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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
	)	
	)	Proceeding Under Section 3008(a) of the Resource Conservation and Recovery Act, as amended 42 U.S.C. Section 6928(a)
Respondents.	)	
	)	
Chem-Solv, Inc. 1111 Industry Avenue, S.E. 1140 Industry Avenue, S.E. Roanoke, VA 24013,	)	
	)	
Facility.	)	

RESPONDENTS' POST-HEARING REPLY BRIEF

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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 § 260.10

40 C.F.R. 261.1

40 C.F.R. § 261.2

40 C.F.R. § 261.3

40 C.F.R. § 261.4

40 C.F.R. § 261.33

40 C.F.R. §262.11

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. §265, Subpart J

40 C.F.R. Part 270

OTHER

RCRA/Superfund Industry Assistance Hotline monthly report for May 1986 (530R861130)

RCRA/Superfund RCRA Industry Assistance Online monthly report for December 1986 (RO12790)

Jay Warren and Nancy Perkinson, Monthly Report – RCRA/Superfund Industry Assistance Hotline Report, 503R86113, U.S. EPA Office of Solid Waste and Emergency Response, 3-4 (May 1986)

Webster's Third New International Dictionary 1378

EPA GUIDANCE

RO12790

EPA ADMINISTRATIVE DECISIONS

General Motors, 2008 EPA App. LEXIS 30 (E.A.B. June 20, 2008)

In re Mr. C.W. Smith, Mr. Grady Smith, & Smith's Lake Corp., CWA-04-2001-1501, 2004 EPA ALJ LEXIS 128 (2004) (Biro, J.)

In re Carroll Oil Company, 10 E.A.D. 635, 650 (2002)

In re J.V. Peters & Co., Inc., 2 E.A.D. 297 (1986)

In re Zaclon, Inc., Zaclon LLC, and Independence Land Dev. Co., RCRA-05-2004-0019, 2006 EPA ALJ LEXIS 19 (Biro, J.)

Port of Oakland and Great Lakes Dredge and Dock Co., MPRSA Appeal No. 91-1, 4 E.A.D. 170, 205 (EAB Aug. 5, 1992

I. 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 Post-Hearing Reply Brief (the "Respondents' Reply") addressing certain issues raised by the Complainant in Complainant's Post-Hearing Reply Brief (hereinafter cited as "Complainant's Reply at__"), dated October 1, 2012. Respondents' Reply also incorporates by reference certain information and arguments set forth in Respondents' Initial Post-Hearing Brief (hereinafter cited as "Respondents' Initial Brief at __"), dated August 30, 2012.

II. ARGUMENT

A. The Complainant Misconstrues Respondents' MPU Exemption Defense.

In Complainant's Reply, the Complainant asserts that the Respondents argue that a subgrade rinsewater storage tank formerly located at Chem-Solv's Roanoke, Virginia facility, sometimes referred to by the parties as the "Pit", was exempt from regulation under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq. ("RCRA") under the exemption set forth in 40 C.F.R. § 261.4(c), which is commonly referred to as the "Manufacturing Process Unit" exemption (hereinafter referred to as the "MPU Exemption"). (Complainant's Reply at 8.) This assertion by the Complainant belies the fundamental elements of Respondents' defenses to the alleged violations. It further demonstrates - as the Respondents have understood throughout the five-year history of this matter – that the Complainant fails to comprehend the nature of the Respondents' position opposing the alleged violations set forth in the Complaint. As explained and articulated in detail in the

Respondents' Initial Brief at 27-43, the Court should separately consider whether each of the categories of material contained in the Pit, including the rinsewater and the settled solids, was a regulated hazardous waste at the time they were sampled by the United States Environmental Protection Agency's (the "EPA") inspectors in May of 2007. As such, the Respondents will address each of these categories of materials contained in the Pit separately below.

The Complainant's muddled arguments concerning the application of the MPU Exemption to the Pit, which focuses on the nature of Chem-Solv's use of the rinsewater contained in the Pit, suggests that it is the Respondents' position that the MPU Exemption exempts the rinsewater from regulation under RCRA. This is not true. Although the evidence in the record concerning the nature of Chem-Solv's use and reuse of the rinsewater establishes that the Pit is subject to the MPU Exemption, it is the same evidence concerning Chem-Solv's use of the rinsewater contained in the Pit that establishes that the rinsewater was not a "solid waste" at the time it was sampled by the EPA's inspector in May of 2007. Since the evidence in the record establishes that the Pit is subject to the MPU Exemption, this exemption, which is set forth in 40 C.F.R. § 261.4(c), operates to exempt the settled solids contained in the Pit from regulation as a "hazardous waste" until such settled solids were removed from the Pit for disposal. This distinction is utterly lost in the Complainant's treatment of the application of the MPU Exemption in the Complainant's Reply. (Complainant's Reply at 8-17.)

B. The Assumptions Upon Which the Complainant's Arguments Concerning the Application of the MPU Exemption Are Based Reveal a Fundamental Misunderstanding of the Facts in the Record Concerning Chem-Solv's Drum Rinsing Operations.

