



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

C-14J

January 5, 2012

VIA U.S. EPA POUCH MAIL

Hon. Barbara Gunning
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Re: Mercury Vapor Processing Technologies, Inc. a/k/a River Shannon Recycling and Laurence Kelly, Docket No. RCRA-05-2010-015

Dear Judge Gunning:

Enclosed please find copies of "Complainant's Reply to Response to Motion To Strike Respondents' Post Hearing Rebuttal And Respondents' Amended Post Hearing Rebuttal As Filed Untimely And, In The Alternative, Motion To Strike Those Parts Of Respondents' Post Hearing Rebuttal And Respondents' Amended Post Hearing Rebuttal That Contain Statements Not Of Record" that was filed today in the above-referenced matter.

Sincerely,


Jeffrey A. Cahn
Associate Regional Counsel

Enclosure

cc: Regional Hearing Clerk
Mr. Laurence Kelly (w/ enclosure)
Andre Daugavietis, ORC (w/ enclosure)
Kasey Barton, ORC (w/ enclosure)
Todd Brown, LCD (w/ enclosure)

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

IN THE MATTER OF:)
)
Mercury Vapor Processing)
Technologies Inc., a/k/a/ River Shannon)
Recycling)
13605 S. Halsted)
Riverdale, Illinois 60827)
U.S. EPA ID No.: ILD005234141)
)
and)
)
Laurence Kelly)
)
)
Respondents.)

DOCKET NO. RCRA-05-2010-0015

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REGIONAL HEARING CLERK
U.S. EPA REGION 5
2012 JAN -5 PH 10:11

COMPLAINANT'S REPLY TO RESPONSE TO MOTION TO STRIKE
RESPONDENTS' POST HEARING REBUTTAL
AND
RESPONDENTS' AMENDED POST HEARING REBUTTAL
AS FILED UNTIMELY
AND, IN THE ALTERNATIVE,
MOTION TO STRIKE THOSE PARTS OF
RESPONDENTS' POST HEARING REBUTTAL
AND
RESPONDENTS' AMENDED POST HEARING REBUTTAL
THAT CONTAIN STATEMENTS NOT OF RECORD

Complainant, the Director of the Land and Chemicals Division, United States
Environmental Protection Agency, Region 5 (Complainant or U.S. EPA), pursuant to 40 C.F.R. §
22.16(b) of the *Consolidated Rules of Practice Governing the Administrative
Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*
(Consolidated Rules or Rules), hereby replies to "Respondents' Response To Complainant's
Motion To Strike Respondents' Post Hearing Rebuttal And Respondents' Amended Post Hearing
Rebuttal As Filed Untimely And, In The Alternative Motion To Strike Those Parts of
Respondents' Response To Complainant's Motion To Strike Respondents' Post Hearing Rebuttal

And Respondents' Amended Post Hearing Rebuttal That Contain Statements Not Of Record" ("Response"). On December 14, 2011, U.S. EPA filed and served¹ its motion to strike "Respondents' Post Hearing Rebuttal" brief ("Respondents' Reply Brief") and "Respondents' Amended Post Hearing Rebuttal" brief ("Respondents' Amended Reply Brief")² on the ground that they were not timely filed³ and, alternatively, to strike those parts of Respondents' Reply Briefs that include statements about matters that are not part of the evidentiary record in this matter. Respondents transmitted their Response for service and filing on December 26, 2011. The certificate of service accompanying the Response indicates it was served by "Registered Mail." The Response was delivered in a commercial delivery service package and was received by U.S. EPA on December 28, 2011. Consistent with Section 22.7(c) and Section 22.16(b) of the Rules, U.S. EPA calculates that its Reply to the Response is due on, or before, January 10, 2012.⁴ 40 C.F.R. §§ 22.7(c); 22.16(b).

¹ On December 14, 2011, Counsel for U.S. EPA personally filed its motion to strike and personally delivered the motion to strike to U.S. EPA's mail room for service by U.S. mail. On December 22, 2011, Counsel for U.S. EPA informed Mr. Kelly that on that day he had learned that there had been difficulties with U.S. EPA's mail room that month and that the U.S. EPA case team was willing to discuss any difficulties Respondents had in receiving the documents mailed to him. U.S. EPA reminded Mr. Kelly that he was provided courtesy copies of the mailed document via e-mail on the date that the motion to strike was filed and served. Mr. Kelly did not respond.

