UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Chem-Solv, Inc.,[1] formerly	)	
trading as Chemicals and	)	
Solvents, Inc.	)	
	)	**DOCKET NO. RCRA-03-2011-0068**
and	)	
	)	
AUSTIN HOLDINGS-VA, L.L.C.,	)	
	)	
RESPONDENTS	)	

CORRECTED ORDER ON RESPONDENTS' MOTION TO TAKE DEPOSITIONS UPON ORAL QUESTIONS

This proceeding arises under the authority of Section 3008(a)(1) and (g) of the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928(a)(1) and (g). On January 27, 2012, Respondents submitted a Motion to Take Depositions Upon Oral Questions ("Motion" or "Mot."), with an accompanying Memorandum of Law ("Memo."), seeking leave to depose three individuals in advance of the March 20, 2012, hearing. On February 7, 2012, Complainant filed a Response in Opposition to Respondent's [sic] Motion to Take Depositions Upon Oral Questions ("Response" or "Resp."), arguing that Respondents' had failed to meet the appropriate standard to justify additional discovery in the form of depositions. On February 17, 2012, the undersigned received Respondents' Reply Brief in Support of Respondents' Motion to Take Depositions Upon Oral Questions ("Reply"), in which Respondents attempt to clarify their request.

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[1] The parties indicate in their Joint Stipulations that they made "minor changes" to the caption to correct Respondent Chem-Solv's name. In a footnote the parties also request that these modifications be approved. Given the ministerial nature of the corrections (simply adding a hyphen and changing the capitalization of the name), the modifications are accepted and the caption is hereby changed to reflect this correction. References to CHEMSOLV, INC., shall now be styled as Chem-Solv, Inc.

I. Legal Standard

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice" or "Rules"), 40 C.F.R. §§ 22.1-22.32. With respect to requests for other discovery, Rule 22.19(e)(1) provides that after the Prehearing Exchange:

> a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted). The Presiding Officer may order such other discovery only if it:
>
> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(1). With respect to depositions upon oral questions specifically, the Rules of Practice require the additional showing that either:

> (i) The information sought cannot reasonably be obtained by alternative methods of discovery; or
> (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

40 C.F.R. § 22.19(e)(3).

Generally speaking, parties in administrative proceedings do not have a constitutional right to take depositions and the Rules of Practice set forth explicit requirements that limit other discovery beyond the prehearing exchange. *Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 368 (EAB 2005). Consequently, opposed motions for oral depositions are rarely granted. Nevertheless, courts have recognized that due process, including the right to take depositions under certain circumstances, must be accorded to all parties. *Housing Auth. of County of King v. Pierce*, 711 F. Supp. 19, 22 (D.D.C. 1989); *see also Withrow v. Larkin*, 421 U.S. 35, 46 (1975). Moreover, an Administrative Law Judge has broad discretion to determine how to

conduct the proceedings under the Rules of Practice. *Chippewa*, 12 E.A.D. at 363.

II. Positions of the Parties

A. Respondents' Arguments

In their Motion, Respondents seek leave to depose the following individuals:

1. Mr. Kenneth J. Cox, EPA employee in the Philadelphia, Pennsylvania office;
2. Ms. Elizabeth A. Lohman, Virginia Department of Environmental Quality ("DEQ") employee in its Roanoke, Virginia office; and
3. Mr. Jose Reyna, III, EPA employee in the Ft. Meade, Maryland office.

Mot. at 1; *see also* Resp. at 12. Respondents identify these individuals, named as witnesses in Complainant's Prehearing Exchange, based on the contents of affidavits submitted by each person in connection with Complainant's earlier Motion for Accelerated Decision. Mot. at 2. Respondents assert that statements made by the proposed deponents conflict with statements made by Respondents' witnesses with respect to certain events related to several inspections of Respondents' facility in Roanoke, Virginia. *Id.*; Memo. at 5-7. Respondents argue that the documentation currently in the record is insufficient to convey these witnesses' "mental impressions or understanding of the facts at issue." Mot. at 2. Consequently, Respondents continue, given the large penalty sought in this case, due process requires that Respondents be allowed to depose the identified witnesses. Mot. at 3.

With respect to the standard set forth in Rule 22.19(e)(1), Respondents state that they seek:

> to obtain certain information concerning the Complainant's witnesses' mental impressions and their understanding of certain facts concerning the Sampling Event and Chem-Solv's operations by taking depositions upon oral questions of the Complainant's Witnesses.