The Complainant's arguments concerning the application of the MPU Exemption to Pit in the context of the facts in the record regarding Chem-Solv's drum rinsing operations are based upon several unsubstantiated assumptions. First, the Complainant assumes that Chem-Solv did not reuse rinsewater to rinse additional drums containing Chem-Solv's chemical products or in the production

of a marketable water based anti-freeze conditioning agent product called FreezeCon. (Complainant's Reply at 9-10.) This assumption is not supported by the weight of the evidence in the record.

Chem-Solv is in the business of repackaging chemical products from bulk storage containers, such as tanks or tanker trucks, into smaller containers, such as drums or totes, in preparation for selling such chemical products to its customers. As explained in Respondents' Initial Brief, as part of its chemical products repackaging business operations, in 2007, Chem-Solv rinsed off the exterior surface of drums in order to remove dust, dirt, and debris that had accumulated during outdoor storage of such drums. (Respondents' Initial Br. at 30; TR3 at 199-200l; TR4 at 127-129, 133.) The rinsewater used to rinse the exterior of such drums on the acid pad was collected in the Pit. (Respondents' Initial Br. at 30; TR3 at 127-129; TR4 at 199.) The rinsewater that was contained in the Pit was then pumped out of the Pit into an above ground storage tank (the "AST") adjacent to the Pit through a diaphragm pump. (TR3 at 130, 133-34; TR4 at 203.) After it was pumped into the AST, Chem-Solv employees reused rinsewater to rinse off the exterior surface of additional drums containing Chem-Solv's chemical products in the same manner. (TR3 130; TR4 202-203.) In 2007, the drum rinsing portion of Chem-Solv's business operations involving the repackaging of chemical products from bulk storage containers into drums in preparation for sale of such chemical products to its customers was designed and implemented with the intent of conserving water by limiting its consumption of tap water, which, in turn, reduced Chem-Solv's operating costs. (TR4 at 205.)

Chem-Solv also is in the business of blending certain chemical products and marketing such blended chemical products for sale to its customers in certain industries. An example of such a blended chemical product is the glycol and water based anti-freeze conditioning agent product called FreezeCon. Chem-Solv sold large quantities of FreezeCon to its coal industry customers. (*See* RX 3, 4 and 5.) In preparation for transportation of coal in cold weather, these customers applied FreezeCon directly to coal during loading into rail cars. (TR3 137-138; TR4 at 212.) The evidence

in the record establishes that Chem-Solv used rinsewater that had collected in the Pit as a raw ingredient in the blending of FreezeCon. (TR3 at 134-138; TR4 at 212-213; RX 3.) Like Chem-Solv's intent in reusing rinsewater that had collected in the Pit for rinsing additional drums containing Chem-Solv's chemical products during Chem-Solv's chemical repackaging operations, the fundamental purpose of Chem-Solv's use of rinsewater in blending FreezeCon as part of its chemical product blending operations was to further reduce operating costs by further limiting its consumption of tap water.

In the Complainant's Reply, the Complainant references certain hearsay statements purportedly made by Cary Lester in support of its position that the Respondents' evidence concerning Chem-Solv's reuse of the rinsewater contained in the pit to rinse additional drums and in the manufacturing of a marketable product, FreezeCon is implausible and incredible. (Complainant's Reply at 9-10.) In examining the hearsay statements attributed to Mr. Lester in the record, the Court should consider the credibility of the source of such statements, Ms. Lohman. The Respondents' Initial Brief includes a detailed discussion of the evidence in the record that demonstrates Ms. Lohman's negative bias against Chem-Solv. (Respondents' Initial Br. at 23-26.) Moreover, the Respondents' Initial Brief also includes a detailed discussion of the Complainant's unjustified reliance upon hearsay statements made by Cary Lester. (Respondents' Initial Br. at 26-27.) For the reasons set forth in the above-referenced sections of the Respondents' Initial Brief, the Court should give little weight to the hearsay statements attributed to Mr. Lester, which have been communicated to the Court through the lens of Ms. Lohman's negative bias against Chem-Solv.

Second, the Complainant assumes that Chem-Solv reused the rinsewater as described above but that it was necessary for Chem-Solv to neutralize the rinsewater contained in the Pit before it could be reused. (Complainant's Reply at 9-11.) Although, as discussed above, the Complainant's assumption that Chem-Solv reused the rinsewater is supported by the weight of the evidence in the record, its assumption that it was necessary for Chem-Solv to neutralize the rinsewater contained in

the Pit before it could be reused is not based on any evidence found in the record. The Complainant attempts to use the absence of any evidence in the record concerning whether it was necessary to neutralize the rinsewater prior to reuse to support the arguments asserted in the Complainant's Reply. (Complainant's Reply at 10.) Contrary to the Complainant's assertion set forth on page 10 of the Complainant's Reply that there is no testimony in the record establishing that neutralization did not occur prior to reuse, the weight of the evidence in the record establishes that neutralization only occurred prior to off-site disposal of rinsewater, in the event that Chem-Solv decided to dispose of some rinsewater. Instead, the evidence contained in the record suggests that the opposite is true.

