UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR



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| **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, IL 60827** | ) | |
| **EPA ID No: ILD005234141, and** | ) | |
| | ) | |
| **Laurence Kelly** | ) | |
| | ) | |
| **Respondents** | ) | |

# RESPONDENTS' POST-HEARING BRIEF

## INTRODUCTION:

**MVP/RSR/SLR believed the IUWR to be viable and operated within those guidelines and the guidance provided by the IEPA and USEPA.**

Initially, the USEPA complaint was premised on the fact that IL is not authorized for Universal Waste (UW). The complainant further indicates that since Illinois is not authorized the regulated community in Illinois must manage UW as Subtitle C hazardous waste. Their position dictates that anyone receiving that waste and storing that waste awaiting subsequent handling, should have had a RCRA Part B permit. But Respondent argues to the contrary, although the USEPA initially brought this action based on the fact that Illinois is not authorized, through the course of this hearing, the USEPA has subtly but pointedly switched the course of their initial complaint "Illinois is not authorized thus Spent Lamps must be managed as RCRA Subtle "C" waste in Illinois" to "MVP and RSR were not in compliance with the unauthorized IUWR" but offered absolutely no proof, no witnesses or affidavits specifically from Illinois regulatory personnel, who they interviewed, to support their allegations.

Noticeable by their absence was any testimony by the USEPA's own response team who saw fit to issue two separate national press releases stating that "the warehouse in question posed no potential harm to human health and safety both inside and outside the warehouse" no testimony from The Toxic Substance Control Agency (TSCA) who conducted their own independent onsite investigation and found no evidence including trace PCB's or any other TSCA waste that would serve to move their investigation forward. The IEPA sent a representative to investigate the

Riverdale Warehouse the same day TSCA was there and apparently concurred with TSCA. The Village of Riverdale sent their own independent team to conduct sampling and concluded there was no evidence of potential insults present in the warehouse which lead to a resolution in The Northern District Federal Court resulting in no harm no foul resolution. Complainant offered a day and half seminar on RCRA which included the investigators opinions and the investigators understanding of RCRA rules but never offered proof to justify how they made a quantum leap from Large Quantity Universal Waste Generator to a full blown illegally run RCRA TSDF requiring closure under Part "B" hazardous waste rules.

Respondents also argue that the results of a TCLP test on twelve lamps demonstrates that the Federal Rule makers were in fact correct when they commented literally 100's of times when explaining why they were adding lamps to the UW rule "some if not all fluorescent lamps fail TCLP thus the reason today we are adding those waste to the UW rule." The fact that four out of twelve lamps tested failed TCLP solidifies the rule makers reasoning. Then the USEPA introduces pictures of a facility purporting to be the Respondents method of housekeeping but fail to mention the those pictures depict the results of a warehouse that had been vandalized and ravaged for 55 consecutive days prior to their entering the property. Their pictures depicted broken lamps and a warehouse that was in significant disarray. Then they presented pictures of an empty warehouse showing a crack in the floor, that were taken two and a half years after MVP/RSR had agreed both with the federal courts, the Village of Riverdale and the village's environmental counsel, that MVP/RSR was leaving the building in clean and broom swept condition and free of any environmental insults.

Again Respondents argue that these pictures severed no purpose other than a thinly veiled attempt to depict MVP/RSR as somehow causing cracks to appear in the floor (cracks were not there when Respondents vacated the building) when the Respondent had no care, custody or control of that building for over two and half years prior to the picture being taken. Pictures of a newly developed housing project that two and half years prior was a one square mile of uninhabited, vacant, abandon property. Again Respondents argue these pictures were entered into the record in an attempt to send a subtle but distorted and untrue picture that our warehouse somehow was located in the middle of single family housing. Respondents argue that is absolutely absurd.

Further, Respondents argue that if the USEPA truly felt that there was any possibility of an existing environmental insult caused by the Respondent to that property, at a minimum, they would have produced sampling results from such areas as wipe samples, dust samples, soil samples, broken glass, volumes reduced lamps and or any communication from the Village of Riverdale that indicated or could have contributed to Complainants' contentions that there may have been some environmental insult to that property prior to Respondents relinquishment of the property. Respondents would like to state that again, it appears that the USEPA has made a quantum leap from a simple warehouse operation functioning within the IEPA published UW rules to a full blown TSDF, that the USEPA unilaterally states is subject to a Part "B" closure of

a RCRA facility with no evident regulatory driver to justify that action, which is similar to the quantum leap from a UW handler to an unpermitted TSDF facility.

Mercury Vapor Processing, Inc. d/b/a River Shannon Recycling (MVP/RSR) is neither a Treatment, Storage or Disposal Facility as that relates to RCRA Subtle "C" Hazardous Waste as defined in 40 CFR Part 261 or 35 IAC Parts 700 to 739.

MVP/RSR acting as an Illinois identified Large Quantity Generator and Handler, it managed small quantities of spent lamps for its allies by supplying a service using specifically designed containers with proper placards, picked up those containers from time to time, carefully and safely transported those containers to its warehouse for subsequent handling (volume reduction) by an outside IEPA authorized vendor (SLR) and then marketed or legally sent that material if industry demand for that material was not currently present, to a licensed and permitted destination facility known as Land and Lakes Landfill. The material at all times moved under and was tracked using non-hazardous Bills of Lading per Federal and State published rules found both at RCRA (40 CFR part 273) and The U.S. Department of Transportation (USDOT). This material known as Universal Waste Lamps is specifically exempted from the stringent management protocols found at both the Federal and Illinois hazardous waste rules.

MVP/RSR acted as a co-generator for Conditionally Exempt Small Quantities Generators (CESQG) and Small Quantity Generators (SQG) by properly managing and carrying out their generator duties. MVP/RSR also reported its activity on a quarterly basis to a designated manager of Universal Waste at the IEPA who managed Handler activities for the IEPA and also managed the permit division for RCRA at the Bureau of Land Pollution at the Illinois EPA.

In the following pages the Respondent will attempt to point out as clearly and precisely as possible where they believe the Complainant is deficient in their arguments and have not proven their case. Respondents will also point out where the Respondent acted in good faith and in accordance with all published rules and guidance both oral and in printed documents in part supported by the Complainants own exhibits.

## I. The USEPA finds that managing spent mercury containing lamps under Universal Waste Rules is both safe and equitable, and encourages conditionally exempt and small quantity handlers to voluntarily participate in the Universal Waste Program, effectively reducing the amount of mercury containing lamps entering the municipal waste stream.

Prior to lamps being added to the Universal Waste Rule Spent Mercury Containing Lamps (MCL) were defined as a hazardous waste. MCL's must be hazardous before they can be defined as Universal Waste.

Respondents argues that all fluorescent lamps contain mercury, whether a lamp fails TCLP or is below the limits is moot, because once broken, mercury vapor emissions within the bulbs are immediately released. The point of a significant insult is where the lamp breaks not necessarily the landfill. Mercury emissions are immediately released at the point where the bulb is broken. Illinois recognized that the mercury emissions occur at the point the bulb is broken, and implemented stringent rules within their IUWR specifically pertaining to mercury emission standards that mirror the OSHA guidelines found at 29 CFR 1910-1000. These rules are even more stringent then the State of Colorado's lamp volume reduction protocols and Colorado is fully authorized to manage Universal Waste lamps in their state.

Respondents argue to store or volume reduce lamps does not require a permit under the UW regulations. However the Respondent argues that Complainant again only address half the answer and fail to point out in their direct testimony that in order to be considered as UW it must have been defined as hazardous first. Only under cross examination (page 422 line 6 through 9) does the complainant fully acknowledge that spent lamps must be considered hazardous in order to qualify as Universal Waste.

