



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

VIA UPS, Next Day Air

December 22, 2011

Hon. Barbara A. Gunning, A.L.J.  
EPA Office of Administrative Law Judges  
1099 14<sup>th</sup> Street, N.W.  
Suite 350 Franklin Court  
Washington, D.C. 20005



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

Dear Judge Gunning:

Enclosed please find Complainant's Reply Brief in further support of Complainant's Motion for Partial Accelerated Decision, Second Declaration of Kenneth Cox, Second Declaration of Peggy Zawodny, Declaration of George Houghton, Declaration of Jose Reyna III, Declaration of Elizabeth Lohman and the Declaration of Dr. Joe Lowry, together with a revised proposed form of Order.

Respectfully,

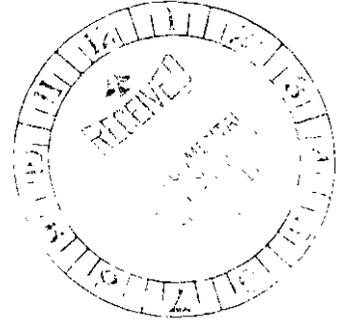
Handwritten signature of Joyce A. Howell in black ink.  
Joyce A. Howell  
Sr. Assistant Regional Counsel

Enclosures

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



In the Matter of: :  
: :  
CHEMSOLV, INC., formerly trading as :  
Chemicals and Solvents, Inc. :  
: :  
and :  
: :  
AUSTIN HOLDINGS-VA, L.L.C. :  
: :  
: :  
Respondents, :  
: :  
Chemsolv, Inc. :  
1111 Industrial Avenue, S.E :  
1140 Industrial Avenue, S.E :  
Roanoke, Virginia 24013 :  
: :  
Facility. :  
:

**COMPLAINANT'S MOTION FOR  
PARTIAL ACCELERATED DECISION  
AS TO LIABILITY**

**EPA Docket No. 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)**

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**COMPLAINANT'S REPLY BRIEF IN FURTHER SUPPORT OF COMPLAINANT'S  
MOTION FOR ACCELERATED DECISION**

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## **I. REPLY STATEMENT OF FACTS**

Using the numeration of Respondents' Response Brief, Complainant submits the following Reply Statement of Facts in Supplement to the Initial Statement of Facts:

1. Complainant does not dispute that Chemsolv's business is located on Industry Avenue. Answer ¶ 4.

2. Complainant does not dispute the facts stated in the Respondents' Brief and accepts the corrected reference.

3. Complainant does not dispute the facts stated in the Respondents' Brief, except that VADEQ inspectors were not at Respondents' Facility on May 17, 2007. See Complainant Exhibit 19, EPA 374, Declaration of Elizabeth Lohman ¶ 5.<sup>1</sup>

4. Complainant does not dispute the facts stated in the Respondents' Brief except that Complainant avers that its data and conclusions are based on sound sampling for the reasons set forth, infra.

5. – 7. Complainant does not dispute the facts stated in the Respondents' Brief, and accepts the corrected references.

8. With regard to the Pit, now referred to by Respondents as "Rinsewater Holding Tank No. 1", it is sufficient for purposes of Complainant's Motion for Accelerated Decision, and undisputed, that Pit/Rinsewater Holding Tank No. 1 was located at Respondents' facility and that Pit/ Rinsewater Holding Tank No. 1 was removed sometime after February 1, 2008.

9. Respondents' now claim the Pit/Rinsewater Holding Tank No. 1 is an existing tank installed in November 1985. This is a new "fact" unsupported by any documentary evidence other than Mr. Austin's novel assertion that the Pit was installed in November 1985. Second Affidavit of Jamison Austin ¶ 10. Nonetheless, as set forth, in Section II. D, infra, this new fact is insufficient to bar the entry of accelerated decision as to Count IV of the Complaint.

10. The name used for the Pit/Rinsewater Holding Tank No. 1 tank is immaterial to Respondents' liability under RCRA and is not a bar to the entry of accelerated decision in favor of Complainant.

11. It is undisputed that EPA took samples of the Pit Water and Pit Solids. For reasons stated in Section II.C, infra, the conclusory statements of Respondents' expert should be disregarded, and do not create an issue of material fact sufficient to bar entry of accelerated decision in favor of Complainant.

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<sup>1</sup> The VADEQ inspection did not continue to May 17, 2007 in part because the facility Operations Manager was busy moving flammable liquids out of a Facility warehouse, presumably because the local fire marshal had found the warehouse did not comply with NFPA 30 standards. Declaration of Elizabeth Lohman ¶ 5. See also Complainant Exhibit 30, EPA 1234.

11A/12. It is undisputed that EPA conducted an analysis of the samples taken at the Respondents' facility on May 23, 2007. For reasons stated Section II.C, *infra*, the conclusory statements of Respondents' expert should be disregarded, and do not create an issue of material fact sufficient to bar entry of accelerated decision in favor of Complainant.

13 – 14. For reasons stated in Section II.C, *infra*, the conclusory statements of Respondents' expert should be disregarded and do not create an issue of material fact sufficient to bar entry of accelerated decision in favor of Complainant.

15. Tetrachloroethene and Trichloroethene are volatile organic (“VO”) compounds. Chloroform is also a VO compound. Declaration of Peggy Zawodny ¶ 8.

16 - 19. For reasons stated *infra*, the conclusory statements of Respondents' affiants Scott Perkins and Jamie Austin should be disregarded and do not create an issue of material fact sufficient to bar entry of accelerated decision in favor of Complainant.

20 - 21. Complainant does not dispute Respondent's ¶¶ 20 – 21 Statement of Facts. Complainant notes that Respondents do not deny the Pit was single-walled, only aver that Jamie Austin never stated the Pit was single-walled. *See* Second Affidavit of Jamison Austin ¶ 12. Complainant agrees to the corrected references.

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

23. Complainant does not dispute that Respondent Chemsolv operated the Pit/Rinsewater Tank No. 1 at all times relevant to the allegations in the Complaint.

24. Complainant disputes Respondent's ¶ 24 Statement of Facts. Chemsolv's business is a facility within the meaning of 9 VAC 20-60-260.A, 40 C.F.R. § 260.10 for the reasons set forth in Complainant's Moving Brief and as further set forth, *infra*.

25. Complainant disputes Respondent's ¶ 25 Statement of Facts. The explanation submitted by Respondents is circular: In fact, it is documented that Respondents accumulated over 6,000 kilograms of hazardous waste on site because Respondents' hazardous waste manifest lading states that it disposed 7,954 kilograms of hazardous waste on February 20, 2008. Complainant Exhibit 23, EPA 1127 – 1137, Declaration of Kenneth Cox ¶ 26.

## **II. REPLY ARGUMENT**

### **A. THE IS NO GENUINE ISSUE OF MATERIAL FACT**

#### **1. The Pit was Used to Accumulate Discarded Material**

There is no such thing as a part time hazardous waste storage unit. Assuming *arguendo* Respondents sometimes used the Pit to store liquid to be used again as rinsewater, and on other occasions used the Pit to store liquid to be added to glycol and sold as “FreezeCon” during the winter months, the uncontested fact remains that the Pit was also used to accumulate liquid and solids prior to disposal, and therefore these materials were discarded, and thus were solid wastes. Accord Respondents’ Brief, p. 14 (“some rinsewater was pumped from Rinsewater Tank No. 1 into a storage tank and from this storage tank some was shipped.”). EPA has further demonstrated that the Pit Water and Pit Solids were hazardous waste. As such, the Pit was a hazardous waste storage tank subject to RCRA regulation. See RO 14262 (undated)( In order to obtain a (waste water treatment) exemption, a tank would have to be dedicated to that use). (Attachment 1).

The most recent version of the facts contained in the Affidavits of Jamison Austin and Scott Perkins, in contradiction to prior sworn testimony submitted in response to EPA Information Requests, is insufficient to raise a genuine issue of material fact barring the entry of an accelerated decision in favor of Complainant. Comcast of Illinois X, LLC v. Toguchi, 2007 WL 4557818 (N.D. Ill. 2007); Jiminez v. All American Rathskeller, Inc., 503 F.3d 247(3d Cir. 2007). Moreover, little credibility can be assigned to Respondents’ subsequent statements that contradict representations made to federal officials conducting lawful inspections of Respondents’ Facility. 18 U.S.C. § 1001; Section 3007(a) of RCRA, 42 U.S.C. § 6927(a). It is

well settled that without a plausible explanation for the contradictory testimony, the weight goes to the prior statement. Pyramid Securities Ltd. v. IB Resolution, Inc., 924 F.2d 1114, 18 Fed. R. Serv. 3d 909 (D.C. Cir. 1991).

## 2. Respondents Previously Claimed the Pit Contained Hazardous Waste

In correspondence dated December 16, 2005, Chemsolv, responding to a November 9, 2005 warning letter from the Virginia Department of Environmental Quality (“VADEQ”), stated:

Chemsolv, Inc. is still governed by the City of Roanoke Water Pollution Control Plant Permit No. 20120 and is inspected on an annual basis. The date of expiration is October 31, 2006. The permit has been included as Attachment A. Chemsolv submits a monthly statement stating that it has not discharged; however, discharges can commence once Part III Special Conditions are met. Chemsolv is actively working on plans to upgrade the ability of its elementary neutralization unit to consistently conform to the discharge parameters and management plans required by the authority. **Irrespective of the temporary suspension of discharge privileges, the treatment tank associated with the acid pad meets the definition of an elementary neutralization unit, because the waste treated in the tank is hazardous only due to corrosivity.** This tank is therefore eligible for the exemption for elementary neutralization units found at 40 CFR 270.1(C)(2)(v). Units qualifying for this exemption are not subject to permitting, generator on-site time limits, weekly inspections, or other technical RCRA standards.

Complainant Exhibit 42, EPA 1526 (Chemsolv Response to VADEQ Warning Letter, dated December 16, 2005)(emphasis added).

Assuming for purposes of this argument that waste was in fact treated in the Pit during this time period, elementary neutralization units by definition contain a solid waste characteristic for corrosivity, and therefore by definition, the contents of the unit are hazardous waste. 40 C.F.R. § 260.10. In essence, Respondents admitted in their communication to VADEQ that the Pit contained hazardous wastes. Whether or not Respondents ever properly claimed this exemption is not relevant to the present matter, except as to Respondents’ admission that the Pit was a hazardous waste storage tank. Notably, the Facility activities that placed hazardous waste

in the Pit remain largely unchanged, no matter what RCRA exemption Respondents claimed. Cf. Complainant Exhibit 37, EPA 1477 (VADEQ inspection notes July 26, 2005) with Complainant's Exhibit 21, EPA 658, Information Request Letter Response 8, dated December 10, 2007. What has changed is that where once Respondents claimed an elementary neutralization unit exemption from RCRA regulation for the Pit, now Respondents claim the manufacturing process unit exemption for the very same vessel and waste stream.<sup>2</sup>

### 3. The Pit Solids Were Disposed

Respondents disposed of 17,500 pounds of Pit Solids in February 2008, every pound of which was disposed of as hazardous waste. The disposal records document this undisputed fact: solids were removed from the Pit, drummed and disposed. Complainant Exhibit 23, EPA 1083, Information Request Letter Response 17(c), 17(d), EPA 1127 - 1137. These Pit Solids were not useful to mix with glycol for FreezeCon, nor were these Pit Solids useful for rinsing out drums. Even if, as Respondents assert, the associated Pit Water was used for rinsewater and for making FreezeCon, the Pit Solids were never anything other than discarded material and thus a solid waste and, as proved by EPA's analytical results, hazardous waste. Respondents' sworn statements are that Pit Solids were drummed in June 2007 and February 2008, and subsequently removed for hazardous waste disposal.<sup>3</sup> Complainant Exhibit 21, EPA 658, Information Request Letter Response 7(d); Complainant Exhibit 23, EPA 1083 and 1127, Information Request Letter Response 17; Complainant Exhibit 63, EPA 1800 -- 1801. There is no question that the intention for the Pit Solids was that they were accumulated and would be discarded. As discarded material,

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<sup>2</sup> As some point in time Respondents dropped their elementary neutralization tank exemption claim. As shown, infra, the Pit is a hazardous waste storage unit because the contents are hazardous for toxicity, not corrosivity.