For example, Ms. Lohman testified that: "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.) Moreover, 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 establish or even 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.) Mr. Tickle 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.

Additionally, on page EPA 658 of Complainant's Exhibit 21, which is Chem-Solv's response to Complainant's November 16, 2007 request for information, 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 response by Chem-Solv to the Complainant's request for information, similarly does not support the Complainant's assumption that Chem-Solv had to neutralize the rinsewater contained in the Pit before re-using it. It is clear that contrary to the Complainant's assumption, there is no evidence in the record suggesting, much less establishing, that neutralization is a prerequisite to Chem-Solv's rinsing operations or other reuse. Instead, the evidence in the record establishes 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.

Without any evidence to support its assumption that it was necessary for Chem-Solv to neutralize the rinsewater prior to reusing it, the Complainant argues in its Reply that it is simply "inconceivable" that Chem-Solv's reuse of the rinsewater could have occurred prior to neutralization. This argument is not based on the evidentiary record nor inferences therefrom. Instead, it is purely based on speculation about Chem-Solv's business operations, which Complainant apparently still fails to comprehend at this late stage of this matter.

C. The Rinsewater Contained in the Pit was not a Solid Waste.

As explained in Respondents' Initial Brief, 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 regulation under RCRA. (Respondents' Initial Br. at 28.) The weight of the evidence in the record in this matter establishes that the rinsewater contained in the Pit was not "solid waste" within the meaning of 40 C.F.R §

260.10[1] or 40 C.F.R. § 261.2[2] because the rinsewater had not been "abandoned" as that term is defined in 40 C.F.R. § 261.2(b)[3] and 40 C.F.R. 261.2(c).

Since the rinsewater contained in the Pit was reused to rinse the exterior surface of additional drums containing Chem-Solv's chemical products and as a raw material in a the blending of a marketable product, FreezeCon, the rinsewater contained in the Pit at the time of the EPA's May 2007 inspection was not a "discarded material" within the meaning of 40 C.F.R. § 261.2(b). (TR4 at 6-7.) Instead, the rinsewater contained in the Pit did not become a "discarded material", and, thus, it did not become a "solid waste" until Chem-Solv made a decision to dispose of it, and, thereafter, actually pumped it from the AST or the Pit into a tanker truck for offsite disposal. (*See* TR3 at 191-196.) The rinsewater did not become a "solid waste" until such point in time because, up until the very moment that the rinsewater was pumped from the AST or the Pit for disposal, it could have been reused by Chem-Solv to rinse additional drums or as a raw material in the blending and production of FreezeCon.

Moreover, as explained in the Respondents' Initial Brief, Chem-Solv's drum rinsing operation satisfied the elements of the EPA's continued use policy. (Respondents' Initial Br. at 32; TR3 at 192-194.) For the reasons set forth above, the rinsewater in the Pit at the time of the EPA's May 2007 inspection was not yet "spent." Therefore, the rinsewater contained in the Pit was not a "spent material" for purposes of determining whether it meets the definition of a "solid waste" under 40 C.F.R. § 261.2(e)(1).

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[1] 40 C.F.R. § 260.10 provides that the term "solid waste" is defined as "solid waste defined in [40 C.F.R. § 261.2]".

[2] 40 C.F.R. § 261.2(a)(1) defines the term "solid waste" 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." 40 C.F.R. § 261.2(a)(2)(i) defines the term "discarded material" 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".

[3] 40 C.F.R. § 261.2(b) provides that materials are "discarded material" and, thus, "solid waste" if they are "abandoned" by being: (1) disposed of; 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.

In its Reply, the Complainant argues that Chem-Solv's use of the rinsewater contained in the Pit for rinsing dirt and debris off of the exterior surface of additional drums containing Chem-Solv's chemical products and in the production of a marketable product, FreezeCon, disqualifies the Pit from being subject to the MPU Exemption. The Complainant's arguments concerning the characterization of rinsewater suggest that the Complainant misunderstands the evidence in the record illustrating Chem-Solv's business operations, and the nature of the Respondents' arguments regarding how the Court should characterize the rinsewater contained in the Pit at the time of the EPA's inspection in May of 2007.

Concerning Chem-Solv's use of rinsewater as a raw material in the blending of its FreezeCon product, the Complainant argues in its Reply that the use of rinsewater in such context makes FreezeCon a "solid waste". (Complainant's Reply at 10.) This argument is based upon the conclusory assertion that, under 40 C.F.R. § 261.2(c)(2)(B), " a secondary material incorporated into a fuel which is to be burned continues to be a solid waste, as is any fuel that incorporates such material." (Complainant's Reply at 10.) This argument is based on strained logic and an apparent continued misunderstanding of the nature of Chem-Solv's customers' use of FreezeCon.