A whole lamp will not emit Mercury Vapor and will not fail TCLP

The Respondent argues that any intact mercury containing lamp whether new or spent will not exhibit TCLP. However some, but not all lamps if intentionally broken in a laboratory for analytical reasons will fail TCLP (4 out of 12 or 33% failed Brown's Analytical CEX 2 ). The Respondents argue the fact that some lamps do fail TCLP is exactly the regulatory driver behind adding spent mercury containing lamps to the Universal Waste rule found at both 40CFR part 273 and 35 IAC part 733.

Further the Respondent would like to point out that both the USEPA and Illinois recognizes mercury containing spent lamps as Universal Waste. A spent lamp does not exhibit any potential toxicity until or unless it is broken, allowing the mercury inside to be released.

Spirit of the UW rule

The Respondents argues that the Spirit of the UW rule was to establish a set of less stringent regulatory guidelines for certain wastes that prior to the rule were defined and managed as Subtle "C" RCRA hazardous waste. When lamps were added to the Federal UW rule in 1999 the intent was to create a proactive response from millions of Conditionally Exempt (CESQG) and Small Quantity (SQG) generators across the country enticing these entities to voluntarily recycle all their Mercury Containing Lamps. By adding lamps to the Universal Waste rule it created a much more user friendly way to manage this waste thus allowing for generators who historically never recycled a bulb to become pro-active and enter a recycling program.

Prior to lamps being added to the UW rule CESQG and SQG's were simply disposing of Spent Mercury Containing Lamps in there municipal garbage, thus potentially creating millions of uncontrolled mercury vapor emissions every day.

After the regulated community became familiar with this less stringent rule and the fact that the significant costs related to managing this waste stream had diminished by over 85% it became apparent that the regulated community was prepared to embrace the rule and pro-actively embrace a program to correctly and safely managing this waste stream. The effect on the regulated community was quick and significant and within a few years CESQG's and SQG's were recycling lamps and were in the majority not the minority. That is where the UW rule is today, generators are proactive, environmental protocols such as the LEED certification process now includes questions as to what buildings do with their spent Universal Waste and the affordable costs of managing these wastes have become very attractive to conditionally exempt and small quantity generators. It should be noted that the Universal Waste Recycling community in Illinois consists almost exclusively of conditionally exempt and small quantity generators. In order to reach a large quantity generator status of more than 5,000 kg, a generator would need to accumulate more than 22,000 T-8 lamps, which equates to 29 pallets, stacked six boxes high and five boxes across. That would comprise of 384 square feet, or an area 24'x16'. No generator, whether a hospital, university or major office building, can allocate that amount of room for the storage of spent fluorescent lamps.

The Respondents argue, to impair the natural progression of a very good rule and retroactively tell the regulated community in Illinois that they have been mismanaging their spent lamps for over 10 years will not only set off a litany of potential litigation issues but force a good portion of the regulated community in Illinois back underground thus eliminating the significant progress that has been made in Illinois for the past 10 years. Illinois' rule although not authorized has succeed in allowing its regulated and non-regulated citizens to contribute to the removal of a significant amount of mercury vapor which would have been emitted into the atmosphere if in fact these lamps would have simply been thrown into their municipal solid waste.

The Respondent would like to draw the courts attention to the Complainants' testimony (Page 213 – re: CX50 FR 2-1993) regarding the purpose of the UW Rule. Complainants are using an old reference from an old publication. This was updated many times subsequently to this issue and therefore they are using stale references to make their case appear accurate. A more current issue Respondents argue would be more accurate and depict the current thinking of the USEPA rule makers found at (CEX 53 FR July 1999)

Further the Respondent would like to draw the courts attention to the trial brief on (Page 213 line 7) through 214 line 10, Mr. Brown is again asked to render his understanding of the UW rule. He goes onto explain that the rule was promulgated, in his opinion to "encourage the purchasing of mercury containing lamps and improve the implantation of the Hazardous waste program by encouraging CESQG and SQG to volunteer their waste into the RCRA scheme".

The Respondent argues to the contrary, the use of Mercury containing lamps were already a way of life in commerce and industry and had been for a long time. The regulators realized that the unilateral discarding of spent mercury containing lamps was potentially causing significant environmental air quality issues. This explanation again can be found at (CEX 53 FR July 1999). By easing the constraints of RCRA and lessoning that stringent method of handling these lamps related to hazardous waste disposal and adding lamps to the less stringent UW rule it prompted the regulated and un-regulated community to enter into a much more manageable and more economical way of participating in a recycling program. Historically the regulated community was not even attempting to manage spent lamps at all; they were simply throwing them into their common municipal garbage because the only alternative was to manage them as RCRA subtle "C" hazardous waste. This was very costly and burdensome as that relates to reporting and other regulatory constraints found at RCRA. Respondents believe that Mr. Brown again missed or simply overlooked the true spirit of adding spent mercury containing lamps to the UW rule and that was to reduce the constraints put on CESQG and SQG across the country allowing for a more streamlined pro-active participation in managing the mercury vapor emissions that emanate from a fluorescent lamps verses simply throwing them into their common municipal garbage. The Respondent argues that the aforementioned intent of the UW rule is contrary to Browns testimony found on page 218 line1 through 219 line 11.

According to the Complainants' sampling and analysis report (CEX2), 66% of spent Universal Waste lamps are not hazardous. Historically, this is what allowed conditionally exempt and small quantity generators to simply define their material as non-hazardous add them to their general garbage destined for a municipal waste landfill, rather than manage them under the complex RCRA hazardous waste program, a practice delineated in the Federal Register at 64 FR 128, and provided at CEX53, page 03961 under (C) *"Why relief from full Subtitle C requirements is warranted both for mercury containing hazardous waste lamps and other hazardous waste lamps"*

Unfortunately there is no way to tell which fluorescent lamps are hazardous and which are not without subjecting each individual lamp to TCLP testing. Respondent would like to draw the court's attention to the results of samples 1 and 2, both ending in SP35, of table 2 of the summary of the TCLP testing performed on fluorescent lamps taken from the Riverdale location (CEX2 bates stamp 00058). These lamps were identical and manufactured at the same time. Yet, sample 1 demonstrated a toxicity of 110 (ug/L) above admissible limits for TCLP, thus failing the TCLP testing, while it's identical twin was under detectable limits by 20 (ug/L), thus passing the TCLP testing.

However, all fluorescent lamps contain mercury to some extent, some of which test above the 0.2mg/m and some below that level. Respondents opted to view all lamps as though potentially hazardous, because all contained some level of mercury vapor, even though most did not contain levels that were technically above the ceiling limit that defines them as hazardous. Illinois

recognized this challenge and invoked any already known rule found at 29 CFR 1910-1000 relating to mercury emissions in the workplace.

The UWR allows for the regulated and un-regulated communities to manage this type of potentially hazardous waste in a safe and equitable, user friendly manner, while at the same time removing this waste from the municipal waste streams and eliminating the need to guess or assume whether or not each individual lamp is hazardous or not.

## II. MVP/RSR was a co-generator of Spent Mercury Containing Lamps

Mr. Kelly has historically sought out guidance not only from the IEPA but also the Wisconsin DNR regarding responsibilities of Co-generator's of waste

Mr. Kelly's pre-existing knowledge and implementation of co-generator activities begins in the early 1980's

Respondents argue that based on Kelly's knowledge and hands on experience dating back to the early 1980's when he was cleaning, removing and disposing of Underground Storage Tanks and its hazardous contents it was common for companies such as his to establish the complete care, custody and control for these UST's and its contents for identifying a method to manage the removal. When managing the contents of the tanks and tracking the proper disposal of the contents of the tank there was a need to create a clear Potential Responsible Party (PRP) relating to ownership of not only the building owner but also the owner of the tank and the materials inside the tank. When conducting a removal for the purpose of tracking these inventories the company actually performing the work would in fact become co-generator, taking on the responsibility for the cradle to grave management and tracking of any hazardous waste generated from the removal process. That entity was deemed to be co-generator because that entity had agreed to carry out and fulfill the generators duties for all. (FR 1980)

In 1997 when Mr. Kelly created his lamp recycling technology and received a subsequent patent he demonstrated this technology to numerous major waste hauling companies including Waste Management. They requested he apply for an air quality permit in anticipation of the newly promulgated rule found at 40 CFR 273. Kelly instead received an exemption from the IEPA Bureau of Air.