<sup>3</sup> It is immaterial to the question of Respondents' liability whether, as Respondents now argue that the Pit continued to be used and that the contents of the Pit changed between May 23, 2007 and when the Pit was removed. Second Affidavit of Jamison Austin ¶ 15. The Pit was a hazardous waste storage tank from at least May 23, 2007 until it was removed. Absent RCRA closure, unsubstantiated claims concerning the nature of materials subsequently placed in the Pit is irrelevant.

the Pit Solids are a solid waste, and, as demonstrated by EPA's analytical results, hazardous waste. The Pit was a hazardous waste storage unit.

#### 4. The Pit Water was Disposed

Respondents' sworn statement is that over 442,000 gallons of Pit Water was disposed of between February 2004 and August 2007. This fact is established from Respondents' sworn statements and is undisputed. Second Declaration of Kenneth Cox, ¶ 1, Respondent Exhibit 11, Information Request Response 1b, CS 160 - 163 ("all shipments of wastewater"); Complainant Exhibit 21, EPA 686 - 852 (manifests attached in support of answer to 1b).

There is no question that the intention for the Pit Water was that it would be accumulated and be discarded. As discarded material, the Pit Water is a solid waste, and, as demonstrated by EPA's analytical results, hazardous waste. The Pit was a hazardous waste storage unit.

#### 5. Respondents Did Not Perform a TCLP analysis of the Pit Solids

As previously noted in the Complainant's Moving Brief, Respondents claimed that a Toxicity Characteristic Leaching Procedure ("TCLP") had been performed on the Pit solids in 2006 and that the analysis of the sample showed no RCRA regulatory levels had been exceeded:

Chemsolv has used the services of W.E.L, Inc. to remove the heavier, bottom sediments on two occasions. A composite sample of the first removal was sent to ProChem Analytical Inc. for hazard characterization in May 2006. The sample was checked for corrosivity, ignitability, and reactivity. The Total Characteristic Leaching Procedure was run for RCRA metals, semivolatiles and volatiles. All constituents were below regulatory levels. The material was shipped to Shamrock Environmental Services, Inc. on April 23, 2007.

Complainant Exhibit 21, EPA 660, Information Request Letter Response 9(b).

Respondents' Expert, Scott Perkins, further reiterates this position, stating:

Samples collected in May, 2006 of settled solids removed from the rinsewater tank ([Respondent] Exhibit 12) show that the settled solids did not meet the regulatory definition of hazardous waste. It was this sampling that dictated future settled solids management.

Respondent Exhibit 30, CS 310.

The record before the Court shows that no such TCLP was performed. What did occur was Respondents mixed Pit solids with two other waste streams, and had a TCLP analysis performed on a sample from this mixture. As noted by VADEQ from its May 15 - 23, 2007

Compliance Evaluation Inspection Visit:

DEQ inquired about containers of Pit sludges as observed and noted in the 2006 DEQ inspections. Mr. Lester<sup>4</sup> stated that all of the pit sludge had been shipped off site with the exception of 4 drums which remained in the warehouse at 1111 Industry Avenue. When asked about the characterization of the pit sludge that had been shipped off site, Mr. Lester stated that the pit sludge had been **mixed** with the contents of the roll-off described above,<sup>5</sup> and that, as described above, a **composite sample of the mixture of soils, spill cleanup debris and pit sludge had been analyzed by TCLP**. He said he would do TCLPs on the four remaining drums. He stated they were inorganic wastes from bottom of the wastewater pit.

Complainant Exhibit 19, EPA 378 (emphasis added).

EPA inspector George Houghton also made a corresponding brief notation in his field notes to this effect:

Pit cleaning – May 2006  
The drums have not been specifically characterized  
Did analyze waste for **3 sources combined** - & found to be NHW

Complainant Exhibit 29, EPA 1209 (emphasis added).

Information from two separate sources indicates that the Pit Solids were mixed with other material in a roll off. The person from whom this information was obtained, was Cary Lester,

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<sup>4</sup> Mr. Lester was the Operations Manager at the time of the May 2007 Compliance Evaluation Inspections conducted by EPA and VADEQ, and was no stranger to the Facility as Respondents' brief seems to suggest: "a Mr. Lester"). Complainant Exhibit 21, EPA 657, Information Request Letter Response 4e.

<sup>5</sup> The VADEQ Site Visit Report records the prior reference: Mr. Lester referenced a roll-off several times during the conversation about spill clean-up debris. The DEQ asked Mr. Lester to clarify the reference. Mr. Lester explained that in January 2003 following a release of contaminated stormwater from the concrete swale onto the adjoining property (owned by Roanoke Industrial Center) CS initiated soil removal activities on the adjoining property. The soils were placed in a 20 – 25 cu. roll-off container. The roll-off was kept on site for several years and during this period, the facility added two additional waste streams to the roll-off: 1) spill clean-up debris (from spills around the plant) and 2) sediment from the stormwater swale. The facility collected a single composite sample from the roll-off (which included all three waste streams) for characterization purposes. The facility shipped the co-mingled waste off-site as non-hazardous. Complainant Exhibit 19, EPA 377.

the Respondents' Operations Manager and the person who took the samples. Respondent Exhibit 12, CS 174. Although Pit Solids may have been part of the mix, undoubtedly the 2005 sample collected by Mr. Lester was diluted from the soils, spill clean-up debris from the roll-off container. There is no indication any sampling protocols were followed, especially those held out Respondents' expert. Respondents' Exhibit 30 CS 312 - 314. It is simply inaccurate to label a sample and the corresponding analytical result as being from one source when in fact it is from three. Moreover, there is no indication that the sample taken by Mr. Lester was obtained following a protocol to ensure that it was not contaminated. Nonetheless, it is disingenuous to suggest, as Chemsolv does here, that in 2005 the Pit Solids alone had been screened for TCLP.

## B. RESPONDENTS HAVE NOT MET THEIR BURDEN OF PROOF

### 1. Claims of Exemption are Subject to Close Scrutiny

The Pit's rebirth as a manufacturing process unit, and the Pit Water and Pit Solids as products, and thus, as Respondents argue, exempt from RCRA regulation, are claims which are subject to heightened scrutiny, as this Court has previously noted. IMO General Motors Automotive – North America, RCRA-05-2004-001, 2006 WL 3406333 (March 30, 2006), aff'd in part, remanded in part, In re General Motors Automotive, 14 E.A.D. \_\_, (June 20, 2008) ("I note that, as a general proposition, exemptions from regulations are to be narrowly construed. In re Consumers Scrap Recycling, Inc., CAA Appeal No. 02-06; CWA Appeal No. 02-06; RCRA (3008) Appeal No. 02-03; MM Appeal No. 02-01, 11 E.A.D. 269, 294 (EAB 2004) (citing Comm'r v. Clark, 489 U.S. 729, 739 (1989) (statutory exceptions are to be construed narrowly in order to preserve the primary operation of the general rule))." It is further noteworthy that the claim of exemption carries with it the inherent admission that absent the exemption, the material and/or vessel would be RCRA regulated.

## 2. A RCRA Exemption Claim is an Affirmative Defense

The burden of proof that a secondary material is not a solid waste lies squarely with Respondent. 50 Federal Register. 614, 642 - 3 (January 4, 1985)(Section J. § 261.2(f): Burden of Proof in Enforcement Actions). Such a claim is an affirmative defense,<sup>6</sup> in which Respondents bear both the burden of proof and burden of persuasion. Respondents have not met either burden. This principle is clearly stated:

We think it appropriate, and the rule states explicitly, that the burden of proof (in the sense of both the burden of producing evidence and the burden of persuasion) is on the persons claiming that their hazardous secondary material is not a waste because it is within the terms of any of these exceptions. This provision, thus, restates the legal principle that parties claiming the benefits of an exception to a broad remedial statutory or regulatory scheme have the burden of proof to show that they fit the terms of the exception. *See, e.g. SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953) (exception to Securities Act registration requirements); *U.S. v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967) (exception to merger provisions of Clayton Act); *Arnold v. Ben Knowsky, Inc.*, 361 U.S. 38, 393 (1960) (exception to Fair Labor Standards Act for retail sales); *Weyerhaeuser, Inc. v. Castle*, 590 F.2d 1011, 1040 (D.C. Cir. 1978) .(burden of proof is on applicant for Agency-created fundamentally different factors variance).

Viewed another way, the regulations presume that hazardous secondary materials stored before recycling are hazardous wastes. The person accumulating can prove, however, that the materials are not wastes due to the manner of recycling (including the amount of material being recycled). These facts are within the special knowledge of the person accumulating the material. Presumptions of this type have been upheld consistently when they further interpret a remedial statutory purpose, guard against harm to public health and safety, and where the facts to rebut the inference are particularly within the knowledge of the other party. *See Beth Israel Hospital v. NLRB*, 437 U.S. 482, 493, 502 (1978); *U.S. v. General Motors Corp.*, 561 F.2d 923, 924 (D.C. Cir. 1977) (Leventhal J. dissenting in part).

Id. Nomenclature will not carry Respondents' burden, nonetheless, it is instructive to review the etymology of the Pit, Pit Water and Pit Solids.

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<sup>6</sup> "Furthermore, this type of claim is an affirmative defense, for which it is appropriate that the person asserting the defense have the burden of proof. In addition, the facts underlying the recycling defense would be peculiarly within the knowledge of the party asserting the defense, a situation as noted above where it is appropriate for that party to have the burden of proving the issue. \* \* \* This allocation of the burden of proof was affirmed in *American Petroleum Institute v. EPA*, 661 F.2d 340, 352, 354 (5th Cir. 1981)."

Since EPA's Compliance Evaluation Inspections in 2007 and through the course of EPA's subsequent investigation, the Pit has evolved into a "rinsewater holding tank" (Answer ¶ 16), "intermediate process tank" (*Id.*), the "1,800 gallon rinsewater holding tank" (Respondents Exhibit 30, CS 310), "manufacturing process unit" (Respondents' Exhibit 30, CS 309) and most recently, "Rinsewater Holding Tank No. 1." Second Affidavit of Jamison Austin, ¶ 7. The Pit Solids have been renamed "settled solids." Answer ¶ 20. The Pit Water, which was referred to as such between 2004 – 2007, or as "wastewater" or "washwater" (Complainant Exhibit 21, EPA 652, 658, Information Request Letter Response 1c and 7d ("wastewater"), Complainant Exhibit 23, EPA 1081, Information Request Letter Response 14d ("wash water"), is now called "rinsewater" or a "raw ingredient." Answer ¶ 20, Respondents' Exhibit 30, CS 309.

However named, Respondents have not established a legitimate reuse of the Pit Water. Respondents have not established any use for Pit Solids. Respondents do not satisfactorily explain how using the Pit to accumulate Pit Water and Pit Solids, and sometimes use the Pit Water rather than dispose of it, excused the Pit from RCRA regulation. In sum, Respondents have not met their burden of proof, and fallen far short of carrying their burden of persuasion.