40 C.F.R. § 261.2(c)(2)(B) provides that a spent material is a solid waste when it is "[u]sed to produce a fuel or are otherwise contained in fuels (in which case the fuel itself remains a solid waste)." In its blunderbuss approach to attacking the Respondents' defenses, the Complainant takes the provisions of 40 C.F.R. § 261.2(c)(2)(B) out of context and relies on it without any evidence in the record supporting its conclusion that FreezeCon was used to "produce a fuel" or that the coal to which FreezeCon is applied otherwise contains FreezeCon when it ultimately is used as a fuel. There is no evidence in the record to suggest that FreezeCon is used to produce a fuel. Instead, as discussed above and in the Respondents' Initial Brief, the evidence in the record establishes that FreezeCon is used to facilitate the loading, unloading and transport of a fuel (coal). Moreover, based on the evidence in the record it is equally probable that the coal to which FreezeCon is applied no longer

contains any FreezeCon when it ultimately is used as a fuel. The Complainant's logic would have the rail care considered a waste.

As discussed above and in greater detail in the Respondents' Initial Brief, one critical fact for the Court to consider when deciding whether the rinsewater contained in the Pit at the time of the May 2007 EPA inspection qualifies as a "solid waste" under 40 C.F.R. § 261.2 is that, contrary to the assumptions set forth on page 11 of the Complainant's Reply, it was not necessary for Chem-Solv to reclaim the rinsewater prior to reuse by adjusting the pH of the rinsewater prior to commencing drumming rinsing operations using reused rinsewater. If Chem-Solv "reclaimed" the rinsewater, as that term is defined in 40 C.F.R. 261.1(c)(4), the 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 above and further explained in Respondents' Initial Brief, the weight of the evidence in the record establishes that Chem-Solv did not "reclaim" the rinsewater. (Respondents' Initial Br. at 40-41.)

For the reasons set forth above, in addition to those discussed in the Respondents' Initial Brief, the Complainant has failed to establish by a preponderance of the evidence that the rinsewater contained in the Pit at the time of the EPA's May 2007 inspection and sampling event was a "solid waste". To the contrary, the greater weight of the evidence in the record establishes that the rinsewater was not a "solid waste" when the EPA collected its samples during the May 2007 sampling event. Therefore, for the reasons set forth above and, those further explained 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.

D. The Settled Solids Contained in the Pit were not a Regulated Waste.

As explained in detail in Respondents' Initial Brief, assuming for the sake of argument that the settled solids contained in the Pit met the definitions of a "discarded material" and a "solid waste", the weight of the evidence contained in the record establishes that the settled solids at issue

were exempted from regulation as a "hazardous waste" under the exemption set forth in 40 C.F.R. § 261.4(c)[4]. (Respondents' Initial Br. at 33-43.) For purposes of applying what is generally but not always accurately called the MPU Exemption, if the Pit falls into one of the categories of tanks described in general terms in 40 C.F.R. § 261.4(c), the settled solids generated in the Pit were exempted from regulation under certain regulations promulgated under RCRA until the settled solids exit the Pit, or until 90 days after the Pit ceased to be operated. *See* 40 C.F.R. § 261.4(c). Although the MPU Exemption applies in this context based upon the nature of Chem-Solv's use of the Pit to collect rinsewater and the nature of Chem-Solv's reuse of such rinsewater, the MPU Exemption exempts the settled solids that were generated in the Pit from regulation as a "hazardous waste" under RCRA until such settled solids were removed from the Pit. The MPU Exemption further exempts the Pit itself from certain regulations, as the Respondents explained in detail in their the Respondents' Initial Brief. (Respondents' Initial Br. at 33-43.)

The evidence in the record establishes that the Pit falls into one of several categories of tanks described in 40 C.F.R. § 261.4(c). (TR3 at 201-209; TR4 at 8-9.) Thus, the greater weight of the evidence in the record further establishes that the settled solids that were generated in the Pit were exempt from regulation under RCRA until they were removed from the Pit for disposal or until 90 days after Chem-Solv ceased operating the Pit. (TR4 at 9.)

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[4] 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.

As further explained in the Respondents' Initial Brief, the MPU Exemption set forth in 40 C.F.R. § 261.4(c) refers to several categories of tanks and units, including "a product or raw material storage tank," "a manufacturing process unit," and "an associated non-waste treatment manufacturing unit." The weight of the evidence in the record establishes that the Pit satisfies the requisite elements of the MPU Exemption. (TR3 at 201-208; TR4 at 140-144.) Moreover, certain applicable guidance documents published by the EPA support this conclusion.

One example of such regulatory guidance document referenced by the Respondents in the Respondents' Initial Brief is 42 F.R. 72,024 (Oct. 30, 1980), codified at 40 C.F.R. § 261.4. When the EPA promulgated the MPU Exemption in 1980, the EPA expressed that the purpose for this exemption was to address issues resulting from the realization that potentially hazardous waste is generated in certain operating processes and material storage units that the EPA did not intend to regulate as hazardous waste storage tanks. (Respondents' Initial Br. at 34-35.) The EPA did not intend to regulate tanks that are integral to the manufacturing process until the waste generated in them is removed for disposal or until such wastes exit the manufacturing process. (Id.) In 42 F.R. 72,024 and subsequently issued guidance documents summarized in the Respondents' Initial Brief, the EPA provided members of the regulated community numerous examples of tanks and units that fall within the scope of the MPU Exemption. (Respondents' Initial Br. at 35-37.) Examples provided by EPA discussed in the Respondents' Initial Brief include: distillation columns; flotation units; discharge trays of screens; cooling towers, which are associated non-waste-treatment process units; solvent-based parts washers; and absorption refrigeration units.

