



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

REPLY TO THE ATTENTION OF:

C-14J

July 7, 2011

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 a copy of the "Complainant's Motion To Strike "Respondents' Response To U.S. EPA Opposition To Respondents' Motion To Dismiss With Prejudice For Lack of Fair Notice And Convolted Regulations" that was filed today in the above-referenced matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey A. Cahn".

Jeffrey A. Cahn
Associate Regional Counsel

Enclosure

cc: Mr. Laurence Kelly (w/ enclosure)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
Mercury Vapor Processing) DOCKET NO. RCRA-05-2010-0015
Technologies Inc., a/k/a/ River Shannon)
Recycling)
13605 S. Halsted)
Riverdale, Illinois 60827)
U.S. EPA ID No.: ILD005234141 and)
)
Laurence Kelly)
)
Respondents.)
)

REGIONAL HEARING CLERK
U.S. EPA REGION 5
2011 JUL - 7 AM 10: 04

CERTIFICATE OF FILING AND SERVICE


I, Jeffrey A. Cahn, hereby certify that I caused a copy of the “Complainant’s Motion To Strike “Respondents’ Response To U.S. EPA Opposition To Respondents’ Motion To Dismiss With Prejudice For Lack of Fair Notice And Convolutd Regulations” to be served by United States Mail on July 7, 2011, upon the following:

Laurence Kelly
Mercury Vapor Processing Technolgies, Inc.
7144 North Harlem Avenue
Suite 303
Chicago, Illinois 60631

I further certify that I caused a copy of the “Complainant’s Motion To Strike “Respondents’ Response To U.S. EPA Opposition To Respondents’ Motion To Dismiss With Prejudice For Lack of Fair Notice And Convolutd Regulations” to be served by U.S. EPA Pouch Mail, on July 7, 2011, 2011, upon the following:

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

I further certify that I caused the original and one copy of the "Complainant's Motion To Strike 'Respondents' Response To U.S. EPA Opposition To Respondents' Motion To Dismiss With Prejudice For Lack of Fair Notice And Convolved Regulations" to be filed with the Regional Hearing Clerk, U.S. EPA, Region V, 19th Floor, 77 West Jackson Blvd., Chicago, Illinois 60604 on July 7, 2011.



Jeffrey A. Cahn
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection
Agency
Mail Code C-14J
77 West Jackson Blvd.
Chicago, Illinois 60604

**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)
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U.S. EPA ID No.: ILD005234141 and)
)
Laurence Kelly)
)
Respondents.)

DOCKET NO. RCRA-05-2010-0015

2011 JUL -7 AM 10:05
REGIONAL HEARING CLERK
U.S. EPA REGION 5

**COMPLAINANT’S MOTION TO STRIKE
“RESPONDENTS’ RESPONSE TO U.S. EPA OPPOSITION TO RESPONDENTS’
MOTION TO DISMISS WITH PREJUDICE FOR LACK OF FAIR NOTICE AND
CONVOLUTED REGULATIONS”**

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(a) 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 moves to strike “Respondents’ Response to U.S. EPA Opposition to Respondents’ Motion to Dismiss with Prejudice for Lack of Fair Notice and Convoluted Regulations” (“Respondents’ Reply”) because of its late filing. For the reasons set forth below, Complainant respectfully requests that the Presiding Officer grant this Motion and strike “Respondents’ Reply” from the record in this case.

I. Background and Applicable Rules

On or about May 27, 2011, Respondents filed their “Motion to Dismiss With Prejudice for Lack of Fair Notice and Convoluted Regulations.” The U.S. EPA timely filed its “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” (“U.S. EPA’s Response”) on June 16, 2011. U.S. EPA’s Response was served on the Respondents by U.S. Mail. Eighteen days later, on July 4, 2011, Respondents transmitted for service and filing their “Respondents’ Reply”

The Consolidated Rules provide in applicable part that “[t]he movant’s reply to any written response must be filed within 10 days after service of such response . . .” 40 C.F.R. § 22.16(b). “In computing any period of time prescribed or allowed in [the] Consolidated Rules of Practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal holidays shall be included.” 40 C.F.R. § 22.7(a). The Rules further provide that “[s]ervice of [any non-complaint] documents is complete upon mailing . . .” and 5 extra days will be added to the time allowed for response “where a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery . . .” 40 C.F.R. § 22.7(c).