Mr. Kelly has sought clarity regarding co-generator applicability and duties from several entities as early as 2001.

Mr. Graham briefly worked for a company that Mr. Kelly was involved with nearly 9 years ago. Respondents would like to point out that Mr. Graham testified "I never became satisfied that I had personally seen analytical data" (Testimony page 472 lines 9-11). Respondents note that the exhibit submitted from Mr. Graham's file (CEX 47, page 03122), clearly states "I reviewed the

SLR process with him (Mark Crites manager of RCRA permitting IEPA) and emphasized that by-product glass and metal do not contain mercury at TCLP levels or even detectable Total levels." An Environmental Engineer is certainly not at liberty to discuss TCLP results he had been precluded from seeing.

Correspondence from the Special Waste Team Leader of the Wisconsin Department of Natural Resources (DNR), Mr. Don Miller and the attorney for the Bureau of Legal Services at the DNR Mr. Don Flaherty found at (CEX 47 – 03136 to 03139 Graham)

Per the above exhibit offered into evidence by the Complainant the Respondent would like to state the following. As a Certified and Licensed Site Assessor and who was also licensed to perform Underground Storage Tank Removals in the State of Wisconsin the Respondent had a pre-existing business relationship with the above captioned person (Mr. Don Miller). The relationship stemmed from numerous instances when working on hazardous waste projects in Wisconsin where Mr. Kelly sought out the guidance of the DNR. Several times during those instances Mr. Kelly would work directly with the special waste team including Mr. Miller to resolve specific issues. Several times over those years the question would arise regarding Potential Responsible Party issues (PRP) that were subsequently resolved by Mr. Kelly's company assuming a co-generator roll in order to complete a project and carry out the duties of various generators.

When Mr. Kelly opened dialog with the State of Illinois in late 2001 he also contacted Mr. Miller and posed the same questions to him. At that time Mr. Kelly expected to offer his services in Wisconsin also but because of the overwhelming response in Illinois was precluded from doing that until a later date. However the CEX exhibit found at 47-03136 and dated 1-25-2002 is one of many communications that Kelly had with Mr. Miller discussing the protocols known as "Co-generator" with him.

Illinois allows co-generator status

The Respondents argue that Illinois EPA recognized the pro-active practice of establishing co-generator responsibilities and allowed MVP/RSR to fulfill and carry out the generator duties of the primary generator. While acting as a co-generator MVP/RSR would take the responsibility and carry out the duties of a generator by providing the following eight (8) functions: **(1) Notifying the agency of LQG activity (2) Acquiring a generator ID number (3) provide properly placarded and structurally sound containers for accumulation of the spent lamps at their SQG or CESQG locations (4) acquiring small quantities of these lamps from time to time from each client (5) replacing with fresh containers (6) safely transporting those containers to a secure warehouse awaiting subsequent management of the lamps including volume reduction and making sure that during the course of any subsequent management there would be no mercury emissions allowed into the atmosphere (7) reporting quarterly**

**to the IEPA of its precise activities delineating the amount of lamps it managed as a LQG and (8) maintaining clear and precise records for 3 years for regulatory review, if needed.**

The above described 8 tasks define the duties of a generator and by MVP/RSR carrying out and fulfilling those duties of the generator as acknowledged by the IEPA, clearly puts MVP/RSR within the co-generator definition. The Large Quantity co-generator in Illinois is subject to specific protocols that the IEPA had in place. This included tracking inventories, reporting that tracking and management of the inventories every three months to a specific person at the IEPA (RCRA permit division at the Bureau of Land, Mr. Mark Crites), reporting back to their generator ally per service call and issuing annual reports to their generator customers delineating the actual amount of lamps managed for them during the course of any calendar year. Also consistent with USEPA and IEPA guidelines, MVP/RSR kept meticulous records for every year they were in business, which when requested were immediately turned over to the Investigators for their review. Those precise records also offered the investigators the opportunity to interview a significant portion of MVP/RSR's past client base which again resulted in no sworn affidavits or witnesses that could have again offered corroborating opinions in the form of affidavits or witnesses regarding MVP/RSR's lamp recycling activities, both at their client's site or at the Respondents warehouse in Riverdale, Illinois.

Consistent with the (CX 47- Bates stamped 03136) memo's obtained from Complainants witness Mr. William Graham P.E. who testified for the USEPA, his file documents prove that Mr. Kelly was in continuous negotiations with not only the IEPA but also The Wisconsin DNR starting in 2001 and running through mid- 2002. The negotiations included how to manage and track spent lamps acting as a co-generator and although not addressed in the rules, Spent Lamps were in essence similar to Thermostats as that related to the removal of its mercury content (not batteries). At that time neither The USEPA nor The Illinois EPA defined Thermostats as Mercury Containing Equipment but did offer verbiage that is identical to the MCE section as how to manage this waste which is found both at the USEPA rules and The IEPA rules. The ongoing discussions resulted in an understanding with IEPA regulatory personnel that in fact Lamps can be managed in a similar fashion as Thermostats. (Explained in section 4 of this brief) while acting as a Large Quantity Co-generator.

<u>Call center example of co-generator (CEX Rebuttal EX1)</u>

The Respondent would like to draw the courts attention to page 658 (line 1 – 24). Brown is testifying to his knowledge of the term co-generator. While attempting to explain the definition of a co-generator he uses the term "my understanding" eight (8) times in 16 lines of testimony. The Respondents argue that his understanding and knowledge is not consistent with how co-generator status is defined. Brown testifies on page 659 (lines 7-14) and it is his understanding "I believe that co-generator, as it pertains to Universal Waste, under the federal contemplation of it, is the entity that actually, a lamp, out of its fixture, that they, at the site of ---- at the request of somebody that hired them to do so". The Respondents argue that someone who simply removes a

light from a light fixture does not necessarily or exclusively meet the definition of a co-generator. Further, the Respondents argue that the term co-generator is not a "coined" phrase (testimony page 658 line 10) or was a newly devised phrase or word, the Respondents argue that the use of co-generators to assist generators in fulfilling their generator duties and also assisting regulatory agencies in properly tracking waste material has been around since the early 80's.

Again the Respondents argue it was acknowledged through ongoing discussions by Mr. Kelly with the regulators at the IEPA and the Wisconsin DNR (See CX 47) dating back to 2001 that because small quantity generators that generate less than 5000 kg of UW lamps per month are not mandated to track or report the amount of lamps they generate so an identified LQH/LQG could in fact carry out and fulfill those duties acting as a co-generator by performing the above referenced 8 duties for their SQG/CESQG clients. If a lamp is taken out of service by a SQG or CESQG, historically those lamps were literally disposed of in their municipal garbage can, thus creating the potential for small amounts of mercury emissions to occur, but when multiplied by literally hundreds of thousands of these generators, these emissions became a potential issue, a fact that is discussed in the federal register (64 FR 36466 CEX 53). It was further concluded that by acting as a co-generator for these entities, while supplying specifically designed containers that are properly placarded and prepared for transportation when needed, replacing those containers with fresh ones as needed, providing the safe transportation, consolidation and subsequent management of those lamps and while acting as a Large Quantity Co- generator that entity would serve many purposes including when acting as a co- generator that entity could safely manage those lamps using an Illinois EPA authorized outsource sub contractor (SLR), track and report the activity of the amount of those lamps that were safely managed to the Manager of RCRA permit division of the IEPA every three months the Respondent clearly meets the definition of co-generator. What MVP/RSR performed was the fulfillment of the duties of the generator consistent with many regulatory opinions relating to the definition of co-generator e.g. "While EPA will normally look to the party who fulfills generator duties" found throughout the federal register dating back to the 1980's.