In the Complainant's Reply, the Complainant argues that one of the guidance documents cited by the Respondents, the RCRA/Superfund Industry Assistance Hotline monthly report for May 1986 (530R861130) was superseded by the RCRA/Superfund RCRA Industry Assistance Online monthly report for December 1986 (RO12790). As discussed in detail in the Respondents' Initial Brief, in 530R86113, the EPA responded to a question about whether a solvent-based parts washer

used by a service station was subject to the MPU Exemption. (Jay Warren and Nancy Perkinson, Monthly Report – RCRA/Superfund Industry Assistance Hotline Report, 503R86113, U.S. EPA Office of Solid Waste and Emergency Response, 3-4 (May 1986).) In 530R86113, although the service station's business operations did not include manufacturing in the conventional sense, the EPA concluded that the solvent-based parts washer was "functioning as a manufacturing process unit." (Warren & Perkinson, RCRA/Superfund, at 4.)

As the Respondents also explained in their Initial Brief, in RO12790, the EPA concluded that not all solvent-based parts washers fall under the MPU Exemption. (Respondents' Initial Br. at 36.) Specifically, the Respondents noted that in RO12790, the EPA concluded that, if a solvent-based parts washer is designed so that the drum of solvent is detached from the wash unit, such solvent-based parts washer is not subject to the MPU Exemption. (Id.)

Although 530R86113 was superseded by RO12790 on grounds that are not directly relevant to the factual context of the instant matter, the principal purpose of the references to 530R86113 and RO12790 in the Respondents' Initial Brief and in this Reply Brief is to bring to the Court's attention the EPA's willingness to apply the MPU Exemption to the service station at issue 530R86113, even though it did not manufacture anything in the conventional sense. The grounds for EPA's decision to supersede 530R86113 in RO12790 had to do with the nature and design of the solvent-based parts washer at issue in that matter. In essence, because, the drum underlying the solvent-based parts washer's collection/wash pan could be removed, in the EPA's opinion, this disqualifies the solvent-based parts washer at issue in that matter from eligibility for the MPU Exemption. However, the EPA's conclusion in RO12790 had nothing to do with the fact that a service station using a solvent-based parts washer is not manufacturing anything in a conventional sense. Thus, although the solvent-based parts washer system addressed in RO12790 is not identical to the Pit at issue here in every respect it is analogous and, the EPA's treatment of that solvent-based parts washer contradicts

the Complainant's argument that the Pit is not subject to the MPU Exemption because it was not part of what the Complainant considers a conventional manufacturing process.

As discussed in the Respondents' Initial Brief, in the matter of *General Motors*, 2008 EPA App. LEXIS 30 (E.A.B. June 20, 2008), the Environmental Appeals Board concluded that the term "manufacturing" is not defined in the enabling statute or regulations. *GM*, 2008 EPA App. LEXIS, at *199. Specifically, the Environmental Appeals Board stated that "[n]either the statute nor the regulations define what constitutes an MPU, a "manufacturing process', a 'manufacturing unit,' or 'manufacturing' alone." *Id.* at *199 n. 54. Thus, the Environmental Appeals Board examined the dictionary definition of manufacturing for guidance. *Id.* at 199 n. 54. The definition relied upon by the Environmental Appeals Board included "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).

Applying this definition in the context of the evidence in the record in this matter, the Court should conclude that Chem-Solv's core business of repackaging chemicals from bulk storage containers into drums suitable for sale and distribution to its customers falls within the definition of "manufacturing." (TR4 at 200-201.) Chem-Solv's business operations concerning the use of rinsewater in the blending of a marketable product, FreezeCon, likewise falls within this definition of the term "manufacturing." The evidence in the record establishes that the drum rinsing and FreezeCon production portions of Chem-Solv's business operations were performed according to organized plans and with division of labor. For example, after empty drums that were stored outside were filled with chemical products from bulk storage tanks, they were rinsed by Chem-Solv employees with rinsewater that had been collected in the Pit. (TR4 at 200-204.) Furthermore, as Mr. Tickle explained to the Court, when Chem-Solv received an order for FreezeCon from one of its customers in the coal industry, its employees would follow instructions set forth on documents referred to as "blend sheets" or "batch tickets" when blending rinsewater with glycol to make the

FreezeCon, a marketable product. (TR3 at 134-138; RX3 at CS032, CS035.) For these reasons, and those set forth above and in greater detail in the Respondents' Initial Brief, the Pit qualifies as a "manufacturing process unit" for purposes of the application of the MPU Exemption set forth in 40 C.F.R. § 261.4(c).

Based on the analysis set forth above, the greater weight of the evidence in the record establishes that, contrary to the Complainants' assertions, the Pit was dedicated to legitimate manufacturing activities during the May 2007 EPA inspection and sampling event. Thus, all solid waste generated in the Pit, including the settled solids at issue, are exempt from certain regulations promulgated under RCRA until such solid waste was removed from the Pit.

