

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

RECEIVED

MAR 04 2011

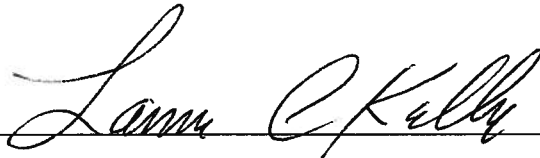
REGIONAL HEARING CLERK  
USEPA  
REGION 5

**OBJECTION TO THE COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED  
DECISION AS TO THE APPLICABLE REGULATIONS AND LIABILITY**

Respondents, Mercury Vapor Processing Technologies, Inc., a/k/a River Shannon Recycling and Laurence Kelly (Respondents), respectfully submit this Objection for Partial Accelerated Decision as to the Applicable Regulations and Liability.

In support of this Objection for Partial Accelerated Decision as to the Applicable Regulations and Liability, Respondent relies on the Consolidated rules, the documents in the record and the facts and law set forth in the attached Memorandum in Support of its Objection to the Complainant's Motion for Partial Accelerated Decision as to the Applicable Regulations and Liability with the attachments and affidavit.

Respectfully Submitted this 3<sup>rd</sup> day of March, 2011,

  
\_\_\_\_\_

Laurence Kelly

7144 N. Harlem Ave.

Suite 303

Chicago, IL 60631

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**RESPONDENT'S MEMORANDUM IN SUPPORT OF ITS OBJECTION TO  
COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO THE  
APPLICABLE REGULATIONS AND LIABILITY**

Respondents respectfully submit this Memorandum in Support of their Objection for Partial Accelerated Decision as to the Applicable Regulations and Liability.

- I. Relevant Corporate Background
  - A. MVP/RSR incorporation

Mercury Vapor Processing Technologies, Inc. (MVP) was formed on October, 16<sup>th</sup>, 2003 and did business as River Shannon Recycling (RSR) in Riverdale, Illinois acting as a transporter, handler/generator and consolidator of Universal Waste (UW) Lamps, Batteries and Ballast from February 2005 through December 2008, after acquiring a business license and passing a series of specific inspections conducted by the Village of Riverdale (Attachment A). RSR shared the property with a window manufacturing company, who occupied 80% of the property, from February 2005 through January 2006. When the prime tenant relocated, RSR became the sole tenant and was therefore afforded the opportunity to consolidate larger quantities of lamps for efficiency and cost purposes (Attachment B). RSR notified the USEPA and acquired a generator number as a large quantity handler/generator of Universal Waste (UW) on January 4<sup>th</sup>, 2006 (RPX 5). RSR acted as a transporter of UW, consolidator and warehoused UW at a warehouse located in Riverdale Illinois in accordance with 40 CFR 273 and 35 IAC 733. RSR moved UW under Bills of Lading in accordance with USDOT regulations; consolidated UW in accordance with USEPA and IEPA published rules and maintained precise records for tracking purposes.

RSR never processed, treated, crushed or volume reduced any of the UW it transported or consolidated.

## B. Riverdale Litigation

### 1. Riverdale Situation

In July 2007, after 2.5 years of operations as a village licensed warehouse, RSR was offered an opportunity by the building owner to acquire the property in Riverdale. While conducting a Phase I Environmental site assessment which includes a 50 year history of the property, RSR contacted the village for historic information relating to the property. When visiting the village hall regarding this information acquisition, a question was posed by one of the city officials as to why RSR required this information. RSR informed the village that they were considering acquiring the property, and village officials countered, stating they owned the property and the surrounding depressed areas, which were slated to become part of their new re-entrification project, for which the village had received many state, federal and private grants. In fact, the village did not own the property RSR occupied but did own every parcel of land surrounding it (Attachment C). Up to that day RSR maintained a very good relationship with the village for over two and half years, but it all went downhill after that.

On September 6, 2007, the Village of Riverdale issued a cease and desist order to RSR, with no prior citations. RSR was physically then precluded from entering the property by reason of placement of village equipment at every entrance to the property from that date on. RSR was randomly allowed access to the property for short periods of time on weekends when the village equipment was not blocking entrances or in the early morning, before the village employees arrived to block the entrances or street (Attachment D). From the outset of the siege RSR immediately began to experience extreme vandalism inside the building on a nightly basis, to which the Village of Riverdale police force refused to respond to. RSR filed a civil rights lawsuit against the village (CPX 4, # 3a) and the village responded with what RSR's then legal counsel referred to as a "self fulfilling prophecy", by refunding three years worth of business license payments (Attachment E) and filing a counter suit for operating without a business license and for being a solid waste nuisance, a situation caused by the inability for RSR to access the property and the unprotected, uncontrolled vandalism that was allowed to occur within the building. The village caused a scathing and erroneous news article to be published on the front page of the Chicago Tribune on October 29, 2007. The following morning, the USEPA arrived at the Riverdale property to perform their inspection. Two police vehicles from the Village of Riverdale parked along the west side of the building, facing the building, to observe the USEPA's inspection through the now broken and pane-less windows that lined the west side of the building. Both Mr. Todd Brown and Mr. Jim Mitchell of the USEPA recommended that RSR repair the hole that had been cut into the fence behind one of the trailers in the parking lot, where the vandals were gaining access to the property. Pictures taken the day of the USEPA's inspection are not representative of RSR's usual housekeeping protocols but are the results of

extreme circumstances. Despite the housekeeping nightmare RSR now faced, inspectors for the USEPA, after extensive sampling and air quality monitoring, found that RSR did not pose a threat to human health, as evidenced by their statements in the two press releases issued by the USEPA on November 1, 2007 and November 6, 2007 (EXHIBIT RPX 16a and 16b). RSR is preparing subpoenas and will bring witnesses at the time of our Administrative Hearing in July of 2011 from various sectors of the government and private industry to attest to our historical housekeeping and record keeping (motions to follow).

