UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
MERCURY VAPOR PROCESSING TECHNOLOGIES, INC., a/k/a RIVER SHANNON RECYCLING, AND LAURENCE C. KELLY,	)	DOCKET NO. RCRA-05-2010-0015
	)	
	)	
RESPONDENTS	)	

ORDERS ON RESPONDENTS' MOTION TO DISMISS WITH PREJUDICE FOR LACK OF FAIR NOTICE AND CONVOLUTED REGULATIONS AND COMPLAINANT'S MOTION TO STRIKE

I. INTRODUCTION

On April 23, 2010, the United States Environmental Protection Agency ("EPA, "USEPA," or "Agency"), Region 5 ("Complainant"), initiated this proceeding by filing a Complaint and Compliance Order ("Complaint") against Mercury Vapor Processing Technologies, Inc., a/k/a River Shannon Recycling ("Respondent MVPT" or "MVPT"), pursuant to its authority under Section 3008 of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928. Appearing *pro se*, Respondent MVPT, through its representative Laurence Kelly, filed an Answer in the form of a letter on May 20, 2010.

Following the parties' prehearing exchange, Complainant filed a Motion for Leave to Amend Complaint and Compliance Order ("Motion to Amend"), a Memorandum in support thereof, and a Proposed Amended Complaint and Compliance Order ("Proposed Amended Complaint"). On January 10, 2011, the undersigned received Respondent MVPT's Memorandum in Support of Complainant's Motion for Leave to Amend the Complaint and Compliance Order, which contained, *inter alia*, responses to each of the numbered paragraphs of the Proposed Amended Complaint.

By Order dated January 19, 2011, the undersigned granted the Motion to Amend. Complainant subsequently filed an Amended Complaint and Compliance Order ("Amended Complaint") against

Respondent MVPT and Mr. Kelly ("Respondent Kelly") on January 28, 2011. The Amended Complaint alleges in two counts that Respondents operated a hazardous waste storage and treatment facility in Riverdale, Illinois, without a RCRA permit in violation of certain provisions of the Illinois Administrative Code ("IAC") promulgated pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b). Pursuant to the Order of January 19, 2011, Respondent MVPT's responses to the Proposed Amended Complaint were deemed to constitute Respondents' Answer to the Amended Complaint ("Amended Answer") and the filing date was designated to be the same as that of the Amended Complaint.

On February 8, 2011, Complainant filed a Motion for Partial Accelerated Decision as to Applicable Regulations and Liability ("Complainant's Motion for Accelerated Decision"), a Memorandum in support thereof, and Attachments A-C. Thereafter, Respondents filed an opposition, and Complainant filed a reply. By Order dated May 5, 2011, the undersigned granted Complainant's Motion for Accelerated Decision as to the applicable law in this proceeding, holding that Respondents' handling of waste lamps at the Riverdale property was governed by the general hazardous waste regulations adopted by the State of Illinois and approved by EPA, as argued by Complainant, rather than Illinois's universal waste rule, which Illinois has adopted but is not yet authorized by EPA to administer and enforce as part of its approved hazardous waste program. The undersigned denied Complainant's Motion for Accelerated Decision, however, as to Respondents' liability for the alleged violations, finding, in pertinent part, that Respondents have essentially raised the affirmative defense of lack of fair notice and that Complainant must be afforded the opportunity to address that issue either at the evidentiary hearing scheduled to commence in this proceeding on July 25, 2011, or in post-hearing briefs.

On June 2, 2011, Respondents filed a Motion to Dismiss with Prejudice for Lack of Fair Notice and Convoluted Regulations and a Memorandum in support thereof ("Respondents' Motion" or "Rs' Motion") and Attachments 1-6. Complainant timely filed a Response of the United States Environmental Protection Agency in Opposition to Respondents' Motion to Dismiss with Prejudice for Lack of Fair Notice and Convoluted Regulations ("Complainant's Response" or "C's Response") on June 16, 2011. The undersigned received Respondents' Response to USEPA Opposition to Respondents' Motion to Dismiss with Prejudice for Lack of Fair Notice and Convoluted Regulations ("Respondents' Reply" or "Rs' Reply") and Attachments A and B on July 5, 2011.[1/]

[1/] 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 ("Rules of

(continued...)