The Pit also falls into the category of a "raw material storage tank." Since, as discussed above and in the Respondents' Initial Brief, the greater weight of the evidence in the record establishes that Chem-Solv did not "reclaim" the rinsewater, the rinsewater contained in the Pit was not a "solid waste." Rather, the evidence in the record establishes that the rinsewater contained in the Pit constituted a "material" under RCRA, due to is reuse for rinsing additional drums containing Chem-Solv's chemical products as part of its chemical repackaging and distribution operations and its use as a raw material in blending a marketable product sold by Chem-Solv to its customers in the coal industry, FreezeCon, as part of its FreezeCon production operations. The regulations promulgated under RCRA distinguish "materials" from "wastes." As such, the rinsewater in the Pit was a "material" and not a "waste." Therefore, the weight of the evidence in the record establishes that the Pit is subject to the MPU Exemption set forth in 40 C.F.R. § 261.4(c) as a "raw material storage tank."

In the Complainant's Reply, the Complainant raises another argument in opposition to the application of the MPU Exemption to the Pit, and the settled solids contained therein, that warrants further discussion. On page 16 of the Complainant's Reply, the Complainant suggests that there is a strong inference that, at the time of the EPA's May 2007 inspection and sampling event, "the Pit was

holding listed hazardous wastes consisting of discarded commercial chemical products." (Complainant's Reply at 16.) This assertion is not supported by the evidence in the record. Instead this argument asserted by the Complainant for the first time after the hearing in this matter is solely based upon supposition, speculation and conjecture.

The Complainant goes on to argue that "once the hazardous wastes listed as U210 and U228 were introduced into the Pit and mixed with the other contents, the entire contents of the Pit would be considered a hazardous waste pursuant to 40 C.F.R. § 261.3(a)(2)(iv)." (Complainant's Reply at 17.) Contrary to the Complainant's argument, there are numerous alternate scenarios that could result in the presence of tetrachloroethene and trichloroethene that would not trigger the application of the U-codes referenced by the Complainant in its Reply. Moreover, the Complainant has failed to establish that the referenced U-Codes are applicable in the context of the evidence contained in the record in this matter. The term "discarded commercial chemical products" refers to unused, essentially pure chemicals listed in 40 C.F.R. § 261.33 or formulations of such chemicals with a single active ingredient. There is no evidence in the record that suggests that the tetrachloroethene and trichloroethene allegedly found in the samples collected from the Pit by the EPA were unused or introduced into the Pit in pure form or as sole active ingredients. In fact, there is no evidence as to how or when these materials got into the Pit. Thus, the Complainant's argument summarized above is without any basis in fact and should be disregarded by the Court.

As articulated in detail in the Respondents' Initial Brief, under 40 C.F.R. §261.4(c), materials generated in any of the categories of tanks and units referenced in the MPU Exemption, while in the tank, 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. In other words, 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).

The greater weight of the evidence set forth in the record 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.

Furthermore, the weight of the evidence in the record also establishes that Chem-Solv had characterized the settled solids contained in the Pit prior to the EPA's May 2007 inspection and sampling event. (TR4 at 237-239.) Specifically, the evidence in the record establishes that 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 generator knowledge based on 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.

E. The Drum of Sodium Hydrosulfide Observed by the EPA During the May 2007 Sampling Event Was Not "Solid Waste."

In the Complainant's Reply, the Complainant argues that the drum of sodium hydrosulfide observed during the May 2007 inspection and sampling event was a "hazardous waste" at that time because: (1) Chem-Solv did not produce documentation establishing that the drum in question was in Chem-Solv's inventory at that time; (2) the condition of the drum at issue suggests that it was not being treated as a useable and valuable material; (3) the drum in question was shipped off site as a hazardous waste on February 20, 2008; and (4) the invoice to Chem-Solv's customer, C.H. Patrick, suggests that it was not charged for the sodium hydrosulfide product in Chem-Solv's inventory. (Complainant's Reply at 17-19.) The weight of the evidence in the record, however, establishes that the drum of 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.)

The weight of the evidence in the record in this matter establishes the following:

(1) 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 time of the May 2007 EPA inspection and sampling event, which were heels left over after Chem-Solv repackaged sodium hydrosulfide from a bulk tank into drums. (*See* TR4 at 192-193.)

(2) The sodium hydrosulfide product in Chem-Solv's inventory at the time of the EPA's May 2007 inspection and sampling event was useable product. (*See* TR4 at 192.)

(3) Chem-Solv contacted one of its customers, C.H. Patrick, to determine if it wanted the sodium hydrosulfide product in its inventory. (*See* TR4 at 192.)

(4) C.H. Patrick committed to purchasing a portion of Chem-Solv's inventory of sodium hydrosulfide, but it would not take delivery until the fall of 2008. (*See* TR4 at 192-193.)