## 2. Riverdale Resolution

After several months of litigation, a Settlement agreement was reached in Federal Court Northern District of the State of Illinois was reached, in which both RSR's civil rights complaint and the Village of Riverdale's counter claim were dismissed without prejudice, and RSR was finally allowed unfettered access to remove the materials at the Riverdale property and return the property to the building owner in clean condition (RPX 17). The condition of the building upon its return to the building owner was approved by the environmental counsel for the Village of Riverdale.

### C. SLR incorporation under corporate umbrella

SLR was a sole proprietorship solely owned by Laurence C. Kelly from October 2003 through September 2007, when, upon advice of counsel handling RSR's civil rights complaint against the Village of Riverdale, SLR was added as an additional company under the MVP corporate umbrella (Attachment F). SLR did not volume reduce any UW at the Riverdale location while it was under the MVP corporate umbrella. Based on the confusion this seemed to be causing the USEPA, SLR was removed from the MVP umbrella and incorporated separately on December 15, 2008. The Complainant now confounds the issue by indicating in their motion that the Respondent is MVPT, the holding corporation, when in fact the Respondents are MVP/RSR and Laurence Kelly. SLR has always been a separate and distinct company that maintained a separate location to stage its' mobile equipment when not in use, as evidenced by the attached affidavit from SLR's landlord, Mr. Bill Ashby (Attachment G) as well as the SLR's Duns and Bradstreet Report listing an address of 6410 Chestnut St. in Morton Grove, IL (CPX 24).

## II. Relevant Factual Background

### A. USEPA's implied authorization to Illinois to manage The Universal Waste rule

#### 1. USEPA website guidance

In the document titled "Where You Live" found at the USEPA's website (RPX 2), the USEPA publishes a map and chart that depict states that are authorized and/or have adopted the Universal Waste rule. The only differentiation between the words authorized and adopted can be

found at the top of the page where it provides a color coded map and states: “The map shows the states that have universal waste regulations and which of those states have added different waste categories (in green)”. The map key defines the states in green as being adopted. Illinois is depicted in green. The map provides a list of states, links to the state’s regulations and a notation as to whether they have adopted and are authorized for the Universal Waste Rule. With the exception of five states, who are either managed by the federal rule or do not have links available, links are provided to the state universal waste rules. A direct link is provided to 35 IAC 733 next to Illinois on the Universal Waste chart provided by the USEPA on their website. There is no mention of Illinois or any other adopted but unauthorized state being mandated to handle Universal Waste lamps as Subtitle C RCRA waste.

## 2. IEPA website guidance

Illinois also states that its’ Universal Waste Rule is a valid option for managing spent fluorescent lamps.

“The Illinois Universal Waste Rule encourages hazardous waste lamps to be properly collected, and subsequently recycled or disposed of.

### **What are my options for managing hazardous lamps?**

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.” (Attachment H)

## 3. UW is not RCRA Subtitle C waste

In a document titled *Response to Comments Document /Final Rule for Hazardous Waste lamps The following response to the very first comment made by Owens Glass is as follows:*

*Currently, under RCRA Subtitle C, a solid waste that exhibits the characteristic of toxicity as set forth in 40 CFR 261.24 must be managed as hazardous waste and is subject to full record keeping, storage, notification and transportation requirements. Many types of lamps consistently fail the toxicity characteristic test for mercury and some fail for lead and therefore are subject to full RCRA Subtitle C management standards. By adding hazardous waste lamps to the universal waste program, the complexity of managing this type of waste is significantly decreased because the universal waste rule provides a reduced set of requirements (i.e. the universal waste rule is less stringent than full Subtitle C management standards). (emphasis added)*

The above statement is consistent with the 337 page document which described the spirit and the regulatory driver behind 40 CFR 273 as explained by the USEPA rule makers just after lamps were added as Universal Waste in 2000. The terms Lamps fail TCLP are now part of the Universal Waste rule are used 137 times in this document in the Response given by the rule makers to various comments. The term less stringent than Full Subtitle “C” is used in this document 897 times and the term Universal Waste rule is less stringent than Subtitle “C” is used 381 times in this document. This 337 page document can be found at:

<http://www.epa.gov/osw/hazard/wastetypes/universal/merc-emi/merc-pgs/vol-1/unwas1.pdf>

Further, Universal Waste is exempt from RCRA regulations, as stated in 40 CFR 261.9:

*§ 261.9 Requirements for Universal Waste.*

*The wastes listed in this section are exempt from regulation under parts 262 through 270 of this chapter except as specified in part 273 of this chapter and, therefore are not fully regulated as hazardous waste. The wastes listed in this section are subject to regulation under 40 CFR part 273:*

- (a) Batteries as described in 40 CFR 273.2;*
- (b) Pesticides as described in §273.3 of this chapter;*
- (c) Mercury-containing equipment as described in §273.4 of this chapter; and*
- (d) Lamps as described in §273.5 of this chapter.*

The exemption of these types of wastes is mirrored in Illinois Authorized RCRA regulations, at 35 IAC 721.109:

*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.*

#### 4. Illinois' Universal Waste rule

Illinois currently maintains an adopted status regarding Universal Waste. Illinois Universal Waste Rules found at 35 IAC 733 were adopted on August 1, 1996. These regulations have been enforceable under state law in Illinois since the date they were adopted, as evidenced by the affidavit from Mr. Gary Westefer, Illinois Regulatory Specialty, USEPA Region 5, submitted by the Complainant as Attachment B of the Motion for Partial Accelerated Decision as the Applicable Regulations and Liability. This statement regarding enforceability under state law in Illinois is consistent with conversations RSR has had with both Mr. Westefer of the USEPA Region 5 as well as with Mr. Mark Crites, Manager of RCRA Unit Permit Section Division of Land Pollution Control, Bureau of Land, IEPA and Ms. Joyce Munie P.E. The Manager of the Permit Division for the Bureau of Land, IEPA, resulting the issuance of the attached document authorizing Larry Kelly and SLR and states ***“The mobile crushing device operated by SLR does comply with the Universal Waste Rule and SLR may operate its device as a large quantity handler of Universal Waste.”*** (emphasis added)

Illinois' application for Universal Waste authorization was initially submitted October 30, 1996, packaged with approximately 60 other rules. Authorization was not granted “for reasons having to do with other aspects of Illinois laws” (Complainant Attachment B to Motion for Accelerated Decision). On October 20, 2010, Illinois submitted a revised application for

authorization of more than 60 rules, including the Illinois Universal Waste rule, and is currently awaiting final determination of this revised application package.

Illinois operates their Universal Waste program, enforceable under Illinois state law, under an agreement with the USEPA, delineated in a memo issued by Mr. Steve Herman, Office of Enforcement and Compliance Assurance, USEPA (RPX 4a). This memo states, “By finalizing 40 C.F.R. Part 273, EPA has taken the position that managing wastes in compliance with those standards is environmentally protective. Therefore, where States are implementing the Part 273 standards but have not yet received authorized, Regions should take enforcement actions involving universal wastes only where handlers of such wastes are not in full compliance with the Part 273 standards.” This memo goes on to state “*Regions should continue to address universal waste management practices that may present an imminent and substantial endangerment to human health and the environment under the authority provided in section 7003 of RCRA.*” (emphasis added) RSR operated its handling and transporting of Universal Waste within the regulations laid out at both 40 CFR 273 and 35 IAC 733 and has never presented any endangerment to human health or the environment. This is evidenced by the USEPA’s own press release dated November 6, 2007, which states “EPA immediately sent inspectors to the site to monitor air inside and outside the facility. They found no evidence that River Shannon posed a public health threat from mercury emissions.” (RPX 16a and 16b)

## B. Compliance

RSR adhered to published rules found at both 40 CFR 273 (Complainant Attachment A to the Motion for Partial Accelerated Decision and Liability) and 35 IAC 733 (RPX 6), as follows:

**Title**                      **40:**                      **Protection**                      **of**                      **Environment**  
PART 273—STANDARDS FOR UNIVERSAL WASTE MANAGEMENT  
Subpart C—Standards for Large Quantity Handlers of Universal Waste

### 273.30 Applicability

A large quantity handler of universal waste is:

(a) Prohibited from disposing of universal waste; and ***From time to time RSR disposed of non-hazardous volume reduced mixed glass and metal that met Land Disposal Regulation (LDR) so as to avoid speculative accumulation issues if reusable markets were not currently available (CPX 4, number 2h)***

(b) Prohibited from diluting or treating universal waste, except by responding to releases as provided in 40 CFR 273.37; or by managing specific wastes as provided in 40 CFR 273.33.

***RSR never diluted, treated and or processed any UW. Volume reduction of the UW lamps was managed by a state authorized mobile reduction unit that was owned by Larry Kelly (RPX 9).***

***This company was located in Morton Grove, Illinois. and brought on site from time to time as needed (Attachment G and(CPX 24).***

#### 273.32 Notification

(a)(1) Except as provided in paragraphs (a) (2) and (3) of this section, a large quantity handler of universal waste must have sent written notification of universal waste management to the Regional Administrator, and received an EPA Identification Number, before meeting or exceeding the 5,000 kilogram storage limit.

***RSR sent notification and received a EPA Large quantity generator ID number to act as a Large quantity handler/generator of UW (RPX 5)***

(2) A large quantity handler of universal waste who has already notified EPA of his hazardous waste management activities and has received an EPA Identification Number is not required to re-notify under this section.

#### 273.33 Waste Management

(d) *Lamps* . A large quantity handler of universal waste must manage lamps in a way that prevents releases of any universal waste or component of a universal waste to the environment, as follows:

(1) A large quantity handler of universal waste must contain any lamp in containers or packages that are structurally sound, adequate to prevent breakage, and compatible with the contents of the lamps. Such containers and packages must remain closed and must lack evidence of leakage, spillage or damage that could cause leakage under reasonably foreseeable conditions.

***RSR supplied structurally sound containers w/ covers to various small quantity generators. Upon request, it safely transported those containers to a consolidation point located in Riverdale Illinois. The containers were dated for tracking purposes and placed in a dry and passive area awaiting a volume reduction process and the eventual reuse of the non-hazardous residual material.***

(2) A large quantity handler of universal waste must immediately clean up and place in a container any lamp that is broken and must place in a container any lamp that shows evidence of breakage, leakage, or damage that could cause the release of mercury or other hazardous constituents to the environment. Containers must be closed, structurally sound, compatible with the contents of the lamps and must lack evidence of leakage, spillage or damage that could cause leakage or releases of mercury or other hazardous constituents to the environment under reasonably foreseeable conditions.



RSR is preparing subpoenas and will bring witnesses at the time of our Administrative Hearing in July of 2011 from various sectors of the government and private industry to attest to our historical housekeeping and record keeping (motions to follow).

#### 273.34 Labeling/Marking

A large quantity handler of universal waste must label or mark the universal waste to identify the type of universal waste as specified below:

(e) Each lamp or a container or package in which such lamps are contained must be labeled or marked clearly with any one of the following phrases: “Universal Waste—Lamp(s),” or “Waste Lamp(s),” or “Used Lamp(s)”. ***RSR provided labeling for all Universal Waste containers (CPX 1 PA300020 and CPX 1 PA300021).***

#### 273.35 Accumulation time limits.

(a) A large quantity handler of universal waste may accumulate universal waste for no longer than one year from the date the universal waste is generated, or received from another handler, unless the requirements of paragraph (b) of this section are met.