² Together referred to as Respondents' Reply Briefs."

³ In their Response, Respondents do not dispute the late filing of the Respondents' Reply Briefs.

⁴ Section 22.16(b) of the Rules provides for 10 days to file a reply to a response to a motion. 40 C.F.R. § 22.16(b). Section 22.7(c) of the Rules provides that "[w]here a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time allowed . . . for the filing of a responsive document. 40 C.F.R. § 22.7(c). The certificate of service accompanying the Response shows transmittal for service on December 26, 2011; service was by commercial delivery service; the Response was received two days after transmittal for service and, thus, was not by overnight or same day delivery. Accordingly, U.S. EPA calculates that it is allowed 15 days (starting with December

I. The Facts Dehors The Record That Appear In Respondents' Reply Briefs Should Be Struck, And Nothing in Respondents' Response changes that.

Respondents Response offers no basis for deviating from the rule that prohibits the introduction, through post-trial briefs, of statements of purported facts that were not introduced at hearing and that are not part of the evidentiary record.⁵

Respondents cite to transcript pages 598-599 as record support for passages contained in Respondents' Reply Briefs at pages 29-32 that address Respondents' ability to pay the requested penalty and to carry out the work in the requested compliance order. The trouble is, the cited transcript pages do not support those passages. For example, the following passages⁶ appear in Respondents' Reply Briefs without direct record support:

“Both the Complainant and the Witness Ewen . . . fail to mention that Mr. Kelly signed and dated those returns at the request of the court, as his own personal copies were not signed and the agency demanded signed copies of the returns.” [Respondents' Reply Briefs at 29.]

“Mr. Kelly sold his home to his partner for \$650,000 Mr. James Molidor in 2003 not 2005, which retired Kelly's mortgage that he owed to the bank at that time. Mr. James

27, 2011), or until January 10, 2012, to file this Reply.

⁵ In its Motion, Complainant renewed the motion that it made in its Post-Hearing Reply Brief to strike those parts of Respondents' Post-Trial Brief that assert purported statements of fact that are not part of the trial record. See Complainant's Post-Hearing Reply Brief at 4 and footnote 3; 6-7 and footnote 8; footnote 11; 13; 15; and footnote 16. Respondents did not respond in any way to the motion to strike these parts of Respondents' Post-Trial Brief.

⁶ Respondents did not file their post-trial brief (or any part thereof) under seal to protect confidential business information (“CBI”) and/or personal privacy information. Respondents also did not file Respondents' Reply Briefs (or any part thereof) under seal to protect confidential business information (“CBI”) and/or personal privacy information. Accordingly, it appears that those claims are waived, and this Reply quotes freely from Respondents' Reply Briefs. Complainant respectfully requests that in light of Respondents' waiver that the sealed portions of the trial record be unsealed and be made publicly available.

Molidor then took out a new mortgage of \$1,000,000 and invested the difference (\$350,000) back into the startup company known as MVP/RSR which all occurred in 2003 not 2005.” [Respondents’ Reply Briefs at 30.]

“Further, Mr. Molidor allowed Mr. Kelly to remain at his residence while their corporation grew, under a ten year buy back agreement.” [Respondents’ Reply Briefs at 30.]

“The home that Mr. Kelly has lived in for over 30 years and raised his family in has been foreclosed on and is now bank owned.” [Respondents’ Reply Briefs at 31.]

“Mr. Kelly has been summoned to appear in The Circuit Court of Cook County Illinois on November 29th to receive an eviction date which could easily be as early as mid-December (Case # 11M1-726897). [Respondents’ Reply Briefs at 31.]

“Mr. Kelly did not sell his home to Mr. Molidor for one million dollars. Mr. Kelly sold his house to Mr. Molidor for \$650,000, the amount owed on the mortgage, and Mr. Molidor re-mortgaged the home and invested \$350,000 he received from the new loan into MVP/RSR, which was a loan to be repaid in part by Mr. Kelly.” [Respondents’ Reply Briefs at 32.]