II. APPROPRIATE STANDARD FOR ADJUDICATING RESPONDENTS' MOTION

Section 22.20(a) of the Rules of Practice authorizes Administrative Law Judges to render accelerated decisions and to dismiss proceedings:

[1/] (...continued)
Practice"), 40 C.F.R. §§ 22.1-22.32. Section 22.16(b) of the Rules of Practice provides that a moving party's reply to any written response of the non-moving party must be filed within 10 days after service of such response. 40 C.F.R. § 22.16(b). Pursuant to Section 22.7(c) of the Rules of Practice, 40 C.F.R. § 22.7(c), service of any document other than the complaint is complete upon mailing. However, where a document is served by first class mail but not by overnight or same-day delivery, Section 22.7(c) requires five days to be added to the time allowed for the filing of a responsive document. Here, Complainant mailed its Response to Respondents by certified mail on June 16, 2011. However, nothing in the record reflects the date on which Respondents received the Response.

On July 7, 2011, Complainant filed a Motion to Strike "Respondent's Response to U.S. EPA Opposition to Respondents' Motion to Dismiss with Prejudice for Lack of Fair Notice and Convoluted Regulations" ("Motion to Strike"), in which Complainant moves to strike Respondents' Reply on the basis that it was not timely filed. Complainant points out that Respondents provided no reason for failing to file their Reply in a timely manner. Complainant also contends that Respondents would not suffer any undue prejudice by the striking of their Reply because the Reply reiterates the same arguments presented by Respondents in their Motion.

On July 13, 2011, the undersigned received Respondents' Response to Complainant's Motion to Strike, in which Respondents represent that they miscalculated the filing deadline for their Reply and, thus, were under the impression that it was due on July 5, 2011. Respondents claim to have timely filed all of their other responsive filings in this proceeding and ask the undersigned to accept their Reply into the record.

As Complainant concedes in its Motion to Strike, Respondents are appearing *pro se* in this proceeding. Second, the record contains no proof of receipt of Complainant's Response by Respondents. Further, the delay in Respondents' filing of their Reply was very brief. Accordingly, Complainant's Motion to Strike is hereby **DENIED**.

> The Presiding Officer[2/] may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a).

Motions to dismiss under Section 22.20(a) of the Rules of Practice are analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993). Rule 12(b)(6) of the FRCP provides that a complaint filed in federal court may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. Pro. 12(b)(6). Motions for dismissal under Rule 12(b)(6) are commonly said to "test the legal sufficiency of a claim." *See, e.g., Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). As stated by the Supreme Court:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, in considering a motion for dismissal, a federal court should assume the veracity of all "well-pleaded factual allegations" in the complaint and "then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 1950.

While the FRCP are not binding on administrative agencies, Rule 12(b)(6) and federal court decisions construing it provide useful and instructive guidance in adjudicating a motion to dismiss under the Rules of Practice. *See, e.g., Euclid of*

[2/] As used in this provision, the term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to preside in the proceeding. *See* 40 C.F.R. §§ 22.3(a), 22.21(a).

Virginia, Inc., 13 E.A.D. 616, 657-58 (EAB 2008) ("While it is appropriate for Administrative Law Judges and the [Environmental Appeals Board] to consult the Federal Rules of Civil Procedure . . . for guidance, these rules are not binding upon administrative agencies."); *Commercial Cartage Co., Inc.*, 5 E.A.D. 112, 117 n.9 (EAB 1994) ("Although the [FRCP] are not applicable here, we have found them to be instructive in analyzing motions to dismiss."). Relying upon the Federal Rules of Civil Procedure, the Environmental Appeals Board ("EAB") has held that, "[i]n determining whether dismissal is warranted, all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the complainant. In addition, in the event dismissal appears to be appropriate, dismissal of a complaint should ordinarily be without prejudice." *Commercial Cartage Co., Inc.*, 5 E.A.D. at 117.