(b) A large quantity handler of universal waste may accumulate universal waste for longer than one year from the date the universal waste is generated, or received from another handler, if such activity is solely for the purpose of accumulation of such quantities of universal waste as necessary to facilitate proper recovery, treatment, or disposal. However, the handler bears the burden of proving that such activity was solely for the purpose of accumulation of such quantities of universal waste as necessary to facilitate proper recovery, treatment, or disposal.

(c) A large quantity handler of universal waste must be able to demonstrate the length of time that the universal waste has been accumulated from the date it becomes a waste or is received. The handler may make this demonstration by:

- (1) Placing the universal waste in a container and marking or labeling the container with the earliest date that any universal waste in the container became a waste or was received;
- (2) Marking or labeling the individual item of universal waste (e.g., each battery or thermostat) with the date it became a waste or was received;
- (3) Maintaining an inventory system on-site that identifies the date the universal waste being accumulated became a waste or was received;
- (4) Maintaining an inventory system on-site that identifies the earliest date that any universal waste in a group of universal waste items or a group of containers of universal waste became a waste or was received;
- (5) Placing the universal waste in a specific accumulation area and identifying the earliest date that any universal waste in the area became a waste or was received; or
- (6) Any other method which clearly demonstrates the length of time that the universal waste has been accumulated from the date it becomes a waste or is received.

***RSR Complied with time limits with an inventory system on-site. (CPX 4, #2g)***

273.36 Employee training.

A large quantity handler of universal waste must ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures, relative to their responsibilities during normal facility operations and emergencies.

(CPX 4, #10)

273.37 Response to releases.

(a) A large quantity handler of universal waste must immediately contain all releases of universal wastes and other residues from universal wastes.

(b) A large quantity handler of universal waste must determine whether any material resulting from the release is hazardous waste, and if so, must manage the hazardous waste in compliance with all applicable requirements of 40 CFR parts 260 through 272. The handler is considered the generator of the material resulting from the release, and is subject to 40 CFR part 262.

273.38 Off-site shipments.

(a) A large quantity handler of universal waste is prohibited from sending or taking universal waste to a place other than another universal waste handler, a destination facility, or a foreign destination.

***UW Lamps were volume reduced on site at the Riverdale Warehouse using a state authorized method issued to Larry Kelly by the IEPA, Permit Section, Bureau of Land and signed by Joyce Munie, P.E. the manager of that division. (RPX #9)***

(b) If a large quantity handler of universal waste self-transportes universal waste off-site, the handler becomes a universal waste transporter for those self-transportation activities and must comply with the transporter requirements of subpart D of this part while transporting the universal waste.

***All UW that was transported to the Riverdale warehouse for consolidation traveling under Bills of Lading in accordance with USDOT and IDOT regulations.(CPX 4, # 13, Book 2 of 3 and Book 3 of 3)***

(c) If a universal waste being offered for off-site transportation meets the definition of hazardous materials under 49 CFR 171 through 180, a large quantity handler of universal waste must package, label, mark and placard the shipment, and prepare the proper shipping papers in accordance with the applicable Department of Transportation regulations under 49 CFR parts 172 through 180;

***RSR transported all UW under Bill of Lading as required by the Department of Transportation. (CPX 4, # 13, Book 2 of 3 and Book 3 of 3)***

273.39 Tracking universal waste shipments.

(a) *Receipt of shipments.* A large quantity handler of universal waste must keep a record of each shipment of universal waste received at the facility. The record may take the form of a log,

invoice, manifest, bill of lading, or other shipping document. The record for each shipment of universal waste received must include the following information:

- (1) The name and address of the originating universal waste handler or foreign shipper from whom the universal waste was sent;
- (2) The quantity of each type of universal waste received (e.g., batteries, pesticides, thermostats);
- (3) The date of receipt of the shipment of universal waste.

***RSR maintained records of all shipments.*** (CPX 4, # 13, Book 2 of 3 and Book 3 of 3)

(b) *Shipments off-site.* A large quantity handler of universal waste must keep a record of each shipment of universal waste sent from the handler to other facilities. The record may take the form of a log, invoice, manifest, bill of lading or other shipping document. The record for each shipment of universal waste sent must include the following information:

- (1) The name and address of the universal waste handler, destination facility, or foreign destination to whom the universal waste was sent;
- (2) The quantity of each type of universal waste sent (e.g., batteries, pesticides, thermostats);
- (3) The date the shipment of universal waste left the facility.

(c) Record retention.

(1) A large quantity handler of universal waste must retain the records described in paragraph (a) of this section for at least three years from the date of receipt of a shipment of universal waste.

(2) A large quantity handler of universal waste must retain the records described in paragraph (b) of this section for at least three years from the date a shipment of universal waste left the facility.

***RSR maintained all records and provided them to the USEPA upon their request.*** (CPX 4, # 13, Book 2 of 3 and Book 3 of 3)

Handlers are allowed to send UW to other handlers in both Federal and Illinois state regulations. RSR turned their materials over to SLR, who volume reduced them in accordance with 35 IAC 733 and authorizations issued to Laurence Kelly and returned the volume reduced mixed glass and metal to RSR for marketing to known end users. The USEPA leaves the option to allow volume reduction up to each individual state. Illinois allows for volume reduction under specific conditions which include the prevention of mercury emissions.