That service also offered and allowed for SQG' and CESGQ's to pro-actively participate in a program that was very user friendly, required no paperwork on the part of these generators and they were supplied with monthly and annual statements of their activity at very attractive and equitable rates. What this accomplished was significant, it allowed for immediate participation on the part of these generators at a very reasonable cost to become pro-active in a lamp management program.

The Respondents argue that the EPA recommends that when two or more parties meet the definition of generator they should mutually agree to have one party perform the generator duties (45 FR 72024, 72026; October 30, 1980). The generator duties in this case are those required of a large quantity handler of universal waste in Part 273, Subpart C, which apply to universal waste handlers accumulating 5,000 kilograms or more universal waste at any time (§273.9).

In order to be defined as a co-generator you must be the entity who agrees to manage all the generator duties on behalf of all the SQG's and CESQG's and reports these activities to the proper authorities, in this case, the IEPA on a regular basis (MVP/RSR reported its co-generator activity every 3 months to The IEPA) .

The Respondent would like to draw the courts attention to a quote from the FR as follows:

**Federal Register generator liability 45 FR No.212 page 72026 10/30/80,**

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"The Agency will, of course, be satisfied if one of the three parties assumes and performs the duties of the generator on behalf of all of the parties. In fact, the Agency prefers and encourages such action and recommends that, where two or more parties are involved, they should mutually agree to have one party perform the generator duties."

The Respondents argue that as an identified Large Quantity Generator acting on behalf of numerous CESQG and SQG who are not mandated to indentify, track or keep records of their Universal Waste streams it was agreed with the IEPA that it would only make since for our company to act as their co-generator because Respondent inessence has taken ownership and inherited those responsibilities which Respondent adhered to precisely. The other amenity to this service was that Respondent created a document for these generators that they could simply keep on file if any question ever came into play relating to their recycling activities such as an Insurance or LEEDS audit.

The Respondents program worked and worked well with a limited amount of added effort or costs on the part of our client base and allowed for these companies to comply with the true spirit of the rule. It also served to entice their peers to proactively address the newly formulated UW rule for lamp recycling. Through Kelly's efforts hundreds of mid-size companies adopted protocols to proactively become participants in this newly adopted process. That is exactly what the rule makers were intending the rule to accomplish and it did.

## III. MVP/RSR and SLR were separate companies that operated under the knowledge of the local and state authorities.

MVP/RSR maintained the Riverdale warehouse as a LQH and co-generator of UW.

MVP was incorporated in October of 2003 in the State of Illinois, with a registered assumed name of River Shannon Recycling (RSR). MVP/RSR operated the Riverdale warehouse from February 2005 until the time of their exit in December 2008. MVP/RSR maintained a business license with the Village of Riverdale from the time they occupied the warehouse in February

2005. Once the quantities of material that MVP/RSR managed began to reach the level that qualified them as a Large Quantity Handler of Universal Waste under the Illinois Universal Waste Rule, MVP/RSR identified as a Large Quantity Generator and were assigned the Generator ID number for the Riverdale warehouse (RX 5). MVP/RSR managed all reporting of the materials to the state (CEX 4).

SLR was historically a sole-proprietorship operated by Larry Kelly.

SLR was a sole-proprietorship based out of Morton Grove, IL and operated by Larry Kelly. SLR was incorporated and added as an additional, separated assumed name under the MVP umbrella in September 2007 based on attorneys' advice regarding MVP/RSR's civil rights law suit against the Village of Riverdale, IL (RX 27). SLR was then remove from the MVP umbrella and incorporated in its' own right in December 2008. It should be noted that SLR did not perform any volume reduction services at the Riverdale warehouse while it was under the MVP corporate umbrella. The Complainant points to inconsistencies in the Respondent's responses to their information requests, (i.e., Page 132 lines 7-11 referencing CEX4), however, statements were accurate as of the time of their submittal to the USEPA, the accuracy of which Mr. Kelly certified to at the end of each response to the Complainant's information requests

## IV. MVP/RSR operated under the regulations for Large Quantity Handlers as delineated in 35 IAC 733 Subpart C.

As a co-generator and consolidator of Universal Waste Lamps from Conditionally Exempt and Small Quantity Handlers, MVP/RSR, while rarely exceeding the 5,000 kilogram accumulation limits for a Small Quantity Handler, operated under the more stringent regulations for a Large Quantity Handler, delineated at 35 IAC 733 Subpart C.

MVP/RSR provided initial notification to the USEPA and obtained a Generator ID number for the Riverdale warehouse before ever reaching or exceeding the 5,000 kilogram storage limit, in accordance with 35 IAC 733.132(a)(1).

MVP/RSR managed all Universal Waste Batteries in accordance with the regulations set forth at 35 IAC 733.133.

MVP/RSR provided structurally sound containers with lids to their clients for the collection of Universal Waste Lamps in accordance with 35 IAC 733.133(d)(1), with proper labeling, in accordance with 35 IAC 733.134(e).

MVP/RSR immediately cleaned up and containerized any lamps that was broken during the vandalism spree, in accordance with 35 IAC 733.133(d)(2)

MVP/RSR complied with the accumulation time limits delineated at 35 IAC 733.135(a) and tracked the amount of time Universal Waste Lamps were onsite through the method suggested at 35 IAC 733.135(c)(5).

MVP/RSR ensured all employees were trained to operate in accordance with MVP/RSR's Health and Safety Plan and Emergency Procedures, which were designed specific to the Riverdale warehouse, in accordance with 35 IAC 733.136.

MVP/RSR tracked all shipments of Universal Waste from Conditionally Exempt or Small Quantity Handlers by Bill of Lading in accordance with 35 IAC 733.139(a) and maintained these records for the required three year period as delineated at 35 IAC 733.139(c).

MVP/RSR requested that their co-generated material be volume reduced at their co-generation location by a company capable of operating in accordance with the guidelines laid out at 35 IAC 733.133(d)(3) and authorized to operate under those regulations by the Illinois EPA.

MVP/RSR reported the volume reduction activity to the manager of the RCRA permit section of Illinois EPA on a quarterly basis, in accordance with the regulation at 35 IAC 733.133(d)(3)(B).

MVP/RSR periodically performed TCLP testing performed on the volume reduced material to identify any hazardous waste constituents in the residuals of the volume reduction process. The TCLP results consistently determined that the residual glass and metal did pass TCLP as well as LDR standards, and were not hazardous materials.

MVP/RSR would then attempt to identify a market for these materials. If no market was available for this mixed glass and metal material, MVP/RSR followed the direction of the manager of the RCRA permit section of the Illinois EPA to manage this residual material in accordance with the guidelines for the residuals of mercury thermostats, which has subsequently been amended to apply to all mercury containing equipment residuals found at 35 IAC 733. 133(c)(4)(A) through (C). MVP/RSR, after determining that the residual materials did not demonstrate toxicity, and unable to identify a market for re-use of this material, sent the non-hazardous residual material to a special waste landfill in accordance with the guidance provided by the Illinois EPA and all federal, state and local solid waste regulations to avoid speculatively accumulating it.

MVP/RSR did not perform any separation of the residual mixed glass and metal from the volume reduction process. To separate the material would have made identifying a market for these materials much easier. However, MVP/RSR is well versed in the regulations that govern this material in the State of Illinois, and is aware that permits are necessary in order to perform separation of these materials. MVP/RSR did not have the permits necessary to perform separation and therefore did not perform separation of the residual materials.

