculations about what Chem-Solv

could have done to cap the trench are substituted for what the inspectors could have done to test to determine whether the trench was capped. It would have been easy for the inspectors to test the trench by pouring water into the drain to observe whether it emptied into the Pit or by simply having the grate lifted to enable a closer inspection. As Mr. Cox testified, the inspectors made no effort to examine the trench to determine whether or not liquid could flow from the blend room into the Pit. (TR3 at 60-61.) With respect to the blend room drain, therefore, the Respondents' statements are reconcilable, and the inspectors have no contradictory evidence.

The Complainant's final so-called "cross-cutting issue" pertains to the level of solids removed from the Pit. The Complainant is convinced that 17,500 lbs of settled solids were removed from the Pit, and that the Respondents' witnesses on this fact issue are not credible. The Pit was cleaned out between late January and early February 2008. (TR4 at 241.) The exact measure of settled solids removed from the Pit is uncertain for several reasons – none having to do with witness credibility.

Approximately two feet of solids settled to the bottom of the Pit. (TR3 at 144.) Chem-Solv employees used a backhoe, shovels, and pails to remove the solids. (TR3 at 144; TR4 at 243-244.) The settled solids were containerized in 32 individual steel drums filled to varying depths, some as low as one-third full. (TR4 at 10.) Each drum contained a unique solid-to-liquid ratio. (TR4 at 10.) Also packed into these drums was broken concrete from the demolition of the wall around the Pit. (TR4 at 244; *see* TR3 at 144.) The drums may also have included other debris, such as sand anchoring the Pit into the ground. (TR3 at 150.) Since all of the 32 steel drums contained some arguably hazardous waste all of them were shipped off as hazardous waste along with three polyethylene drums containing material from an earlier June 2007

cleanout. (TR3 at 242; *see* CX 23 at EPA 1127.) The drums were not weighed, as Chem-Solv paid for their removal on a dollars per container basis. (TR4 at 242.)

The Complainant concludes that 17,500 lbs of settled solids were removed from the Pit. (Complainant's Br. at 34.) It supports this claim with reference to the shipping manifest for the 35 drums. (CX 23 at EPA 1127.) The evidence set forth above, however, demonstrates that more than just settled solids were containerized in the drums and shipped offsite. The Respondents' witnesses on this fact issue are credible and consistent. In his September, 2011, affidavit, Jamie Austin stated that a backhoe was used to clean out the Pit. At trial, Jamie testified to Chem-Solv's use of a backhoe in addition to other devices to improve efficiency. (TR4 at 243-244.) Testimony by Don Tickle confirms that a backhoe was used at some point during the process. (TR3 at 144.) Scott Perkins also testified as to the "tremendous variation" of materials packaged into the 35 drums.

The Complainant's witness on the level of solids in the Pit is George Houghton, the EPA inspector who took samples in May 2007. (Complainant's Br. at 36; *see* TR1 at 231-232.) His estimates are dubious, however, as he neither observed the cleanout nor took accurate measurements of the settled solids during the May inspection. Houghton testified that in May 2007 the water was approximately one foot deep, beneath which were six feet of sludge. (TR1 at 232; TR1 at 266; *see* CX 23 at EPA 1083.) George Houghton, however, admits he took no depth measurements but, rather, simply based his estimate on feel. (TR1 at 263-64.)

The Complainant points to differences between Mr. Tickle's description of the Pit cleanout, versus the account relayed by other witnesses. (Complainant's Br. at 35.) Mr. Tickle testified to shoveling out sand from the Pit into a hopper, akin to a dumpster. (TR3 at 150.) The Respondent acknowledged that this account is different from Jamie Austin's description of the

cleanout. Mr. Tickle, however, was describing his participation in the final removal of the Pit's tank, which occurred several weeks after the cleanout of settled solids. (See TR3 at 140.) The Complainant assumes that whatever sand Mr. Tickle helped remove was included in the 35 drums shipped offsite. Mr. Tickle's testimony, however, establishes that the sand was shoveled only into the hopper and never made it to the steel drums. (TR3 at 150.)

Certainly the testimony of Respondents' witnesses – individuals who directed, observed, and participated in the cleanout – is more reliable than the testimony of the Complainant's witness – who did not even use a measuring device when he had the chance back in May 2007. Indeed, the Complainant has to strain the evidence to support its claim that 17,500 lbs of settled solids were shipped off as hazardous waste, when the evidence is that the 35 drums contained a tremendous amount of various of materials. The bottom line is that the Respondents' witnesses are consistent and coherent, and the Complainant's efforts to discredit them reflect a lack of understanding of the of the operation of Chem-Solv's business, and a lack of confidence in the Respondents' legal position.

VI. Cross Cutting Issues Identified by the Respondents

The Respondents now highlight two issues that cut across and diminish the strength of the Complainant's case. The first pertains to the testimony of the Complainant's chief witness, VADEQ inspector Beth Lohman. Ms. Lohman routinely cast facts and conclusions in a light least favorable to the Respondents, as she built her testimony on hearsay statements and a fundamental misunderstanding of Chem-Solv's business.

The second issue, largely intertwined with the first, pertains to the specter of Cary Lester. Cary Lester was a Chem-Solv employee who was not at trial but whose hearsay statements formed a substantial basis for the Complainant's factual allegations. The Respondents do not

argue that hearsay has no place in administrative proceedings, but they encourage this court to accord little weight to any conclusions based on Mr. Lester's out-of-court statements.

A. Beth Lohman's Negative Bias

At trial, Ms. Lohman never missed an opportunity to convey negative commentary about Chem-Solv and its employees. The "facts" she presented were tinged with bias and based on unsubstantiated hearsay statements by Mr. Lester. The Respondent offers the following examples of Ms. Lohman's insistently negative bias:

1. Cessation of Discharge to the POTW

Beth Lohman routinely testified that Chem-Solv's permit to discharge to the Western Virginia Water Authority (alternatively referred to as the POTW) was suspended or revoked:

- "...what we learned is that the Western Virginia Water Authority, the waste water authority, the POTW had revoked [Chem-Solv's] privileges to discharge to the sanitary sewer system." (TR1 at 47.)
- "Mr. Lester explained to us that when [Chem-Solv's] privileges to discharge to the POTW had been revoked or suspended, they began shipping waste water off site." (TR1 at 109.)

Thus, Ms. Lohman was very clear on direct examination that Chem-Solv's POTW permit privileges were revoked. Ms. Lohman's use of words like "suspended" or "revoked" on direct examination implies that Chem-Solv misbehaved and thus was the target of punitive measures by the POTW. This negative spin stands in marked contrast to her handwritten field notes, which neutrally observe as follows: "pretreatment permit: no permit currently." (CX 37 at EPA 1477.) Furthermore, on cross-examination, Ms. Lohman acknowledged that the word "revoke" was her word – not anything she learned from the POTW or from Chem-Solv:

...I don't know the circumstances or the mechanism that was used, but what I did understand is that the POTW, it was the understanding between the POTW and Chem-Solv, that they could no longer discharge to the POTW. **“Revoked” is just the best word I could use to describe the situation.**

(TR1 at 172-73) (emphasis added). The evidence at trial was that Chem-Solv ceased discharging to the POTW around 1999 or 2000, when the POTW changed its zinc limits. (TR4 at 195-98.) Chem-Solv had determined that its municipal tap water supply was high in zinc and made a business decision to stop discharging to the POTW and, instead, ship waste water offsite. (TR4 at 195-98.) This evidence, coupled with Ms. Lohman's acknowledgment that “revoked” was her word, her own notes clearly show that she did not know the circumstances of Chem-Solv's cessation of discharge to the POTW. The Complainant, however, did not and cannot offer any evidence that Chem-Solv committed an offense warranting revocation or punishment.