Memo. at 8.

With respect to Rule 22.19(e)(1)(i), Respondents argue that this request does not unreasonably delay the proceedings nor unreasonably burden the Complainant. Respondents note that the Motion itself was filed prior to the relevant deadline, they do not seek a postponement of the hearing, and sufficient time remains to conduct the depositions prior to the hearing. Memo.

at 8-9. Respondents argue that the conflicting statements "go to the heart of the Respondents' defenses" and, therefore, it is reasonable to take time before hearing to conduct the depositions. Memo. at 9. Additionally, Respondents assert that the need for the depositions arose only after Complainant submitted affidavits in connection with its Motion for Accelerated Decision (filed November 29, 2011) and its subsequent Reply Brief (filed December 22, 2011). Memo. at 5-7.

With respect to Rule 22.19(e)(1)(ii), Respondents argue that the information sought is most reasonably obtained from the proposed deponents because the documents in the record are insufficient to allow Respondents to "glean what [these] witnesses would testify to" because they "do not fully convey the Complainant's Witnesses' mental impressions or understanding of the disputed material facts at issue in this case." Memo. at 11. In addition, Respondents state that Complainant has declined to make these witnesses available for deposition voluntarily. *Id.*

With respect to Rule 22.19(e)(1)(iii), Respondents argue that the information sought is highly relevant. Specifically, the allegations that Mr. Austin was not present during the Sampling Event goes to the foundation for Respondents' challenge to the validity of the sampling methods. In addition, whether the floor trench connected to Rinsewater Tank No. 1 is relevant to the issue of whether the contents of the Tank were solid waste. Memo. at 11-12.

With respect to Rule 22.19(e)(3), Respondents argue that alternative methods of discovery would be ineffectual because no other method would offer access to the witnesses mental impressions and understanding of disputed facts. Memo. at 13.

Respondents conclude that it would be "patently unfair and inconsistent with the requirements of due process" to deny the Motion as such denial would deprive Respondents of the opportunity to "adequately prepare their defense." Memo. at 15.

B. Complainant's Response

In its Response, Complainant identifies why it believes Respondents have failed to meet each part of the standard set forth in the Rules of Practice at 40 C.F.R. § 22.19(e). With respect to Rule 22.19(e)(1), Complainant argues that Respondents have failed to provide "any meaningful description of the information" sought and leaves Complainant "to speculate as to the extent, nature and purported relevance of the vague, overly broad and wholly unidentified 'mental impression' information . . . ." Resp. at 13-14. Complainant asserts that Respondents have offered no factual review or evidentiary analysis to support the

argument that the documents already in the record do not convey these "mental impression" sufficiently. *Id.* at 13.[2/]

With respect to Rule 22.19(e)(1)(i), Complainant asserts that granting the Motion will place a great burden on counsel for Complainant, citing the time necessary to attend the depositions, the short time remaining before hearing, and the impact of the recent substitution of counsel for Complainant. Resp. at 16-17. Complainant argues that the "mental impressions" sought by Respondents are so vague that Complainant cannot determine what information is sought, whether the witnesses possess it, or whether the information has already been provided. Resp. at 17.

With respect to Rule 22.19(e)(1)(ii), Complainant argues that Respondents do not in fact seek "mental impressions" but rather whether Respondents' representative, Mr. Austin, made certain statements and witnessed certain events. Resp. at 18. As such, Complainant argues that the party from which this information can most reasonably be obtained is not Complainant's witnesses but Respondents' representative himself or Mr. Lester, Respondents' Operations Manager. Resp. at 18-20. As to information concerning the sampling of the Rinsewater Tank/Pit, Complainant suggests referring to documents already exchanged. Resp. at 21.

With respect to Rule 22.19(e)(1)(iii), Complainant asserts that the "status of the 'trench drain'" has "no bearing on the material facts that are relevant to Respondent's liability in this matter" because the Complainant does not specifically identify the "trench drain" in any allegations. Resp. at 23. Additionally, Complainant claims that information regarding Mr. Austin's whereabouts during the sampling event are not probative of the sampling methodology issue and "do not go to the heart of the Respondents' defenses." Resp. at 24-26 (noting that the validity of sampling methodology is an issue that involves expert opinion and Mr. Austin has not been identified as an expert witness).