## V. SLR operated within 35 IAC 733 and the guidance provided by the IEPA

SLR operated within 35 IAC 733

The USEPA allows individual states to decide whether or not to allow for volume reduction of Universal Waste lamps. Illinois' Universal Waste Rule, similar to Colorado's authorized Universal Waste Rule, specifically allows for the volume reduction of Universal Waste Lamps at 35 IAC 733.133(d)(3). The Illinois Universal Waste Rule states that "The lamps must be crushed 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/m3 when measured on the basis of time weighted average over an 8-hour period." When framed in the RCRA scheme, the volume reduction of lamps could be construed as "treatment", however, under the Illinois Universal Waste Rule, the volume reduction of lamps is simply volume reduction.

Mr. Kelly sought additional guidance from the Illinois EPA regarding the volume reduction of Universal Waste lamps utilizing his patented mobile technology

In early 2000 Larry Kelly opened dialog with the IEPA seeking clarification for the IEPA's newly published UW rule. Through a series of meetings and conference calls between the Illinois EPA and Larry Kelly, Kelly established specific protocols with the IEPA pursuant to their published rule resulting in a letter of authorization issued by the Director of the Bureau of Land at the IEPA acknowledging that his patented technology did in fact comply with the IEPA rule.

The letter also included some added clarity to questions posed pertaining to Mr. Kelly's technology acting on behalf of generators as follows:

> A) Acting as the sole owner of SLR technologies, the letter indicates that Mr. Kelly could crush and/or volume reduced lamps at other Handlers locations.
>
> B) The letter also indicates that Mr. Kelly when managing his mobile equipment could not receive or accumulate lamps at his facility where the mobile volume reduction equipment was to be staged when not in use. It became apparent that in order to comply with the last two sentences in the letter Mr. Kelly would have to change the operating protocols and create a completely autonomous company specifically dedicated to volume reducing lamps at generator sites and could neither participate in the storage and or recycling or disposal activities related to the volume reduced non-hazardous materials.
>
> C) During the course of negotiations with the IEPA and per the letter it at Handler's acting as a mobile volume reduction service for a SQG or LGQ could not attempt any subsequent component separation without specific permits. (RX 9) "All component separation had to occur at a fully regulated facility"

D) Per the IEPA instructions, Kelly's mobile technology only acted as a handler offering volume reducing services to SQG' and LQG's and consistent with the IEPA (RX 9)

E) Per IEPA letter SLR never took custody of the material from its generator allies but would return to its yard upon completion of its volume reduction services thus maintaining autonomy from its handler/generator client base.

F) From 2000 to 2002 Kelly offered this service to a company known as VX technologies and acquired a stock interest in the company that acted as a co-generator of Universal Waste per the negotiations that Kelly had with the IEPA. In December 2002, Mr. Kelly severed his ties with VX and resigned as its president based on operational and management differences he had with other stock holders and key management personnel of VX.

**VI. MVP/RSR adamantly denies that its Warehouse in Riverdale, Illinois was a Destination Facility or TSDF. Respondent argues that the warehouse located in Riverdale, Illinois was an identified Large Quantity Generator/Handler (EPA ID No: ILD005234141) of Universal Waste.**

The Respondent would like to bring the courts attention to the definition of Large Quantity Handler in 35 IAC Part 733.109 ***"A facility at which a particular category of universal waste is only accumulated is not a destination facility for the purposes of managing that category of universal waste."***

Destination Facility means a facility that treats, disposes of or recycles Universal Waste.

MVP/RSR has never treated spent lamps. It did hire outside services authorized in the state of Illinois to volume reduce their lamps. That process included the ability to safely prevent mercury emissions from exceeding Illinois published limits also found at 29 CFR 1910-1000.

MVP/RSR has never recycled any mixed glass and metal. Mr. Kelly sought out and received guidance through a series of negotiations with the Illinois EPA in a letter (RX #9) dated 10-16-2000. That letter clearly stated that if any handler of Universal Waste lamps wanted to separate the glass and metal for the purpose of recycling those materials that handler would need to be fully regulated with the state of Illinois a a destination facility.

MVP/RSR performed TCLP tests on the volume reduced material. The volume reduced mixed glass and metal never demonstrated TCLP or was it ever above LDR. Therefore in negotiations that were ongoing with Mr. Crites (as indicated in CEX 47 03122 and 03123) materials that did not meet the definition of hazardous could be managed by a generator as solid non-hazardous

waste. If end users of the material were not present at the time the materials were reduced and in order to avoid "Speculative Accumulation" issues MVP/RSR would send its non-hazardous materials for disposal to Land and Lakes Landfill under non-hazardous Bills of Lading.

The Respondent understood the guidance Mr. Kelly received from the IEPA some 3 years prior to MVP/RSR existence and adhered to that guidance precisely.

The Respondent argues that a facility at which a particular category of universal waste is only accumulated is not a destination facility for purposes of managing that category of universal waste. When performing the co-generator duties, Illinois allows for volume reduction activity to take place at a generator site. That volume reduction method used by MVP's outsource ally (SLR) specifically adhered written authorizations it received from the IEPA and to published Universal Waste rules found at 35 IAC 733 and captured emissions if present while conducting its volume reduction task. As an ancillary amenity of MVP's ally's service, SLR when volume reducing lamps used an activated charcoal filter designed to trap mercury vapors if they were present during the volume reduction process. This method is consistent with the Illinois rule found at: 35 IAC 733.132 (d) (3) (A) that stipulates ***"The lamps must be crushed 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/m3 when measured on the basis of time weighted average over an 8-hour period"*** The quote that appears in the Illinois Universal Waste rule was framed around published safe mercury emission standards found at OSHA 29 CFR Part 1910-1000 and was a direct result of Mr. Kelly's testimony given at the Illinois Pollution Control Boards' public hearing conducted as part of the promulgation process of the Illinois Universal Waste rule.

Further, the Respondent argues the carbon owned by SLR, whether spent or not, does not demonstrate TLCP thus allowing for the safe staging and transportation of the material. Although SLR had not completely used the life of its carbon while operating its volume reduction process from 2003 to 2007, SLR's carbon can be traded out with their supplier and manufacturer of the activated carbon for fresh carbon. (RX 12)

SLR, the owner of the carbon units, never land-filled spent carbon. SLR was asked to quantify the fact that the semi spent carbon staged at the MVP warehouse did not demonstrate any potential hazardous constituents by the owners of MVP. MVP was given permission to sample the carbon and then profile that carbon for non-hazardous disposal at an industrial non-hazardous landfill known as Land and Lakes. The owners of MVP had received questions as to the status of that carbon during site specific regulatory audits that were being conducted from time to time for potential new customers. The results were consistent with SLR's stipulation that the carbon did not demonstrate TCLP and was below LDR and qualified if necessary to be safely land-filled.

Respondent argues that Land and Lakes was the destination facility for MVP/RSR's mixed volume reduced non-hazardous glass and metal. MVP/RSR determined the material to be non-hazardous and managed it in accordance with all applicable solid waste regulations.

The Respondent argues that Riverdale is no more of a destination facility than any of MVP's other clients/generators locations where MVP hired SLR to perform their volume reduction service directly at their Small Quantity Generator locations when needed (e.g. University of Illinois, The University of Chicago or Commonwealth Edison)

MVP/ RSR did not violate Subtitle "C" RCRA waste rules.

Respondent argues that it operated openly for three years as an Identified Large Quantity Generator/ Handler and a consolidator of Universal Waste with the full knowledge of the IEPA prior to a 55 day siege of the property by the village it was licensed to do business in. During that period of time the owners of MVP/RSR and their employees were precluded from entering the property thus leaving the property completely unprotected which lead to significant vandalism issues both inside and outside the MVP/RSR warehouse.

The Respondent argue that MVP/RSR obtained proper business licenses, it maintained very good records, it reported in a timely fashion all of its activity and reported quarterly to the IEPA as instructed by the IEPA to the Director of IEPA, RCRA permitting division Bureau of Land Pollution (Mr. Mark Crites). Further, it maintained very good housekeeping practices as testified to by the Director of Recycling for The Solid Waste Agency of Northern Cook County (SWANCC – Page 611 to 622 Ms. Mary Allen)

The Respondent argues that MVP/RSR maintained an excellent Health and Safety record while operating its fully licensed warehouse (over 2 ½ years) in Riverdale, IL.