2. 4-inch “Opening” in the Liner

Ms. Lohman put undue emphasis on an alleged hole in the polyethylene liner of the Pit, and Chem-Solv's alleged failure to repair this hole. (TR1 at 37 – 43.) She relied on a letter dated January 28, 1999, to Chem-Solv from Environmental Directions, Inc. (EDI), a company hired by Chem-Solv to consult on its elevated zinc levels. (TR1 at 29-30; TR4 at 207 – 208.) The letter identified a “four inch diameter opening” in the liner of the rinsewater tank and recommended replacing that liner. (CX 43 at EPA 1561.) This 4-inch opening identified by EDI signaled to VADEQ that there were problems with the integrity of the rinsewater tank, triggering a cascade of inquiry and inspection. (TR1 at 29-30.) In her testimony at the hearing, Ms. Lohman recounted this cascade, emphasizing what she perceived as Chem-Solv's continuous failure to repair the problem. (See TR1 at 37-43.) The EDI letter ended up as attachment to VADEQ's Notice of Violation dated January 5, 2006, as if there were one continuous violation. (CX 43 at EPA 1543.) The VADEQ's fixation on Chem-Solv's alleged failure to remedy this 4-inch

opening is a red-herring. The evidence from Jamie Austin is that the 4-inch opening was necessary for purposes of threading through PVC pipe to connect the acid-pad drain to the rinsewater tank. (TR4 at 209.) Therefore, the 4-inch opening in the polyethylene liner was a functional feature, not a sign of damage that went unmitigated by Chem-Solv. Further, the polyethylene liner was a redundant feature and not related to the integrity of the ceramic-lined steel tank. Finally, Chem-Solv did replace the piping with schedule #80 PVC in response to EDI's concerns. (TR4 at 209.)

To further emphasize Ms. Lohman's fundamental misunderstanding regarding the "Pit" we examine her testimony that she believed, based on her investigation that the Pit was square or rectangular with a round liner (TR1 at 91, 181-182.) and that the concrete had degraded due to contact with chemicals. (TR1 at 167.) No other evidence in the record supports this motion, particularly the photographs offered into evidence by the Complainant at the Hearing. The fact that the tank was actually a cylindrical ceramic-lined steel tank makes Ms. Lohman's unsubstantiated claim of concrete degradation impossible. Further, the allegation that the Pit was a rectangular concrete tank is contradicted by all other available evidence.

3. Commingling of Storm Water and Rinsewater

Ms. Lohman was wedded to the idea that Chem-Solv collected storm water in a swale, directed it toward a low point at the back of the facility against a concrete jersey barrier, and then pumped it into an above-ground tank to be shipped offsite. (TR1 at 98-99; TR at 101.) She testified that storm water from the swale was comingled with Pit water. (TR1 at 101-02.) She further testified that Chem-Solv measured the pH of Pit water only after it was comingled with storm water. (TR1 at 102.) Ms. Lohman's testimony, however, simply echoes out-of-court

statements by Cary Lester and contradicts the economics of Chem-Solv's business and the evidence from all other sources. As such, it deserves very little weight.

The evidence was that the concrete drainage way and above-ground tank were produced for and constructed in connection with a contingency plan for tanker-truck spills. (TR4 at 186-89.) This was not part of storm water management plan. (TR4 at 187.) Storm water was not combined with water from the Pit and then hauled off. (TR4 at 187.) Chem-Solv had to pay to ship water offsite. Indeed, the primary reason Chem-Solv reused Pit water to rinse the outside of drums and to make FreezeCon was to minimize water purchase and shipment costs. It makes no sense, therefore, that Chem-Solv would purposefully collect storm water only to turn right around and pay to ship it away. Ms. Lohman's testimony thus represents a fundamental misunderstanding of Chem-Solv's operations and should be accorded little weight.

B. Unjustified Reliance on Statements by Cary Lester

Throughout her testimony, Ms. Lohman repeatedly invoked "what Cary Lester explained" or "what Cary Lester told us." During direct examination of Ms. Lohman, counsel for the Complainant repeatedly asked, "What did Lester say about that?" By way of example, Ms. Lohman relied on Mr. Lester for the following:

- Mr. Lester said that Chem-Solv's inventory management program was not a "first in, first out" system so the drums would age. (TR1 at 60.)
- Mr. Lester advised that the pH of Pit water was adjusted in the tanker truck. (TR1 at 97.)
- Mr. Lester advised that waste water sometimes would have pH less than 2 or more than 12.5 but he was keeping no records. (TR1 at 98.)
- Mr. Lester explained that after a precipitation event, storm water would be pumped into a polytank and then commingled with Pit water and shipped offsite. (TR1 at 101.)

- Mr. Lester never indicated that Pit water was used in making or blending FreezeCon but, rather, that Pit water was shipped off as waste water. (TR1 at 107.)
- Mr. Lester stated that drums of pit sludge had been in the 1111 Industry Avenue warehouse since March 30, 2006. (TR1 at 115.)
- Mr. Lester indicated he was not getting enough support from the Austins to make hazardous waste determinations and to manage the materials properly. (TR1 at 127.)

The Complainant chose not to subpoena Mr. Lester for the trial yet depends significantly on his hearsay statements to build its case. While the rules of this administrative proceeding permit consideration of out-of-court statements, this Court should nonetheless accord Mr. Lester's statements little weight – especially insofar as they were tendered through the testimony of Ms. Lohman who, as described above, exhibited a determined bias against the Respondents.

It is of further interest that Ms. Lohman's recollection of exculpatory hearsay was such a challenge. On cross examination, her recall of analytical results showing lack hazardous characteristics was thin and evasive. (See TR1 at 168-170.)

VII. Argument

As demonstrated by the evidence offered by the Complainant at the hearing, the alleged violations enumerated above are premised upon five erroneous assumptions made by the Complainant: (1) rinsewater contained in the Pit was a "solid waste"; (2) settled solids contained in the Pit were a "regulated waste"; (3) the 55 gallon drum of sodium hydrosulfide identified by the EPA contained a "solid waste"; (4) empty aerosol cans allegedly observed in a solid waste receptacle had not been characterized by Chem-Solv; and (5) samples of rinsewater and settled solids collected by the EPA properly characterized such materials. The evidence admitted into

evidence during the Hearing establishes that all five of the above-listed assumptions are incorrect.

Generally, RCRA establishes certain management requirements for materials that are “hazardous wastes.” As explained by the Respondents’ expert witness, Mr. Perkins, at the hearing, in order to be a RCRA regulated “hazardous waste”, a material must (1) meet the definition of a “solid waste”, (2) meet one of the definitions of “hazardous waste”, and (3) not be excluded or exempted from regulations. (TR3 at 179-180.) With the exception of Count II of the Complaint, all of the alleged violations asserted in the Complaint are contingent upon each of the materials in question – rinsewater, settled solids, sodium hydrosulfide and aerosol cans – falling within the scope of the definitions of “hazardous waste” under RCRA. As Mr. Perkins further explained, if the rinsewater contained in the Pit is not “solid waste”. (TR3 at 194.) Thus, Chem-Solv is not liable for the violations alleged in Counts III through VII of the Complaint. Likewise, as Mr. Perkins explained, if the rinsewater contained in the Pit was not “solid waste”, and the settled solids contained in the Pit were subject to an exemption from regulation as a “hazardous waste”. (TR3 at 181, 194 and 200-201.) Therefore, Chem-Solv is not liable for the violation alleged in Counts III through VII of the Complaint. Likewise, as Mr. Perkins explained, if the sodium hydrosulfide and the rinsewater contained in the Pit were not “solid wastes” and the settled solids contained in the Pit were subject to an exemption from regulations as “hazardous wastes”, then Chem-Solv is not liable for the violation alleged in Count I of the Complaint.

Moreover, because the evidence presented by the Respondents at the hearing demonstrated that the samples of the rinsewater and settled solids contained in Rinsewater Tank No. 1 taken by the EPA did not properly represent and, therefore, characterize such materials or

if the analysis of such samples were not properly performed, the Complainant has failed to establish by a preponderance of the evidence that such materials meet the definitions of “hazardous waste” under 40 C.F.R. §§ 260.10 and 261.3. Thus, since the EPA’s flawed samples do not properly characterize the rinsewater and settled solids contained in Rinsewater Tank No. 1, and its analysis of such samples does not establish by a preponderance of the evidence that such materials meet the definitions of “hazardous waste”, and Chem-Solv is not liable for the violations alleged in Counts I, III, IV, V, VI and VII of the Complaint.