### 3. Rinsewater is a Solid Waste

Even if, as Respondents argue, the Pit Water is accumulated to be used as rinsewater, the Pit Water would not be exempt from RCRA regulation. Rinsewater is within the definition of a "spent material" and is "discarded" when it is used to wash product drums and product spills, falls to the floor of the acid pad and flows into the trench, and enters the Pit for accumulation prior to disposal. 40 C.F.R. § 261.2(c)(1). Rinsewater is abandoned" – i.e., ". . . accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of . . ." 40 C.F.R. § 261.2(b). The principle that commercial products reclaimed from hazardous

wastes are products, and not wastes, “does not apply to reclaimed materials that are not ordinarily considered to be commercial products, such as waste-waters”. 50 Federal Register. 614, 634 (January 4, 1985). The Agency has noted and explained that “[t]hese materials rarely are dealt with as products moving in commerce, and are often discharged, and so reasonably can be considered to remain wastes. Our claim of jurisdiction over these materials is made explicit in proposed [40 C.F.R.] § 261.2(a)(2(ii).” Thus, EPA has stated that products generally cannot be “reclaimed” from wastewaters. 48 Federal Register 14472, 14489 (April 4, 1983). Even if “part time” use of the Pit to accumulate Pit Water for use as rinsewater, or to accumulate rinsewater for use in FreezeCon was a plausible argument supporting Respondents’ claim of exemption, rinsewater would still be classified as a discarded material and a solid waste by application of the RCRA regulations. Respondents claim that the use of Pit Water as rinsewater creates a RCRA exemption fails, and does not raise a genuine issue of material fact barring the entry of accelerated decision.

4. Pit Material was not Managed as a Product or Raw Material

Perhaps the first inquiry regulators make when, as here, a respondent claims the RCRA product exemption for material which, by all other appearances, is hazardous waste, is whether the Facility managed the material as a product. 40 C.F.R. § 261.2(e)(i). Such factors include: the condition of containers, management of containers, and exposure of the material to deteriorating conditions (rain, heat, or sun). Second Declaration of Kenneth Cox, ¶ 2. It is uncontested there was little control regarding material entering the Pit:

The facility blends various chemicals in various tanks and containers to make different products. Any product spillage or floor wash down wastewater goes to the floor drain in the blending room which drains to the “pit area.”

Complainant Exhibit 19, EPA 374.

Question: What other liquids are either channeled to or inadvertently enter the pit?

Answer: The pit is the receiving tank for inorganic production activity. Small amounts of inorganic acids and bases from filling drums and totes are conveyed from the center drain to the acid vat.

Complainant Exhibit 21, EPA 658, Information Request Letter Response 8b.

The Pit received rinse water used to rinse the inside and outside of containers that had contained surfactants, acids, and bases returned from Chemsolv's customers. In addition, a piping manifold system used for the distribution of product from the corrosive-materials tank farm into 55 gallon drums in the area where the Pit was located. Spills from that filling operation went through a drain in the poured concrete slab and into the Pit. In addition, stormwater was pumped into the Pit from a swale that collected stormwater from the property. Stormwater runoff came from areas where organic materials were transferred from a tanker-truck to 275-gallon totes and/or 55 gallon drums. During the numerous site visits, I witnessed organic chemical releases during transfers and organic chemical releases from leaking totes.

Declaration of Elizabeth Lohman ¶ 12.

The "Pit received wastewater, material spillage, and stormwater." Declaration of Elizabeth Lohman ¶ 8.<sup>7</sup> The Pit had a shed roof. Declaration of Elizabeth Lohman ¶ 8, Complainant Exhibit 18, EPA 359. The Pit was not enclosed in a building, but was open to the outdoors. Complainant Exhibit 18, EPA 358 and 359. The Pit had a surrounding wall measuring only four feet high. Declaration of Joe Reyna ¶ 11, First Affidavit of Jamison Austin ¶ 18. The wall surrounding the Pit was permeable (wall gate not flush with floor). Complainant Exhibit 18, EPA 358. As observed by EPA Inspector Kenneth Cox;

[t] he material from the Pit would not be useful as rinsewater because it would not accomplish the task of cleaning a drum or container, but rather actually make the drum or container dirtier. See Complainant Exhibit 17, EPA 313. Moreover, the same concept would apply if the Pit Water was used as a substitute for fresh water as an ingredient in a product; the Pit Water would contaminate the product whereas fresh water would not.

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<sup>7</sup> Respondents devoted a portion of their response to their new claim that a trench from the blend room had been closed and capped "many years ago", contrary to Respondents' statements at the May 2007 Inspection. Compare Second Jamison Austin Affidavit ¶¶ 9–11; Scott Perkins Affidavit ¶ 6 with Complainant Exhibit 17, EPA 297 (Mr. Austin said the drain led to the acid pit outside); Complainant Exhibit 19, EPA 374 ([Mr. Lester]Any product spillage or floor wash down wastewater goes to the floor drain in the blending room which drains to the "pit area"). Although contrary to what was told to EPA and VADEQ Inspectors, it is immaterial with regard to the within motion since there is sufficient evidence in the record to establish that material in the Pit was discarded, a solid waste, and not managed as a product.

Second Declaration of Kenneth Cox ¶ 2. In sum, the claim that the Pit is a manufacturing process unit, or an intermediate process unit, or a raw material storage unit, or that the contents of the Pit were a product, is contradicted by the evidence illustrating how the Pit was managed.

5. Pit Water May Have Been Used on One Occasion to Make FreezeCon

Chemsolv produced many “batch tickets” (see Respondents’ Exhibit 3, CS7 – CS122)<sup>8</sup> to demonstrate the use of Pit Water in making the “product” FreezeCon.<sup>9</sup> However, an examination of the batch tickets indicates that Pit Water was used only on one relevant occasion: January 6, 2008. Respondents’ Exhibit 3, CS 035. Respondents’ lack of documentation is consistent with Respondents’ prior statements to EPA and VADEQ concerning the fate of the Pit Water. Respondents’ sworn statements, made in Information Request Letter Responses, stated that the Pit Water was discarded and disposed of. Compare Complainant Exhibit 19, EPA 375 Information Request Letter Response 7c: (Wash water is pumped from the pit into [a] storage tank adjacent to acid pad when full and tested for pH prior to shipment to processing facility) with Answer ¶ 21, Respondents’ Exhibit 2, CS4, ¶ 14. Lack of documentation is a form of proof that the claimed exemption is sham recycling. As observed in the Preamble in 50 Federal Register 614, 642-3 (January 4, 1985) Section J. [40] § 261.2(f): Burden of Proof in Enforcement Actions, footnote 33:

Absence of documentation not only would make it difficult or impossible for a respondent to carry its burden of proof, but also would itself be evidence that the claimed recycling is a sham.

Id. Respondents’ claim that Pit Water was used as a FreezeCon ingredient is a nascent claim

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<sup>8</sup> Query why CS55 – CS122 are included in Respondents’ Exhibit 3 since these batch tickets are dated 1/2/2009 – 1/10/2011, and the Pit was removed no later than March 2008. Answer ¶ 21.

<sup>9</sup> In contradiction to its defense, Mr. Austin now avers as “inaccurate” EPA’s characterization of Chemsolv as “is in the business of purchasing, blending and repackaging chemicals” (Declaration of Kenneth Cox ¶ 9). Mr. Austin states Chemsolv is chemical distributor (Second Affidavit of Jamison Austin ¶ 6), indicating no products are made at the Facility.

dating to Respondents' Answer. It is respectfully submitted that the lack of documentation specifically indicating the use of Pit Water in making FreezeCon nullifies Respondents' manufacturing process unit exemption claim.

#### 6. The Pit was Not a Manufacturing Process Unit

No product was made in the Pit and no raw material was stored in the Pit. As shown ante, rinsewater was accumulated, with no controls over what such rinsewater contained. The Facility rinsewater is not "a hazardous waste which is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, a product or raw material pipeline, or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit" and the Pit is not subject to the 40 C.F.R. § 261.4(c) manufacturing product exemption unit. 40 C.F.R. § 261.4(c).

In contrast to a production system, the rinsing of product drums and spills at the Facility acid wash pad which subsequently drained into the Pit did not produce a product. Accordingly, the part time" rinsewater function of the Pit did not qualify it for the manufacturing process unit exemption. See General Motors, supra, at 42.

FreezeCon is a "glycol-based anti-freezing product." Respondents' Exhibit 30, CS 309. FreezeCon is applied to coal, id., which often is placed on the land in coal piles. Pit Water was not an effective substitute (i.e., a substitute product or ingredient) for fresh water in the making of FreezeCon. Assuming arguendo, liquid from the Pit was used as a FreezeCon ingredient, the Pit Water remained a hazardous waste because materials used to produce products that are applied to the land are solid wastes. 40 C.F.R. § 261.2 (e)(2)(i), see also RO 14001 (May 19, 1990). Moreover, hazardous wastewaters are not an effective substitute for freshwater, because fresh water "would probably contain significantly fewer hazardous constituents or characteristics" and the wastewaters is not likely to be an effective substitute. Id., 40 C.F.R. § 40 C.F.R. § 261.2 (e)(ii). See also Second Declaration of Kenneth Cox ¶ 2. The "part time" FreezeCon ingredient function of the Pit did not

qualify it for the manufacturing process unit exemption.

As this Court has noted:

It is well-established that when a material has become part of the “waste disposal problem,” it is considered discarded. *E.g.*, *American Mining Congress v. EPA*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (“*AMC I*”). Furthermore, it is well-established that used materials that are contaminated can be considered waste even if those materials have value. *E.g.*, *American Petroleum Institute v. EPA*, 906 F.2d 729, 741 & n.6 (D.C. Cir. 1990) (per curiam) (“*API I*”) (materials were considered discarded even though they ultimately would be reclaimed as valuable metals); *accord United States v. ILCO, Inc.*, 996 F.2d 1126, 1131-32 (11th Cir. 1993) (spent batteries were considered waste even though they were reclaimable).

General Motors, supra. When Chemsolv was no longer able to discharge to the POTW, the rinsewater became “part of the disposal problem.” General Motors, supra. Respondents shipped at least 442,000 gallons of Pit Water off site for disposal between 2004 and 2007. Second Declaration of Kenneth Cox ¶ 1. It is undisputed that the Pit Water was disposed of.

C. EPA’s Sampling and Analysis Proves the Pit Contained Hazardous Waste

Chemsolv’s fallback position is that if the Pit Water and Pit Solids are solid wastes, and the Pit is a storage unit, (which indeed these were), the EPA sampling was “flawed” because it was:

- 1) not collected in compliance with EPA’s prescribed sample collection requirements; and
- 2) the samples were not representative of any waste stream at the point of generation, because they were collected from an intermediate process tank.

See e.g., Answer ¶¶14, 16; Respondents’ Exhibit 30, CS 311.

Respondents now tack on a third attack against EPA’s sampling and analysis, claiming that there are unspecified “inconsistencies” between the lab reports and the chain of custody. Scott Perkins Affidavit ¶13.

1. EPA's Sample Collection was Reliable and Appropriate

With due respect, Respondents' argument is simply wrong. Respondents challenge to the EPA sampling on May 23, 2007 fails because the sampling methods Respondents have described do not apply to field samples taken by EPA inspectors conducting Compliance Evaluation Inspections. The difference is based on what one is attempting to prove. If a regulated entity is sampling in order to prove that a constituent does not exceed regulatory levels, stricter protocols apply. However, if EPA is sampling to prove a constituent is present in the sample in excess of the regulatory levels, then these same strict protocols need not apply. If the analysis of an EPA sample, taken with reasonable protocols to prevent contamination, shows a constituent exceeds regulatory thresholds, then the RCRA regulations will apply to the material from whence the sample came:

The testing methods and approaches described in SW-846 are designed primarily for use by persons to demonstrate that a regulatory threshold has not been exceeded. \* \* \* \* (Demonstrating that a waste is not a hazardous waste is hereinafter referred to as proving the negative).

The sampling strategy for these situations (proving the negative) should be thorough enough to insure that one does not conclude a waste is nonhazardous when, in fact, it is hazardous. For example, one needs to take enough samples so that one does not miss areas of high concentration in an otherwise clean material. Samples must be handled so that properties do not change and contaminants are not lost. The analytical methods must be quantitative, and regulatory detection limits must be met and documented.