Respondents acknowledge that the word treatment in the regulated industry is most commonly referring to hazardous waste. Respondents take exception that the word treatment permeates the questions posed by counsel to and the well rehearsed answers given by Mr. Brown especially when they refer to the Respondents answers supplied after every request for information by Mr. Brown. Respondents have never used the word treatment, which outside the context of RCRA means action, management or handling. Respondents do use the word process, which means procedure, method or course of action. There appears to be is an obvious intent on the part of the USEPA to inject hazardous terms and meanings into these proceedings to subtly mold the courts thought process. Treatment insinuates that the purpose was to extract mercury. The Respondent's sub-contractor (SLR) performed a process to volume reduce Spent Lamps. As a part of that process SLR was mandated to insure that mercury vapor emissions were not present when volume reducing which is consistent with the published IUWR and published health and safety rules found at 29 CFR 1910-1000 of OSHA.

## VII. Closure is unnecessary

Closure does not apply to Universal Waste Handlers

The Riverdale warehouse was not a TSDF, did not conduct hazardous activities, and is not subject to RCRA Closure. The regulation found at 35 IAC 721.109, which mirrors 40 CFR 261.9, appears to be authorized under 40 CFR 272.701 and is enforceable under Illinois state law, clearly states that these wastes are "not fully regulated as hazardous waste" and are exempt from regulation under all sections that govern the RCRA program. In the State of Illinois, Respondents are not required to comply with RCRA requirements if they are complying with the less stringent Universal Waste Rule. Under both the federal and state Universal Waste Rules, a Universal Waste handler's location is not subject to RCRA regulations nor are they required to maintain or perform a RCRA closure plan.

Respondents have already cleaned the Riverdale warehouse

In 2008 MVP/RSR reached a settlement agreement with the Village of Riverdale in which MVP/RSR agreed to relocate their operation and leave the Riverdale warehouse in a clean, broom swept condition. MVP/RSR removed all co-generated waste, office equipment and furniture and materials left behind by previous tenants, and cleaned the building under the supervision of the environmental attorney for the Village of Riverdale to the satisfaction of both the Village and the Federal Court of Northern Cook County by December 2008.

Complainant has not proven any environmental impairment or insult to justify a RCRA closure

Complainant has not quantified any environmental impairment or insult from mercury vapor emissions at the warehouse in Riverdale that would necessitate performing closure at a location that Illinois exempts from RCRA regulations, exemptions that carry the appearance of authorization from the USEPA.

To the contrary, the USEPA created two separate documents, a media advisory and a news release, stating "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." (RX 16)

The equipment Respondents utilized to monitor for mercury vapor emissions while SLR performed volume reduction services monitors for mercury vapor in parts per million, a measurement far more exact than the Illinois Universal Waste Rule calls for. USEPA investigators spent nearly eight hours at the Riverdale warehouse monitoring for mercury vapor emissions utilizing equipment that measured in parts per billion. The USEPA, subsequent to their monitoring results utilizing this extremely sensitive equipment, has already concluded that the Riverdale warehouse did not exhibit elevated levels of mercury.

The USEPA has provided no other cause for performing closure except a follow up investigation at the Riverdale warehouse performed nearly two and a half years after MVP/RSR exited the property. As of May 26, 2011, the date of Mr. Brown's most recent inspection of the Riverdale warehouse (CEX42), the building appears to be in an extreme state of disrepair. Per Mr. Brown's Narrative Summary of Inspection, the building owner was unable to open and enter the premises through the primary entrance to the building, which causes the Respondents to surmise that the building has been left unattended and unprotected since the time of their exit two and a half years prior. Mr. Brown's photographs seem to depict broken two small piles of broken lamps along the east side of the building. It does not follow that Respondents would spend nearly a year cleaning and exiting the warehouse under the supervision of the environmental counsel for the Village of Riverdale only to leave behind two small piles of broken lamp material. That material was not there as of December 2008, when the environmental counsel for the Village of Riverdale as well as the building owner completed their final walk through of the warehouse and entered into a settlement agreement with MVP/RSR. Mr. Brown's inspection alludes to a ladder present at the facility having been used to strip the building of its' copper electrical wiring. Respondents note that many of the overhead ceiling fixtures seem to now be missing their light bulbs and that the piles of broken lamp material seem to have collected along the east side of the building, directly opposite the expanse of broken windows along the west side of the building. Further, Mr. Brown saw fit to photograph residential homes directly east of the Riverdale warehouse, homes that sat dilapidated and uninhabitable during MVP/RSR's handler operations at the Riverdale warehouse. Gentrification of these homes was just beginning during Mr. Brown's initial investigation in October of 2007.

## VIII. FAIR NOTICE and ENFORCEMENT DISCRETION:

Fair Notice

The USEPA's complaint states that the Illinois Universal Waste Rule, while adopted, is not authorized, and therefore the authorized Illinois RCRA regulations apply to the Respondent's Universal Waste Handling operations. The Honorable Judge Gunning has already ruled that this is technically correct, a ruling to which the Respondents agree. However, the Respondents should not be held liable for operating within the Illinois Universal Waste Rule based on the information and guidance provided by both the USEPA and the Illinois EPA.

Where you live

The most prominent guidance document provided by the USEPA regarding the management of Universal Waste can be found at their website and is titled "Where you live" (RX2). This document provides a color coded map followed by an alphabetical list of states. Illinois is listed as "yes" under adopted and "no" under authorized. However, the USEPA provides a link directly to the Illinois Universal Waste Rule, which clearly implies that citizens in Illinois should

follow these adopted regulations, and provide no implication that in actuality, Illinois' authorized RCRA subtitle C regulations are the regulations that currently apply to this material and must be followed when handling spent mercury containing lamps.

Exemptions and authorizations to exemptions in CFR

Illinois' authorized RCRA program exempts Universal Waste from the RCRA program at 35 IAC 721.109, and exempts Universal Waste handlers from permitting at 35 IAC 703.123. These regulations fall directly within the Illinois RCRA regulations that the USEPA lists as authorized at 40 CFR 272.701. The authorization of these regulations are assumed to be accurate as of the date most recently amended, in this case April 9, 2004, well after Illinois published and began implementing their Universal Waste Rule. Counsel for the Complainant has stated that the appearance of authorization for the two sections that exempt Universal Waste from the Illinois RCRA program "is not necessarily accurate" (Testimony Page 32 line 1-3). The inaccurate inclusion of unauthorized regulations within authorized regulations published in the Code of Federal Register creates a regulatory trap into which the Respondents have fallen. Respondents cannot be held liable for following inaccurately authorized regulations published by the Complainant in the Code of Federal Register.

The State of Illinois directs handlers managing Universal Waste lamps to comply with either Illinois RCRA regulations or the Illinois Universal Waste Rule.

The State of Illinois' primary guidance document on the management of Universal Waste Lamps can be found at RX29. This document poses the question "What are my options for managing hazardous lamps?" and provides the response "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."

The Illinois Universal Waste Rule has been effective and enforceable within the State of Illinois since the date of publication, as noted in the affidavit submitted by Mr. Westefer of the USEPA.

Respondents cannot be held liable for following the Complainants inaccurately authorized regulations published within the Code of Federal Register, nor can they be held liable for complying with regulations both the USEPA and the State of Illinois direct them to follow.