A. The Rinsewater in Rinsewater Tank No. 1 Was Not a “Solid Waste.”

1. Definition of “Solid Waste”

In 40 C.F.R. § 260.10, the term “solid waste” is defined as “solid waste defined in [40 C.F.R. §261.2].” The term “solid waste” is further defined in 40 C.F.R. §261.2(a)(1) as “any discarded material that is not excluded by § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.” The term “discarded material” is defined in 40 C.F.R. §261.2(a)(2)(i) as “any material which is: (A) *abandoned*, as explained in paragraph (b) of this section; (B) *recycled* as explained in paragraph (c) of this section; or (C) considered *inherently waste-like*, as explained in paragraph (d) of this section ...”.

Under 40 C.F.R. §261.2(b), materials are “discarded material” and, therefore, “solid waste” if they are “abandoned” by being: (1) disposed of; (2) burned or incinerated; (3) accumulated, stored or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated. The evidence in the record demonstrates that the rinsewater contained in the Pit was not “solid waste” within the meaning of 40 C.F.R. § 260.10 or 40 C.F.R. § 261.2 because such materials had not been “abandoned” as that term is defined in 40 C.F.R. § 261.2(b) and 40 C.F.R. § 261.2(c), respectively.

2. *Definition of “Hazardous Waste”*

The term “hazardous waste” is defined in 40 C.F.R. § 260.10 as “hazardous waste as defined in § 261.3 of this chapter.” 40 C.F.R. § 261.3 provides, in pertinent part, that a “solid waste” is a “hazardous waste” if: “(1) it is not excluded from regulation as a hazardous waste under § 261.4(b); and (2) it meets any of the following criteria: (i) it exhibits any of the characteristics of hazardous waste identified in subpart C of [40 C.F.R. § 261] ... (ii) it is listed in Subpart D of [40 C.F.R. § 261] and has not been excluded from the lists in Subpart D of [40 C.F.R. § 261] under §§ 260.20 and 260.22 of this chapter.” In addition to the § 261.4(b) exclusion cited above, there are exemptions that limit the requirements that hazardous wastes are subject to. For example, even if a material meets the definition of “solid waste”, if it is exempted from regulation as a “hazardous waste” under 40 C.F.R. 261.4(c), then it is not subject to the requirements set for in RCRA allegedly violated.

3. *Summary of Evidence in the Record Concerning Chem-Solv’s Drum Rinsing Operation.*

In May 2007, as part of its business of repackaging chemical products from bulk storage containers such as tanks and tanker trucks into drums, Chem-Solv rinsed off the exterior surface of drums after they had been used in order to remove dust, dirt, and debris that had accumulated on them during outdoor storage of the empty drums. (TR3 at 199-200; TR4 at 127-129, 133.) The rinsewater used to rinse off the exterior of such drums was collected in the Pit. (TR3 at 127-129; TR4 at 199.) The rinsewater was then pumped up and out of the Pit into the AST through a diaphragm pump. (TR4 at 203.) Thereafter, the rinsewater was reused to rinse the exterior of additional drums in the same manner described above. (TR4 at 202-203; TR3 at 130.) Chem-Solv’s drum rinsing operation was designed and implemented with the intent of conserving water

and limiting its consumption of tap water and further reducing Chem-Solv's operating costs. (TR4 at 205.)

In deciding whether the rinsewater qualifies as solid waste under 40 C.F.R. § 261.2 and whether the rinsewater was reclaimed prior to re-use, as the Complainant alleges in its Brief (Compl. Br. at 89.), one critical fact that the Court should consider is the fact that it was not necessary for Chem-Solv to adjust the pH of the rinsewater prior to commencing drum rinsing operations using re-used rinsewater. If Chem-Solv "reclaimed" the rinsewater, as defined in 40 C.F.R. 261.1(c)(4), such rinsewater arguably could be considered a "solid waste" under 40 C.F.R. §261.2(a)(2)(i)(B), 40 C.F.R. §261.2(c)(3), and 40 C.F.R. §261.1(c)(7). As discussed below, Chem-Solv did not "reclaim" the rinsewater. Thus, the rinsewater was not a solid waste under 40 C.F.R. §261.2(a)(2)(i)(B), nor did it fall into any of the other categories of "discarded material" under 40 C.F.R. §261.2(a)(2). Consequently, the rinsewater does not constitute a "solid waste" under 40 C.F.R. §261.2(a)(1).

The rinsewater that collected in the Pit also was used as a raw ingredient in the blending of a glycol and water based anti-freeze conditioning agent product called FreezeCon. (TR3 at 134-138; TR4 at 212-213; RX 3.) Chem-Solv sold large quantities of FreezeCon to its coal industry customers (See RX 3, 4 and 5), who applied it directly to coal during loading into rail cars in preparation for transportation in cold weather. (TR3 at 137-138; TR4 at 212.)

Because some of the rinsewater contained in Rinsewater Tank No. 1 was used as a raw ingredient in a marketable product, FreezeCon, or reused to rinse the exterior surface of additional drums containing Chem-Solv's chemical products, such rinsewater was not a "discarded material" within the meaning of 40 C.F.R. §261.2(b). (See TR4 at 6-7.) The rinsewater contained in Rinsewater Tank No.1 did not become a "discarded material" and, thus,

it was not a “solid waste” until Chem-Solv made an election or determination to dispose of it and pumped it from the tanks, and not before such point in time. (See TR3 at 191-196.)

Similarly, as Mr. Perkins testified, Chem-Solv’s drum rinsing process satisfied the elements of the EPA’s continued use policy. (TR3 at 192-194). The continued use policy is referenced by the EPA in RO 14281 and in 2008 EPA App. LEXIS 30 (Ea.B. June 20, 2008). In RO 14281, the EPA concludes that a used parts washing solvent that is subsequently used for drum washing does not require characterization as a potential solid waste under the recycling provisions discussed in the Complainant’s Initial Post-hearing Brief. Specifically, the EPA concluded that “[b]ecause the material... remains a product, your question about the applicability of 40 C.F.R. 261.2(e)(1) is moot. That regulatory section is intended to apply to secondary materials, which is not the case for used solvents that are not yet ‘spent’”.

In its Brief, the Complainant argues that “EPA has consistently interpreted “corrosivity” as a form of contamination as that term in (sic) used in the “spent material” definition. (Complainant’s Br. at 90.) However, the documents cited by the Complainant in support of this assertion, including RO 11822 (March 24, 1994 Memorandum from Michael Shapiro, Director, Office of Solid Waste to Hazardous Waste Management Division Directors, Regions I – X), “clarification of when a secondary material meets the definition of “Spent Material”, and in the matter of Brentag Great Lakes, LLC 2004 EPA ALJ LEXIS 18 at 10, make no reference to corrosivity. Furthermore, the Complainant references RO 11822 with an incorrect title. It is not clear what the Complainant is referring to on Page 90 of its Brief. This, its assertion that the EPA has historically interpreted corrosivity as a form of contamination as that term is used in the “spent material” definition is unsupported by the cited authorities.

For these reasons, the Complainant has not established by a preponderance of the evidence that the rinsewater was a “solid waste” at the time of the Sampling Event. Accordingly, for the reasons set forth above, and those further discussed below, the Complainant has not established by a preponderance of the evidence that the Respondents are liable for the violations alleged in Counts I, III, IV, V, VI and VII of the Complaint.

B. The Settled Solids Contained in the Pit Were Not a Regulated Waste.

1. The Settled Solids Contained in the Pit Are Exempted from Regulation Under 40 C.F.R. § 261.4(c).

Assuming for the sake of argument that the settled solids contained in Rinsewater Tank 1 met the definitions of a “discarded material” and a “solid waste”, the evidence in the record establishes that such settled solids are exempted from regulation as “hazardous waste” under the exemption found in 40 C.F.R. §261.4(c) (the “MPU Exemption”). 40 C.F.R. §261.4(c) provides, in pertinent part, that:

A hazardous waste which is generated in a product or raw material storage tank ... or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit, is not subject to regulation under parts 262 through 265, 268, 270, 271 and 124 of this chapter or to the notification requirements of section 3010 of RCRA until it exits the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation of product or raw materials.

