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January 3, 2008

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2008 JAN -9 AM 10:14
REGIONAL HEARING
CLERK

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866

Re: In the Matter of Crossgates Mall Company, LP, et al.
Docket No. RCRA-02-2007-7113

Dear Ms. Maples:

Attached for filing and service upon the U.S. Environmental Protection Agency, Region 2 is the Crossgates Respondents' Answer to the United States Environmental Protection Agency, Region 2 Complaint.

Very truly yours,


Robert L. Sweeney

Enclosure

c: Dere LaPosta
Carl R. Howard, Esq.
Austin Hoffman, Esq.
Terri Walsh
Janis Fallon, Esq.

REGIONAL HEARING CLERK
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 2

In the matter of

CROSSGATES MALL COMPANY, LP,
PYRAMID MANAGEMENT GROUP,
INC. AND CROSSGATES MALL
COMPANY NEWCO, LLC

Docket No. RCRA-02-2007

ANSWER

Respondents

U.S. ENVIRONMENTAL
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Respondents Crossgates Mall Company, LP, Pyramid Management Group, Inc. and Crossgates Mall Company Newco, LLC (hereinafter collectively the “Crossgates Respondents”), by their attorneys, Whiteman Osterman & Hanna LLP, for their answer to complainant’s complaint, compliance order and notice of opportunity for hearing, dated September 28, 2007, state as follows:

BACKGROUND ALLEGATIONS

1. The Crossgates Respondents admit the allegations contained in Paragraph 1 of the complaint.
2. The Crossgates Respondents admit the allegations contained in Paragraph 2 of the complaint.
3. The Crossgates Respondents admit the allegations contained in Paragraph 3 of the complaint.
4. The Crossgates Respondents admit the allegations contained in Paragraph 4 of the complaint regarding the definition of “existing facility.”
5. The Crossgates Respondents admit the allegations contained in Paragraph 5 of the complaint.

6. The Crossgates Respondents admit the allegations contained in Paragraph 6 of the complaint.

7. The Crossgates Respondents deny knowledge or information sufficient to form a belief as to the truth of each every allegation contained in Paragraph 7 of the complaint, in particular whether any of its spent lamps contain lead in sufficient quantities to exhibit the characteristic of toxicity under the toxic characteristic leachate procedure.

8. The Crossgates Respondents admit the allegations contained in Paragraph 8 of the complaint to the extent the allegations refer to the regulations found at 6 NYCRR §374-3.2 and not solely to subsection (d)(4).

9. The Crossgates Respondents admit the allegations contained in Paragraph 9 of the complaint that Respondents are currently considered a Small Quantity Handler of Universal Waste. The Crossgates Respondents deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 9 of the complaint related to its past status.

10. The Crossgates Respondents deny the allegations contained in Paragraph 10 of the complaint in so far as the notification requirement does not apply to hazardous waste conditionally exempt small quantity generators under 6 NYCRR §371.1(f).

11. The Crossgates Respondents deny the allegations contained in Paragraph 11 of the complaint in that the allegation calls for conclusions of law and on the grounds that the allegation appears to link full regulation of a conditionally exempt small quantity generator and notification requirements to compliance with specific regulatory sections, and such a link does not appear as a dependent condition in the regulations. The

Crossgates Respondents respectfully refer all questions and conclusions of law to the Court.

12. The Crossgates Respondents deny the allegations contained in Paragraph 12 of the complaint to the extent that the allegation links a hazardous waste determination to qualification as a conditionally exempt small quantity generator of hazardous waste of small volumes of potentially hazardous waste. The Crossgates Respondents respectfully refer all questions and conclusions of law to the Court.

13. The Crossgates Respondents admit the allegations contained in Paragraph 13 of the complaint.

EPA INVESTIGATORY ACTIVITIES

14. The Crossgates Respondents admit the allegations contained in Paragraph 14 of the complaint.

15. The Crossgates Respondents partially deny the allegations contained in Paragraph 15 of the complaint. The Crossgates Respondents note that a large portion of the trash at the Mall is generated and stored by tenants prior to its removal and subsequent disposal by the Crossgates Respondents.

16. The Crossgates Respondents admit the allegations contained in Paragraph 16 of the complaint.

17. The Crossgates Respondents deny knowledge or information sufficient to form a belief as to the truth of each and every allegations contained in Paragraph 17 of the complaint.

18. The Crossgates Respondents admit the allegations contained in Paragraph 18 of the complaint.

19. The Crossgates Respondents deny some of the allegations contained in Paragraph 19 of the complaint. The Crossgates Respondents were not responsible for the removal and disposal of spent lamps by certain tenants and under certain circumstances; for example anchor stores which handle their own solid waste disposal and construction activities. The Crossgates Respondents also do not handle neon lamps. Crossgates Respondents also deny that all spent lamps were disposed of in the trash at the time of the EPA inspection. During a large change-out program in 2005, all bulbs removed were recycled using Northeast Lamp Recycling. In addition at the time of the EPA inspection a large number of metal halide bulbs were being stored for recycling by Northeast Lamp Recycling.

20. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 20 of the complaint. The Crossgates Respondents were not responsible for the removal and disposal of spent lamps by certain tenants and under certain circumstances; for example anchor stores which handle their own solid waste disposal and construction activities. The Crossgates Respondents also do not handle neon lamps.