While the regulated community is concerned with proving the negative, or absence of any hazardous constituents or characteristics, regulatory agencies are often concerned with demonstrating the opposite -- that the waste concentration of a specific analyte in a waste, exceeds a regulatory level, or that the waste exhibits a hazardous waste characteristic. (Hereinafter referred to as proving the positive).

55 Federal Register 4440, 4441-4444 (February, 8, 1990)(*Required Versus Optional Use of SW-846 Testing Methods*). In this case, EPA Inspectors George Houghton and Jose Reyna's sampling methods were sufficient to "prove the positive," i.e., hazardous constituents were

resident in the Pit Solids. Declaration of Dr. Joe Lowry ¶¶ 9 – 11.<sup>10</sup>

## 2. The Samples Were Representative

The concentration of hazardous constituents found in the Pit Solids, 457 mg/L tetrachloroethene and 15.5 mg/L trichloroethene, were in sufficient concentration to defeat

Respondents' arguments as to representativeness:

Sampling strategies for these situations (proving the positive) often do not require a precise determination of the actual magnitude of the property. If a sample possesses the property of interest, or contains the constituent at a high enough level relative to the regulatory threshold, then the population from which the sample was drawn must also possess the property of interest or contain that constituent. Depending on the degree to which the property of interest is exceeded, testing of samples which represent all aspects of the waste or other material may not be necessary to prove that the waste is subject to regulation. \* \*

\*

Id. See also Declaration of Dr. Joe Lowry, ¶ 13. Proof that a regulated substance is in the waste and that its concentration is greater than a regulatory limit are the important attributes. Id. Even so, the concentration of the hazardous waste in the sample collected by EPA Inspectors Houghton and Reyna was so large, representativeness is not at issue:

[t]he concentration of tetrachloroethene found in the pit solids sample was so large (457 mg/L) that representativeness of the sample is demonstrated. It would be necessary to take over 653 additional samples, all with an analytical result of zero to bring the mathematical average concentration below the regulatory contaminant threshold of 0.7 mg/L tetrachloroethene for toxicity characteristic hazardous waste identified with EPA Hazardous Waste Number D039. The likelihood of this occurrence is beyond reasonable expectation.

Similarly, the concentration of trichloroethene found in the pit solids sample was so large (15.5 mg/L) that representativeness of the sample is demonstrated. It would be necessary to take over 31 additional samples, all with an analytical result of zero to bring the mathematical average concentration below the regulatory contaminant threshold of 0.5 mg/L trichloroethene for toxicity characteristic hazardous waste identified with EPA hazardous Waste Number D040. The likelihood of this occurrence is beyond reasonable

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<sup>10</sup> Mr. Austin offers testimony that is at best, a very detailed false memory. First Affidavit of Jamison Austin ¶¶ 16 – 22. Mr. Austin was not present for the May 23, 2007 EPA sampling of the Pit. Declaration of Elizabeth Lohman ¶¶ 6 – 10. In fact, Mr. Austin was not present for any of the May 23, 2007 EPA sampling at Respondents' Facility. Compare First Affidavit of Jamison Austin ¶¶ 16 – 25 ("I personally observed EPA's inspector collect samples of rinsewater... I also personally observed the EPA's inspector collect samples from certain totes...") with Declaration of Elizabeth Lohman ¶¶ 10 ("This encounter, lasting a few minutes at most, was the only time Mr. Austin was in the presence of the sampling inspection team on May 23, 2007.")

expectation.

Declaration of Dr. Joe Lowry ¶¶ 14 -15.

Further confirmation is found in Respondents' analytical results. A sample of the material shipped for hazardous waste disposal on February 20, 2008 was analyzed.

Respondents' analytical results further underscored the reliability of EPA's results:

The reliability of EPA sampling and analysis for the pit settled solid sample is also demonstrated by the close agreement of tetrachloroethene and trichloroethene concentrations with a sample of the pit settled solids collected on January 24, 2008 by or for the defendants. The EPA laboratory reported 37,100 mg/kg tetrachloroethene and 835 mg/kg trichloroethene for the EPA pit settled solids sample. These are dry weight values based on the reported 43.1 percent solids content of the sample, the wet weight values are 16,000 mg/kg tetrachloroethene and 360 mg/kg trichloroethene. A certificate of analysis dated January 30, 2008 from ProChem Analytical Incorporated of Ellison, Virginia for a pit sludge sample collected on January 24, 2008 reports 21,000 mg/L tetrachloroethene and 590 mg/L trichloroethene.

Declaration of Dr. Joe Lowry ¶ 16.

### 3. Respondents did not Identify a Chain of Custody Issue

Respondents' expert states: "there are significant inconsistencies between the laboratory reports and the Chain of Custody that shed doubt on the validity of the analytical results."

Affidavit of Scott Perkins ¶13. Respondents would have the Court guess at what the supposed "Inconsistencies" might be. Respondents' expert's unsubstantiated statement fails to create any material facts that bar the entry of accelerated decision.

Respondents' expert also seems to claim that some sort of chain of custody that is required for the written analytical reports. There is not. As clarified by Ms. Zawodny:

I compared the copies of the two Final Analytical Reports attached to Complainant's Prehearing Exchange as Exhibits 15, EPA 241 – 283 and 16, EPA 284 – 294, with the originals maintained by the EPA Regional Laboratory located in Ft. Meade, Maryland. These copies are identical to the originals maintained by the EPA Regional Laboratory located in Ft. Meade, Maryland.

Second Declaration of Peggy Zawodny, ¶ 5. Respondents have not raised any issue of material

fact barring the entry of partial accelerated decision in favor of Complainant.

D. The Age of the Pit is Immaterial to Entry of Accelerated Decision on Count IV.

Assuming for purposes of argument the Pit was built in 1985, as Respondents now claim.<sup>11</sup> Even so, Respondents were still obligated to obtain the certificate of a professional engineer under RCRA. Such certificate would have had to attest that the Pit met the specific requirements set forth in 9 VAC 20-60-260.A , 40 C.F.R. § 264.191(b)(1) – (5). Moreover, the language of such statement would have had to include the specific language set forth in 40 C.F.R. § 270. 11(d). EPA asked Respondents to submit any certifications on file for the Pit:

Question: Regarding the Pit at the acid transfer /container wash station: (g) Submit any certifications on file.

Complainant Exhibit 22, Information Request 18(g), EPA 1069.

Answer: Plans for construction were produced and stamped approved by a professional engineer.

Complainant Exhibit 23, Information Request Letter Response 18(g), EPA 1083. See also

Partial line drawing submitted in response to Information Request 18(d), Complainant Exhibit

23, EPA 1139.<sup>12</sup> Respondents have never proved the existence of a certification of a

professional engineer, in any form, attesting to the soundness of the Pit, no less the form required

by RCRA regulations. 9 VAC 20-60-260.A , 40 C.F.R. § 264.191(b)(1) – (5), 40 C.F.R. § 270.

11(d). Second Declaration of Kenneth Cox, ¶ 4.

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<sup>11</sup> Compare Second Jamison Austin Affidavit ¶ 10 with Complainant Exhibit 23, Information Request Letter Response 18(e) EPA 1083. (Question: What is the date of the construction of the Pit? Answer: Approximately 1989 – 1990). Id.

<sup>12</sup> Respondents attempt to imply that “pages” (i.e., plural) of design documents and line drawings were turned over to EPA. See Second Affidavit of Jamison Austin ¶¶ 19 – 20. The page at Complainant Exhibit 23, EPA 1139 is the only document resembling a Pit design produced to EPA, and the only such document in the record, including Respondents’ Prehearing Exchange.

E. There is No Evidence of Daily Tank Inspections.

Respondents claim that documentation of daily inspections “done on all tanks and plumbing in the Acid Pad area” were turned over to EPA during a March 27, 2008 site visit, after the Pit had been removed. Second Affidavit of Jamison Austin, ¶ 18. Notably, Respondents did not produce this documentation with their Response Brief, nor is any such documentation in Respondents’ Prehearing Exchange. The only evidence in the record is Respondents’ sworn statement that the daily inspections of the Pit did not occur:

Question: Regarding the Pit at the acid transfer /container wash station: (f) Submit any and all inspection records for the Pit.

Complainant Exhibit 22, Information Request 18(f), EPA 1069.

Answer: Tank was visually inspected each time the water was pumped and during both solids removals. Management recorded no defects or deviations from normal operation at any time. Any defect, leak or otherwise would be noted and submitted to management as per normal with any vessel. Plans for construction were produced and stamped approved by a professional engineer.

Complainant Exhibit 23, Information Request Letter Response 18(f), EPA 1083.

It is respectfully submitted that Respondents have not demonstrated the Pit was inspected daily as required by 9 VAC 20-60-264.A, 40 C.F.R. § 264.195(b) and (h). Complainant is entitled to accelerated decision as to liability on Count V.

III. CONCLUSION

Respondents promise that “any and all information relevant to the alleged violations will be presented at hearing.” Second Affidavit of Jamison Austin ¶ 23. It is respectfully submitted that if Respondents’ do not presently have any material fact(s) with which to counter the allegations in Counts III – VII of the Complaint, and furthermore have no substantiation for their affirmative defenses, then there is no reason for any hearing. Rather, Accelerated Decision as to

Liability on Counts III- VII should be entered forthwith.

It is respectfully submitted that there is no genuine issue of material fact raised by Respondents and no proof supporting Respondents' affirmative defenses. Complainant is entitled to Partial Accelerated Decision as to Counts III - VII of the Administrative Complaint.

Respectfully submitted,

Date: 12-22-2011



Joyce A. Howell  
Senior Assistant Regional Counsel

# ATTACHMENT 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
SOLID WASTE AND EMERGENCY  
RESPONSE

Ms. Susan Pendleton  
Program Manager  
ERM-New England, Inc.  
19 Commercial Street  
Portland, Maine 04101

Dear Ms. Pendleton:

Thank you for your March 12, 1998 letter in which you request the Environmental Protection Agency's (EPA's) interpretation of certain preamble language relating to the wastewater treatment unit (WWTU) exemption at 40 CFR §264.1(g)(6) and 265.1(c)(10). Specifically, you ask whether, under EPA's interpretation of this language, a tank could qualify for the WWTU exemption if it is used solely for wastewater treatment for part of the year and is then used for another purpose for another part of the year.

The September 2, 1988 Federal Register preamble language, which is the subject of your inquiry, states the following:

*EPA intends that this [wastewater treatment unit] exemption apply to any tank system that manages hazardous wastewater and is dedicated for use with an on-site wastewater treatment facility. However, if a tank system, in addition to being used in conjunction with an on-site wastewater treatment facility, is used on a routine or occasional basis to store or treat a hazardous wastewater prior to shipment off-site for treatment, storage, or disposal, it is not covered by this exemption. Unless the tank system otherwise qualifies for some other exemption, it would be subject to the revised standards for hazardous waste tank systems.*

53 Fed. Reg. 34080 (emphasis added).

You ask what EPA meant by the language "dedicated" [for use with an on-site wastewater treatment facility] and offer two possible interpretations. One interpretation, you suggest, is that the WWTU must be dedicated solely for wastewater treatment at all times. A second interpretation, you suggest, is an "alternating use" scenario in which a WWTU may operate as a WWTU for a portion of a year, dedicated for wastewater treatment for that period of time in use, and then operate as an accumulation tank for a different part of the year. The Agency confirms the first interpretation, described above. That is, in order to satisfy the WWTU exemption, a tank

RO 14262

must be dedicated solely for on-site wastewater treatment at all times and for no other purpose. EPA believes that the preamble language is clear on this point. EPA did not intend the WWTU exemption to apply in situations involving "dual use" of a tank (when a tank is concurrently used for wastewater treatment and for another purpose). Nor did EPA intend for the exemption to apply in situations, such as the one your letter describes, involving "alternating use" of a tank. Since the purpose of this exemption is to avoid dual regulation under the Clean Water Act and the Resource Conservation and Recovery Act (RCRA), EPA believes that a tank must be used only for wastewater treatment purposes at all times in connection with an on-site wastewater treatment facility in order to qualify for the exemption. EPA did not intend for the exemption to apply in either the "dual use" or "alternating use" scenario. Accordingly, a tank that operates on an "alternating use" basis, as you describe above, does not satisfy the WWTU exemption and is subject to all relevant RCRA regulations.