Enforcement Discretion

The Complainant did not utilize the enforcement discretion recommended by Mr. Steve Herman, Assistant Administrator, Office of enforcement and Compliance Assurance, USEPA, in his memo titled "Universal Waste Rule – Implementation" (RX 4 "The Herman memo"). The amended complaint filed against the Respondents at CEX30, Numbers 11 and 12, states "At all times relevant to this Complaint and Compliance Order, the Administrator has not granted final

authorization to Illinois to administer the Universal Waste regulations at 40 C.F.R. Part 273", and "In the absence of state authorization for the Universal Waste program, the authorized Subtitle C requirements apply to the treatment, storage and disposal of hazardous waste batteries, mercury-containing equipment, pesticides and lamps in Illinois." The Complaint does not state that the Respondents were operating outside the adopted Illinois Universal Waste Rule and are therefore subject to the Subtitle C requirements, however, the Respondents have been forced to defend themselves against this claim as well, as it was contended during the hearing by counsel for the Complainant at testimony page 65, lines 12-14. Throughout the course of pre-hearing exchanges, the Complainant did not address the recommendation of enforcement discretion in states with an adopted Universal Waste Rule. It was not until the Respondents suggested that they should have been subject to the discretion delineated in the Herman memo that the Complainant began to claim that Respondents were operating outside of the Illinois Universal Waste Rule, and therefore not subject to enforcement discretion as suggested. The suggestion that Respondents were operating outside the Illinois Universal Waste Rule is not a claim made in the USEPA's amended complaint and remains unsubstantiated. The Herman memo clearly 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 authorization, Regions should take enforcement actions involving universal wastes only where handlers of such wastes are not in full compliance with the Part 273 standards." Mr. Brown states in his testimony that the Illinois Universal Waste Rule is almost exactly the same as the Federal Universal Waste Rule (Testimony page 266 lines 13-15), and Respondents were in compliance with the Illinois Universal Waste Rule. The Herman memo goes on to state that "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." The USEPA clearly states in their news release and their media advisory (RX 16) that "EPA inspectors found no evidence that River Shannon poses a current public health threat from mercury emissions" and "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." Respondents operated within the Illinois Universal Waste Rule and further, did not present an imminent and substantial endangerment to human health and the environment, as evidenced by the USEPA's initial inspection in October 2007. Respondents should be subject to the enforcement discretion delineated in the Herman memo.

## IX. The USEPA has not succeeded in proving that Respondents should be held liable for operating an unpermitted TSDF.

By applying RCRA regulations and terms to the Respondents' Universal Waste management operations, Complainants paint a picture of an unpermitted TSDF. However when framed within the context of Illinois Universal Waste Rule, Respondents' operations comply with all applicable

Universal Waste Regulations. Complainant fails to identify or prove where the Respondents' co-generator operations were out of compliance with the Illinois Universal Waste Rule and therefore subject to RCRA regulations.

The Complainant's counsel stipulated in his opening statement (page 33 lines 8-15) "Your Honor, EPA is going to present facts today that establish that the Respondents in this case violated RCRA....." , yet provided no evidence, no witnesses, no affidavits, no lab analysis of MVP's volume reduced materials, dust samples or wipe samples that could have fortified their enforcement action that Respondents were not subject to the enforcement discretion delineated in the Herman memo, and were in violation of RCRA because it was managing Hazardous Waste

Respondents argue that the presents of hazardous waste lamps at their warehouse does not automatically create a hazardous waste TSDF when they are being managed as Universal Waste.

Testing Methods:

It is widely known among field personnel that sampling results can be swayed by simply using a method if looking for a known or specific substance with some prior knowledge, that substance will probably be identified if enough individual grab samples are taken randomly. There is a tendency on the part of many investigators who are taking samples to believe that grab, purposive, biased, or judgmental sampling is all that is needed to arrive at a decision about a particular site that is under investigation. "Grab samples" or judgmental samples lack the component of correctness; therefore, they are biased. The so-called grab sample is not really a sample but a specimen of the material that may or may not be representative of the sampling unit. Great care must be exercised when interpreting the meaning of these samples. So-called "grab samples" or judgmental sampling are often used to do a "quick and dirty" evaluation of a site. In the legal arena, these samples often lead to problems. There is no basis for evaluating the validity of the sample, nor is there any means for using these samples in arriving at a sound decision with regards to the site. The potential for bias introduced by the person taking the sample is great and unknown.

Regarding the above "Grab Sample" otherwise known as judgmental sampling it is very clear that the objectives of Mr. Brown and his partner Mr. Gram were decided based on pre-existing knowledge (i.e. MSDS) they must have had that if they took twelve random samples of lamps in their hunt to find one that would fail, they stood a very good chance of identifying at least a few lamps that would exceed TCLP limits. The Respondent would like to point out to the courts that if Mr. Browns' testimony under oath was in fact sincere that he would not have recommended enforcement if MVP was in compliance with the Illinois UW rule (Testimony page 116 lines 11-15) his actions as versus his testimony are contradictive. If Mr. Brown truly felt this way he would not have conducted sampling at all because lamps that fail TCLP are part of the UW rule both at the federal level and the state level.

However, if Mr. Brown felt compiled to conduct sampling the method should have been in the form of "Simple Composite Radom Sampling" with a mean or average combined result that would have reflected results below TCLP detectable limits (171 ug/L). The Respondents argue that it is obvious that Mr. Brown was not looking for the average reading in the warehouse but was by design, looking for at least one lamp to fail TCLP thus allowing him to recommend RCRA enforcement which again is not consistent with his testimony related to complying with the Universal Waste Rule in Illinois and the fact that he did conduct TCLP sampling knowing that some lamps would fail is again not consistent in what he told the courts. He told the courts that he would not have recommended enforcement if MVP was in compliance with the Illinois UW rule and by some lamps failing TCLP is not a violation of Illinois or Federal UW rules and that does not define MVP/RSR as being out of compliance with neither the Illinois rule or the Federal UW rule. The Respondent believes the courts should take specific note of that. It appears Mr. Brown is arguing "Oranges" and forcing the Respondent to defend "Apples"!

The Respondents argue that Mr. Brown's protocols on testing were designed to find at least one lamp that would fail TCLP to justify this enforcement action. However, if he would have sampled those lamps in the same fashion that he collected them (Simple Composite Sampling) by pairs and then adding up the total results from all 6 pairs then mathematically creating a mean and/ or average, his conclusion would have to have been passed (the mean was .171 ug/L) 29 clicks under failing or detectable limits TCLP.

Witnesses and Evidence Produced:

The majority of the Complainants case hinges on the opinions and understanding of the lead investigator in this complaint. However, Complainant has produced no corroborating testimony from any other regulator or regulatory body to verify the opinions and understandings of the investigator.

The USEPA interviewed Illinois regulatory personnel. The courts and the Respondent will never know the results of those interviews based on the fact that they never produced one affidavit or more importantly one witness from the IEPA who potentially would have lent significant credibility to or corroborated the USEPA's position that MVP was acting outside of Illinois rules and specific guidance related to that rule Larry Kelly had obtained from the IEPA.

Further, Brown stated under oath that he would not have recommended enforcement if MVP/RSR was in compliance with the unauthorized Illinois rule. Yet he never offered any hard proof that the Respondents were acting outside the IEPA rule or that any regulator they interviewed at the IEPA to corroborate or remotely agree with their quantum leap from managing Universal Waste to managing Subtle "C" RCRA waste without a permit based on Illinois was not fully authorized or more importantly that Illinois regulatory personnel thought that the Respondent was operating outside the Illinois rules.

Respondents argue that the agency's conclusions are not supported by any substantial evidence whether that be in the form of proof of existing environmental impairments caused by the MVP/RSR warehouse operations or its subcontractor (SLR) who conducted state authorized services for the volume reduction of lamps at the MVP/RSR warehouse and other locations from time to time, sworn affidavits or witnesses by IEPA personnel who monitored our business operations and protocols and who MVP/RSR reported to every three months or any customer or ex-employees that could have lent any credible testimony to this hearing that would support Mr. Brown's accusations.