Similarly, Respondents cite to transcript pages 579-580 and exhibit RX-9 as record support for passages contained in Respondents’ Reply Briefs at pages 3; 20-21; 22; and 24 29-32 that address the substance of purported conversations and communications between Respondents and Illinois regulatory personnel regarding compliance matter. Again those transcript pages and RX-9 do not support the passages. For example, the following passages appear in Respondents’ Reply Briefs without direct record support:

The discussion at page 3-4 of Respondents' Reply Brief that recounts purported conversations and meetings with Illinois EPA personnel "negotiating and arriving at agreed protocols" based on a review of the universal waste rules of other states, including Colorado. [Respondents' Reply Briefs at 3-4.]

The discussion at page 20 of Respondents' Reply Brief that recounts the purported frequency of reporting by Respondents to Illinois EPA. [Respondents' Reply Briefs at 20.]

"MVP/RSR ran an open door policy and was the subject of many site specific regulatory audits as the Riverdale Warehouse. Mr. Kelly was present for the majority of these site visits and subsequently a very high percentage of the regulatory personnel sent to the warehouse after reviewing and confirming the MVP/RSR protocols found that operation to be regulatory compliance thus recommending that their company proceed to allow MVP/RSR to become their co-generator ally." [Respondents' Reply Briefs at 20.]

Next, Respondents cite to exhibits RX-16 and RX 33 as record support for passages contained in Respondents' Reply Briefs at pages 16 and 17 that address the timing and locations of residences and conclusions regarding the absence of harm posed by air releases of mercury. The exhibits do not support the passages. For example, the following passages appear in Respondents' Reply Briefs without direct record support:

"At the time there was no dwellings or businesses [sic] within 4 blocks of the warehouse so even if every lamp broke at once the mercury that would be emitted would disseminate causing no potential harm to Human Health and Safety. And more importantly no insult to land or soil at the Riverdale warehouse or surrounding area could be caused by airborne mercury vapor." [Respondents' Reply Briefs at 16.]

“Further yet, despite the complainant’s attempt to depict residences in the vicinity of the Riverdale property (CX 42) the Riverdale warehouse stood alone, between and abandoned [sic] building owned by the village to the West and blocks upon blocks of uninhabited row houses to the East, upon which gentrification was just beginning as MVP/RSR’s was exiting the property in December 2008. To the South of the property was an open field where a drive in movie theater formerly resided, and to the North was a rail yard. MVP/RSR’s warehouse was the only inhabited property within the Vicinity, which contributed to the ongoing and increasing vandalism MVP/RSR incurred while occupying the Riverdale warehouse. [Respondents’ Reply Briefs at 17.]

Finally, Respondents cite to exhibits RX-33, CEX-42, and RX 17 as record support for the passage contained in Respondents’ Reply Briefs at page 17 that asserts that the warehouse floor was crack-free at the time Respondents vacated the building. The exhibits simply do not support the assertions made in the cited passage. The following passage appears in Respondents’ Reply Briefs without direct record support:

“Respondents deny there having been cracks in the floor at the time they exited the property some two and half years prior to the pictures taken by Mr. Brown. Also the Respondents would like to point out that the spent fluorescent bulbs contain mercury vapor, not solid mercury as testified to by Mr. Brown when he was attempting to explain the toxicology report (CEX 49).” [Respondents’ Reply Briefs at 17.]

All of the statements appearing in Respondents’ Reply Briefs that are not part of the trial record should be disregarded as irrelevant, struck from Respondents’ Reply Briefs, and should not be considered in this matter. It is established law in this Tribunal that statements of fact not contained in the trial record are disregarded as irrelevant and are properly struck when contained

in post-trial filings. In the Matter of Hilco, Docket No. TSCA-III-389, Initial Decision at 3 (Nov. 21, 1991)(granting motion to strike matters in reply brief that were not admitted at hearing); In the Matter of Western Compliance Services, TSCA Docket No. 1087-11-01-2615, Initial Decision at 6-7 (Feb. 10, 1989)(references in, and attachments to, post-trial brief and reply brief that were not part of trial disregarded as irrelevant to issues presented for decision). The decisions of this Tribunal are consistent with those of the federal Courts. Coca-Cola Co. v. Feulner, 7F.Supp. 364, 367 (S.D. Texas, 1934)(facts in brief not supported by record evidence must be disregarded). See also, Schley v. Pullman's Palace Car Co., 120 U.S. 575, 578-79 (1887)(striking facts dehors the record contained in appellate brief); Chesapeake & O. RY. Co. v. Greenup County, Kentucky, 175 F.2d 169, 170 (6th Cir. 1949)(like the trial court, appellate court would not consider facts contained in brief that were not part of the trial record).