40 C.F.R. §261.4(c). In summary, under what is collectively and commonly called the MPU Exemption, any hazardous waste that is generated in a tank that falls into one of the categories of tanks described in 40 C.F.R. §261.4(c) is exempted from regulation under certain regulations promulgated under RCRA until such hazardous waste exits the tank in which it was generated, or until 90 days after the tank ceases to be operated. *See* 40 C.F.R. §261.4(c).

For the reasons discussed below, as Mr. Perkins testified during the hearing, the Pit falls into several of the categories of tanks described in 40 C.F.R. §261.4(c). (TR3 at 201-209; TR4 at 8-9.) Thus, as Mr. Perkins further explained during his testimony, the settled solids that were generated in the Pit were exempt from regulation under RCRA until they were removed from the tank for disposal or until 90 days after Chem-Solv ceased operating the Pit. (See TR4 at 9.)

i. Rinsewater Tank 1 Is Subject to the MPU Exemption.

Although the exemption provided in 40 C.F.R. § 261.4(c) is commonly referred to as the “MPU Exemption”, the term “MPU” collectively refers to the categories of units referenced in 40 CFR § 261.4(c), including (1) “a product or raw material storage tank”; (2) “a product or raw material transport vehicle or vessel”; (3) “a product or raw material pipeline”; (4) “a manufacturing process unit”; and (5) “an associated non-waste-treatment manufacturing unit.” As Mr. Perkins testified that the Pit satisfies the requisite elements of the MPU Exemption. (TR3 at 201-208; TR4 at 140-144.) Applicable guidance documents published by the EPA supports this conclusion.

For example, when the EPA promulgated the MPU Exemption in 1980, the EPA stated that its intent behind the exemption was to recognize that potentially hazardous waste is generated in various industries in operating processes and material storage units that the EPA did not intend to regulate as hazardous waste tanks or containers, such as Rinsewater Tank 1. See Hazardous Waste Management System, 45 F.R. 72,024 (Oct. 30, 1980) (Codified at 40 C.F.R. § 261.4. As Mr. Perkins further explained, the EPA did not intend to apply the containment requirements under RCRA to “hazardous waste” contained in tanks that are integral to the manufacturing process until such waste is removed for disposal or until such wastes exit the manufacturing process. Furthermore, Mr. Perkins’ explained that the EPA intended to provide

relief to manufacturers in cases where the point of “hazardous waste” generation could be the tank itself. (TR3 at 203.) To provide additional guidance to members of the regulated community, the EPA provided a number of examples of systems that fall within the scope of the MPU Exemption in the Federal Register, including: (1) distillation columns, flotation units, discharge trays of screens and “in associated non-waste-treatment process units such as cooling towers”. See Hazardous Waste Management System, 45 F.R. 72,024 (Oct. 30, 1980) (Codified at 40 C.F.R. § 261.4) In subsequent guidance, the EPA provided the regulated community additional examples of tanks that qualify for the MPU Exemption.

As Mr. Perkins testified, one example of a manufacturing process unit identified by the EPA is a solvent parts washer. (TR3 at 205-206.) In the RCRA/Superfund Industry Assistance Hotline monthly report for May 1986 (530R86113) the EPA responded to a question about whether a solvent-based parts washer in use at a service station constituted a manufacturing process unit for purposes of the application of the MPU Exemption. (Jan Warren and Nancy Perkinson, Monthly Report – RCRA/Superfund Industry Assistance Hotline Report, 530 R86113, U.S. EPA Office of Solid Waste and Emergency Response, 3-4 (May 1986.)) In spite of the undisputed fact that the service station was not engaged in manufacturing in the conventional sense, the EPA nonetheless concluded that the solvent-based parts washer was “functioning as a manufacturing process unit.” (Warren & Perkinson, RCRA/Superfund, at 4.) Settled solids in solvent parts washers, which are potentially hazardous waste due their propensity to contain elevated concentrations of metals, are consequently not fully regulated under RCRA until they are removed from the unit.

The operation of a solvent-based parts washer is favorably analogous to Chem-Solv’s drum rinsing operation in 2007. In both instances, the rinsing operation is conducted outside of a

storage unit and the liquid used to clean a particular item flows back to its source storage tank. Moreover, in both cases, the liquid used for the purpose of cleaning is periodically disposed by the operator.

Not all solvent-based parts washers fall under the MPU Exemption. For example, the EPA has concluded that if the drum of solvent is detached from the wash unit, a solvent-based parts washer is not exempted from regulation under RCRA by the MPU Exemption. (*See* RO 12790.) There is no comparable periodic detachment of the storage unit from the cleaning unit in Chem-Solv's drum rinsing operation. Therefore, the EPA's May 1986 guidance document remains the most applicable guidance on the subject of the application of the MPU Exemption in the factual context set forth in the record.

Rinsewater Tank 1 also falls into the category of a "raw material storage tank." The applicable regulations promulgated under RCRA draw a distinction between "materials" and "wastes". Since, as discussed above, Chem-Solv did not "reclaim" the rinsewater, the rinsewater contained in Rinsewater Tank 1 was not a "solid waste". Rather, as Mr. Perkins testified, based on the testimony of Mr. Austin and Mr. Tickle, this rinsewater constituted a "material" under applicable regulations.

Another example of a commonly used unit that qualifies for the MPU Exemption and, yet, neither is associated with manufacturing in a conventional sense, is an absorption refrigeration unit. (*See* TR3 at 206-07.) As Mr. Perkins testified, such devices, which are used for chilling materials in industrial and commercial settings, contain a refrigerating liquid such as ammonia or water, and often contain an anti-scaling agent such as arsenic trioxide that can result in a settled solid with elevated arsenic, sometimes in excess of the regulatory threshold for toxicity. (TR3 at 206-207.) In the absence of the savings of the MPU Exemption, these

absorption refrigeration units would otherwise be considered regulated hazardous waste storage tanks or containers. However, due to the application of the MPU Exemption, they are not.

The solvent-based parts washer and absorption refrigeration examples described above address several of the arguments raised in the Complainant's Initial Post-Hearing Brief in opposition to the application of the MPU Exemption to the Pit. The Complainant's Initial Post-Hearing Brief raises two arguments in opposition to Chem-Solv's position that Rinsewater Tank 1 is properly considered a "raw material storage tank" or a "manufacturing process unit." In opposition to Chem-Solv's argument that the Pit constitutes a "raw material storage tank," the Complainant argues that "the ordinary meaning of these terms dictate that this is a container that stores unused material." (Compl. Br. at 93.) Concerning its opposition to Chem-Solv's position that the Pit constitutes a "manufacturing process unit," the Complainant states that "the ordinary meaning of terms dictates that it is a unit where an actual step in the manufacturing process takes place." (Complainant's Br. at 93.) To the contrary, both of the units described in the examples of units that fall under the MPU Exemption discussed above, the solvent-based parts washer and the absorption refrigerator, contain liquids that are used repeatedly, as opposed to unused material. Moreover, neither such unit functions as a step in a manufacturing process. Thus, applying the Complainant's ordinary meaning argument, the solvent-based parts washer and the absorption refrigerator would be considered hazardous waste storage tanks or containers. However, this is not the case. To the contrary, under applicable EPA guidance, which is cited above, the settled solids contained in such devices are subject to the MPU Exemption as were the settled solids that were contained in the Pit in 2007.

Exemptions available under 40 C.F.R. § 261.4(c) are not foreign concepts to this court or to its Appeals Board. In the matter of *General Motors*, 2008 EPA App. LEXIS 30 (E.A.B. June

20, 2008), the Environmental Appeals Board reviewed the ruling of an Administrative Law Judge in a RCRA enforcement action. The Judge found that GM violated RCRA when it deployed “paint solvents” to remove paint from automated spray painting equipment that the company used to prime, paint, and topcoat car and truck bodies in its assembly plant paint shops. *General Motors*, 2006 EPA ALJ LEXIS 17 (ALJ March 30, 2006). On appeal, GM argued *inter alia* that the ALJ erred in holding that GM did not qualify for the “manufacturing process unit” under 40 C.F.R. § 261.4(c). Although the Appeals Board remanded on other grounds, the case provides guidance on the MPU exemption and favors application of it here.