(5) After Chem-Solv determined that some, but not all, of its inventory of sodium hydrosulfide would be sold to C.H. Patrick later in 2008, it decided to dispose of the remainder of the product, rather than continue to store it. (*See* TR4 at 194.)

(6) 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.)

(7) Chem-Solv shipped the unneeded partial drum of sodium hydrosulfide off site as hazardous waste on February 20, 2008, the same month that C.H. Patrick advised that it only wanted a portion of the sodium hydrosulfide in Chem-Solv's inventory. (*See* TR4 at 194-195.)

(8) In October 2008, Chem-Solv shipped the desired portion of Chem-Solv's inventory of sodium hydrosulfide to C.H. Patrick as planned. (*See* TR4 at 275; *see* also RX 15 at CS 196; *See* also RX2 at CS003, ¶ 7.).)

The Complainant has not met its burden of proving by a preponderance of the evidence that the sodium hydrosulfide drum observed by EPA's inspectors in May 2007 was a hazardous

waste at that time. The Complainant's evidence on this issue is merely that (1) inspectors observed a drum that appeared to be leaking in May of 2007; and (2) an invoice in the record shows that one drum of hydrogen sulfide was shipped off as hazardous waste on February 20, 2008. (CX 23 at EPA 1097, 1098.) The Complainant argues that the evidence in the record establishes that the drum of sodium hydrosulfide observed by EPA in May 2007 and the drum of sodium hydrosulfide shipped off-site by Chem-Solv as "hazardous waste" in February 2008 were the same drum. (Complainant's Reply at 18.)

As the Respondents explained in their Initial Brief, the evidence set forth in the record does not clearly establish that two drums referenced above were the same drum. (*See* TR4 at 273.) For example, during cross-examination at the hearing in this matter, counsel for the Complainant attempted to get Mr. Austin to admit that the drum that the EPA's inspectors observed in May of 2007 was the same drum that Chem-Solv shipped off-site as "hazardous waste" in February of 2008, and Mr. Austin refused to do so. (TR4 at 271-272.) Later, Mr. Austin admitted that page EPA 1078 of Complainant's Exhibit 23 appears to request disposal records for the drum of sodium hydrosulfide observed by the Virginia Department of Environmental Quality's inspectors in May of 2007. (TR4 at 273.) Assuming for the sake of argument that the two drums described above were, in fact, the same drum, the fact that a drum of sodium hydrosulfide was shipped off-site by Chem-Solv as hazardous waste in February 2008 does not establish that the same drum of sodium hydrosulfide in Chem-Solv's inventory in May of 2007 was hazardous waste at that time. To the contrary, the weight of the evidence in the record establishes that the drum of sodium hydrosulfide observed by the EPA's inspectors in May 2007 was a product in Chem-Solv's inventory at that time.

For example, as set forth above, at the time of the EPA's May 2007 inspection and 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.) Mr. Austin testified that these three drums were heels left over after Chem-Solv repackaged sodium hydrosulfide product in its inventory from bulk containers into drums. (*See* TR4 at 192.) Chem-Solv employees evaluated the drum of sodium hydrosulfide observed by the inspectors and determined that it was not leaking and it was a useable product. (RX 30 at CS 311; TR4 at 192-193, 272.) Moreover, Ms. Lohman, 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 also testified that Chem-Solv's customer, CH Patrick, which used sodium hydrosulfide a intermittently in a batching process, committed to taking a portion of Chem-Solv's inventory of hydrogen sulfide by the end of 2008 and the rest later if still available. (Affidavit by Jamie Austin, ¶7; *see* TR4 at 192-193.) Therefore, the sodium hydrosulfide drum observed by inspectors was not a waste but, rather, was a useable product at the time of the May 2007 EPA inspection and sampling event. Even though some of Chem-Solv's inventory of sodium hydrosulfide was shipped offsite as a hazardous waste on February 20, 2008, for the reasons set forth above and in the Respondents' Initial Brief, the weight of the evidence establishes that the drum of sodium hydrosulfide in question it was not a "solid waste" on May 23, 2007.

In summary, the Respondents' evidence conclusively establishes that the drum of sodium hydrosulfide observed by the EPA during the May 2007 inspection and sampling event was not a "solid waste" at that time. Thus, for these reasons, in addition to those set forth above and in the

Respondents' Initial Brief, Chem-Solv is not liable for the violations alleged in Count I of the Complaint.

III. RESPONSE TO COMPLAINANT'S PENALTY CONSIDERATIONS

As to the penalty aspects of this matter, the Complainant argues that the nature of the violations are so egregious that significant penalties are indicated. In this context, it must be kept in mind that the activity in question as it relates to the Pit was seen by the Virginia DEQ for decades before 2007 and no enforcement action was taken. Indeed, for certain periods up until the 2000s, by all accounts, the tank was exempted from regulation under RCRA. Once Chem-Solv knew of the true quality of its contents, the Pit was closed by removal without argument or prompting. Nearly five years have passed since the Pit was taken out of service and removed. Further, the EPA argues that it must insist on a penalty to preclude further violation. As said, the physical basis for further violation is non-existent.

