

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Mercury Vapor Processing)
Technologies, Inc. a/k/a River Shannon)
Recycling)
13605 S. Halsted)
Riverdale, IL 60827)
EPA ID No: ILD005234141, and)
)
Laurence Kelly)
)
Respondents)

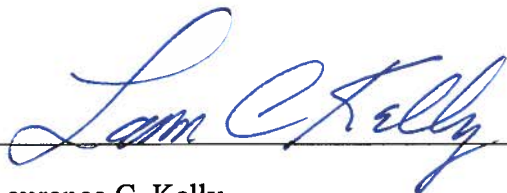
Docket No. RCRA-05-2010-0015

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REGION 5

MOTION TO DISMISS WITH PREJUDICE FOR
LACK OF FAIR NOTICE AND CONVOLUTED REGULATIONS

Respondents Mercury Vapor Processing Technologies, Inc. a/k/a River Shannon Recycling, and Laurence Kelly, pursuant to 40 C.F.R. Part 22.16 and 22.20 of the Consolidated Rules of Practice, respectfully request Docket No. RCRA-05-2010-0015 be Dismissed With Prejudice For Lack Of Fair Notice And Convoluted Regulations for reasons detailed in the attached Memorandum In Support Of Motion To Dismiss With Prejudice For Lack Of Fair Notice And Convoluted Regulations.

Respectfully Submitted,



Laurence C. Kelly

5-27-11
May 27, 2011

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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS WITH PREJUDICE FOR
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A. Facts

Respondents Mercury Vapor Processing Technologies, Inc. a/k/a River Shannon Recycling and Laurence Kelly allege that all information and guidance provided by the Complainant (USEPA) not only fails to bar the management of spent lamps as Universal Waste in Illinois, but that Complainant clearly guides constituents of Illinois to Illinois' Universal Waste Rule, constituting implied authorization, and in essence setting a regulatory trap into which the Respondents have fallen.

B. Argument

1. The USEPA clearly instructs constituents of Illinois to manage their spent lamps as Universal Waste under Illinois' Universal Waste Rule.

USEPA is aware that Illinois has been managing this waste under their adopted Universal Waste regulations for what is now nearly 15 years and clearly acknowledges that the Illinois Universal Waste Rules have been enforceable under Illinois state law since August 1, 1996, as evidenced by the affidavit submitted by Mr. Westefer, the Illinois Regulatory Specialist, RCRA Programs Section, RCRA Branch, Land and Chemicals Division, USEPA Region 5 (Complainant Attachment B to Motion for Partial Accelerated Decision). Yet the USEPA has made no attempt to intervene or inform the constituents of Illinois that this is an improper form of management and has simply allowed businesses within the State of Illinois to manage this hazardous waste material

under the environmentally safe but unauthorized and therefore illegal Illinois Universal Waste Rule found published at 35 IAC 733.

USEPA guidance on how to manage this material repeatedly advises, on various documents (RX32, Attachments 1 and 2), that the inquirer check with their state regarding specific regulations within their state, and for constituents of Illinois who have questions as to how to properly manage this type of waste, goes so far as to provide direct links to 35 IAC 733, Illinois Universal Waste regulations (RX2). These direct links to Illinois' Universal Waste Regulations are not buried within the depths of the USEPA's website on an obscure document, but can be plainly found on the second page of the USEPA's Universal Waste guidance section. Further, the link provided by the USEPA does not simply connect to Illinois' Administrative Code in general, where regulations on the management of both RCRA wastes and Universal Wastes can be found, but links directly to 35 IAC 733, Illinois' Universal Waste Regulations. This direction to manage spent lamps under Illinois' adopted but unauthorized Universal Waste Regulations creates a regulatory trap into which the Respondents have fallen.

2. The USEPA does not clearly delineate or define the meaning of adopted or abilities of regulations that maintain an adopted status.

The glossary of regulatory terms under the Universal Waste section of the USEPA's website define Adoption as follows (Attachment 3):

“Adoption

Referring to states adopting Federal regulations. As an initial step toward obtaining final authorization, a state typically adopts the federal regulations in some manner. Adopting the Federal program means either incorporating Federal rules into the State's rules, or creating state rules that are equivalent to federal rules. See [RCRA Orientation Manual Chapter 11: Authorizing States to Implement RCRA \(PDF\)](#) (7 pp, 95 KB) .”

This definition gives no indication that a state regulation maintaining an adopted status cannot implement their regulations and constituents of said state cannot follow regulations that maintain an adopted status. The referenced and linked RCRA Orientation Manual Chapter 11 makes little mention of adopted status outside of the following (Attachment 4):

*“As an initial step toward obtaining final authorization, a state typically adopts the federal rules in some manner. Adopting the federal program means either incorporating federal rules into the state's rules, or creating and adopting state rules that are equivalent to federal rules. Many states simply incorporate the federal rules by reference (this is known as **incorporation by reference**). This is when the regulatory language in a state's regulations actually cites, or refers to, the federal regulations. A state may also choose to create an analogous set of state regulations through the state legislative*

process. Even though a state may have adopted the federal program and its hazardous waste program is similar or identical to the federal program, it still does not have primacy for implementing and enforcing the hazardous waste regulations. To assume this role, the state must first be granted final authorization by EPA.”