The Respondents argue further that they (USEPA) interviewed those same regulatory personnel that Mr. Kelly received his direction and guidance from over the last ten years. If those regulators believed that Respondents were operating outside the Illinois published rules, Respondents argue that the USEPA had a responsibility and should have and could have either produced those individuals they admittedly interviewed to corroborate the USEPA's understanding or opinions or at a minimum produced a sworn affidavit to confirm their contentions.

Aside from the above, Complainant introduced 3 additional witnesses: One testified to the fact that he acquired a Part "B" permit but was not completely sure why he had it. Another an Environmental Engineer who apparently had an axe to grind with Kelly and testified to specific matters which Respondents believe he may have, in his attempt to paint a negative picture, perjured himself doing  Finally a forensic accountant who tracked Kelly's limited income while Kelly he was building a new and aspiring but now defunct company.

Offered Pictures: One set of pictures (CEX1) were taken the day that the USEPA conducted their in depth site specific reconnaissance sampling for potential health and safety issues. Although the complainants alluded to these pictures as being the normal methods of housekeeping practices the Respondents believe that our witness (Mary Allen page 611) was able to testify to and add some clarity that those pictures that in fact were not accurate. That investigation culminated in two separate press releases issued by the USEPA  (RX 16-A and 16-B).

They also introduced a second set of pictures purportedly to support their contention that the warehouse was subject to a full Part "B" closure plan, these pictures highlighted a crack in the floor which to our knowledge did not exist 2 ½ prior to these pictures being taken. This set of pictures were taken 2 ½ years after MVP had completely cleaned the warehouse under the Village of Riverdale's environmental attorneys' over site which was part of a Federal Court settlement of  the Respondents' Civil Rights action. These pictures were presented again to subtly depict MVP as somehow being subject to a full Part B closure. Respondents further argue that again they were presented as cosmetics to sway the courts thinking as to what the real truth is and that is MVP/RSR simply did nothing wrong they simply followed rules and guidance that the Respondent continuously sought out and precisely abided by for many years.

Effects on Illinois Businesses

It is commonly known and specifically alluded to by USEPA regulatory rule makers that Fluorescent lamps fail TCLP and that is the reason today we are adding them to the Universal Waste rule. In order for any waste to be considered a Universal Waste they must first be considered potentially hazardous. The rule makers rational is and has been to create a less stringent method of safely handling these spent materials that are widely generated in small quantities by entities across the country. Historically these small quantities were unilaterally disposed of in municipal garbage winding up in municipal landfills all across the country thus cumulatively creating potential significant insults to the environment. In an effort to create the ability for these small quantities to be more efficiently managed the less stringent rule was applied to these spent materials allowing for generators of the lamps to easily and proactively participate in recycling programs across the country at much less cost combined with reduced record keeping for small generators of these materials.

Unless the regulated community tests every spent lamp, there is absolutely no way to know which one will pass and which one will fail thus precluding the ability of any generator to identify and separate some that are potentially hazardous and most that are not. Simply by testing one lamp a year there is a very good chance that the lamp will pass TCLP (70% by Mr. Brown's results) and therefore before lamps were added to the UW rule a generator could simply justify throwing all their lamps in the garbage, while investing somewhere between $35.00 to $50.00 per year to obtain a positive test result but in the meantime disposing of potentially thousands of spent mercury containing lamps in their municipal waste creating continuous bio-accumulative mercury emissions potentially damaging the health and safety to anyone in the vicinity of their municipal garbage container.

The position taken by the USEPA that Illinois was not authorized therefore lamps must be managed as Subtle "C" Hazardous Waste created significant trepidation to the regulated community in Illinois, thus impairing and significantly setting back the important gains that were made towards voluntary participation of CESQG's, SQG's and LQG's in lamp recycling arena in Illinois.

The USEPA has not proven their case

Complainants never tied together how MVP violated unauthorized Illinois rules with actual evidence. Accusing MVP/RSR and Larry Kelly as a major violator of hazardous waste rules and a major polluter of the environment is clearly unwarranted and untrue. Their presentation to this court was loaded with hyperbole, matter of fact statements while offering absolutely no firm proof to validate those statements other than using terms such as "in my opinion" or "it is my understanding". Respondents argue opinions and understandings do not constitute fact, and this complaint is an abuse of the US EPA's enforcement discretion.

## CONCLUSION

Universal Waste is a safe and practical way to manage spent fluorescent Lamps both in Illinois and Nationally. MVP/RSR abided by all published rules and direction it received both in guidance documents and direction it received from regulatory personnel as to the proper a regulatory compliant way to manage these waste.

The USEPA brought an enforcement action against MVP/RSR but after four years of investigation have not proven their case either by providing supporting evidence, witnesses, affidavits or any other reasonable proof other than proving what was already known that "Some lamps fail TCLP".

Respondent respectfully submits that in the absence of the above documentation and or supporting or corroborating witnesses a judgment should be entered in its favor and the Complaint and Enforcement Action should be dismissed.

Initially the enforcement action that was brought by the USEPA appears to have hinged on a matter of semantics Authorized verses Adopted. This statement is found at the USEPA's initial complaint and also in their amended complaint dated January 2011and found in paragraph 11 as follows: "In the absence of state authorization for the Universal Waste program, the authorized Subtle "C" requirements apply to the treatment, storage and disposal of hazardous waste batteries, mercury-containing equipment, pesticides and lamps in Illinois.

But during the administrative hearing, when a question was posed by Complainants own counsel to Mr. Brown regarding the published Illinois UW rule, while under oath Mr. Brown acknowledged that he would not have recommended an enforcement action if MVP/RSR was in compliance with although not fully authorized Illinois rule. The Respondent argues that Mr. Brown and Complainants Counsel have flip flopped between RCRA and Universal Waste rules both at the Federal and Illinois levels and while doing so did not submit one piece of viable evidence to justify their four year long enforcement action against MVP/RSR other than some lamps fail TCLP which is the fundamental driving factor for adding lamps to the Universal Waste Rule.

The Complainant offered not so much as a modicum of tangible proof, or actual witnesses and/or sworn affidavits as a result of Mr. Brown's interviews with IEPA regulator's who presumably would have corroborated Mr. Brown's opinions and/or accusations that the Respondent MVP/RSR was in fact operating outside of the Illinois Universal Waste rule. This type of solid testimony from Illinois regulatory personnel would have added a great deal of clarity to Mr. Browns' opinion's or understanding's. Further, the Respondent argues this would have allowed the Respondent an opportunity to cross examine those witnesses for the courts to hear or read to establish just where the Illinois regulators found the Respondent to be operating outside the

Illinois rules. The Respondent further argues that they find the absence of this type of testimony from Illinois regulatory personnel to be somewhat remarkable by its absence.

The Respondents argue the lack of evidence relating to any results of samples taken from safely staged already volume reduced lamps most certainly would have confirmed Mr. Browns opinion that the volume reduction process would not pass TCLP. Over the course of Complainants' day and a half long testimony regarding RCRA rules and his subsequent rebuttal testimony that included assertions, innuendo, his understanding and his opinions, there was no proof offered into the record other than the widely known fact that some whole lamps when broken may fail TCLP. This fact was widely discussed in the Comments and Answer section found in the Federal Register as follows: "nor did they offer any justification to the court that could rationalize the Complainant's quantum leap from Universal Waste to the much more stringently regulated rule known as RCRA.

**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, IL 60827** | ) | |
| **EPA ID No: ILD005234141, and** | ) | |
| | ) | |
| **Laurence Kelly** | ) | |
| | ) | |
| **Respondents** | ) | |

## CERTIFICATE OF SERVICE

I certify that the foregoing Respondents' Post-Hearing Brief was sent this day, November 7, 2011 in the following manner to the addressees listed below:

Original by Registered Mail to:

Regional Hearing Clerk
U.S. EPA - Region 5
77 W. Jackson Blvd.
Mail Code: E-19J
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