At issue was whether certain piping and equipment were “integral components” of GM’s painting operations. At trial, it was undisputed that painting automobiles was an integral part of GM’s manufacturing process. *GM*, 2006 EPA ALJ LEXIS, at *98. The real question was whether equipment and piping leading from the paint applicators to purge-mixture storage tanks were also “integral” to GM’s operations and therefore qualified for the MPU exemption. *General Motors*, 2008 EPA App. LEXIS, at *200.

GM offered several expert and technical witnesses to support its position that the downstream equipment and piping were “integral components” in the painting operations, “without which the continuous assembly line production of automobiles through the paint shop would be impossible.” *Id.* GM also pointed to a Clean Air Act rule which defined “paint shop” comprehensively to include purge-process components such as downstream equipment and piping. *Id.*

The Judge ruled that MPU exemption did not apply. First, the regulation defining “paint shop” for CAA purposes was unpersuasive in helping determining the meaning of MPU under

RCRA. *Id.* at *200-01. Also, GM did not manufacture anything downstream of the equipment and piping in question, but only conveyed waste to storage tanks. *Id.* at *203.

Because the Appeals Board remanded on other grounds, it did not reach the merits of GM's appeal as to the MPU. *See id.* at *203-04. Nonetheless, the opinions by both the Judge and the Appeals Board are instructive on the following points: At a very basic level, the two *GM* opinions show that the MPU exemption is recognized and given credence by agency decision-makers, whether they be Judges or members of the Appeals Board. Second, the decisions show that "manufacturing" is not defined in the enabling statute or regulations. *GM*, 2008 EPA App. LEXIS, at *199 ("Neither the statute nor the regulations define what constitutes an MPU, a 'manufacturing process,' a 'manufacturing unit,' or 'manufacturing' alone.") The Appeals Board looked to the dictionary definition of manufacturing for guidance. *Id.* at 199 n.54. This definition includes "to make (as raw material) into a product suitable for use" and "to produce according to an organized plan and with division of labor." *Id.* (quoting Webster's Third New International Dictionary 1378). Manufacturing, therefore, conclude easily include Chem-Solv's business of making drums suitable for re-packaging and distributing a variety of chemicals. (TR4 at 200-201.) The evidence establishes that this process was done according to an organized plan and with a division of labor. Mr. Austin testified about this process, describing how empty drums were stored outside and, when ready to be re-filled, would first be rinsed off by Chem-Solv employees with water that had collected in the Pit. (TR4 at 200-204.)

ii. Respondents' Responses to Complainant's Arguments that the MPU Exemption Does Not Apply to the Pit.

In support of its argument that Rinsewater Tank 1 is not eligible for the MPU Exemption, the Complainant contends that Rinsewater Tank 1 is a waste storage tank because "the Pit water ... had to be neutralized to be re-used", the "evidence shows that from time to time, the

wastewater in the acid pit had to be neutralized before it could be re-used,” and “Chem-Solv employees, however, admitted that the wastewater was at least sometimes neutralized before re-use”. (Compl. Br. at 89-91.) In support of this allegation that rinsewater contained in the Pit had to be neutralized before it was re-used, the Complainant references the following portions of the hearing transcript: (1) TR1 at 97-98; and (2) TR3 at 139. The Complainant further cites the following exhibits in support of such argument: (1) CX19 (EPA 375); and (2) CX21 (EPA 658). None of these portions of the record establish that Chem-Solv adjusted the pH of the rinsewater as a precondition to its re-use. For example Ms. Lohman testified as follows: “From the AST, they transferred the water to a tanker truck and they adjusted the pH on the way to the tanker truck, so that as they pumped the water, they – they got the benefit of the mixing as it went into the tanker.” (TR1 at 97-98.) On page EPA 375 of Complainant’s Exhibit 19, Ms. Lohman states: “From the AST, the pit water is transferred to a tanker truck. The pH is adjusted in the tanker by adding acid or caustic as needed as the pit water is transferred from the AST to the tanker.” (CX 19 at EPA 375.) Neither of these statements by Ms. Lohman imply that the Chem-Solv had to neutralize the rinsewater prior to rinsing containers. Such statements can only be understood to address Chem-Solv’s pre-disposal operations, not its drum rinsing operations.

Similarly, Mr. Tickle was asked: “Where did that neutralization take place, back in 2007?” (TR3 at 139.) His response was: “Inside the pit.” (TR3 at 139.) He did not state that neutralization was a necessary pre-requisite to rinsing containers. Instead, this statement by Mr. Tickle is consistent with the other statements discussed above, in that it references pre-disposal pH adjustments by Chem-Solv.

The final reference relied upon by the Complainant in support of its position that “the wastewater in the acid pit had to be neutralized before it could be re-used” is found on page EPA

658 of Complainant's Exhibit 21. (Complainant's Br. at 91.) In this document, which is Chem-Solv's response to Complainant's November 16, 2007, the question posed to Chem-Solv by the EPA was: "How often is the pit cleaned out?" Chem-Solv's response was: "Wash water is pumped from the pit into storage tank adjacent to acid pad when full and tested for pH prior to shipment to processing facility." (CX 21 at EPA 688.) This RFI response, similarly does not support the Complainant's assertion that Chem-Solv had to neutralize the rinsewater contained in the Pit before re-using it. In fact, there is no evidence in the record suggesting, much less establishing, that neutralization is a prerequisite to Chem-Solv's rinsing operations. Instead, Chem-Solv's RFI response and the other exhibits and testimony establish that pH neutralization was only a concern prior to off-site shipment of rinsewater, in the event that Chem-Solv decided to dispose of some rinsewater.

In addition to the arguments set forth above, the Complainant argues that the Pit is disqualified from MPU Exemption because the settled solids allegedly were generated outside the tank. (Complainant's Br. at 92.) The evidence in the record suggests that the waste stream at issue, the settled solids, were generated when certain solids settled out of rinsewater after it was conveyed to the Pit. There is no evidence in the record to support the notion that this settling process occurred outside the Pit. As Mr. Austin testified, the other tanks and totes that intermittently received water from the Pit had no settled solids. (See TR3 at 225.) The point or origin of the particles comprising the settled solids contained in the Pit is irrelevant. For example, compare the process generating the settled solids contained in the Pit to the process generating settled solids contained in an underground gasoline storage tank. Such solids originate at some point "upstream" from the underground storage tank, such as at the refinery. After being transported to the underground storage tank by tanker truck, the solids settle out in

the underground storage tank. Nevertheless, the Pit is subject to the MPU Exemption. A similar example is the solvent-based parts washer discussed above. Solids originate in the parts washing operation that takes place in a tub overlying the tank or container. The settling process occurs within the storage unit that the EPA has concluded qualifies for the MPU Exemption

iii. Under the MPU Exemption, the Settled Solids in the Pit Are Not Subject to Regulation Under RCRA Until They Are Removed From the Tank.

As provided in 40 C.F.R. §261.4(c), and as explained by Mr. Perkins during his testimony, materials generated in any of the categories of MPUs referenced in the MPU Exemption generally are not subject to regulation as “hazardous waste” under RCRA, including the waste determination requirements set forth in 40 C.F.R. §262.11, the permitting requirements found in 40 C.F.R. Part 270, and the tank requirements contained in 40 C.F.R. §265, Subpart J. Stated differently, the exemption set forth in 40 C.F.R. 261.4(c) expressly applies to every regulatory requirement referenced by the Complainant regarding the settled solids, including 40 C.F.R Part 270 (Count I – Operating a Regulated Facility Without a Permit), 40 C.F.R. § 262.11 (Count II – Failure to Make a Waste Determination), 40 C.F.R. §264.193 (Count III – Failure to Have Secondary Containment), 40 C.F.R. §264.192 (Count IV – Failure to Obtain a Tank Assessment), 40 C.F.R. §264.195 (Count V – Failure to Conduct Inspections), 40 C.F.R. §264.195 (Count VI – Failure to Comply with Subpart CC Emissions Standards for Tank), and 40 C.F.R. §264.197 (Count VII – Failure to Properly Close a Regulated Tank).

As applied in the context of the Pit, Mr. Perkin’s testimony shows that the settled solids contained in the Pit did not become a regulated waste until they were physically removed from the tank for the purpose of disposal, and not before that point in time. As such, at the time of the sampling event, the settled solids contained in the Pit were not a regulated waste under RCRA.