That a state “does not have primacy” (a term undefined by the USEPA glossary but defined by the Merriam Webster Dictionary as 1: the state of being first (as in importance, order, or rank) : [preeminence](#) 2: the office, rank, or preeminence of an ecclesiastical [primate](#)) for implementing and enforcing the hazardous waste regulations is not clearly tantamount to being utterly precluded from implementing and enforcing said regulations until final authorization is received.

Under the same Universal Waste glossary of regulatory terms, authorized state is defined as follows:

“Authorized State

A state that has been delegated the authority by EPA to implement and enforce its own regulations for hazardous waste management under RCRA. The state program must be at least as stringent as the federal standards. See [RCRA Orientation Manual Appendix D Glossary \(PDF\)](#) (24 pp, 328 KB)”.

The glossary of the RCRA Orientation Manual referenced in this definition of Authorized State defines an Authorized State using identical verbiage to the above definition and does not define Adopted at all (Attachment 5).

The USEPA undeniably states in the Westefer affidavit that “Since the effective date of August 1, 1996, the Universal Waste Rules have been enforceable under state law in Illinois”, which is, by definition, an express right of an authorized state . The information and definitions publically available regarding the abilities of regulations that maintain an adopted status are vague, unclear, and create significant regulatory confusion. This regulatory confusion is further echoed in conversations Respondents have had with the USEPA, most notably a conversation with Jane Radcliffe, Chief of Internal Services Section USEPA on September 4, 2008, in which she stated, “It appears on my chart that the State of Illinois is authorized, but let me pass you on to the head of that department, Gary Westefer.” During the subsequent conversation between Respondent Laurence Kelly and Mr. Westefer, Mr. Westefer stated “Illinois does not have formal authorization to manage Universal Waste. The only thing holding up Illinois from being authorized is a legislative glitch. Illinois has a published Universal Waste Rule, which we allow them to manage.” It is impossible for a person of average intelligence to discern from the information publically available or from conversations with the appropriate USEPA representatives that it is illegal for residents and businesses in Illinois to adhere to Illinois adopted Universal Waste Rule, as the USEPA would suggest in their complaint. It seems possible that while no express time limits on the ability for a regulation to maintain an adopted status can be located, an adopted status was not intended to span such an

excessive amount of time, in this case nearly 15 years, so as to allow for a situation such as this to arise.

3. Respondents relied upon guidance from their state agency at the direction of the USEPA.

On all guidance documents regarding the management of Universal Waste, USEPA directs constituents to contact their state for further guidance. Respondent Laurence Kelly consulted the IEPA Bureau of Air and the IEPA Bureau of Land regarding the Illinois Universal Waste regulations as that relates to certain technology that he employs to volume reduce lamps. He was informed that the technology and practices he employed complied with the published regulations in Illinois and was granted permission to operate his technology under Illinois Universal Waste regulations.

Illinois Universal Waste regulations have been published and enforceable in Illinois since 1996. The IEPA distinctly states that this type of waste may be managed under either the RCRA hazardous waste regulations or under the Illinois Universal Waste regulations on their "*How to Manage Used Fluorescent and High-Intensity-Discharge Lamps as Universal Waste*" document, the primary guidance document available from the State of Illinois regarding Universal Waste lamps, which poses the question "*What are my options for managing hazardous lamps?*" and responds with "*In Illinois, you may follow the Universal Waste Rule described in this fact sheet (and in [state regulations](#)) or you may follow RCRA requirements for hazardous-waste handling, storage, treatment and disposal. **You must choose one of these options.***" (emphasis added) (RX 29)

Illinois RCRA regulations clearly exempt spent lamps from being managed as RCRA waste within the State of Illinois at 35 IAC 721, the Identification and Listing of Hazardous Waste, at 721.109 by stating:

Requirements for Universal Waste

The wastes listed in this Section are exempt from regulation under 35 Ill. Adm. Code 702, 703, 722 through 726, and 728, except as specified in 35 Ill. Adm. Code 733, and are therefore not fully regulated as hazardous waste. The following wastes are subject to regulation under 35 Ill. Adm. Code 733:

- a) Batteries, as described in 35 Ill. Adm. Code 733.102;*
- b) Pesticides, as described in 35 Ill. Adm. Code 733.103;*
- c) Mercury-containing equipment, as described in 35 Ill. Adm. Code 733.104; and*
- d) Lamps, as described in 35 Ill. Adm. Code 733.105.*

Further, Illinois exempts Universal Waste from the RCRA permitting program in Illinois in 35 IAC 703, the RCRA Permit program section of Illinois regulations, at 35 IAC 703.123, by stating (RX3):

Section 703.123 Specific Exclusions from Permit Program

The following persons are among those that are not required to obtain a RCRA permit:

h) A universal waste handler or universal waste transporter (as defined in 35 Ill. Adm. Code 720.110) that manages the wastes listed in subsections (h)(1) through (h)(5) of this Section. Such a handler or transporter is subject to regulation pursuant to 35 Ill. Adm. Code 733.