With respect to Rule 22.19(e)(3), Complainant makes two arguments. First, Complainant asserts that Respondents have failed to establish that no alternative "source" of the information is available (i.e., Mr. Lester) and therefore the Motion should be denied. Resp. at 28. Second, Complainant

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[2/] Complainant also faults Respondents for failing to propose a time and place for the depositions as required by Rule 22.19(e)(1). In their Reply, however, Respondents state that such information was deliberately omitted "in an effort to accommodate" Complainant and its witnesses. Respondents further state that they are willing to travel to any reasonable location at any reasonable time to conduct the depositions. Reply at 4.

argues that Respondents must also demonstrate that the evidence sought may not be preserved for the hearing and their failure to establish this fact is grounds to deny the Motion.[3/] Resp. at 29.

C. Respondents' Reply

Respondents attempt to clarify the nature of the information sought in the Motion, asserting that they seek information concerning "Mr. Cox's recollections about his alleged conversation with Mr. Lester" and "Ms. Lohman and Mr. Reyna's recollections of the sampling event." Reply at 3. Because Respondents seek such "mental impressions and recollections" they argue that the proposed deponents are the only source of this information and it cannot reasonably be obtained from any other source. Reply at 6.

With respect to the alleged probative value of this information, Respondents argue that the function and usage of the trench drain goes to the issue of whether the Rinsewater Tank/Pit contained "waste" while the sampling methodology goes to the heart of Respondents' defense regarding the characterization of the liquids and solids contained therein. Reply at 7-8. With respect to the burden the depositions would place on Complainant, Respondents state that they would agree to depose Mr. Cox and Mr. Reyna on the same day either in Philadelphia or Ft. Meade, Maryland. Reply at 4. Moreover, Respondents note that the impetus for the Motion only arose recently during briefing on Complainant's Motion for Accelerated Decision. Reply at 5.

With respect to Rule 22.19(e)(3)(i), Respondents argue that depositions upon oral question are the most effective means of obtaining the information sought. Specifically Respondents assert that depositions are the only viable method to gather information necessary to the preparation for hearing. Reply at 8-9 (noting the importance of spontaneity in depositions to pursuing unexpected responses and the importance of understanding the deponents' mental impressions) (quoting *Isochem North Am., L.L.C.*, Docket No. TSCA-02-2006-9143, 2008 EPA ALJ LEXIS 8, *17-18 (ALJ, Mar. 6, 2008).

[3/] In its Reply, however, Respondents note that Rule 22.19(e)(3) is written in the alternative and a movant need only establish either that the information sought cannot reasonably be obtained by alternative methods of discovery, or that there is a substantial reason to believe the evidence will not be preserved for hearing. Reply at 9 (citing 40 C.F.R. § 22.19(e)(3)).

III. Discussion

As the movants, Respondents bear the burden of demonstrating that the Motion meets the requirements set forth in Rule 22.19(e) and here they have established the minimum justification for deposing certain witnesses in advance of trial. Contrary to Complaniant's contention, Respondents have identified the nature of the information sought in sufficient detail. Respondents specifically limit the scope of interest to the May 23, 2007, inspection and, within that, seek only to question the proposed deponents on the issue of the sampling event, including the methods used and Mr. Austin's whereabouts during that time, and the issue of the statements made regarding the trench drain in the blend room and the connections to the Rinsewater Tank/Pit. Memo. at 8; Reply at 5-6. Respondents also identify specific affidavits attached to Complainant's earlier Motion for Accelerated Decision and subsequent reply as the basis for the asserted confusion.[4/] Memo. at 4-6.

With respect to Rule 22.19(e)(1)(i), Respondents do not request any delay (and Complainant identifies none). Given that the stated impetus for the Motion arose only after the completion of the briefing on Complainant's Motion for Accelerated Decision, Respondents cannot be deemed to have delayed unreasonably in bringing the instant Motion. In addition, Respondents have made efforts to minimize the burden of the requested depositions on Complainant. Provided the parties reach an agreement on the location, date, and time of the depositions, the burden on Complainant to participate cannot be deemed unreasonable.

With respect to Rule 22.19(e)(1)(ii), Respondents have argued that the type of information they seek is bound up in the recollections and mental impressions of the proposed deponents. Memo. at 10-11. While Complainant points out that the factual assertions themselves are available in the very affidavits that Respondents state gave rise to the Motion, Respondents specifically note that their focus is on the memories of the witnesses as the basis for their testimony at the hearing. Resp. at 13; Reply at 5-6. Given that Complainant's witnesses will necessarily testify based on their own recollections, and given that when compared to affidavits of the proposed deponents, Respondents' affidavits indicate inconsistent recollection of events, I find that clarification on these points is most reasonably obtained from the proposed deponents themselves.