Subsequent to volume reduction, the residual glass and metal end caps were returned to RSR, who staged them in a lined and covered roll off pending final reuse by qualified vendors or disposal at a not a solid waste landfill, but permitted special waste landfill. The residual glass and metal end caps consistently passed TCLP and LD restrictions. Due to the mixed nature of this material and RSR's inability to separate the glass from the metal end caps, demands for this type of material were limited. Subsequent to shopping markets for reuse with known vendors (RPX 10a and 10b), RSR would dispose of the volume reduced material at a permitted special waste landfill to avoid any speculative accumulation issues (CPX 4, #2h). RSR never managed the volume reduction of spent lamps.

### C. EPA's inspection of the Riverdale Facility

On October 30, 2007, subsequent to a front page headline in the Chicago Tribune, the USEPA arrived at the Riverdale property operated by RSR. Although the city equipment had been removed from the entrances the day before, at 9:50 am, two police vehicles from the Village of Riverdale arrived and parked along the west side of the building throughout the course of the morning, facing the building, in order to observe the USEPA's investigation. During the course of the afternoon, one of the vehicles moved to the front of the building while the other drove back and forth up and down the alley way to the east of the building. Prior to the USEPA's inspection of the Riverdale property, RSR had experienced significant issues with the Village of Riverdale and had been precluded from accessing the facility and while at the same time was exposed to extreme vandalism for nearly two months leading up to the October 30, 2007 inspection. The pictures submitted to the court are the result of the siege of the property and are not an accurate representation of the day to day housekeeping maintained by RSR prior to the Riverdale incident. RSR is preparing subpoenas and will bring witnesses at the time of our Administrative Hearing in July of 2011 from various sectors of the government and private industry to attest to our historical housekeeping and record keeping (motions to follow).

Once able to access the property, RSR safely staged lamps that had been strewn throughout the building in containers that were labeled and covered. The residual broken lamps in unmarked containers were an effort to containerize lamps that had been intentionally broken over the course of nearly two months by unknown vandals. The pictures depicting broken windows to the perimeter of the building are again a result of vandalism. The pictures depicting broken lamps in a roll off on the west side of the building were lamps that were had been thrown through the windows, which RSR found in the parking lot and swept up. That roll off, which was a Construction and Demolition (C&D) roll off, also contained broken office furniture and equipment, which had also been destroyed by vandals. The lamps in the second roll off behind the building contained lamps and metal end caps from bulbs that had been broken within the building itself. RSR placed three semi-trailers in the fenced rear yard and safely loaded those trailers with lamps that had not yet been broken by the vandals inside the warehouse. This was done in an attempt to protect these lamps from further damage cause by the ongoing vandalism. The trailers were dry and once they were loaded, they were locked and secured. These trailers were intentionally placed in a high profile location on the property, which successfully served to mitigate the chance of vandals breaking into them. Mr. Todd Brown and Mr. Jim Mitchell of the USEPA recommended RSR repair the hole in the fence of the rear yard where vandals were gaining access, which RSR had done several times previously and multiple times subsequent to the USEPA's inspection of the Riverdale property from the alleyway opposite the fence, outside the perimeter of the property, as they were precluded from accessing the property through the entrances, which were blocked by equipment from the Village of Riverdale (Attachment D).

Respondent Laurence Kelly was present at the time of the USEPA's inspection of the Riverdale property. Mr. Kelly at no time informed the USEPA that the Respondents used a "mobile treatment unit" to crush the waste lamps they picked up from customers, as RSR did not

crush any waste lamps. Mr. Kelly informed the USEPA that a mobile unit was employed to volume reduce lamps. The mobile unit was operated by SLR, who was based in Morton Grove, IL. The employment of the mobile unit is echoed by the USEPA in their November 5, 2007 Request for Information (CPX 4, #2). At no time did Mr. Kelly use the word treatment during the course of the inspection, nor did he use the word treatment in his response to this Request for Information dated November 26, 2007.

The USEPA issued two press releases regarding their inspection of the Riverdale property, on November 1, 2007 and November 6, 2007 (RPX 16a and 16b). The November 1, 2007 media advisory stated "EPA inspectors found no evidence that River Shannon poses a current public health threat from mercury emissions". The November 6, 2007 press release stated "EPA immediately sent inspectors to the site to monitor air inside and outside the facility. They found no evidence that River Shannon posed a public health threat from mercury emissions."

#### D. EPA's sampling and analysis of the waste lamps at the Riverdale Property

The USEPA took samples of whole lamps from the Riverdale Property on November 14, 2007. A whole fluorescent lamp will not demonstrate TCLP. The USEPA acknowledges this fact on their website under their Mercury Information for Consumers page, stating "No mercury is released when the bulbs are intact (i.e., not broken) or in use, but CFLs release mercury vapor when broken." (ATTACHMENT I) MSDS sheets published by lamp manufacturers indicate that most if not all fluorescent lamps will fail TCLP if broken in a confined space. (CPX 9) Sampling of the materials volume reduced by RSR's ally consistently passes TCLP (RPX 14 and CPX 4 #2h). It is well known that fluorescent lamps will fail TCLP when broken in a confined space a majority of the time, as stated by the USEPA as follows: "The Agency thanks the commenter for the comments and the additional data submitted. EPA studies have determined that the majority of spent lamps currently fail the TCLP for mercury and that some spent lamps also fail TCLP for lead. Spent lamps that fail the TCLP for any hazardous waste constituent or exhibit any other hazardous waste characteristic are subject to today's final rule. The final rule adds hazardous waste lamps to the universal waste regulations under 40 CFR Part 273. The Agency has determined that hazardous waste lamps meet the criteria established for designating a material as universal waste under 40 CFR Part 273. The universal waste rule provides a reduced, or streamlined set of requirements (i.e., universal waste rule standards are less stringent than full Subtitle C management standards) but still requires that lamps be treated to meet LDR standards, before disposal, unless they are recycled." This is an excerpt from a 337 page document titled "Response to Comments Document / Final Rule for Hazardous Waste Lamps Comments on the Measurement of Mercury in Lamps; Use of TCLP, MINTEQ 4" which can be found at: <http://www.epa.gov/osw/hazard/wastetypes/universal/merc-emi/merc-pgs/vol-1/unwas1.pdf>

The USEPA sampling and subsequent results of breaking whole lamps in a confined space and then sampling for TCLP simply confirms the regulatory driver behind the Universal Waste Rule, as stipulated above.