Accordingly, to prevail on a motion to dismiss in the present proceeding, Respondents must demonstrate that the allegations in the Amended Complaint, if true, fail to establish a violation of the IAC as charged or otherwise fail to show a right to relief. I note, however, that Respondents do not directly challenge the sufficiency of the Amended Complaint in their Motion. Rather, Respondents request a dismissal of this proceeding for "lack of fair notice and convoluted regulations."[3/]

As Respondents assert, lack of fair notice is an affirmative defense to liability. Accordingly, Complainant was not required to rebut it in the Amended Complaint as part of its *prima facie* case. *See, e.g., Bausch v. Stryker Corp.*, 630 F.3d 546, 561 (7th Cir. 2010) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)) ("[P]leadings need not anticipate or attempt to circumvent affirmative defenses."). Instead, Respondents bear "the burdens of presentation and persuasion for any affirmative defenses" pursuant to Section 22.24(a) of the Rules of Practice, 40 C.F.R. § 22.24(a). Under these circumstances, Respondents' Motion is deemed to be more appropriately considered under the standard for adjudicating a motion for accelerated decision rather than a motion to dismiss. *See* Fed. R. Civ. Pro. 12(d) ("If, on a motion under Rule 12(b)(6) . . ., matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."); *BWX Techs.*,

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[3/] In their Motion, Respondents do not specify the authority under which they seek a dismissal of this proceeding. In their Reply, however, Respondents clarify that, pursuant to Section 22.20(a) of the Rules of Practice, they seek a dismissal for "[f]ailure to state [a] claim upon which relief can be granted based on the affirmative defense of lack of fair notice. . . ." Rs' Reply at 2.

Inc., 9 E.A.D. 61, 74 (EAB 2000) ("*BWX Techs.*") (considering a motion to dismiss supported by affidavits as a motion for accelerated decision).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are analogous to motions for summary judgment under Rule 56 of the FRCP. *See, e.g., BWX Techs.*, 9 E.A.D. at 74-75; *Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, at *8 (ALJ, Sept. 11, 2002). Pursuant to Rule 56(a) of the FRCP, a tribunal "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).[4/] Therefore, federal court rulings on motions for summary judgment provide guidance for adjudicating motions for accelerated decision. *See, e.g., Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

In assessing materiality for summary judgment purposes, the United States Supreme Court has held that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). In turn, a factual dispute is genuine if a finder of fact could reasonably find in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 252.

The Supreme Court has held that the party moving for summary judgment bears the burden of showing that no genuine issue of material fact exists. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255; *Adickes*, 398 U.S. at 158-59. Summary judgment on a matter is inappropriate when contradictory

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[4/] The standard for granting summary judgment was previously set forth in subsection (c) of Rule 56 and read as follows: summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Rule 56 was amended effective on December 1, 2010 (after the motion presently before the undersigned was filed), and among other modifications, the standard for granting summary judgment was moved from subsection (c) to subsection (a). However, the substantive standard "remains unchanged," and the amendments do not affect earlier case law construing and applying the standard. Fed. R. Civ. P. 56 Notes of Advisory Committee on 2010 amendments.

inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In support of or in opposition to a motion for summary judgment, a party must "cit[e] to particular parts of materials in the record," such as documents, affidavits or declarations, and admissions, or "show[] that the materials cited do not establish the absence or presence of a genuine dispute." Fed. R. Civ. P. 56(c)(1). The Supreme Court has found that, once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, the non-moving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

More specifically, the Supreme Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist. *Strong Steel Products*, EPA Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57, at *22 (ALJ, Sept. 9, 2002). Rather, a party opposing a motion for accelerated decision must produce some evidence that places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; see *Bickford, Inc.*, EPA Docket No. TSCA-V-C-052-92, 1994 EPA ALJ LEXIS 16, *8 (ALJ, Nov. 28, 1994).

The Supreme Court has noted, however, that there is no requirement that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex*, 477 U.S. at 323-324. Of course, if the moving party fails to meet its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes*, 398 U.S. at 156.

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether a genuine factual dispute exists, I must consider as the finder of fact whether I could reasonably find for the non-moving party under the "preponderance of the evidence" standard.

Accordingly, a party moving for accelerated decision must establish by citing to particular parts of materials in the record that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law by the preponderance

of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the presence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. Even if the finder of fact believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

III. ARGUMENTS OF THE PARTIES

A. Respondents' Motion

Respondents present four arguments in support of their Motion. First, Respondents contend that EPA "clearly instructs constituents of Illinois to manage their spent lamps as Universal Waste under Illinois' Universal Waste Rule." Rs' Motion.[5/] Respondents point out that certain webpages located at EPA's website concerning the appropriate manner in which to manage waste lamps repeatedly advise readers to consult their respective states as to the applicable regulations. Rs' Motion (citing Attachments 1 and 2). Relying upon an exhibit submitted as part of their prehearing exchange,[6/] Respondents further point out that another webpage located at EPA's website "goes so far as to provide direct links to . . . [the] Illinois Universal Waste regulations," rather than to "Illinois' Administrative Code in general, where regulations on the management of both RCRA wastes and Universal Wastes can be found." Rs' Motion (citing RPX 2). Respondents argue that "[t]his direction to manage spent lamps under Illinois' adopted but unauthorized Universal Waste Regulations creates a regulatory trap into which the Respondents have fallen." *Id.*