One alternative approach to the WWTU exemption that you may wish to consider is the hazardous waste generator accumulation provision under §262.34. Under this provision, you could manage the tank as an accumulation device in your capacity as a hazardous waste generator (subject to the requirements of §262.34), and not as a tank subject to the WWTU exemption. As a generator, you could still perform wastewater treatment in that tank in addition to other "alternating" functions for those wastewaters generated on-site. Similar to the WWTU exemption, you would not need a RCRA permit or interim status for that tank under the generator accumulation provision, as long as you satisfy the requirements of this provision.

Please note that because RCRA authorized states may have more stringent requirements than the federal program, we suggest that facilities contact their state agency to determine whether any additional requirements apply. Should you have any questions about the contents of this letter, please contact Jeff Gaines of my staff (703) 308-8655.

Sincerely,

Elizabeth A. Cotsworth, Acting Director  
Office of Solid Waste

27 March 1998

Ms. Elizabeth Cotsworth  
Acting Director, Office of Solid Waste  
U.S. Environmental Protection Agency  
401 M Street SW  
MC 5301W  
Washington, DC 20460

RE: Interpretation Request

Dear Ms. Cotsworth:

This letter requests an interpretation of language found in a September 2, 1988 Federal Register preamble (53 FR 34079) concerning tanks used as wastewater treatment units (WTUs) that may also be desired to be used for other purposes. The relevant section states [Para II (2)],

"EPA intends that this exemption [for WTUs] apply to any tank system that manages hazardous wastewater and is dedicated for use with an on-site wastewater treatment facility. However, if a tank system, in addition to being used in conjunction with an on-site wastewater treatment facility, is used on a routine or occasional basis to store or treat a hazardous wastewater prior to shipment off-site for treatment, storage, or disposal, it is not covered by this exemption Unless the tank system otherwise qualifies for some other exemption, it would be subject to the revised standards for hazardous waste tank systems."

The issue was also briefly addressed in an August 15, 1990 letter from Sylvia Lowrance, Director, Office of Solid Waste to Ted A. Hopkins, Oregon Department of Environmental Quality. The letter refers to and paraphrases the above citation, while not elaborating.

There are two ways to interpret the meaning of the word Adedicated@ in the above. First, it could be that EPA is saying that WTU tanks must be dedicated for wastewater treatment service at all times and never for anything else. The second possibility is that WTU tanks must be dedicated for wastewater treatment service in the sense that if they are ever used for hazardous waste accumulation service, they must meet the stricter design and operational requirements for hazardous waste tanks.

RO 14262

In practice the second possibility would occur when a tank system is dedicated to WTU service for part of the year, and dedicated to hazardous waste accumulation for a different part of the year. When the tank system operates in WTU mode, it would have to meet all the design and operations requirements of that service (primarily imposed via a wastewater pretreatment approval); when the tank system operates in hazardous waste accumulation mode, it would have to meet all the design and operational requirements imposed for that service.

Naturally, the design elements of the tank system would have to meet the most stringent of either type of service from the start of this alternating use, and the tank system would need to be purged of hazardous waste before being switched to WTU service.

We believe that EPA intends to allow the second possibility. The last sentence of the citation shows that the operative concern of EPA is that tanks used even occasionally for accumulation "would be subject to the revised standards for hazardous waste systems." The sentence seems to be cautionary in nature, to warn that full RCRA requirements apply if the WTUs are occasionally used for accumulation. Therefore, if tanks do meet full RCRA requirements when operated in accumulation mode and meet applicable requirements under the Clean Water Act for WTU tanks, alternating use as described above would be allowable. Also, it is clear that some alternate uses are allowed, specifically a use that "otherwise qualifies for some other exemption." If alternate uses subject to exemption are allowable, it follows that alternate uses in compliance with the standards for that alternate use should be allowed.

It is understandable that the wording of the 1988 preamble assumes in inference that tanks are either accumulation or WTU and is not focused on the alternating use possibility. That is likely because the preamble was written before 40 CFR 265 Subpart J was extended to cover accumulation tanks as well as storage tanks. It is likely that a storage facility would not alternate the USC of a tank system since it would have little need to store before shipment off-site, instead, performing treatment on-site. Therefore, the preamble does not pause to clarify the alternating use possibility. That clarity comes from the intent of the last sentence. Thus, the word "dedicated" precludes dual use of a WTU tank designed only for CWA service, and is not meant to preclude complying alternating use, which would not have been a subject of interest in a preamble discussion directed at TSDFs.

In addition, the foregoing offers a reasonable conclusion. It would be wasteful to require an operator to build two parallel tank systems, each meeting a separate standard. When operating in RCRA mode, the WTU system would lie dormant, when operating in WTU mode, the RCRA system would be dormant. It is reasonable to allow alternating use when a tank system is adequately regulated for either and both applications.

Please determine if our reading of EPA's intent is the correct one. Please call me at (207) 761-3928 if you have any questions. Thank you for your help.

Sincerely,

Susan Pendleton  
*Program Manager*

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



In the Matter of :  
:  
CHEMSOLV, INC., formerly trading as :  
Chemicals and Solvents, Inc. :  
:  
and :  
:  
AUSTIN HOLDINGS-VA, L.L.C. :  
:  
Respondents. :  
:  
Chemsolv, Inc. :  
1111 Industrial Avenue, S.E. :  
1140 Industrial Avenue, S.E. :  
Roanoke, Virginia 24013 :  
:  
Facility :  
:

EPA Docket No. 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)

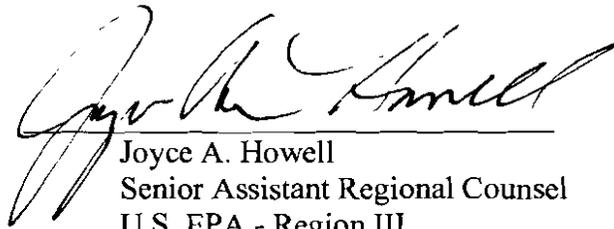
**CERTIFICATE OF SERVICE**

I certify that I sent by UPS, next day delivery, a copy of Complainant's Reply Memorandum in Further Support of Complainant's Motion for Accelerated Decision, Second Declaration of Kenneth Cox, Second Declaration of Peggy Zawodny, the Declaration of George Houghton, the Declaration of Jose Reyna III, the Declaration of Elizabeth Lohman and the Declaration of Dr. Joe Lowry, together with a revised proposed form of Order to the addressees listed below. The original and one copy of Complainant's Reply Memorandum in Further Support of Complainant's Motion for Accelerated Decision, Second Declaration of Kenneth Cox, Second Declaration of Peggy Zawodny, the Declaration of George Houghton, the Declaration of Jose Reyna III, the Declaration of Elizabeth Lohman, together with a revised proposed form of Order these papers, were hand-delivered to the Regional Hearing Clerk, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103-2029. A printout of .pdf file and one copy of the Declaration of Dr. Joe Lowry was filed with the Regional Hearing Clerk, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103-2029. The original of the Declaration of Dr. Joe Lowry will be filed under motion *nunc pro tunc*.

Hon. Barbara A. Gunning, A.L.J.  
EPA Office of Administrative Law Judges  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20005

Charles L. Williams, Esq.  
Gentry, Locke, Rakes & Moore  
800 Sun Trust Plaza  
Suite 350 Franklin Court  
10 Franklin Road  
Roanoke, VA 24011

Dated: 12-27-2011

A handwritten signature in black ink, appearing to read "Joyce A. Howell", written over a horizontal line.

Joyce A. Howell  
Senior Assistant Regional Counsel  
U.S. EPA - Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

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

In the Matter of: :  
: :  
CHEMSOLV, INC., formerly trading as :  
Chemicals and Solvents, Inc. :  
: :  
and :  
: :  
AUSTIN HOLDINGS-VA, L.L.C. :  
: :  
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: :  
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1111 Industrial Avenue, S.E :  
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Roanoke, Virginia 24013 :  
: :  
: :  
Facility. :  
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EPA Docket No. 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)

**ORDER**

This matter having been opened to the Court upon Complainant's Motion for Partial Accelerated Decision as to Liability for Counts III through VII of the Administrative Complaint, and the Court having considered the argument of counsel and for good cause shown, it is hereby:

ORDERED that Respondents are liable for the allegations contained in Counts III through VII of the Administrative Complaint, to wit:

1. Respondents are persons as defined in Section 1004(15) of RCRA, 42 U.S.C. Section 6903(15), and 9 VAC 20-60-260.A, which incorporates by reference 40 C.F.R. § 260.10 with exceptions not relevant herein.

2. Respondent Chemsolv is and, at all times relevant to the violations alleged in Counts III through VII of the Administrative is Complaint, was the "owner" and "operator" of a "facility" located at 1111 and 1140 Industry Avenue, S.E., in Roanoke, Virginia ("the Facility"), as those terms are defined in 9 VAC 20-60-260.A, which incorporates by reference 40 C.F.R. § 260.10 with exceptions not relevant herein.
3. Respondent Austin Holdings–VA, L.L.C. is and, at all times relevant to the violations alleged in Counts III through VII of the Administrative is Complaint, was the "owner" of a "facility" located on at 1111 and 1140 Industry Avenue, S.E., in Roanoke, Virginia as those terms are defined in 9 VAC 20-60-260.A, which incorporates by reference 40 C.F.R. § 260.10 with exceptions not relevant herein.
4. Respondents are and were, at all times relevant to the Complaint, a "generators" of "hazardous waste," as described below, at the Facility, as those terms are defined at 9 VAC 20-60-260.A which incorporates by reference 40 C.F.R. § 260.10 with exceptions not relevant herein.
5. Until sometime on or about March 27, 2008, Respondents owned and/or operated a subgrade hazardous waste storage tank at the Facility known as the "Pit."
6. The Pit is either an "existing tank system" or "new tank system" as that term is defined at 9 VAC 20-60-260A, which incorporates by reference 40 C.F.R § 260.10.
7. Complainant's representatives took samples of water and solids contained in the Pit on May 23, 2007 at the Chemsolv Facility.
8. The analysis of the May 23, 2007 Pit water sample, using the Toxicity Characteristic Leaching Procedure ("TCLP") described in 40 C.F.R. § 261.24 (incorporated by reference in 9 VAC 20-60-261), indicated the Pit water contained 6.1 mg/L chloroform.
9. Solid waste with a concentration of 6.0 mg/L chloroform or greater is a hazardous waste (D022) pursuant to 9 VAC 20-60-261, which incorporates by reference 40 C.F.R. § 261.24 with exceptions not relevant herein, because it exhibits the characteristic of "toxicity" for chloroform.
10. The analysis of the May 23, 2007 Pit solids sample, using the TCLP described in 40 C.F.R. § 261.24 (incorporated by reference in 9 VAC 20-60-261), indicated the Pit sludge contained 457 mg/L tetrachloroethene and 15.5 mg/L trichloroethene.
11. Solid waste with a concentration of .7 mg/L tetrachloroethene or greater is a hazardous waste (D039) pursuant to 9 VAC 20-60-261.A, which incorporates by reference 40 C.F.R. § 261.24 with exceptions not relevant herein, because it exhibits the characteristic of "toxicity" for tetrachloroethene.
12. Solid waste with a concentration of .5 mg/L or greater trichloroethene is a hazardous waste (D040) pursuant to 9 VAC 20-60-261.A, which incorporates by reference 40 C.F.R. § 261.