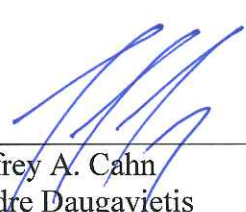
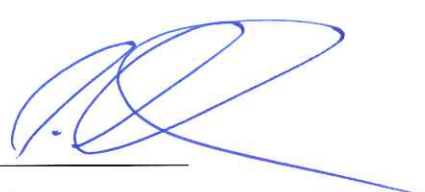
Complainant will be prejudiced if Respondents are allowed to introduce through post-trial briefs information that is not part of the trial record in this matter. The "facts" that Respondents attempt to introduce to the Court are untested and cannot now be contested. Consideration by the Court of this new information without the safeguards provided by trial would deprive Complainant of its right to a full and fair hearing in this matter. For example, Complainant has no opportunity to cross-examine Mr. Kelly (and other witnesses) now about the new "facts" regarding his financial history of dealings with Mr. Molidor. Similarly, U.S. EPA has no opportunity to present information that could rebut the new information. Thus, the rule that new facts cannot be introduced through post-trial briefs should be enforced here for sound policy reasons.

II. Conclusion

All of the statements appearing in Respondents' Reply Briefs regarding assertions of alleged "facts" that are not part of the trial record should be disregarded as irrelevant, should be struck from Respondents' Reply Briefs, and should not be considered in deciding this matter. Nothing in the Response of the Respondents should lead to a different conclusion.

Respectfully submitted,

DATED: 1/5/2012

Jeffrey A. Cahn
Andre Daugavietis
Kasey Barton
Office of Regional Counsel
U. S. Environmental Protection Agency,
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

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U.S. ENVIRONMENTAL
PROTECTION AGENCY

IN THE MATTER OF:)
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Mercury Vapor Processing)
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U.S. EPA ID No.: ILD005234141)
)
And)
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Respondents.)
_____)

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CERTIFICATE OF FILING AND SERVICE

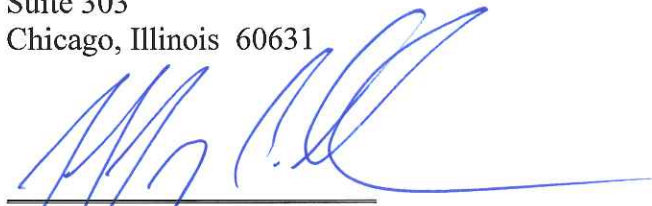
I hereby certify that on this day I caused to be filed with the Regional Hearing Clerk the original and one copy of the accompanying "Complainant's Reply to Response to Motion To Strike Respondents' Post Hearing Rebuttal And Respondents' Amended Post Hearing Rebuttal As Filed Untimely And, In The Alternative, Motion To Strike Those Parts Of Respondents' Post Hearing Rebuttal And Respondents' Amended Post Hearing Rebuttal That Contain Statements Not Of Record." I further certify that on this day I caused copies of "Complainant's Reply to Response to Motion To Strike Respondents' Post Hearing Rebuttal And Respondents' Amended Post Hearing Rebuttal As Filed Untimely And, In The Alternative, Motion To Strike Those Parts Of Respondents' Post Hearing Rebuttal And Respondents' Amended Post Hearing Rebuttal That Contain Statements Not Of Record" to be served on the following persons by the following means:

VIA POUCH MAIL:

Honorable Barbara Gunning
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460-2001

VIA U.S. MAIL:

Laurence Kelly
7144 North Harlem Avenue
Suite 303
Chicago, Illinois 60631



Date: January 5, 2012

Jeffrey A. Cahn
Associate Regional Counsel
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312-886-6670