For the reasons set forth above, Chem-Solv is not liable for the violations alleged in Counts I through VII of the Complaint.

2. Respondents' Evidence Showed that Chem-Solv Properly Characterized the Settled Solids Contained in the Pit.

Contrary to the Complainant's claim in Count II that Chem-Solv failed to characterize the settled solids contained in the Pit, the evidence offered by the Respondents at the hearing establishes that Chem-Solv had, in fact, previously characterized the settled solids. (TR4 at 237-239.) Specifically, samples of the settled solids contained in the Pit collected and analyzed by Chem-Solv in May 2006, indicated that such settled solids did not meet the regulatory definitions of "hazardous waste" under 40 C.F.R. § 260.10 and 40 C.F.R. § 261.3. Thereafter, Chem-Solv managed the settled solids contained in the Pit in accordance with its knowledge of the results of the analysis of the samples of settled solids it collected in May 2006. (See TR4 at 235-241.) Based on Chem-Solv's generator knowledge of the particulars of its drum rinsing process and the results of the analysis of the samples of settled solids it collected in May 2006, there was no basis to expect chloroform, tetrachloroethene or trichloroethene to be in the Pit. (See TR4 at 240.)

For these reasons, the evidence offered to the Court by the Respondents demonstrates that the violations alleged in Counts I through VII of the Complaint are without merit, and Chem-Solv is not liable therefor.

C. The Drum of Sodium Hydrosulfide Observed by the EPA During the Sampling Event Was Not "Solid Waste."

The Complainant alleges that a 55 gallon drum of sodium hydrosulfide was observed during the May 2007 sampling event and that such drum of sodium hydrosulfide was shipped off site as a hazardous waste on February 20, 2008. (Complainant's Br. at 19.) The Respondents'

evidence, being the only evidence addressing this issue, shows that, even though some sodium hydrosulfide was shipped off site as a hazardous waste on February 20, 2008, the sodium hydrosulfide observed by the EPA during the Sampling Event was not a “solid waste” or a “hazardous waste” on that date. (See TR3 at 180-182.) This is the case, because, the drum of sodium hydrosulfide observed by the EPA during the sampling event was one of several partial drums of sodium hydrosulfide product that were in Chem-Solv’s inventory at the Property at that time. (TR4 at 192-193.)

The Respondents’ evidence further demonstrates that the sodium hydrosulfide in its inventory at the time of the sampling event was useable product. (See TR4 at 192.) Thereafter, Chem-Solv contacted one of its customers to determine if it wanted this product. (See TR4 at 192.) This customer committed to purchasing two such drums of sodium hydrosulfide, but they would not take delivery until the fall of 2008. (See TR4 at 192-193.) The Respondents’ evidence additionally indicates that, after Chem-Solv determined that some, but not all, of its inventory of sodium hydrosulfide would be sold to this customer later in 2008, it decided to dispose of the remainder of the product, rather than continue to store it. (See TR4 at 194.) This decision by Chem-Solv to dispose of the remainder of its inventory of sodium hydrosulfide was based upon its perception that the EPA had specific concerns about such material, despite the fact that it was a marketable product at that time. (See TR4 at 194.)

Consequently, Chem-Solv shipped the unneeded drum of sodium hydrosulfide off site as hazardous waste on February 20, 2008, the same month that its customer advised that it only wanted a portion of such product in Chem-Solv’s inventory. (See TR4 at 194-195.) In October 2008, Chem-Solv shipped the desired portion of Chem-Solv’s inventory of sodium hydrosulfide

to its customer as planned. (See TR4 at 275; See also RX 15 at CS 196; See also RX2 at CS003, ¶ 7.)

The Complainant failed to meet its burden of proof that the sodium hydrosulfide drum observed by EPA and VADEQ inspectors on May 23, 2007 contained a hazardous waste. The Complainant's evidence on this issue is merely that (1) inspectors observed a drum that appeared to be leaking on May 23, 2007; and (2) a shipping manifest shows that one drum of hydrogen sulfide was shipped off as hazardous waste on February 20, 2008. (CX 23 at EPA 1097, 1098.) The Respondents ask this court to infer that the observed drum and the shipped drum were the same drum. The evidence in the record does not clearly establish that they were the same drum. (See TR4 at 273.) However, even if they were the same drum, the fact that sodium hydrosulfide was shipped as hazardous waste in February 2008 does not establish that it was hazardous waste as of May 2007 because it was, at that earlier time, a product in Chem-Solv's inventory. A leaking drum, if it is believed that the drum in questions was leaking, does not prove the contents to be waste.

The Respondents and the Complainant offered ample evidence to support the fact that sodium hydrosulfide was a product in Chem-Solv's inventory. At the time of the EPA's May 15, 2007 Inspection and the May 23, 2007 Sampling Event, Chem-Solv had at least three partial drums of sodium hydrosulfide in inventory at its Roanoke facility. (Affidavit by Jamie Austin, ¶6; TR4 at 192.) Jamie Austin testified that these three drums were heels from a bulk drum-off. (TR4 at 192.) Chem-Solv employees evaluated the drums of sodium hydrosulfide observed by the inspectors and determined it to be a useable product. (RX 30 at CS 311; TR4 at 192-193.) The Respondents' evidence on this fact is supported by the Complainant's own witness, Ms. Lohman, who testified that Mr. Lester "reworked approximately two-thirds of the drums back

into different products, and ... that they were working as quickly as they could to ... evaluate the remainder of the materials in question.” (TR1 at 64.) Jamie Austin testified that Chem-Solv had a customer, CH Patrick Corporation, which was a consumer of sodium hydrosulfide and used it intermittently in a batching process. (TR4 at 192-193.) CH Patrick committed to taking a portion of Chem-Solv’s stock of hydrogen sulfide by the end of 2008 and the rest later if still available. (Affidavit by Jamie Austin, ¶7; see TR4 at 193.) Therefore, the sodium hydrosulfide drum observed by inspectors was not a waste but, rather, was a useable product.

It makes no difference that the sodium hydrosulfide was stored in a container that was less than pristine. It was part of Chem-Solv’s business operations to use refurbished drums. Furthermore, the fact that a product may be stored in a leaking drum does not make the product waste. The significant fact is that Chem-Solv’s business involves receiving bulk shipments of hydrogen sulfide, which it then apportions into drum for purposes of re-distributing to customers like CH Patrick.

Indeed, it also makes no difference that the ultimate Bill of Lading suggests that there was no charge to CH Patrick. Chem-Solv contacted CH Patrick in January 2008 but shipment did not occur until October 2008. (TR4 at 274.) CH Patrick was a long-time customer, presumably with a credit arrangement with Chem-Solv.

Even though some hydrogen sulfide was shipped offsite as a hazardous waste on February 20, 2008, it was not a “solid waste” or a “hazardous waste” on May 23, 2007.

In summary, the Respondents’ evidence conclusively establishes that the drum of sodium hydrosulfide observed by the EPA during the sampling event did not contain “solid waste” at that time. Thus, for these reasons, in addition to those set forth above, Chem-Solv is not liable for the violations alleged in Count I of the Complaint.

D. Empty Aerosol Cans Observed During the Inspection and the Sampling Event Had Been Properly Characterized.

The Complainant claims that Chem-Solv did not properly characterize aerosol cans that the EPA allegedly observed in a solid waste receptacle during the Sampling Event. (Compl. ¶ 43-44.) The evidence presented to the Court during the hearing demonstrates that this claim is without merit. In fact, Chem-Solv had previously concluded that such aerosol cans, when emptied of their contents using standard means, such as depressing the spray nozzle until no additional material comes out, met the definition of “empty” as that term is defined in 40 C.F.R. § 261.7. Chem-Solv personnel had been instructed to only deposit completely “empty” aerosol cans into solid waste receptacles located on the Property and that any and all non-empty aerosol cans were to be used until they were, in fact, “empty” or, if an aerosol can were determined to be inoperable before they were empty, such personnel were instructed to return it for credit to the vendor from which it had been purchased. (TR4 at 249-250.)