Second, Respondents cite the "Glossary of Regulatory Terms" webpage under the Universal Wastes section of EPA's website and the RCRA Orientation Manual and claim that these sources of information do not clearly define the term "adoption" or distinguish between a state that has merely adopted universal waste regulations and a state that has both adopted and been authorized to administer universal waste regulations by EPA. Rs' Motion (citing Attachments 3, 4, and 5). Respondents argue that the "vague" information provided by EPA "create[s] significant regulatory confusion," which was "echoed" during conversations Respondents had with Ms. Jane Radcliffe and Mr. Gary Westefer of

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[5/] Respondents did not number the pages of their Motion.

[6/] Such exhibits will be referred to as "CPX" and "RPX."

EPA. Rs' Motion. Respondents conclude that "[i]t 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 or businesses in Illinois to adhere to Illinois adopted Universal Waste Rule, as [Complainant] would suggest in [the Amended Complaint]." Rs' Motion.

Third, Respondents contend that, heeding the advice to readers of EPA's website to consult their respective states regarding applicable regulations, Respondent Kelly contacted the Illinois Environmental Protection Agency ("IEPA") and relied upon their guidance. Rs' Motion. Specifically, Respondents claim that Respondent Kelly was informed by representatives of IEPA "that the technology and practices he employed [to reduce the volume of waste lamps] complied with the published regulations in Illinois and was granted permission to operate his technology under Illinois Universal Waste regulations." *Id.* Additionally, Respondents point out that a webpage located at IEPA's website instructs readers that they may choose to handle waste lamps in accordance with either Illinois's general RCRA regulations or Illinois's universal waste rule. Rs' Motion (citing RPX 29). Respondents also maintain that Illinois's general hazardous waste regulations exempt waste lamps from regulation as hazardous waste. *Id.* (citing 35 IAC §§ 721.109 and 703.123). Accordingly, Respondent argues, "[i]t is utterly impossible for a person of average intelligence to conclude that [those exemptions] are not authorized or viable regulations when they are incorporated within the Authorized Illinois RCRA Subtitle C Program regulations." *Id.*

Finally, Respondents claim to "have made every reasonable effort to identify which regulations were applicable to [their] operations . . . ." Rs' Motion. Relying upon Attachments to their Motion and exhibits from their prehearing exchange and Complainant's prehearing exchange, Respondents maintain that they then fully complied with the regulations to which they were referred by EPA and IEPA. *Id.* (citing Attachments 1, 2, and 6; RPX 2, 5, 9, 16a, 16b, 31, and 32; and CPX 4, parts 2d and 15).

B. Complainant's Response

Complainant contends that, if the undersigned treats Respondents' Motion as a motion for accelerated decision, it should be denied on the basis that it relies upon a misperception of the facts and/or law in this proceeding. C's Response at 1. Complainant asserts that, in determining whether an agency has fairly notified the regulated community of its interpretation of a regulation, courts consider whether a regulated party could identify that interpretation with "ascertainable certainty." C's Response at 4 (quoting *Howmet Corp. v. EPA*, 614 F.3d 544, 553-54 (D.C. Cir. 2010) ("*Howmet*")). Complainant further asserts that

the "ascertainable certainty" standard is met as long as the agency's communications do not contain contradictions or major ambiguities, *id.* at 4 (citing *Star Wireless, LLC v. FCC* (D.C. Cir. 2008) ("*Star Wireless*")), or definitive guidance accompanies otherwise ambiguous regulations, *id.* at 5 (citing *Howmet*, 614 F.3d at 554). Finally, Complainant asserts that, "if a fair notice defense is built on ambiguities in agency rules and communications alone, then such ambiguities must be more than *de minimus*." *Id.* (citing *Star Wireless*, 522 F.3d at 474, and *United States v. Lachman*, 387 F.3d 42, 57 (1st Cir. 2004)).