[4/] The remaining requirements in 40 C.F.R. § 22.19(e)(1) have been met. Respondents have identified the method of discovery sought as depositions upon oral questions and, though not included in the Motion specifically, have sufficiently addressed the issue of time and place in their briefs.

With respect to Rule 22.19(e)(1)(iii), I find that Respondents have established that the information sought has significant probative value on disputed issues of material fact relevant to liability or the relief sought. Underlying each of the seven counts in this case are certain threshold issues, proof of which is necessary to establish liability. Whether, under RCRA and its implementing regulations, the contents of the Rinsewater Tank/Pit were properly considered "waste" and, if so, whether that waste was "hazardous" go directly to the issue of jurisdiction in this matter. Evidence tending to prove that certain connections were or were not conveying waste to the Rinsewater Tank/Pit may be significantly probative on the issue of whether the contents were "waste." Similarly, evidence tending to prove the validity or invalidity of the testing methods used to identify the substances as "hazardous" may be significantly probative on that issue. Overall, Respondents have met the requirements of 40 C.F.R. § 22.19(e)(1)(iii).

With respect to the requirements set forth in Rule 22.19(e)(3), Respondents have asserted that the information they seek can only be obtained through depositions and that other forms of discovery would be insufficient. Complainant argues that "Mr. Lester clearly presents a viable alternative source" for this information. Resp. at 28. However, Rule 22.19(e)(3) does not require Respondents to establish that proposed deponents are not the best *source* of the information (that prong is addressed in Rule 22.19(e)(1)(ii)); rather, Respondents must demonstrate that the information cannot reasonably be obtained by alternative methods of discovery, such as interrogatories. 40 C.F.R. § 22.19(e)(3)(i). Here, Respondents have demonstrated the bare minimum for justifying depositions upon oral questions, arguing that the affidavits are the result of organized and deliberate preparations, whereas the spontaneity and flexibility of live depositions are necessary to probe the alleged inconsistencies presented in those affidavits.[5/] Nonetheless, practical constraints will affect Respondents' ability to depose the proposed witnesses.

Whereas Mr. Cox and Mr. Reyna are both EPA employees, under Complainant's control, and located relatively near each other, Ms. Lohman is an employee of the Virginia DEQ, a non-party, and is located in Roanoke, VA. Given the proximity of the hearing, it is impractical to permit Respondents to depose Ms. Lohman not only because of her distance from Complainant and the other

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[5/] As noted above, the requirements of Rule 22.19(e)(3) are set forth in the alternative. Thus, because Respondents establish the first prong (subparagraph (3)(i)) there is no requirement to establish the second prong (subparagraph (3)(ii)) additionally. Complainant's arguments as to the second prong are, therefore, not addressed herein.

deponents but because there is insufficient time to move for, issue, and serve a subpoena. In addition, I note that the information sought from Ms. Lohman appears to overlap with the information sought from Mr. Reyna. Therefore, Respondents will likely obtain the information they seek by deposing Mr. Reyna. Accordingly, Respondents will be allowed to submit written interrogatories to Ms. Lohman. The scope of those interrogatories shall be limited to her activities, observations, and recollections during the May 23, 2007, joint inspection.

IV. Order

Respondents' Motion to Take Depositions Upon Oral Questions, in **GRANTED** in part and **DENIED** in part.

1. Respondents are granted leave to depose Mr. Kenneth J. Cox and Mr. Jose Reyna, III, at a location and time mutually agreeable to the parties and the deponents. The depositions must conclude before March 20, 2012. The scope of the depositions shall be limited to activities, observations, and recollections during/from the May 2007 inspections, and the contents of affidavits signed by the deponents.

2. Respondents are granted leave to submit written interrogatories to Ms. Elizabeth A. Lohman. The scope of those interrogatories shall be limited to her activities, observations, and recollections during/from the May 23, 2007, joint inspection, and the contents of affidavits signed by the deponent.

3. Respondents request to depose Mr. Elizabeth A. Lohman is denied.

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Barbara A. Gunning
Administrative Law Judge

Dated: February 29, 2012
Washington, DC