24 with exceptions not relevant herein, because it exhibits the characteristic of "toxicity" for trichloroethene.

13. The analysis of the May 23, 2007 Pit sludge sample indicated the Pit sludge contained a volatile organic ("VO") concentration of greater than 500 parts per million by weight.

14. Respondent Chemsolv cleaned out the Pit on or around February 1, 2008, removed the Pit, a single-walled subgrade tank constructed of carbon steel with a ceramic interior coating, and filled the opening with gravel on or about March 27, 2008.

15. The Pit water and Pit solids referred to above, are and were, at the time of the EPA and VADEQ inspections referred to above, "solid wastes" as that term is defined at 9 VAC 20-60-260.A, which incorporates by reference 40 C.F.R. § 260.10, and thus "hazardous wastes" as that term is defined at 9 VAC 20-60-260.A, which incorporates by reference 40 C.F.R. § 260.10.

16. Respondents accumulated 7,924 kilograms (17,500 lbs.) of hazardous waste at the Facility at one time from March 23, 2007 through and including February 20, 2008.

17. From at least May 23, 2007 until approximately February 1, 2008, Respondents violated 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.193(a), (d) and (e), with exceptions not relevant herein, by failing to provide secondary containment for the Pit which met the requirements of 40 C.F.R. § 264.193(1)(a), (d) and (e).

18. From at least May 23, 2007 until approximately February 1, 2008, Respondents did not obtain and/or keep on file at the Facility written statements by those persons required to certify the design of the tank system and supervise the installation of the tank system in accordance with the requirements of 40 C.F.R. § 264.192(b) - (f) for the Pit, as required by 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.192(a) and (g).

19. From at least May 23, 2007 until February 1, 2008, including all "operating days" within the meaning of 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.195(b) and (d) with exceptions not relevant herein, Respondents did not inspect and/or document the inspections of the aboveground portions of the Pit, in violation of the requirements of 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.195(b) and (d).

20. From at least May 23, 2007 until February 1, 2008 Respondents violated 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.1082(b) and 1084(b), by failing to control air pollutant emissions from the Pit in accordance with the Tank Level 1 or 2 controls specified in 40 C.F.R. § 264.1084(c) or (d).

21. Respondents violated 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.197, by failing to comply with the closure requirements of 40 C.F.R. Part 264, Subparts G and H.

WHEREAS, IT IS FURTHER ORDERED:

22. Pursuant to the authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Respondents are hereby ordered to perform the Compliance Task listed in Paragraph 23 of this Order. Respondents shall certify completion of the Compliance Task in accordance with Paragraph 24 below. "Days" as used herein shall mean calendar days unless specified otherwise.

23. Respondents shall, within sixty (60) days of the date of this Order, submit a closure plan prepared pursuant to 9 VAC 20-60-264.A, which incorporates by reference 40 C.F.R. § 264.112 and .197 with exceptions not relevant herein, for the area where the Pit was located at the Facility and submit such plan to the Virginia Department of Environmental Quality, and implement the same upon approval of the Virginia Department of Environmental Quality.

24. Any notice, report, certification, data presentation, or other document submitted by either Respondent pursuant to this Compliance Order which discusses, describes, demonstrates, supports any finding or makes any representation concerning such Respondent's compliance or noncompliance with any requirements of this Compliance Order shall be certified by a responsible corporate officer of such Respondent. A responsible corporate officer means: (1) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation; or (2) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25 million (in second quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

The certification of the responsible corporate officer required above shall be in the following form:

I certify that the information contained in or accompanying this [type of submission] is true, accurate and complete. As to [the/those] identified portions of this [type of submission] for which I cannot personally verify [its/their] accuracy, I certify under penalty of law that this [type of submission] and all attachments were prepared in accordance with a system designed to assure the qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

Signature: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Any notifications or submissions required by this Compliance Order to be submitted to EPA, including, but not limited to, the aforementioned certification, shall be sent via certified mail/return receipt requested or overnight mail commercial delivery service to the attention of the following persons:

Kenneth J. Cox (3LC70)  
Land and Chemicals Division  
United States Environmental Protection Agency - Region III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029; and

Joyce A. Howell, Esq. (3RC30)  
Senior Assistant Regional Counsel  
Land and Chemicals Division  
United States Environmental Protection Agency - Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

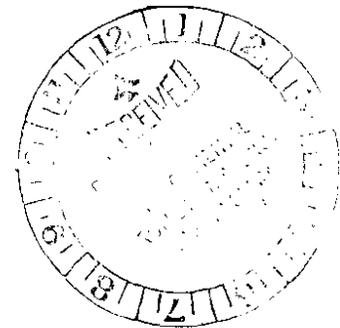
SO ORDERED.

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Hon. Barbara A. Gunning, A.L. J.

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

In the Matter of: :  
: :  
CHEMSOLV, INC., formerly trading as :  
Chemicals and Solvents, Inc. :  
: :  
and :  
: :  
AUSTIN HOLDINGS-VA, L.L.C. :  
: :  
: :  
Respondents, :  
: :  
: :  
Chemsolv, Inc. :  
1111 Industrial Avenue, S.E :  
1140 Industrial Avenue, S.E :  
Roanoke, Virginia 24013 :  
: :  
: :  
Facility. :  
: :



EPA Docket No. 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)

**SECOND DECLARATION OF KENNETH COX IN SUPPORT OF  
COMPLAINANT'S MOTION FOR ACCLERATED DECISION**

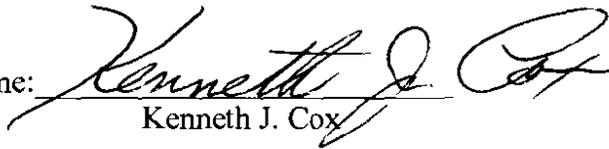
Kenneth J. Cox, hereby declare that:

1. Using the table supplied in Respondents' Information Request Letter Response dated December 10, 2007 Respondents' Exhibit 11, CS 160 – 163, I calculated the total gallons of Pit Water shipped for disposal between February 2004 and August 2007 as over 442,000 gallons.
2. When an owner or operator of a Facility claims a material is a product or raw material as opposed to a waste, I examine how the material is handled. Some of the factors I consider in determining whether a material is being managed as a product or raw material, are: the condition of containers in which the material is stored, the management of the containers in which the material is stored, and the exposure of the material to deteriorating conditions such as rain, heat, or sun. In the case of the material in the Pit

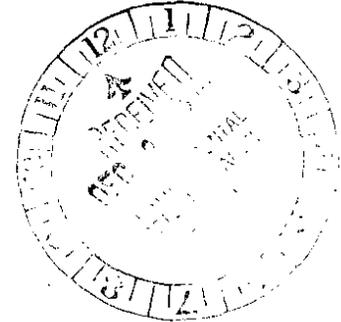
that I observed at the time of my inspection on May 15, 2007, the material from the Pit would not be useful as rinsewater because it would not accomplish the task of cleaning a drum or container, but rather actually make the drum or container dirtier. See Complainant Exhibit 17, EPA 313. Moreover, the same concept would apply if the Pit Water was used as a substitute for fresh water as an ingredient in a product; the Pit Water would contaminate the product whereas fresh water would not.

3. Respondents have never proved the existence of a certification of a professional engineer, in any form, attesting to the soundness of the Pit, no less the form required by RCRA regulations set forth at 9 VAC 20-60-260.A , 40 C.F.R. § 264.191(b)(1) – (5) or 40 C.F.R. § 264.192(b) - (f) (new tanks). Moreover, Respondents have never proved the existence of a certification of a professional engineer that contains the language set forth in 40 C.F.R. § 270. 11(d).
4. In further clarification of my statements set forth in paragraphs 29 - 31 of my First Declaration, these statements were for purpose of illustration of the possible maximum volume only.
5. The word “basis” in paragraph 36 of my First Declaration should read “basin.”
6. In further clarification of my statement in paragraph 39 of my First Declaration, I concluded that Chemsolv did not have any Tank Level I or Tank Level II controls in place with regard to the Pit because it had an open top with no air emission controls.
7. In further clarification of my statement in paragraph 40, I observed that the subgrade tank that was known as the Pit had been removed and the excavation backfilled by Chemsolv during my site visit of the Facility on March 27, 2008.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on: 12/22/11 Name:   
Kenneth J. Cox

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



In the Matter of: :  
: :  
CHEMSOLV, INC., formerly trading as :  
Chemicals and Solvents, Inc. :  
: :  
and :  
: :  
AUSTIN HOLDINGS-VA, L.L.C. :  
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Roanoke, Virginia 24013 :  
: :  
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Facility. :  
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EPA Docket No. 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)

**DECLARATION OF DR. JOE LOWRY IN SUPPORT OF  
COMPLAINANT'S MOTION FOR ACCELERATED DECISION**

I, Joe Lowry, hereby declare that:

1. I am employed as the Chief Scientist, and I am a National Technical Expert for the United States Environmental Protection Agency (EPA), in the National Enforcement Investigations Center (NEIC) in Lakewood, Colorado. I have been in this position for 14 years. I have been employed by EPA for 33 years.
2. As part of my duties, I have worked to develop EPA sampling guidance. I assisted in drafting the guidance document titled *RCRA Waste Sampling Draft Technical Guidance*, August 2002 (Complainant Exhibit 59, EPA 1638 – 1667). I also worked on the Federal Register Notice set forth at 55 Federal Register 4440 (February 8, 1990) (Complainant Exhibit 60, EPA 1697 - 1702). I have testified about representative sampling at civil and criminal legal proceedings, some of which involved the sampling guidance provided in

chapter 9 of the EPA method manual *Test Methods for Evaluating Solid Waste, Physical/Chemical Methods*, EPA Publication SW-846 (Complainant Exhibit 61, EPA 1703 – 1780). I used these publications in part to formulate my opinion set forth herein.

3. I was asked by EPA Region 3 to review the sampling and analytical results for the samples taken by EPA at the Chemsolv Facility on May 23, 2007, of the subgrade tank known as the ‘Pit.’
4. In addition, I reviewed the May 23, 2007, EPA Compliance Evaluation Inspection (Complainant Exhibit 18, EPA 331 – 371) and the EPA analytical results (Complainant Exhibit 15, EPA 241 – 283; Complainant Exhibit 16, EPA 284 – 294), the response to the EPA Information Request submitted by the Environmental Quality Company (Complainant Exhibit 63, EPA 1791 -1801), together with the Declarations of Jose Reyna, George Houghton, Kenneth Cox and Peggy Zawodny.
5. I have reviewed the expert report of Defendant’s Expert, Scott Perkins, P.E., (Respondent Exhibit 30, CS 315 – 316), as well as the materials included in Respondent’s Pre-Hearing Exchange upon which Mr. Perkins relied in making his report:
  - Respondent Exhibit 21, CS 239, Sampling Geometry Graphic
  - Respondent Exhibit 22, CS 240, 40 C.F.R. § 261.20
  - Respondent Exhibit 23, CS 241, 40 C.F.R Appendix I
  - Respondent Exhibit 24, CS 242 – 256, EPA Tank Sampling SOP # 2010
  - Complainant Exhibit 29, EPA 1209 - 1229 (entire document) and Respondent Exhibit 25, CS 257 – 258, (excerpt) EPA field notes
  - Respondent Exhibit 26, CS 259 – 261, ASTM D5495-03 Standard Practice for Sampling with a Composite Liquid Waste Sampler (Coliwasa)
  - Respondent Exhibit 27, CS 262 – 302, Complainant Exhibit 59, EPA 1638 - 1677 *RCRA Waste Sampling Draft Technical Guidance*, August 2002
  - Respondent Exhibit 28, Photograph, CS 303 – 304
  - Respondent Exhibit 29 ASTM D5358-93 Standard Practice for Sampling with a Dipper or Pond Sampler CS 305 - 306
6. I have also reviewed an affidavit of Scott Perkins, P.E. and two affidavits of Jamison G. Austin as well as Respondents’ Response to Complainant’s Motion for Partial Accelerated Decision as to Liability.
7. Based on my review of the materials listed above, together with my own knowledge and experience, I have formed an opinion concerning the soundness of the sampling of the subgrade tank at the Facility known as the “Pit,” conducted by EPA inspectors on May 23, 2007, and as to the reliability of the determination that the material in subgrade tank at the facility known as the Pit, contained hazardous waste.
8. It is my opinion that the sampling of the liquid and solid material in the Pit conducted by EPA Inspectors George Houghton and Jose Reyna on May 23, 2007, at Respondents’ Facility, obtained material from which a hazardous waste determination of the Pit could

be made.