Turning to the arguments presented by Respondents in their Motion, Complainant claims that Respondents' assertion of a fair notice defense is disingenuous on the basis that the factual allegations set forth in the Amended Complaint support a violation of both Illinois's general hazardous waste regulations and Illinois's universal waste rule.[7] C's Response at 6-8.

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[7] Codified at 35 IAC part 733, Illinois's universal waste rule authorizes small and large quantity handlers of universal waste lamps to "treat those lamps for volume reduction at the site where they were generated," without a permit, under certain enumerated conditions. 35 IAC §§ 733.113(d)(3) and 733.133(d)(3). The owner or operator of a destination facility, on the other hand, remains subject to Illinois's full hazardous waste regulations, including the requirement that the owner or operator obtain a RCRA permit, pursuant to 35 IAC § 733.160. A "destination facility" is defined by Illinois's universal waste rule as a "facility that treats, disposes of, or recycles a particular category of universal waste." 35 IAC § 733.109.

The Amended Complaint alleges that, without first obtaining a permit, Respondents received waste lamps from third parties, transported the waste lamps to their Riverdale property, crushed the waste lamps at their Riverdale property, and disposed of the resulting materials at solid waste landfills. In its Response, Complainant claims that, due to these alleged activities, the Riverdale property constitutes a "destination facility" for which Respondents were obligated to obtain a RCRA permit. C's Response at 7. Complainant further claims that "[t]he fact that Respondents were operating a destination facility without a permit gives rise to the alleged violation of the Illinois hazardous waste law that U.S. EPA is enforcing here." *Id.* at 8 n.6.

By raising such an argument, Complainant must be careful in citing the governing law in this proceeding. The Amended Complaint charges Respondents with violations of 35 IAC § 703.121(a)(1), which provides, in pertinent part, that "[n]o person may conduct any hazardous waste storage, hazardous waste treatment, or hazardous waste disposal operation . . . [w]ithout a RCRA permit

(continued...)

Thus, Complainant contends, "[a]ny differences between the authorized and unauthorized state regulations are a 'red herring' for purposes of the violations at issue in this case[] because the treatment of hazardous waste mercury vapor lamps at the Riverdale facility required a permit under both sets of regulations." C's Response at 7. Complainant further claims that evidence in the record demonstrates that IEPA informed Respondent Kelly that Respondents' activities at the Riverdale property were subject to the permit requirements of Illinois's general hazardous waste regulations, rather than exempt under Illinois's universal waste rule. *Id.* at 7-8 (citing RPX 9). Complainant then argues that the fair notice defense is not available "when the regulated party has actual notice of a potential violation." *Id.* at 8 (citing *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 987 (7th Cir. 1999)).

Complainant next contends that the evidence proffered by Respondents in support of their Motion is insufficient to satisfy the "ascertainable certainty" standard under which courts determine whether a regulated party had fair notice of agency's interpretation of a regulation. C's Response at 10-23. Within the context of this argument, Complainant first argues that neither EPA's nor IEPA's websites contain statements contradicting its position in this proceeding that Illinois's universal waste rule is not authorized by EPA and that, in the absence of authorization, EPA retains the authority to enforce Illinois's full hazardous waste regulations against regulated entities such as Respondents. C's Response at 10-16. Even if statements on IEPA's website could be considered contradictory to its position, Complainant argues, "conflict or ambiguity created by state interpretations of federal law generally cannot serve as the basis of a federal fair notice claims." C's Response at 14-15 (citing *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, 618 F.Supp.2d 815, 831-32 (E.D. Tenn. 2009)).

[1/] (...continued)
for the HWM (hazardous waste management) facility . . . ." This regulation is authorized as part of Illinois's general hazardous waste program. As I held in the Order issued on May 5, 2011, Illinois's general hazardous waste regulations apply in this proceeding, not because the Riverdale property constitutes a "destination facility" as defined by Illinois's universal waste rule, but because Illinois's universal waste rule is not enforceable by EPA in the absence of EPA's authorization of the rule. Accordingly, the parties are cautioned against referring to the Riverdale property as a "destination facility," or otherwise describing the Riverdale property in the context of Illinois's universal waste rule. As Respondents point out in their Reply, the Amended Complaint does not charge Respondents with violations of that rule. Rs' Reply at 3.