#### E. Respondent MVPT's Responses

USEPA would indicate that RSR continue to change their description of operations, which is simply untrue. USEPA repeatedly posed similar if not identical questions, which indicated a need for further clarification of RSR's operations. The Complainants' addition of Laurence Kelly to this Complaint and Compliance order, granted by the Presiding Officer on January 19, 2011, is simply an attempt to justify claims the USEPA had already made against RSR but could not support.

At the time of the first response, MVPT was a holding company for two separate companies that maintained two separate and distinct locations, and performed two separate and distinct services. The respondent to this Request for Information was MVP d/b/a RSR. RSR described in detail the way lamps were volume reduced, as the preparer, Laurence Kelly, had intimate knowledge of the way these lamps were volume reduced. However RSR at no point stated they were performing the volume reduction, and SLR did not volume reduce any materials at the Riverdale facility while under the MVP corporate umbrella. MVPT did not provide bills of lading, nor did it send tons of crushed glass and aluminum to solid waste landfills, these actions were performed by RSR, and the documentation, (CPX 4) clearly name RSR. The USEPA asked River Shannon Recycling if it owned the mobile unit, and RSR responded that it was owned by MVPT, the holding company for both RSR and SLR. RSR stated that "consolidated spent lamps collected from generators are staged inside the Riverdale facility, placarded and processed periodically depending on volumes." RSR does not state they perform the volume reduction of this material.

Mr. Laurence Kelly was the president of RSR, and Vice President, Chief Operating Officer and Health and Safety Officer of MVPT. RSR stated in their October 20, 2008 response (CPX 8) that the spent lamps present during the USEPA's inspection over 11 months prior had been transported to a different location and volume reduced by SLR. RSR had informed the USEPA of their intent to volume reduce the lamps onsite during the USEPA's inspection in their response to the USEPA's Request for Information dated November 26, 2007 (CPX 4, #4c). Over the course of 11 months subsequent to RSR informing the USEPA of their intent have the materials in question volume reduced, the USEPA at no point stated that it would be improper for RSR to have said lamps volume reduced. The lamps were transported to a different location prior to volume reduction based on RSR's issues with Riverdale and subsequent move from the Riverdale location.

#### F. The parties prehearing exchange and addition of Respondent

The Complainants' addition of Laurence Kelly to this Complaint and Compliance order, granted by the Presiding Officer on January 19, 2011, is simply an attempt to justify claims the USEPA had already made against RSR but could not support.

The statement that RSR was only responsible for picking up waste lamps and transporting them to the Riverdale facility is not a new argument, RSR provided this information in all of their responses to the USEPA's Requests for Information. RSR acted as a large quantity generator and handler of Universal Waste at the Riverdale property.

### III. Standard of Review

Accelerated decision is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 40 C.F.R § 22.20(a). Motions for accelerated decision under 40 CFR § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (FRCP). *See, e.g., In re BWX Techs., Inc.*, 9 E.A.D. 61, 74-77 (EAB 2000); *Belmont Planting Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at \*8(ALJ Sept. 11, 2002). The movant has the initial burden of showing "no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. §22.20(a). Once the movant meets its burden, the non-movant must come forward with specific facts showing there is a genuine issue for hearing. *See BWX Techs., Inc.*, 9 E.A.D. at 75. All of the evidence must be viewed in a light most favorable to the non-movant. *SMS Demag Atkiengesellschaft v. Material Scis. Corp.*, 565 F.3d 365, 386 (7<sup>th</sup> Cir. 2009) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). However, in order to raise a genuine issue of material fact, the non-movant must present significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. *BWX Techs., Inc.*, 9 E.A.D. at 75; *In re FRM Chem, Inc., et al.* Docket No FIFRA-07—2008-0035, 2010 EPA ALJ LEXIS 18 at \*8 (ALJ Sept. 13, 2010).

### IV. Argument

#### A. The EPA authorized Illinois Subtitle C regulations do not apply to the Respondents

"The universal waste program is less stringent than full Subtitle C hazardous waste regulations." (ATTACHMENT J, page 2) Universal Waste is not a RCRA Subtitle C waste, it is a sub-straight of RCRA and is managed under a less stringent set of guidelines. As discussed in II.A. *supra*, all guidance provided by the USEPA refer to Illinois' published Universal Waste rule. All guidance provided by the IEPA clearly state that Illinois Universal Waste rule is a viable option for managing spent lamps in Illinois. Further, the affidavit provided by Mr. Westefer states that "Universal Waste Rules have been enforceable under state law in Illinois" since the effective date of August 1, 1996. The USEPA clearly had knowledge that Illinois was managing these wastes under their Universal Waste Rule and not as RCRA wastes since August 1, 1996, when the Universal Waste Rule became effective and enforceable under Illinois State law. If it is improper for Illinois to have allowed these wastes to be managed as Universal

Wastes instead of RCRA wastes for the past 14 years, the USEPA certainly had an obligation and responsibility to intercede. Instead, the USEPA directly refers denizens of Illinois who request information on how to manage spent lamps in Illinois to the Illinois Universal Waste Rule, and not to Illinois RCRA regulations. RSR and Laurence Kelly have operated within the guidelines provided by Illinois Universal Waste rule, and have reported Universal Waste activities on a quarterly basis (CPX 4, #15), as required by the Illinois Universal Waste Rule (RPX 6), to Mark Crites, Manager RCRA UIT Permit Section, Division of Land Pollution Control, Bureau of Land, IEPA, the representative the USEPA lists to handle all questions regarding Universal Waste in Illinois (RPX 19).