9. Appendix I to 40 CFR Part 261 titled "Representative Sampling Methods" provides that the sample tool appropriate for the form and consistency of the waste should be used, but the regulations do not require the protocols referenced. The sampling tools employed by EPA inspectors Houghton and Reyna were appropriate for the form and consistency of the waste. The pond sampler is appropriate for the liquid, and the tank scraper is appropriate for settled solids. The devices were manufactured with intent of sampling the media sampled.
10. The definition of representative sample provided at 40 CFR §260.10 is, "Representative sample means a sample of a universe or whole (e.g. waste pile, lagoon, ground water) which can be expected to exhibit the average properties of the universe or whole." The sampling technique used by EPA inspectors Houghton and Reyna involved multiple sampling increments of each media, the liquid and the settled solids. The multiple sampling increments were collected with the expectation of providing physical coverage. The sample increments were composited with the expectation of allowing translation of the physical coverage via measurement in the laboratory to the average properties of the media.
11. In my opinion, that the samples are suitably representative to determine whether a hazardous constituent is present. As noted in the Section 2.2.4. of the EPA Guidance Document *RCRA Waste Sampling Draft Technical Guidance*, August 2002:

*An enforcement official, when conducting a compliance sampling inspection to evaluate a waste handler's compliance with a "do not exceed" standard, take(s) only one sample. Such a sample may be purposively selected based on professional judgment. This is because all the enforcement official needs to observe – for example to determine that a waste is hazardous – is a single exceedance of the standard.*
12. Based on my review of the materials listed above, together with my own knowledge and experience, it is my opinion that the sampling conducted by EPA obtained sufficient data upon which EPA could conclude that chloroform, tetrachloroethene, and trichloroethene were identified as being present in the Pit at the Respondents' facility in sufficient concentrations to exceed the regulatory levels set forth at 40 CFR § 261.24.
13. I am especially confident that the samples are reliable given the level of concentration indicated by the EPA analysis of the samples. As noted in Complaint Exhibits 15 and 16, the analysis of the May 23, 2007, Pit settled solids sample indicated the Pit settled solids contained 457 milligram per liter (mg/L) tetrachloroethene and 15.5 mg/L trichloroethene. As stated in the Preamble to the proposed rule at 55 Federal Register 4440, "Hazardous Waste Management System: Testing and Monitoring Activities," February 8, 1990:

*If a sample possesses the property of interest, or contains the constituent at a*

*high enough level relative to the regulatory threshold, then the population from which the sample was drawn must also possess the property of interest or contain that constituent. Depending on the degree to which the property of interest is exceeded, testing of samples which represent all aspects of the waste or other material may not be necessary to prove that the waste is subject to regulation.*

14. Consistent with the above, the concentration of tetrachloroethene found in the Pit solids sample was so large (457 mg/L) that representativeness of the sample is demonstrated. It would be necessary to take more than 653 additional samples, all with an analytical result of zero, to bring the mathematical average concentration below the regulatory contaminant threshold of 0.7 mg/L tetrachloroethene for toxicity characteristic hazardous waste identified with EPA hazardous waste No. D039. The likelihood of this occurrence is beyond reasonable expectation.
15. Similarly, the concentration of trichloroethene found in the Pit solids sample was so large (15.5 mg/L) that representativeness of the sample is demonstrated. It would be necessary to take more than 31 additional samples, all with an analytical result of zero, to bring the mathematical average concentration below the regulatory contaminant threshold of 0.5 mg/L trichloroethene for toxicity characteristic hazardous waste identified with EPA hazardous waste No. D040. The likelihood of this occurrence is beyond reasonable expectation.
16. The reliability of EPA sampling and analysis for the Pit settled solid sample is also demonstrated by the close agreement of tetrachloroethene and trichloroethene concentrations with a sample of the Pit settled solids collected on January 24, 2008, by or for the defendants. The EPA laboratory reported 37,100 milligrams per kilogram (mg/kg) tetrachloroethene and 835mg/kg trichloroethene for the EPA Pit settled solids sample. These are dry weight values and based on the reported 43.1 percent solids content of the sample; the wet weight values are 16,000 mg/kg tetrachloroethene and 360 mg/kg trichloroethene. A certificate of analysis dated January 30, 2008, from ProChem Analytical Incorporated of Ellison, Virginia, for a Pit sludge sample collected on January 24, 2008, reports 21,000 mg/L tetrachloroethene and 590 mg/L trichloroethene.
17. The EPA Toxicity Characteristic Leaching Procedure (TCLP) SW-846 Method 1311 causes a sample that is 100 percent solids to be extracted at a volume-to-mass ratio of 20. That is, for a 25-gram subsample for the zero headspace extracts, a 500-milliliter extract volume is produced. Therefore, if all the tetrachloroethene and trichloroethene in EPA's Pit settled solids sample were solubilized into the TCLP extract, then the 16,000 mg/kg tetrachloroethene and 360 mg/kg trichloroethene would result in TCLP extract concentrations of 780 mg/L tetrachloroethene and 18 mg/L trichloroethene. The EPA laboratory reported concentrations of 457 mg/L tetrachloroethene and 15.5 mg/L trichloroethene. The close agreement of the calculated values and the measured values demonstrates the reliability of the results.
18. For the EPA Pit settled sample, essentially all of the trichloroethene was solubilized by

the TCLP, while only about 57 percent of the tetrachloroethene was solubilized. This suggests that even if another Pit settled solid sample had a tetrachloroethene concentration of one-half or a much greater concentration than that reported by EPA, the TCLP tetrachloroethene could be the same because the aqueous solubility would still be at saturation. That is, variability in the tetrachloroethene content of samples would not result in variability of the TCLP results. Tetrachloroethene saturation of the TCLP extract demonstrates reliability of the TCLP result.

19. The aqueous liquid above the settled solids was found to contain about 0.7 mg/L tetrachloroethene. Because this concentration is not near saturation, the tetrachloroethene of the settled solids must not have had good communication with the aqueous liquid. Tetrachloroethene is a liquid and has a specific gravity of about 1.6. Being heavier than water, if a free nonaqueous liquid phase of tetrachloroethene were present in the Pit, it would be expected to pool near the bottom. Depending on the permeability of the settled solids, the tetrachloroethene might percolate through particulate solids. This may account for the lack of communication with the aqueous liquid in the pit. Hence, samples not incorporating the very bottom of the settled solids might cause measurement to underestimate the tetrachloroethene concentration of the settled solids.
20. The EPA laboratory reported 9.5 mg/L chloroform for the Pit liquid and 6.1 mg/L chloroform for the TCLP extract of the Pit liquid. The contaminant threshold limit for chloroform is 6 mg/L for toxicity characteristic hazardous waste identified with EPA hazardous waste No. D022. Although the ZHE of the TCLP was intended to mitigate volatility loss during filtering, losses occurred. This is evidenced by the 9.5 mg/L chloroform for the sample and 6.1 mg/L chloroform for the sample TCLP extract. However, the closeness of the values demonstrates the reliability of each result.
21. Although EPA inspectors Houghton and Reyna did not conduct sampling specifically for the purpose of determining the applicability of 40 CFR Subpart CC to the Pit, the analytical results from the Pit samples indicated that the requirements of 40 CFR Subpart CC apply to the Pit.
22. The analysis of the May 23, 2007, samples of the material in the Pit was sufficient to support a conclusion that the requirements of 40 CFR Subpart CC would apply to the Pit because the concentration of volatile organic (VO) compounds was large enough that if even three additional samples had a value of zero, the VO concentration in the material from the Pit would still exceed the regulatory threshold of 500 parts per million by weight (ppmw, which is equal to mg/kg).
23. Respondents' response to Complainant's motion at page 16 declares "the EPA failed to incorporate sufficient quality control steps to ensure reliability." As discussed above, the reliability of the EPA sampling and analysis of the Pit liquid and solid is demonstrated in various manners. Further, the custody record provides that the Pit samples were collected on May 23, 2007, and transferred to the laboratory on May 24, 2007. This document provides that there were 17 containers for the liquid and nine containers for the sludge (settled solids). The document also shows three containers for the trip blank and five

containers for the equipment blank. The preparation and the analysis of trip and equipment blanks are quality control steps taken to ensure reliability. The analytical results for the blanks provide assurance that the Pit sample analytical results are not attributed to contamination by the sample containers, sampling handling, preparation, or analysis.

24. Moreover, the analytical records provide the samples were analyzed by EPA for semi-volatile and volatile organic compounds by gas chromatography coupled to mass spectrometry. TCLP extracts of the samples were analyzed for volatile organic compounds by the same technology. This technology is widely accepted in the scientific community and is considered reliable. Proper application of the technology is demonstrated by the matrix and surrogate organic compound known additions of the samples as well as laboratory control sample results.
25. The laboratory records show that the Pit samples were prepared for volatile and semivolatile organic compound analyses on June 7, 2007, and analyzed on June 7, 2007, June 26, 2007, and June 27, 2007. Because very high concentrations of volatile organic compounds were found by these determinations, the laboratory records show that TCLP zero headspace extracts were prepared on August 16, 2007, and volatile organic compounds were determined for the extracts on August 22, 2007. The laboratory identified that the recommended holding time for samples for such analyses of 14 days was exceeded. Exceeding recommended holding time does not detract from the reliability of the determination that the waste exhibits the toxicity characteristic because contaminant concentrations are considered to be minimum values, and concentrations could only have been higher or the same if holding times were met. This is because the concentration of organic compounds can be lowered by various degradation pathways (biological activity, volatility, etc.). EPA has provided this guidance in rulemaking preamble (55 Federal Register 4443, 1990 and 58 Federal Register 46045, 1993) and in chapter 2 at page 2-5 of its methods manual *Test Methods for Evaluating Solid Waste, Physical/Chemical Methods*, EPA Publication SW-846.