Complainant also dismisses Respondents' claimed reliance upon any oral statements made by employees of EPA as irrelevant to the fair notice inquiry on the basis that "an isolated opinion of an agency official does not authorize a court to read a regulation inconsistently with its language." C's Response at 17 (quoting *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 580-81 (2007)). Should Respondents' arguments be construed as claims of equitable estoppel against the government, Complainant argues that such claims are generally disfavored, particularly where they are based upon informal pages on agency websites or the oral advice of agency employees. C's Response at 12-13, 15-16, 17.

As further support for its contention that Respondents fail to meet the "ascertainable certainty" standard, Complainant claims that RCRA and the implementing regulations unambiguously convey that EPA retains the authority to enforce any regulations adopted by Illinois and authorized by EPA as part of Illinois's hazardous waste program, including the permit requirement at issue in this proceeding, and that Illinois's universal waste rule has not yet been so authorized. C's Response at 18-20. Additionally, Complainant claims that public statements made by the Agency in the preamble to the federal universal waste rule and the RCRA Orientation Manual 2008 also unambiguously convey the requirements that apply to Respondents. C's Response at 20-22.

Finally, Complainant argues that Respondent Kelly represented to potential clients and investors that he understood the federal and state regulations applicable to Respondents' activities. C's Response at 22-23 (citing EX 37 and 47[8/]). Complainant contends that, "[b]ecause the fair notice analysis is conducted from the perspective of whether the regulated party could be expected to ascertain the standards that the agency expected it to adhere to, . . . Respondent Kelly's statements about his knowledge of regulatory requirements are relevant to the inquiry." C's Response at 23 (citing *Howmet*, 614 F.3d at 553-54.

[8/] On June 8, 2011, Complainant filed a Motion for Leave to File First Supplemental Prehearing Exchange Instanter ("Complainant's First Motion to Supplement") and a copy of its First Supplemental Prehearing Exchange. Complainant's First Motion to Supplement is currently pending before the undersigned. In its Response, Complainant relies upon the proposed exhibits it seeks to add to its prehearing exchange through its First Motion to Supplement. These proposed exhibits are identified herein as EX 30 through EX 49.

C. Respondents' Reply

In their Reply, Respondents first reiterate their denials of the allegations set forth in the Amended Complaint.[9/] Rs' Reply at 1-4. Respondents then contend that a number of considerations led to their belief that EPA had granted "apparent authority" to Illinois's universal waste rule and that the regulated community in Illinois was consequently bound to abide by that rule. Rs' Reply at 2. Specifically, Respondents cite regulations found in Illinois's authorized hazardous waste program that exempt universal waste from regulation as hazardous waste and advice provided on EPA's website, which refers regulated parties in Illinois to Illinois's universal waste rule and directs readers to consult their respective states for "the exact regulations that apply." *Id.* (citing RX2 and Attachment A). Respondents claim that "[t]o direct citizens to check with their state implies the state has the authority to manage [universal wastes] under their [authorized] program." *Id.* at 5. Additionally, Respondents maintain that EPA's failure to prevent the State of Illinois from implementing its universal waste rule also "sent a message of Apparent Authority to the regulated community in Illinois." *Id.* at 6.

Respondents next argue that the evidence offered in support of their Motion is sufficient to establish a fair notice defense. Rs' Reply at 4-7. Respondents contend that EPA's apparent authorization of Illinois's universal waste rule "is clearly in contradiction" to the position adopted by Complainant in this proceeding. Rs' Reply at 4. Respondents further claim that "[t]he continuous use of the words Authorized and Adopted throughout published USEPA documents without defining the difference or the ramifications has lead not just the Respondents but most of the regulated community in the State of Illinois to believe that these two words are synonymous with one another . . . ." *Id.* Thus, Respondents contend, the use of these words is ambiguous. *Id.* at 7. Respondents also characterize other statements on EPA's website as creating a "significant ambiguity"

[9/] Notably, Respondents claim that River Shannon Recycling ("RSR") did not treat waste lamps at the Riverdale property. Rs' Reply at 3. Rather, Respondents contend, RSR acted as a large quantity generator that transported and consolidated waste lamps at the Riverdale property and an "ally" of RSR reduced the volume of those lamps at RSR's request. *Id.* In characterizing RSR as a generator, Respondents rely upon a document entitled "Call Center Questions & Answers," which cites the preamble to the final rule adding hazardous waste lamps to the federal version of the universal waste rule. *Id.* (citing Attachment B). The preamble states that "[c]ontractors who remove universal waste lamps from service are considered handlers and *co-generators* of the waste." 64 Fed. Reg. 36,466, 36,474 (July 6, 1999) (emphasis added).