B. Respondents are not liable for conducting a hazardous waste storage and treatment operation without a RCRA permit for the hazardous waste management facility.

By individual admissions, RSR transported and consolidated Universal Waste in accordance with 35 IAC 733 and 40 CFR 273, and Laurence Kelly as SLR volume reduced the Universal Waste in accordance with 35 IAC 733, utilizing his patented technology under approval provided by the Illinois EPA. There is no question that the non-hazardous material (CPX 4, #2c) produced by the volume reduction process has secondary re-use. As discussed in II.B. *supra*, the market for the mixed crushed glass and metal, which continuously passed TCLP, (RPX 14 and CPX 4 #2h) is driven by supply and demand, and there was no demand for this mixed material (RPX 10a and 10b). In order to avoid a “Speculative Accumulation” issue we profiled the volumes of material that we had staged at a well known highly regarded special waste landfill and disposed of those materials as non-hazardous special waste. The material was disposed of at a special waste landfill, not a solid waste landfill. There is no regulatory driver in place that require the residual glass and metal to be recycled, nor is the glass and metal the primary driver behind the Universal Waste rule. The primary driver behind the Universal Waste rule and the recycling of fluorescent lamps is noted on the USEPA’s website as follows (ATTACHMENT K):

**“Recycling prevents the release of mercury into the environment.** Fluorescent and other mercury-containing bulbs often break when thrown into a dumpster, trash can or compactor, or when they end up in a landfill or incinerator. To prevent the release of mercury, these bulbs should be taken to a recycler before they break.”

The mercury contained in the partially spent carbon filters does pass LDR standards but is awaiting larger quantities and will be trade out and reactivation. Although the mercury contained in the partially spent carbon filters does pass LDR standards we have never disposed of this material in a landfill. RSR intends to trade the spent carbon out for fresh carbon when it is necessary. The spent carbon will be sent under Bill of Lading to our supplier, reactivated and put back into use in the form of reactivated carbon. It is not uncommon for RSR to test certain material, whether that is lamps or carbon, to make sure that these materials continue to pass TCLP and LDR standards for no other reason than to support our QA/QC. We have had questions posed in the past from companies or other entities performing site specific regulatory



audits as to whether our staged material was in fact non-hazardous. It makes it easier to simply show them lab work that is consistent with our statement and that is “any residual material carbon or volume reduced glass and metal does in fact pass TCLP. (CPX 3 #2h and #2i)

1. Complainants application of Illinois Subtitle C definitions to a waste exempted from Subtitle C.

Complainants apply RCRA definitions to the Respondents and the Riverdale property in complete disregard for the enforceable Universal Waste Rule in Illinois. RSR again assert that they has never conducted any treatment or disposal of hazardous waste. RSR was a USEPA indentified large quantity transporter and consolidator and handler of UW waste (RPX 5) and took title to that waste pending a non-hazardous volume reduction method applied to this material, using an outsource vendor who had received authority from the State of Illinois to perform this specific service. RSR again asserts that it has never processed, treated and or stored Hazardous waste but has conformed with all protocols established at 40 CFR 273 and 35 IAC 733 as a transporter of lamps from small quantity generators and acted as a Large Quantity Handler/Generator and Consolidator of Universal Waste. There is absolutely no truth in the agencies accusation because it simply never happened. To quote RCRA definitions does not prove their position and to continuously use RCRA Subtitle “C” terms does not prove their position. USEPA can call our warehouse a “facility” or they can use terms such as processing and treatment but those accusations are at a minimum arbitrary and capricious.

2. Waste lamps must first be hazardous waste before they are Universal Waste.

***“To be covered under the universal waste program, these items must first be identified as hazardous waste” (emphasis added)*** (ATTACHMENT J Page 3). The USEPA took samples of whole lamps. A whole lamp will not exhibit TCLP while intact (RPX 13). Only when broken in a confined space will a lamp exhibit TCLP. The USEPA took samples of whole lamps and broke them, thus releasing the mercury encapsulated within them and causing them to release hazardous mercury. The mercury contained within these bulbs is exactly the spirit and the driver behind the Universal Waste Rule (Attachment K) which allows these waste to managed in a less stringent method than the Full Subtitle “C” hazardous waste rules, thus allowing small to midsize generators to pro-actively participate in a cost effective and safe method of managing these wastes to prevent the release of mercury within these bulbs.

3. Respondents did not conduct a hazardous waste storage operation.

Complainant applies the RCRA definition of storage to RSR’s consolidation operations with complete disregard for Illinois’ published and enforceable Universal Waste Rule. Respondent RSR did not conduct a hazardous waste storage operation, it consolidated Universal Waste in accordance with 40 CFR 273 and 35 IAC 733 standards for Large Quantity Handlers. RSR argues that its transportation and consolidation protocols were correct, efficient, safe and compliant in accordance with every guidance document available either at the USEPA’s web site

or at the IEPA's web site, as discussed in II.A. *supra*.