For these reasons, the Respondents’ evidence establishes that Chem-Solv made a waste determination concerning the aerosol cans observed by the EPA during the sampling event based on generator knowledge. Thus, the Complainant has not proved by a preponderance of the evidence that Chem-Solv is liable for the violations alleged in Count II of the Complaint concerning the aerosol cans at issue in this proceeding.

E. Samples of Rinsewater and Settled Solids Collected by the EPA During the Sampling Event Do Not Properly Characterize these Materials.

Assuming for the sake of argument that the rinsewater and settled solids contained in the Pit met the definitions of “discarded materials” and “solid wastes”, the Complainant failed to prove by a preponderance of the evidence that such materials met the definition of “hazardous waste”, because as Mr. Perkins explained to the Court, evidence shows that the samples collected

by the EPA during the sampling event do not meet the EPA's own standards for sampling. (See TR3 at 217-220; TR3 at 233-236.) Accordingly, the analytical results upon which the violations alleged in Counts I through VII of the Complaint are based are not reliable or valid. Specifically, the data upon which the Complainant's conclusion that the rinsewater and the settled solids contained in the Pit is based were flawed in the following respects: (1) they were not representative of the ultimate waste streams generated and shipped off site for disposal; and (2) they were collected using sampling protocols and methodology that is wholly inconsistent with established EPA procedures. (See TR3 at 218-220; TR3 at 225-230; TR3 at 233-236; RX 23, 24, 25, 26 and 27.)

The evidence offered by the Respondents includes certain regulations promulgated by the EPA, certain guidance documents published by the EPA and certain guidance authored by other professional organizations, such as the American Society for Testing and Materials ("ASTM") providing detailed sampling requirements, which regulations and guidance were promulgated and published to ensure that potentially hazardous wastes are sampled and analyzed in a reliable and defensible manner. The methodology used by the EPA did not conform to such regulatory requirements or such published guidance documents and, thus, the samples collected by the EPA generated analytical results that are not representative of the waste streams at issue in this matter. (See TR3 at 217-218.) Consequently, the evidence presented to the Court at the hearing shows that the Complainant's conclusion that the rinsewater and the settled solids met the definition of "hazardous waste" under 40 C.F.R. §§ 260.10 and 261.3 cannot reasonably be based upon EPA's flawed analytical results.

The Complainant contends that pit water constitutes a hazardous waste based on one positive analytical result for the substance chloroform. The chloroform yield reported was 6.1 ppm. The regulatory threshold is 6.0 ppm.

There was general discussion among experts offered up by the Complainant, namely Dr. Lowry and Ms. Zawodny, that speaks to the reliability of these results. Specifically, Dr. Lowry was questioned and candidly acknowledged that his confidence in the 6.1 ppm chloroform value would not be as high as his confidence level as to other chemicals of concern. (TR2 at 103.) When questioned by the Court and counsel for the Respondent, this same witness, Dr. Lowry, confirmed that a very small margin of error would put the chloroform quantity below the regulatory threshold. (TR2 at 124.)

When questioned about analytical results relating to chloroform, Ms. Zawodny commented that the criteria in question for the instrument used would render anything within 20 percent to be highly accurate. (TR2 at 57.) Obviously, however, any variation over 2 percent would yield a result that would make the subject water non-hazardous. Based on such scientific inaccuracy, it must be concluded that the Complainant cannot sustain its burden of proof by a preponderance of the evidence that any of the water related to the subgrade tank was hazardous.

The natural expected variability of the chloroform concentrations throughout the tank makes the alleged exceedence even more uncertain. This variability was not accounted for by the singular grab sample that was collected at the surface of the tank. The tank was in use and new water introduced creating agitation which together with the added dynamic of potential chloroform creation via the interaction of chlorine with inorganics, (TR3 at 197-199), even more strongly mandates the use of multiple grab samples being collected to ascertain the true concentration of chloroform.

The rinsewater and settled solids contained in Rinsewater Tank No. 1 cannot be considered “hazardous waste” unless they are proven by the Complainant to meet the definition of “hazardous waste” set forth in 40 C.F.R. §§ 260.10 and 261.3. Thus, due to these fatal flaws in the sampling and analytical protocols and methodology used by the EPA, the Complainant has not proved by a preponderance of the evidence that the rinsewater and the settled solids were “hazardous wastes.”

Therefore, for these reasons, in addition to those set forth above, the evidence presented to the Court by the parties at the hearing demonstrates that Chem-Solv is not liable for the violations alleged in Counts I through VII of the Complaint, all of which are based upon the EPA’s unreliable and invalid analytical results.

VIII. Respondents’ Response to Proposed Penalty.

Should the deliberation of this matter reach a stage where penalties are considered, there are a number of facts and factors that should be considered. One such consideration is the fact that the RCRA Civil Penalty Policy (June 2003) guidance is just that, guidance, and not statutory or regulatory mandate. It is clear that that guidance is viewed as instructive by most courts but clearly is not binding on the court including the present.

It appears from the record, particularly the testimony of Mr. Cox, that the waste streams in question relate to (1) the sludge and water in the underground tank or pit, (2) a drum of sodium hydrosulfide, and (3) certain aerosol cans noted in a trash container. Penalty considerations, however, mainly related to the pit and sodium hydrosulfide. (TR3 at 72, 76, 77.) With specific respect to the aerosol cans, it appears from the record that the EPA gives little weight to that alleged offense in connection with the penalty assessment. In fact, no specific penalty amount was assessed as to the aerosol containers. (TR3 at 79.) Further, as the Court

observed, there is no evidence that the cans were not empty as defined in the regulations. TR3 at 119. Accordingly, the Respondents urge that no consideration be given to the alleged violations relating to aerosol cans.

With respect to sodium hydrosulfide and related counts, the Respondents' evidence is not effectively contradicted that the material that is identified by the Complainant as being waste was, in fact, not waste but rather was usable product at all times, most of which was shipped in the ordinary course of commerce to a legitimate customer. One partial drum of sodium hydrosulfide, in the light of criticism from the regulators, was disposed of and, since its chemical content dictated, it was declared to be hazardous waste and disposed of properly and in accordance with all rules and regulations. (*See* RX 14.)

In connection with the sodium hydrosulfide-related violations, it must also be noted that it was nevertheless product, even if contained in a leaking drum. Further, there is no question that the ultimate disposition of the sodium hydrosulfide was consistent with law. Accordingly, no penalty should flow from allegations relating to sodium hydrosulfide material.

As to the Pit, there are several general observations as follows:

Based on generator knowledge, which concededly is an effective tool recognized as an appropriate method of making waste determination, the facility had no reason to believe that the Pit contained in any way tetrachloroethylene or trichloroethylene. (TR3 at 63; TR4 at 248, 249.) Further, the inspectors lacked the same suspicion. (TR3 at 68, 69, 70.) Imperfect as it may have been, the facility did have the benefit of prior analytical in 2006 indicating that material from the pit was non-hazardous showing no detections of tetrachloroethylene or trichloroethylene, RX 12, and further had a long history of waste water disposal by way of commercial carrier indicating that materials from the pit passed freely along the roads of

commerce without objection. To the same point and to the extent analyzed by the regulators, during sampling in May of 2007, of ten containers ostensibly containing pit-related material, nine showed no evidence of hazardous characteristics whereas only one displayed a pH of 1.58. (CX 18 at EPA 333.) That material and material similarly stored had been the subject of prior DEQ inspections and, with the knowledge of the Virginia DEQ, were being managed by being worked in to the process and used or otherwise dispensed with. (TR1 at 64.)

Further with respect to the pit and to the extent there is a penalty consideration, the EPA endeavors to impose multi-day penalties in many counts. It should not and cannot be overlooked that in August or September of 2007 but no later than October 1, 2007, (TR3 at 70-71), EPA had full analytical results upon which they now base their contention that pit water and pit sludges were hazardous wastes, yet did not share these with the facility. (TR3 at 71.) In the spirit of fundamental fairness, this Court, within its sound discretion, should not consider imposing any penalties for multi-day violations, particularly those that could have been avoided by simple disclosure.

Likewise with respect to the pit, the Complainant finds comfort in what it would have this Court believe is a spotty but negative regulatory history. An examination of the record, however, is such that none of the criticisms, subjects of warning, or alleged violations were resolved or inactive as of the May 15-23, 2007, inspection event, all without findings of liability or imposition of penalties.