While it should go without restatement, we must again note that we are dealing with an area of regulation that is far from clear in interpretation and is the subject to fair but perhaps different interpretations. This is a factor that must be considered in the context of culpability.

IV. CONCLUSION

With the exception of Count II of the Complaint, all of the alleged violations set forth in the Complaint are contingent upon each of the materials at issue in this matter – the rinsewater, the settled solids, the sodium hydrosulfide in Chem-Solv's inventory, and the aerosol cans observed by the EPA's inspector – falling within the scope of the definitions of "hazardous waste" under RCRA. (Respondents' Initial Br. at 28.) The evidence in the record establishes that the rinsewater and the sodium hydrosulfide are not "solid wastes" and the settled solids contained in the Pit were exempt from regulation as "hazardous waste". (Respondents' Initial Br. at 28.) Therefore, the Respondents are not liable for the violations alleged in Counts I through VII of the Complaint.

V. THE COMPLAINANT'S MOTION TO AMEND SHOULD BE DENIED

The Court should deny the Complainant's Motion to Amend the Complaint to Conform the Pleadings to the Facts and Evidence. The Respondents address this point at length in their Initial Brief (*See* Respondent's Br. at 53), but nonetheless highlights the following three points.

First, the evidence to which the Complainant seeks to conform the pleadings is disputed. *Port of Oakland and Great Lakes Dredge and Dock Co.*, MPRSA Appeal No. 91-1, 4 E.A.D. 170, 205 (EAB Aug. 5, 1992). In *Port of Oakland*, the appeals board affirmed the presiding officer's order denying EPA's motion to file a Second Amended Complaint. There, at the conclusion of an evidentiary hearing, the EPA moved for leave to amend its First Amended Complaint to allege three additional violations of MPRSA. The appeals board concluded that none of the additional violations alleged had been proven and, therefore, that the outcome of the litigation would be unaffected by granting the EPA's motion to amend. So, too, here. The EPA has not met its burden of proof that Austin Holdings owns the parcel on which the Pit lies. By the Complainant's own admission, the Virginia tax map is "not completely clear" which entity owns the parcel of land in question. (Complainant's Reply Br. at 32). 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.) No survey evidence of the location of the Pit exists and graphic evidence in the record is inconclusive.

Furthermore, the Complainant's proposed amendment would enable it to recover from Austin Holdings without meeting its burden of proof on piercing the corporate veil. Absent evidence of undercapitalization, alter ego, or sham, this court should not ignore the corporate form and subject Austin Holdings to joint and several liability with Chem-Solv. *See In re Mr. C.W. Smith, Mr. Grady Smith, & Smith's Lake Corp.*, CWA-04-2001-1501, 2004 EPA ALJ

LEXIS 128 (2004) (Biro, J.) (declining to pierce corporate veil after exhaustive review of an evidentiary record). Because the Complainant did not establish the facts to which it now seeks to conform the pleadings, its motion should be denied.

Second, alleging joint and several liability effectively makes Austin Holdings a new party to the Complainant's claims in Counts II through VII. *See In re Carroll Oil Company*, 10 E.A.D. 635, 650 (2002) (denying motion to amend complaint where complainant sought to add new parties); *In re J.V. Peters & Co., Inc.*, 2 E.A.D. 297 (1986) (declining to charge an entity related to the respondent with "constructive notice" of potential joint and several liability). Austin Holdings has had no reason or opportunity to prepare individualized responses to Counts II through VII, on issues of either liability or penalty. As stated in the Respondent's opening post-hearing brief, 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 at this phase in the litigation.

Third, granting the Complainant's motion will cause undue prejudice to Austin Holdings. Austin Holdings has never been called upon to substantively defend itself to joint and several liability. While the rules of administrative procedure are not formalistic, there are fundamental principles of constitutional due process that must be observed to sustain the rule of law. Due process requires fair notice and procedure to all parties sought to be charged with liability for environmental offenses. The existence of Austin Holdings as a legal entity was never a mystery to the Complainant, and the Complainant was free to allege joint and several liability from the outset of litigation. Yet the Complainant delayed until mid-hearing to assert this theory and has not provided any explanation for this delay. *See In re Zaclon, Inc., Zaclon LLC, and Independence Land Dev. Co.*, RCRA-05-2004-0019, 2006 EPA ALJ LEXIS 19 (Biro, J.)

(denying complainant's motion for leave to amend due to delay and unfair prejudice to respondent). This tribunal should decline to reward the Complainant for sitting on its hands and thus not allow the requested amendment.

The purpose of a complaint is to give adequate notice of the alleged charges so that the charged party has an opportunity to prepare a defense. Austin Holdings was afforded no such opportunity and therefore should not be held jointly and severally liable with Chem-Solv on Counts II through VII.

Dated: October 31, 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

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 Industrial Avenue, S.E. 1140 Industrial Avenue, S.E. Roanoke, VA 24013,	)))))	
Facility.	)	

CERTIFICATE OF SERVICE

I certify that, on October 31, 2012, I sent by Federal Express, next day delivery, a copy of the Respondents' Post-Hearing Reply Brief to the addressees listed below.

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