4. Respondents did not conduct a hazardous waste treatment operation.

RSR again asserts that it has never processed, treated and or stored Hazardous waste but has conformed with all protocols established at 40 CFR 273 and 35 IAC 733 as a transporter of lamps from small quantity generators and acted as a Large Quantity Handler/Generator and Consolidator of Universal Waste. The USEPA leaves the decision to allow crushing or volume reduction up to each individual state. Illinois' published and enforceable Universal Waste Rule allows for volume reduction of lamps by large quantity handlers "in a closed system designed and operated in such a manner that any emission of mercury from the crushing system must not exceed 0.1 mg/m<sup>3</sup> when measured on the basis of time weighted average over an 8-hour period" (RPX 6). Respondent Kelly as SLR sought clarification from the IEPA as to whether his patented technology met their requirements for volume reduction of lamps, and the IEPA found that his technology did meet their qualifications and provided to him authorization to operate that technology (RPX 9). Complainants state RSR changed its story throughout its responses to the USEPA's Request for Information, when in fact RSR provided further clarification to repeated questions. The Complainants' addition of Laurence Kelly to this Complaint and Compliance order, granted by the Presiding Officer on January 19, 2011, is simply an attempt to justify claims the USEPA had already made against RSR but could not support. Two separate and distinct companies are being combined into one so as to make it appear as if when looking at the combined companies it could be construed as TSD activities. This is simply not the case.

5. Respondents did not need a RCRA Subtitle C permit.

Universal Waste is exempt from RCRA regulations at 40 CFR 261.9 and 35 IAC 721.109, and is exempt from the RCRA permitting process at 40 CFR 270.1(c)(2)(vii) and 35 IAC 703.123 (h).

Universal Waste is exempt from RCRA regulations, as stated in 40 CFR 261.9:

*§ 261.9 Requirements for Universal Waste.*

*The wastes listed in this section are exempt from regulation under parts 262 through 270 of this chapter except as specified in part 273 of this chapter and, therefore are not fully regulated as hazardous waste. The wastes listed in this section are subject to regulation under 40 CFR part 273:*

*(a) Batteries as described in 40 CFR 273.2;*

*(b) Pesticides as described in §273.3 of this chapter;*

*(c) Mercury-containing equipment as described in §273.4 of this chapter; and*

*(d) Lamps as described in §273.5 of this chapter.*

The exemption of these types of wastes is mirrored in Illinois Authorized RCRA regulations, at 35 IAC 721.109:

*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.*

Universal Waste is exempt from the RCRA permit program in 40 CFR 270.1(c)(2)(vii) as follows:

*40 CFR 270.1(c)(2)(vii)*

*(2) Specific exclusions. The following persons are among those who are not required to obtain a RCRA permit:*

*(viii) Universal waste handlers and universal waste transporters (as defined in 40 CFR 260.10) managing the wastes listed below. These handlers are subject to regulation under 40 part CFR 273.*

- (A) Batteries as described in 40 CFR 273.2;*
- (B) Pesticides as described in §273.3 of this chapter;*
- (C) Mercury-containing equipment as described in §273.4 of this chapter; and*
- (D) Lamps as described in §273.5 of this chapter.*

This exemption from the RCRA permit program is mirrored in 35 IAC 703.123(h) as follows:  
*35 IAC 703.123 (h)*

*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.*

C. Respondents were in compliance with the federal Universal waste rule and are subject to enforcement discretion under the Herman memo.

Respondents operated within the guidelines of 40 CFR 273 and the published, enforceable rules at 35 IAC 733. Respondents at no time created an endangerment to human health and safety or to the environment. Complainant combines the two Respondents to create the appearance of blatant violations of RCRA Subtitle C requirements, when this is simply not the case. Respondents in this Complaint consist of two separate and distinct entities, who

performed separate and distinct services, and operated within the published and enforceable UW regulations in the State of Illinois.

## V. Conclusion

If the court recognizes only one thing, it should be that UW rules were created so that these types of waste could be safely managed using the less stringent rules other than the Full RCRA Subtitle “C” protocols published in 40 CFR and 35 IAC. Further the USEPA makes the following statement “There is no genuine issue of material fact as to the applicable regulations in this matter and the Respondents’ liability”. Respondents vehemently disagree and contend that the facts speak for themselves and in that the USEPA has simply taken a quantum leap in bypassing the published UW rule and the spirit and driver behind the rule, acting as if the published, enforceable Illinois UW rules simply do not exist.

In conclusion, specific rules were published for Large Quantity Handlers/Generators and RSR followed those rules both at 40 CFR 273 and 35 IAC 733. A completely separate company known as SLR solely owned by Laurence Kelly was given permission to act as a Large Quantity Handler of Universal Waste and both Mr. Kelly and RSR are prepared to prove that at the hearing scheduled in July. Respondents intend to bring witnesses (motion to follow) both from the private sector and governmental agencies that will attest to RSR’s historical procedures for transporting and safely consolidating the lamp inventories while acting as a Large Quantity Generator/Handler. RSR has never processed, treated and or volume reduced lamps that it staged at its Riverdale Warehouse. The USEPA has painted a pretty good picture but that picture starts after they make a quantum leap from the Universal Waste rule into fully regulated Subtitle “C” regulations with no evidence, no regulatory driver and at the complete refusal to acknowledge the UW rule even exists. RSR expects to be vindicated, and they intend to prove that at our hearing in July. To allow for a Motion for Partial Accelerated Decision as to The Applicable Regulations and Liability without allowing RSR or Laurence Kelly their day in court would be premature at best.

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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CERTIFICATE OF SERVICE

I certify that the foregoing Objection to Complainant's Motion for Partial Accelerated Decision as to the Applicable Regulations and Liability, dated March 3, 2011, was sent this day in the following manner to the addressees listed below:

Original by Overnight Delivery to: Regional Hearing Clerk  
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Copy by Overnight Delivery to: Thomas M. Williams  
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The Honorable Judge Gunning  
U.S. Environmental Protection Agency  
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 3-3-11

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