- 1) Batteries, as described in 35 Ill. Adm. Code 733.102;*
- 2) Pesticides, as described in 35 Ill. Adm. Code 733.103;*
- 3) Mercury-containing equipment, as described in 35 Ill. Adm. Code 733.104; and*
- 4) Lamps, as described in 35 Ill. Adm. Code 733.105.*

It is utterly impossible for a person of average intelligence to conclude that the two aforementioned regulations which exempt Universal Waste from the RCRA management program are not authorized or viable regulations when they are incorporated within the Authorized Illinois RCRA Subtitle C program regulations.

4. Respondents made significant efforts to clarify and comply with all applicable regulations to which they were directed.

Since its inception Mercury Vapor Processing Technologies, Inc. (MVP) an Illinois Corporation and its D/B/A River Shannon Recycling (RSR), along with one of its officers Laurence C. Kelly, have made every reasonable effort to identify which regulations were applicable to its operations acting as a transporter, handler, generator and consolidator of Universal Waste. Respondents have fully complied with the regulations to which they were directed to follow by both the United State Environmental Protection Agency (USEPA) and The Illinois Environmental Protection Agency (IEPA).

Respondents notified the USEPA as a Large Quantity Generator and acquiring a generator number for its warehouse located in Riverdale, Illinois (RX5). Respondents followed the USEPA's direction to comply with Illinois' Universal Waste Regulations found at 35 IAC 733 (RX 2) as well as the USEPA's direction to contact their state for further clarification (RX 32, Attachments 1 and 2). Respondent Laurence Kelly contacted the USEPA and was informed that Illinois has a Universal Waste Rule which, although not yet authorized "*For reasons having to do with other aspects of Illinois laws, the authorization was not approved by the U.S. EPA*" (emphasis added), the USEPA allows them to manage. Respondent Laurence Kelly met with the IEPA Bureau of Land and the IEPA Bureau of Air for clarification of the regulation governing spent mercury containing fluorescent lamps and was provided with clear and concise direction as to how to manage Universal Waste in Illinois (RX9 + Attachment 6). Respondents complied with Universal Waste Large Quantity Generator regulations found at 35 IAC 733 Subpart C (RX6), reported their activities to the manager of the IEPA Bureau of Air RCRA Permit Section on a quarterly basis (CX4 part 15), and continuously ran TCLP testing on their volume reduced material (CX4 part 2d), the results of which consistently

demonstrated the volume reduced material as non-hazardous, and passes LDR restrictions.

The USEPA undeniably endorses the management of these wastes as Universal Wastes to be a safe and equitable way to prevent the uncontrollable release of mercury vapor into the environment. (RX31) Based on a site specific day long investigation of Respondent's Riverdale property on October 29, 2007 by more than 8 professional emergency response and highly trained environmental professionals, using highly sensitive monitoring equipment, and subsequent inspection on November 14, 2007, the USEPA found that Respondents posed no potential threat to Human Health or Safety and posed no insult to the environment, both inside and outside the warehouse located in Riverdale, Illinois as evidenced by two separate press releases and media advisories issued by the USEPA (RX16a and 16b). Respondents have safely and responsibly managed spent mercury containing lamps under Illinois' Universal Waste Rule, per the direction of both the USEPA and the Illinois EPA.

CONCLUSION

For the foregoing reasons, and for the best interest of the remaining constituents of Illinois, the Defendants' Motion to Dismiss With Prejudice For Lack of Fair Notice and Convoluted Regulations should be granted and the Claims for Liability should be dismissed.

5-27-11

Date

Laurence C. Kelly

Laurence C. Kelly

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CERTIFICATE OF SERVICE

I certify that the foregoing Motion to Dismiss with Prejudice for Lack of Notice and Convolutd Regulations, dated May 27, 2011, was sent this day in the following manner to the addressees listed below:

Original by Certified Mail to: Regional Hearing Clerk
U.S. EPA - Region 5
77 W. Jackson Blvd.
Mail Code: E-19J
Chicago, IL 60604

Copy by Certified Mail to: Jeffery Cahn
Associate Regional Counsel
US Environmental Protection Agency - Region 5
77 W. Jackson Blvd.
Mail Code: C-14J
Chicago, IL 60604

The Honorable Judge Gunning
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 5-27-11

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