as to the meaning of the term "adopted" in the context of Illinois's universal waste rule. *Id.*

IV. DISCUSSION

As noted above, the Amended Complaint in this proceeding charges Respondents with violations of 35 IAC § 703.121(a)(1), which provides, in pertinent part, that "[n]o person may conduct any hazardous waste storage, hazardous waste treatment, or hazardous waste disposal operation . . . [w]ithout a RCRA permit for the HWM (hazardous waste management) facility . . . ." This regulation is one of Illinois's traditional hazardous waste requirements, which EPA granted final authorization to the State of Illinois to administer and enforce as part of its hazardous waste program in lieu of the federal Subtitle C program pursuant to Section 3006(b) of RCRA. In this proceeding, Respondents contend, in essence, that EPA failed to provide fair notice that such regulations, as opposed to Illinois's universal waste rule, which EPA has yet to authorize, apply to the management of universal waste lamps in the State of Illinois.[10/]

As Complainant asserts, courts apply an "ascertainable certainty" standard in determining whether an agency provided fair notice of its regulatory interpretations:

> If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainably certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.

Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

In considering the arguments raised by Respondents in the context of this standard, I note at the outset that Respondents' contention that EPA improperly overlooked Illinois's implementation of its universal waste rule, and thereby provided apparent authorization of the rule, necessarily must fail. Such an argument assumes that the State of Illinois lacked the authority to implement and enforce its universal waste rule. In fact, as I pointed out in the Order of May 5, 2011, the State of Illinois and EPA have distinct enforcement authorities within the State. As a matter of state law, Illinois's universal waste rule has been enforceable by the State of Illinois since the effective date of the rule on August 1, 1996. As a matter of federal law,

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[10/] Respondents have also claimed that Illinois's traditional hazardous waste regulations exempt universal waste from regulation as hazardous waste at 35 IAC §§ 721.109 and 703.123.

however, I held in the Order of May 5, 2011, that Illinois's general hazardous waste regulations are enforceable by EPA within the State in the absence of EPA's authorization of Illinois's universal waste rule. Thus, two sets of regulations apply to the management of hazardous waste lamps in Illinois, and the regulated community is required, as Complainant points out in its Response, "to ensure its compliance with the law of *both* jurisdictions." C's Response at 16 (emphasis added). Accordingly, EPA was under no obligation "to step in and stop the state" from implementing its universal waste rule, as Respondents contend.

That being said, I find that, at this juncture, a ruling on Respondents' Motion should be held in abeyance until after the evidentiary hearing is conducted in this proceeding. As discussed above, the Amended Complaint alleges that Respondents engaged in the treatment of hazardous waste lamps at the Riverdale property, not at the site of generation of those lamps. Thus, the factual allegations of the Complaint appear to be outside the scope of Illinois's universal waste rule, which permits handlers of universal waste lamps to treat hazardous waste lamps for volume reduction only at the site where those lamps were generated.[11/] Accordingly, I find that Respondents' defense of lack of fair notice need not be addressed at this stage of the proceeding and that the parties must be afforded the opportunity to present their full cases at hearing. The parties may address the merits of Respondents' defense at the hearing and in their post-hearing briefs.

In view of the foregoing discussion, Respondents' Motion is hereby held in abeyance until after the evidentiary hearing in this matter is conducted.

Barbara A. Gunning
Administrative Law Judge

Dated: July 14, 2011
Washington, DC

[11/] Again, I note that Respondents claim that RSR acted as a generator and handler of universal waste lamps and that the exclusions set forth at 35 IAC §§ 721.109 and 703.123 exempt its activities from regulation under Illinois's traditional hazardous waste program.

In the Matter of *Mercury Vapor Processing Technologies, Inc., a/k/a River Shannon Recycling, and Laurence C. Kelly,* Respondent.
Docket No. RCRA-05-2010-0015

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Orders on Respondent's Motion to Dismiss With Prejudice for Lack of Fair Notice and Convoluted Regulations and Complainant's Motion to Strike,** dated July 14, 2011, issued by Barbara A. Gunning, Administrative Law Judge, was sent on this 14th day of July 2011, in the following manner to the addressees listed below.

Mary Angeles
Legal Staff Assistant

Original and One Copy by Facsimile and Pouch Mail to:

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Dated: July 14, 2011
Washington, DC