In fact, Ms. Lohman confirmed that the DEQ considered its earlier warnings to have been resolved to the satisfaction of the DEQ at that time. Accordingly, the criticisms of Chem-Solv, including those relating to the pit or drum management, never rose to the level of penalty assessment or injunctive relief. (TR1 at 185.)

The Complainant's primary witness relating to penalty consideration is Mr. Cox who presented the Court with a summary of the Complainant's assessment and consideration of penalties. (CX 67 and 68.)

In that context, there are several further general observations with respect to the penalty aspect of this matter. The much discussed pit no longer exists because of voluntary response from the facility. Within days of receiving the initial analytical results indicating the possibility of unwanted contaminants, namely TCE and PCE, Mr. Austin directed that the tank be emptied and removed and all contents disposed of. This was done before Chem-Solv received the February 2008 request for information from Mr. Cox which included the analytical results from EPA testing. Therefore, the offending mechanism is gone, not to return. Further as to the pit, it is obvious from the record in this case and, particularly, the briefs now being submitted, that the issues at hand present genuine issues of fact as well as issues of law. If the Court finds there to be a violation, it will be based on the application of rules having no crystal clear interpretation or limited guidance. In this same vein, it must be concluded that any violation was unintentional and has now been voluntarily corrected. Accordingly, a good faith effort to comply as recognized in the RCRA Civil Penalty Policy, June 2003, applies, which should be coupled with an adjustment factor recognized as to the degree of wilfulness and/or negligence.

IX. The Complainant's Motion to Amend to Seek Joint and Several Liability Should be Denied.

This Court should deny the Complainant's request to amend its Complaint to seek joint and several liability against Respondent Chem-Solv and Respondent Austin Holdings, LLC on Counts II through VII. The Court has already denied this request, and the Complainant gives no reason for reconsideration of that ruling. Furthermore, amendment at this late stage would unduly prejudice Austin Holdings.

Counts II through VII are currently against Chem-Solv only, and the Complainant has calculated its proposed penalty as to Chem-Solv only. Based on the Respondents' statement that Austin Holdings owns the parcel on which the Pit is located, the Complainant requested an order "conforming the pleadings to the facts" to allege liability against Chem-Solv as operator, and against Austin Holdings as owner. (Comp. Acc. Dec. Reply at 4, ¶22). This Court denied the Complainant's request for leave to amend when it entered the Order on Complainant's Motion for Partial Accelerated Decision as to Liability (Order, February 2, 2012.)

No new facts or evidence have come to light that warrant reconsideration of this ruling. At best, the evidence at trial was that ownership of the Pit is still uncertain. Ken Cox, in his testimony on the proposed penalty, stated that "we are still not sure" who owns what on the premises. (TR3 at 40.) The ownership of certain distinct parcels is clear. However, no survey evidence of the location of the Pit exists and graphic evidence in the record is inconclusive.

The Court's "recognition" at trial that the Complainant now seeks joint and several liability is not the same as granting leave to amend. (TR3 at 123; *see* Complainant's Br. 9 & n.2.) The Complainant acknowledges this procedural problem in its own post-hearing brief, stating in a footnote that the Court may deem it necessary or appropriate for a formal amendment. (Br. 9 & n.2.) The Complainant suggests that amending the pleadings at this stage is a mere formality, a ratification of the Court's approval of joint and several liability. The Court, however, has already denied the Complainant's motion, as discussed above. Amending the Complaint, therefore, is not a mere formality, but instead requires a full evaluation by this Court of the propriety of granting leave to amend under the rules and regulations governing this proceeding.

The Consolidated Rules of Procedure at 40 C.F.R. part 22 do not specify the circumstances under which ALJs should grant motions to amend complaints; rather, they more

generally state that after a respondent has filed an answer, the “complainant may amend the complaint only upon motion granted by the Presiding Officer.” 40 C.F.R. § 22.14(c). In the absence of administrative rules on this subject, it is appropriate to consult the Federal Rules of Civil Procedure applicable in analogous situations. See *In re: Lazarus, Inc.*, 1997 EPA App. LEXIS 27, 29 n.25 (E.A.B. Sept. 30, 1997) (using Federal Rules to aid in the interpretation and application of part 22 rules); *In re: Asbestos Specialists*, 1993 EPA App. LEXIS 7, 17-18 & n.20 (E.A.B. Oct. 6, 1993) (same).

While the Federal Rules of Civil Procedure adopt a permissive stance toward amending pleadings, the decision of whether to grant or deny a motion to amend is within the discretion of the court. See *Foman v. Davis*, 371 U.S. 178, 182 (1962). One of the most significant factors a court must consider is whether an amendment would “unduly prejudice” the opposing party. *Lazarus*, 1997 EPA App. LEXIS, at *32 (discussing *Foman* factor of undue prejudice²).

Where delay in amending the complaint would unduly prejudice the opposing party, an ALJ does not abuse its discretion in denying the motion to amend. *Carroll Oil Co.*, 2002 EPA App. LEXIS 14 (E.A.B. July 31, 2002). Prejudice is usually manifested by lack of opportunity to respond, or by a need for additional pre-hearing fact-finding and preparation that cannot be readily accommodated. *In re: Lazarus, Inc.*, 1997 EPA App. LEXIS, at *29. Whether an amendment is prejudicial is often determined by the nature of the amendment and its timing. The further the case has progressed before judgment is entered, the more likely it is that amendment will prejudice the opposing party. *Newport News Holdings Corp. v. Virtual City Vision*, 650 F.3d 423, 439 (4th Cir. 2011).

²The *Foman* case sets forth the following factors for a court to consider in considering a motion to amend: “In the absence of ... undue delay, bad faith or dilatory motive on the part of the movant, ... **undue prejudice to the opposing party**, ... [or] futility of amendment,” the amendments to pleadings should be permitted.” *Foman*, 371 U.S. at 182 (emphasis added).

Here, both the nature and timing of the proposed amendment would unduly prejudice Austin Holdings. Allowing the Complainant to amend to allege joint and several liability would permit substantive new claims against Austin Holdings. Austin Holdings has had no reason or opportunity to prepare individualized responses to Counts II through VII, on issues of either liability or penalty. Indeed, Austin Holdings is a separate legal entity from Chem-Solv, with its own rights, responsibilities, and defenses. The Complainant's new claims would require additional fact-finding, which is not feasible in this post-hearing phase.

The *Carroll Oil* case is particularly instructive on this issue. In that case, the ALJ denied leave to amend to add new parties as respondents. These parties were entities related to the respondent already named in the complaint. *Carroll Oil*, 2002 EPA App. LEXIS at *30. One of the proposed new respondents was an individual who served as the president, vice president, treasurer, secretary, and sole stockholder of the original respondent. *Id.* at *15. The other proposed new respondent was an "affiliated entity" which may have owned the underground storage tanks at issue in the case. *Id.* at *30. The complainant filed its motion to amend two weeks before an agreed-upon motion deadline, which was over a month before trial. *Id.* at *34 n.11; *see id.* at *32. The Environmental Appeals Board upheld the ALJ's order denying the motion to amend: the new entities would not have sufficient time to prepare appropriate defenses, even though they were related to the named respondent. *Id.* at *39-40.

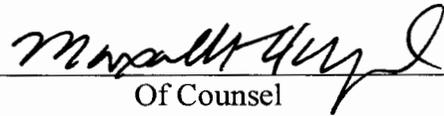
So, too, here. The proposed eleventh-hour addition of substantive claims against Austin Holdings is unduly prejudicial. The time for amendment has come and gone. The Court has already ruled on the issue, and the Complainant has not shown the requisite justification for reconsideration. Instead, the Complainant suggests that the proposed amendment is a mere

formality. Austin Holdings, however, is a separate legal entity with its own defenses. Granting leave to amend at this late stage is therefore unduly prejudicial to Austin Holdings.

Dated: August 30, 2012

Chem-Solv, Inc. and Austin Holdings-VA, L.L.C.

By



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BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

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

CERTIFICATE OF SERVICE

I certify that, on August 30, 2012, I sent by Federal Express, next day delivery, a copy of the Respondents' Post-Hearing Brief to the addressees listed below.

The Honorable Susan L. Biro
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