II. Discussion

Complainant filed U.S. EPA’s Response on June 16, 2011, and served Respondents by U.S. Mail on that date. Pursuant to the Consolidated Rules (see 40 C.F.R. § 22.7(a) and (c) and 22.16(b)), Respondent had 15 total days to reply (i.e., until July 1, 2011). Accordingly, the due date for filing and service of Respondents’ Reply was Friday, July 1, 2011. However, the certificate of service accompanying the reply, as well as facsimile transmission record at the top of each page of the reply, show that “Respondents’ Reply” was not transmitted for filing until July 4, 2011, which is three days outside the time allowed by the Rules.¹ When a statute or

¹ Of course, July 4, 2011, was a Monday and a federal holiday. U.S. EPA’s office, and the office of the Regional Hearing Clerk, were closed that date. Accordingly, if the Respondents’ Reply were accepted for filing by the Regional Hearing Clerk, then filing would

regulation contains clearly defined dates or time periods, courts are required to follow the plain words of the statute or regulation. *See United States v. Locke*, 471 U.S. 84, 93 (1985) (“To attempt to decide whether some date other than the one set out in the statute is the date actually “intended” by Congress is to set sail on an aimless journey, for the purpose of a filing deadline would be just as well served by nearly any date a court might choose as by the date Congress has in fact set out in the statute.”).

Respondents had ample opportunity to learn the applicable procedural requirements and to seek an accommodation if they were unable to meet the requirements. Respondents could have availed themselves of the provision of the Consolidated Rules at 40 C.F.R. § 22.7(b), which allows parties to file a timely motion for an extension of any filing deadline where the party can show good cause. A post hoc extension outside the bounds of this specific regulatory framework would deprive Complainant of its legal right to respond to proposed deviations from normal practice. *Id.*; *Isochem North America, LLC*, Docket No. TSCA-02-2006-9143 2007 WL 1934720 (ALJ Apr. 25, 2007), at 3. The Presiding Officer in this case has held that the requirements of § 22.7(b) were intended to be “strictly enforced,” *Farmers Union Oil Co.*, Docket No. FIFRA-8-99-46, 2000 WL 1868879 (ALJ Dec. 8, 2000), at 1. Recognition of Respondents’ late reply would disregard that clear intent by rendering the procedures for extensions essentially nugatory and optional.

Although some latitude on procedural deadlines is occasionally exercised with pro se litigants, such latitude does not wholly excuse pro se litigants from complying with the EPA’s Consolidated Rules of Practice. *Agronics, Inc.*, No. CWA-6-1631-99, 2003 EPA RJO LEXIS 11 (RJO May 7, 2003) (citing *Jiffy Builders*, 8 E.A.D. 315, 321 (EAB 1999)). *See also Rybond, Inc.*,

not have occurred until Tuesday, July 5, 2011, or four days after it was due.

6 E.A.D. 614, 647 (EAB November 8, 1996) (“a litigant who elects to appear pro se takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance.”). This point is amplified here, as Respondents provided no reason whatsoever for the late filing, and the late filed Respondents’ Response itself seeks to enforce provisions of the Consolidated Rules against Complainant.


Respondents would not suffer any undue prejudice by the striking of their late response since they have had ample opportunity to advance their arguments in their “Motion to Dismiss with Prejudice for Lack of Fair Notice and Convolutd Regulations” (“Motion to Dismiss”). “Respondents’ Response” makes essentially the same argument that was advanced in Respondent’s “Motion to Dismiss.” The late response does not advance any novel point, the absence of which would cause detriment to Respondents were this Motion to be granted.

III. Conclusion

“Respondents’ Reply” was not filed within the time period permitted by the Consolidated Rules. For the reasons set forth above, Complainant respectfully requests that the Presiding Officer strike “Respondents’ Reply,” and not consider it in reaching a decision on the merits of the underlying Motion to Dismiss.

Respectfully submitted,

DATED: 7/7/2011



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