



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

REPLY TO THE ATTENTION OF:

C-14J

December 14, 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 copies of 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' 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)

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, Illinois 60827)
U.S. EPA ID No.: ILD005234141)

and)

Laurence Kelly)

Respondents.)

DOCKET NO. RCRA-05-2010-0015

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PROTECTION AGENCY

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U.S. EPA REGION 5

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(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' Post Hearing Rebuttal" brief ("Respondents' Reply Brief") and "Respondents' Amended Post Hearing Rebuttal" brief ("Respondents' Amended Reply Brief")¹ on the ground that they were not timely filed.

¹ Respondents provided no explanation for the filing of "Respondents' Amended Post

Alternatively, Complainant moves to strike those parts of Respondents' Reply Briefs that include statements that are not part of the evidentiary record in this matter. For the reasons set forth below, Complainant respectfully requests that the Presiding Officer grant this Motion and either strike Respondents' Reply Briefs as untimely or, alternatively, strike those parts of Respondents' Reply Briefs that recite statements that are not part of the record in this matter.

I. Argument

Respondents are serial late filers of submittals in this matter. Respondents also are repeat offenders of 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.

A. Respondents' Reply Briefs Were Filed Late And Should Be Struck

The Consolidated Rules of Practice state that “[a] document is filed when it is received by the appropriate Clerk.” 40 C.F.R. § 22.5(a)(emphasis added). The Presiding Officer ordered that the parties must file their post-hearing reply briefs on, or before, November 21, 2011. *Order Designating Certain Transcript Pages and Exhibits As Confidential and Resetting Briefing Schedule* (Sept. 29, 2011) at 2 (emphasis added). Respondents' Reply Brief was sent to the Regional Hearing clerk via Registered Mail on November 21, 2011, and served on Complainant by facsimile and Registered mail on that same day. See, the Certificate of Service attached to Respondents' Reply Brief. The Regional Hearing Clerk's docket shows that the Respondents' Brief was filed stamped “received” on November 22, 2011 (the Presiding Officer can take judicial notice of these readily verifiable facts).

Hearing Rebuttal” brief. From what Counsel for Complainant can tell, the only difference between the two versions of the reply briefs is that in certain instances Respondents have replaced the word “Warehouse” where it appears in the original reply brief with the word “Facility” in the amended reply brief. Together, these two versions of the reply briefs are referred to herein as “Respondents' Reply Briefs.”

Respondents also served “Respondents’ Amended Reply Brief” on November 21, 2011. The certificate of service reflects that the original was sent on that day via facsimile (only) to the Regional Hearing Clerk, and was served on Complainant and on the Court also via facsimile on that day. The Regional Hearing Clerk’s docket shows that the Respondents’ Amended Reply Brief was filed stamped “received” on November 23, 2011 (the Presiding Officer can take judicial notice of these readily verifiable facts).

Respondents’ Reply Briefs were untimely, because Respondents’ Reply Briefs were received by the Regional Hearing Clerk after the deadline set by the Presiding Officer. When a statute or 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.”). Being untimely, Respondents’ Reply Briefs should be stricken in their entirety and not considered in ruling in this matter.

Respondents had ample opportunity to learn the applicable procedural requirements and to seek an accommodation if they were unable to meet the requirements. Indeed, this is the third instance² of Respondents making late filings, with Complainant having formally objected in the

² On July 7, 2011, U.S. EPA filed “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 Convuluted Regulations” on the ground that Respondents’ filing was filed late. Complainant’s July motion to strike laid out the facts and law regarding this issue. Respondents filed a response to U.S. EPA’s motion, explaining that they miscalculated the number of days they had for filing. Respondents’ response is an acknowledgment of understanding the rules.

Respondents’ post trial brief also was not timely filed. As explained by U.S.EPA at

first two instances. 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.³ 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), 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), 1. Recognition of the late-filed Respondents’ Reply Briefs 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

footnote 3 of its post-hearing reply brief:

[t]he Presiding Officer ordered the parties to file their initial briefs on, or before, November 7, 2011. The Consolidated Rules of Practice state that “[a] document is filed when it is received by the appropriate Clerk.” 40 C.F.R. § 22.5(a). Respondents’ Brief was sent to the Regional Hearing clerk via Registered Mail on November 7, 2011, and served on Complainant by facsimile and Registered mail on that same day. See, the Certificate of Service attached to Respondents’ Brief. The Regional Hearing Clerk’s docket shows that the Respondents’ Brief was filed stamped “received” on November 8, 2011 (the Presiding Officer can take judicial notice of this readily verifiable fact). For purposes of preserving the issue for appeal, Complainant hereby moves that the Presiding Officer strike the Respondents’ Brief from the record on the ground that it was not timely filed.