*Analytical data generated outside of the recommended holding times should typically be considered as minimum values only. Such data may be used to demonstrate that a waste is hazardous where it shows the concentration of a constituent to be above the regulatory threshold, but cannot be used to demonstrate that a waste is not hazardous.*

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on: 12/21/2011

Name:

  
Joe Lowry, PhD



7. On the day of the May 23, 2007 inspection, the EPA Inspectors finished sampling at the warehouse located at 1111 Industry Avenue near the end of the day shift for the Chemsolv employees, at approximately 5- 5:30 PM. At that point in time, Kim Thompson left the site, and I remained with the EPA Inspectors.
8. At this time, 5- 5:30 PM, George Houghgton, Jose Reyna, and myself moved across the street to 1140 Industry Avenue to begin sampling activities at the Pit. The Pit is a sub-grade tank located under a shed roof and received wastewater, material spillage, and stormwater. On the way to the Pit, EPA staff, Cary Lester, and I encountered Jamie Austin.
9. Mr. Austin appeared irritated that EPA was conducting a sampling inspection and asked questions about the progress of sampling activities and how much longer we would be on site. Upon hearing that additional sampling would take place at 1140 Industry Avenue, Mr. Austin turned and walked toward his car.
10. Mr. Austin entered his vehicle, a black four-door car and drove what appeared to be extremely fast and passed within several feet of us as he left the property. Mr. Houghton, Mr. Reyna and I made comments about the speed and proximity of Mr. Austin's car. This encounter, lasting a few minutes at most, was the only time Mr. Austin was in the presence of the sampling inspection team on May 23, 2007.
11. Throughout the day on May 23, 2007, while the EPA's inspection team was collecting samples, DEQ staff engaged Mr. Lester in conversations about facility operations, waste generation, waste management and other activities at the site. Several times, Mr. Lester and DEQ staff walked away from where the sampling activities were taking place to investigate an odor emanating from another area of the 1111 Industry Avenue warehouse. Upon investigation of the odor, DEQ and Mr. Lester discovered a leaking drum. Mr. Lester made arrangements with employees to have the leaking drum addressed. As a result, Mr. Lester did not observe the entire sampling activities.
12. The Pit received rinse water used to rinse the inside and outside of containers that had contained surfactants, acids, and bases returned from Chemsolv's customers. In addition, a piping manifold system used for the distribution of product from the corrosive-materials

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

In the Matter of: :

CHEMSOLV, INC., formerly trading as :  
Chemicals and Solvents, Inc. :

and :

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

Respondents, :

Chemsolv, Inc. :  
1111 Industrial Avenue, S.E. :  
1140 Industrial Avenue, S.E. :  
Roanoke, Virginia 24013 :

Facility. :

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EPA Docket No. 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)

**DECLARATION OF JOSE REYNA, III IN SUPPORT OF  
COMPLAINANT'S MOTION FOR ACCELERATED DECISION**

I, Jose Reyna, III, hereby declare that:

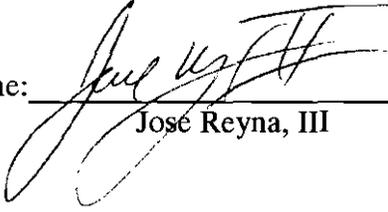
1. I have been employed as a Physical Scientist in the Enforcement and Compliance Assistance Branch in the Office of Enforcement, Compliance and Environmental Justice, U.S. EPA Region III for the past five years. Prior to my employment with EPA, I was employed by the Texas Commission on Environmental Quality for two years.
2. My principal duties are conducting Compliance Evaluation Inspections ("CEIs") for EPA Region III. I often perform sampling activities at facilities that are the subject of an EPA investigation.
3. On May 23, 2007, I together with another EPA employee, George Houghton, took samples at various locations at the Chemsolv Facility in Roanoke, Virginia.

4. Before commencing the sampling activities on May 23, 2007, Mr. Houghton and I donned appropriate protective gear.
5. Both Mr. Houghton and I took samples of the liquid and the settled solids from the subgrade tank at the Chemsolv Facility known as the "Pit."
6. The types of tools Mr. Houghton and I used to obtain the samples from the Pit on May 23, 2007 are pictured in the attachment to this Declaration.
7. The tool used to take the liquid sample from the Pit is known as a "swing sampler." A swing sampler consists of a glass jar attached to a telescoping pole.
8. The tool used to obtain the solids sample from the Pit is known as a "scraper." It is a 9" long, 3" wide, 5 1/2" deep, rectangle-shaped stainless steel scoop. It is can be attached to a pole, which is six feet in length. Additional six foot sections can be attached to extend the pole's length. As shown in the attached photograph, one edge of the scraper has jagged teeth.
9. I took the photographs that are attached to this Declaration.
10. For the May 23, 2007 sampling of the Pit at the Chemsolv facility, two sections of pole were attached to the scraper, making the pole twelve feet in length.
11. The Pit was surrounded by a 4 foot high wall. Mr. Houghton stood on one side of the Pit and I stood on an adjacent side, approximately 3 - 4 feet from Mr. Houghton.
12. Mr. Houghton and I took turns taking samples of both the liquid and the solids from the Pit. We passed the sampling tool between us so that during the liquid sampling, we each took samples of liquid, and during the solids sampling, we each took samples of the solids. We took all of the samples from the same physical locations at the Pit wall. We only took samples of one type of material at any given time.
13. Mr. Houghton and I took liquid samples from several locations in the Pit. To accomplish this, we dipped the swing sampler below different locations of the liquid surface in the Pit. We were able to submerge the glass jar below the surface of the Pit liquid to obtain samples.
14. To obtain samples of the settled solids from the Pit, I reached over the wall surrounding the Pit and brought the scraper in at approximately a 45 degree angle so that the teeth on the scraper would engage the solids. I would then push down and pull the scraper towards me.
15. By applying pressure to the pole and force to the downward movement of the scraper, I estimate that the scraper penetrated the solids approximately two to three feet below the surface of the liquid.

16. Mr. Houghton and I took solids samples from several locations in the Pit. To accomplish this, we cast the scraper at several locations in the Pit.
17. The solids level of the Pit began approximately one foot below the surface of the liquid.
18. Each solids sample Mr. Houghton and I collected was from a different area of the Pit.
19. The solids samples were retrieved and placed into a stainless steel pan. The samples were stirred slightly, and then placed in the sample jars.
20. The sampling jars were prepared and handled in the manner described in George Houghton's May 23, 2007 Inspection Report, Complainant Exhibit 18, EPA 334.
21. I recall that an employee of Chemsolv, Mr. Carey Lester, was present off and on while we conducted the sampling of the Pit. While we were sampling the pit, Mr. Lester, would leave from time to time and then return. When Mr. Lester was present during the Pit sampling, he observed the activity from a distance of approximately twenty feet.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on: 12-7-2011

Name:   
Jose Reyna, III







12-06-2011



NASCO  
SWISS  
Sampler

Manufactured by  
by NASCO, FOR  
1 800

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



In the Matter of: :  
: :  
CHEMSOLV, INC., formerly trading as :  
Chemicals and Solvents, Inc. :  
: :

and :  
: :

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

Respondents, :  
: :

EPA Docket No. RCRA-03-2011-0068

Chemsolv, Inc. :  
1111 Industrial Avenue, S.E :  
1140 Industrial Avenue, S.E :  
Roanoke, Virginia 24013 :  
: :

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

Facility. :  
: :  
: :

**DECLARATION OF GEORGE HOUGHTON IN SUPPORT OF  
COMPLAINANT'S MOTION FOR ACCELERATED DECISION**

I, George Houghton, hereby declare that:

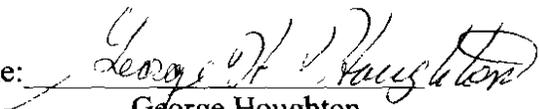
1. I was employed as an Inspector in the Enforcement and Compliance Assistance Branch in the Office of Enforcement, Compliance and Environmental Justice, U.S. EPA Region III. I was an EPA employee for 37 years, and was employed as an Inspector after the National Pollutant Discharge Elimination System regulations were promulgated. I retired from this position in 2009.
2. My principal duties as an EPA Inspector were to conduct Compliance Enforcement Inspections for EPA Region III. I often performed sampling activities at facilities that were the subject of an EPA Investigation.
3. On May 23, 2007, I together with another EPA employee, Jose ("Joe") Reyna, took

samples at various locations at the Chemsolv Facility in Roanoke, Virginia.

4. Before commencing the sampling activities on May 23, 2007, Mr. Reyna and I donned appropriate protective gear.
5. Both Mr. Reyna and I took samples of the liquid and the settled solids from the subgrade tank at the Chemsolv Facility known as the "Pit."
6. The types of tools Mr. Reyna and I used to obtain the samples from the Pit are pictured in the attachment to Mr. Reyna's Declaration.
7. The tool used to take the liquid sample from the Pit is known as a "swing sampler." A swing sampler consists of a glass jar attached to a telescoping pole.
8. The tool used to obtain the solids sample from the Pit is known as a scraper. It is 9" long, 3" wide, 5 1/2" deep, rectangle-shaped stainless steel scoop. It is can be attached to a pole, which is six feet in length. Additional six foot sections can be attached to extend the pole's length. One edge of the scraper has jagged teeth.
9. For the May 23, 2007 sampling of the Pit at the Chemsolv facility, two sections of pole were attached to the scraper, making the pole twelve feet in length.
10. The Pit was surrounded by a wall about 4 feet high. ("wall"). I stood on one side of the Pit and Mr. Reyna stood on an adjacent side, approximately 3 - 4 feet from me.
11. Mr. Reyna and I took turns taking samples of both the liquid and the solids. We passed the sampling tool between us so that during the liquid sampling, we each took samples of liquid, and we each took samples of the solids. We took all of samples from the same physical locations at the Pit wall. We only took samples of one media at any given time.
12. Mr. Reyna and I took liquid samples from several locations in the Pit. To accomplish this, we dipped the swing sampler at different locations in the Pit. We were able to submerge or partially submerge the glass jar below the surface of the Pit liquid to obtain samples.
13. To obtain samples of the settled solids from the Pit, I reached over the wall surrounding the Pit and brought the scraper in at approximately a 45 degree angle so that the teeth on the scraper would engage the solids. I would then push down and pull the scraper towards me.
14. I estimate that the scraper penetrated the solids approximately two to three feet below the surface of the liquid.
15. Mr. Reyna and I took solids samples from several locations in the pit. To accomplish this, we dipped the scraper at several locations in the Pit.

16. The solids level of the Pit began one foot below the surface of the liquid, more or less.
17. Each solids sample Mr. Reyna and I collected was from a different area of the Pit.
18. The solids samples were retrieved and placed into a stainless steel pan. The samples were stirred slightly, and then placed in the sample jars.
19. The sampling jars were prepared and handled in the manner described in my May 23, 2007 Inspection Report, Complainant Exhibit 18, EPA 334.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on: 12-19-2011 Name:   
George Houghton

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

In the Matter of:	:	
	:	
CHEMSOLV, INC., formerly trading as	:	
Chemicals and Solvents, Inc.	:	
	:	
and	:	
	:	
AUSTIN HOLDINGS-VA, L.L.C.	:	
	:	
	:	
	:	
Respondents,	:	EPA Docket No. RCRA-03-2011-0068
	:	
Chemsolv, Inc.	:	
1111 Industrial Avenue, S.E	:	
1140 Industrial Avenue, S.E	:	
Roanoke, Virginia 24013	:	
	:	Proceeding under Section 3008(a)
	:	of the Resource Conservation and
	:	Recovery Act, as amended, 42 U.S.C.
	:	Section 6928(a)
Facility.	:	
	:	

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**SECOND DECLARATION OF PEGGY ZAWODNY IN SUPPORT OF  
COMPLAINANT'S MOTION FOR ACCELERATED DECISION**

I, Peggy Zawodny declare that:

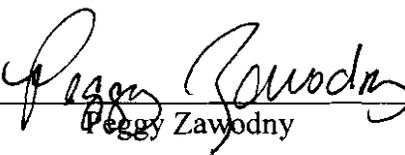
1. I am employed by the United States Environmental Protection Agency as an Environmental Scientist in the Laboratory Branch of the Environmental Assessment & Innovation Division (EAID), located at the EPA Regional Laboratory located in Ft. Meade, Maryland. I have been employed by EPA since December 1986. I have been at the Ft. Meade Regional Laboratory the entire 25 years of my employment with EPA.
2. This Declaration is submitted to clarify statements in my previous Declaration.
3. I performed the analysis of both of the samples taken by EPA on May 23, 2007 from the Chemsolv facility, including the samples taken from the Pit.

4. Paragraph 10 of my previous declaration should read: The analysis of the May 23, 2007 Pit water sample indicated the Pit water contained nineteen different volatile organic compounds.

5. I compared the copies of the two Final Analytical Reports attached to Complainant's Prehearing Exchange as Exhibits 15, EPA 241 – 283 and 16, EPA 284 – 294, with the originals maintained by the EPA Regional Laboratory located in Ft. Meade, Maryland. These copies are identical to the originals maintained by the EPA Regional Laboratory located in Ft. Meade, Maryland.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on: Dec 19, 2011

Name:   
Peggy Zawodny