Despite this express reminder, Respondents elected to again ignore the Presiding Officer’s Order establishing the schedule in this case, as well as the rules of practice.

In the instant Motion, Complainant renews the motion that it made in its Post-Hearing Reply Brief to strike Respondents’ Post-Trial Brief on the ground that it was filed untimely.

³ In fact, Respondents have filed motions for extensions of time previously in this matter, although they did not show good cause for doing so. On October 10, 2010, Respondents filed a motion for extension of time to file a rebuttal prehearing exchange, which was granted by the Presiding Officer on November 3, 2010.

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.*, 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 filings.

Respondents were late, again, in filing Respondents' Reply Briefs. Striking Respondents' Reply Briefs, given the repeated, serial nature of Respondents' habit of filing matters late, is an appropriate sanction here and would serve as an example to respondents in other matters. In the Matter of Thomas Waterer and Waterkist Corp. d/b/a/ Nautilus Foods, Docket No. CWA-10-2003-007, Order on Motions at 2 (2004).

B. The Facts Dehors The Record That Appear In Respondents' Reply Briefs Should Be Struck

As in their initial post-trial brief, Respondents improperly inject Respondents' Reply Briefs with statements regarding alleged facts not appearing in the trial record.⁴ All such statements appearing in Respondents' Reply Briefs that are not part of the trial record should be disregarded as irrelevant and struck from Respondents' Reply Briefs. For example, Respondents' Reply Briefs include discussions regarding Mr. Kelly's finances, including his housing status, which appear nowhere in the trial record. Respondents' Reply Briefs at 29-32. As another example, Respondents refer to numerous purported meeting and conversations they have had

⁴ In the instant Motion, Complainant renews 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.

with Illinois regulatory personnel regarding regulatory compliance, absent record support. Respondents' Reply Briefs at 3; 20-21; 22; 24. Respondents also refer to seeking Wisconsin regulatory guidance, again without any record support. Respondents' Reply Briefs at 23. Another example are the statements of facts dehors the record regarding the timing and location of residences by the facility and the conclusion regarding the absence of harm posed by air releases of mercury. Respondents' Reply Briefs at 16; 17. Respondents now state as fact that there were no cracks in the floor when they exited the facility – another non-record fact. Respondents' Reply Briefs at 17. Without record support Respondents also present as fact information about the circumstances of their exit from the Riverdale property and the state of the Facility. Respondents' Reply Briefs at 25-26.

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).

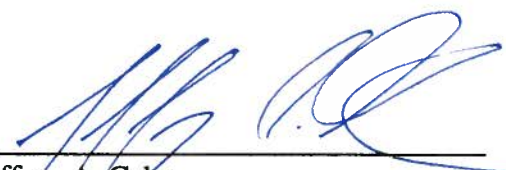
Accordingly, all of the statements appearing in Respondents' Reply Briefs that are not part of the trial record should be disregarded as irrelevant and struck from Respondents' Reply Briefs.

II. Conclusion

Respondents' Reply Briefs were not filed within the time period ordered by this Tribunal and permitted by the Consolidated Rules. For the reasons set forth above, Complainant respectfully requests that the Presiding Officer strike Respondents' Reply Briefs and not consider them in reaching a decision on the merits of this matter. Alternatively, Complainant moves to strike those parts of Respondents' Reply Briefs that include statements of purported facts that are not part of the evidentiary record in this matter, and not consider those statements in reaching a decision on the merits of this matter.

Respectfully submitted,

DATED: 12/14/2011



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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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 Mercury Vapor Processing)
 Technologies Inc., a/k/a/ River Shannon)
 Recycling)
 13605 S. Halsted)
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 U.S. EPA ID No.: ILD005234141)
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 And)
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 Laurence Kelly)
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 Respondents.)
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CERTIFICATE OF FILING AND SERVICE

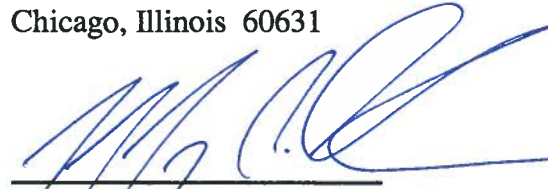
I hereby certify that on this day I caused to be filed with the Regional Hearing Clerk the original and one copy of the accompanying Complainant's "Motion To Strike Respondents' Post Hearing Rebuttal And Respondents' Amended Post Hearing Rebuttal As Filed Untimely And, In The Alternative, Motion To Strike 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 "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: December 14, 2011

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