21. The Crossgates Respondents admit the allegations contained in Paragraph 21 of the complaint.

22. The Crossgates Respondents partially admit the allegations contained in Paragraph 22 of the complaint that those bulbs changed out during the 2005 change-out were all recycled. The Crossgates Respondents also note that it is their understanding that incandescent lamps do not contain mercury and are not considered a universal hazardous waste under state or federal universal waste regulations. The Crossgates

Respondents deny knowledge or information sufficient to form a belief as to the truth of each and every allegations contained in Paragraph 22 of the complaint as to whether incandescent lamps used at the mall are a hazardous waste or whether the EPA or State DEC in the past have taken enforcement action for incandescent lamps. The Crossgates Respondents respectfully refer all questions and conclusions of law to the Court.

23. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 23. As noted in Paragraph 19 and 22 a recycling program for spent lamps was in place prior to the inspection for large change-outs of bulbs in 2005 and 2006.

24. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 24. As noted in Paragraph 19, 22 and 23 a recycling program for spent lamps was in place prior to the inspection for large change-outs of bulbs in 2005 and 2006.

25. The Crossgates Respondents deny the allegations contained in Paragraph 25 in that metal halide lamps removed prior to the inspection during a large change-out of all metal halide bulbs in 2006 were being stored for recycling.

26. The Crossgates Respondents admit the allegations contained in Paragraph 26 of the complaint.

27. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 27.

28. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 28.

29. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 29.

30. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 30.

31. The Crossgates Respondents deny some of the allegations contained in Paragraph 31; and affirmatively state that a recycling program for spent lamps was in place prior to the EPA inspection.

32. The Crossgates Respondents admit the allegations contained in Paragraph 32 to the extent that it received a Notice of Violation (“NOV”) from EPA dated April 19, 2007 containing the violations cited.

33. The Crossgates Respondents admit the allegations contained in Paragraph 33.

RESPONDENTS’ RESPONSE TO NOV AND IR

34. The Crossgates Respondents admit the allegations contained in Paragraph 34.

35. The Crossgates Respondents deny some of the allegations contained in Paragraph 35 in that the Crossgates Respondents had a recycling program in place prior to the EPA inspection for the large change-outs and in their response to the NOV documented the program for fluorescent bulbs and ballasts and actions taken to address specific issues raised regarding containers, labeling and inventory as well as other proactive actions taken by the Crossgates Respondents including communications to mall tenants and staff.

36. The Crossgates Respondents deny the allegations contained in Paragraph 36 in that Northeast Lamp Recycling was contacted prior to May, 2007 and Northeast Lamp Recycling removed the stored spent metal halide lamps for recycling May 9, 2007.

37. The Crossgates Respondents deny some of the allegations in contained in Paragraph 37 as noted in Paragraph 36 in that a large majority of bulbs from change-outs were recycled and the response to EPA contained this information.

38. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 38. The Crossgates Respondents deny that their response indicated any information regarding its tenants' disposal of bulbs except noting those which are responsible for their own trash disposal. As noted in Paragraph 37 a large majority of bulbs from change-outs were recycled.

ANSWERING THE FIRST COUNT

(FAILURE TO MAKE HAZARDOUS WASTE DETERMINATIONS)

39. With respect to the allegations incorporated by reference in Paragraph 39 of the complaint, the Crossgates Respondents incorporate their responses as set forth above.

40. To the extent that Paragraph 40 of the complaint contains conclusions of law it does not require an answer.

41. To the extent that Paragraph 41 of the complaint contains conclusions of law it does not require an answer.

42. The Crossgates Respondents admit the allegations contained in Paragraph 42.

43. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 43. As noted in Paragraph 19, 22, and 23 a recycling program for spent lamps was in place prior to the inspection for large change-outs of bulbs in 2005 and 2006.

44. To the extent that Paragraph 44 of the complaint contains a conclusion of law it does not require an answer. To the extent that any allegations against the Crossgates Respondents are contained in Paragraph 44 they are neither admitted nor denied.

45. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 45.

46. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 46.

47. To the extent that Paragraph 47 of the complaint contains conclusions of law it does not require an answer.

ANSWERING THE SECOND COUNT

(FAILURE TO PREVENT AND/OR MINIMIZE RELEASES)

48. With respect to the allegations incorporated by reference in Paragraph 48 of the complaint, the Crossgates Respondents incorporate their responses as set forth above.

49. The Crossgates Respondents deny some of the allegations contained in Paragraph 49 in that EPA's Notice of Violation issued on or about April 19, 2007 only identifies that at the time of the inspection on or about March 15, 2007 high intensity lamps and fluorescent bulbs generated by the Crossgates Respondents.

50. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 50. As noted in Paragraph 19, 22, and 23 a recycling program for spent lamps was in place prior to the inspection for large change-outs of bulbs in 2005 and 2006.

51. The Crossgates Respondents admit the allegations contained in Paragraph 51.

52. With respect to the allegations in Paragraph 52 of the complaint related to failure to make a hazardous waste determination, the Crossgates Respondents incorporate their responses as set forth above in the answers to Count 1. The Crossgates Respondents respectfully refer all questions and conclusions of law to the Court.

53. The Crossgates Respondents deny the allegations contained in Paragraph 53 of the complaint to the extent that the allegation links a hazardous waste determination to qualification as a conditionally exempt small quantity generator of hazardous waste of small volumes of potentially hazardous waste as causing that conditionally exempt small quantity generator to full regulation under 6 NYCRR §§370 -376. The Crossgates Respondents deny the allegations contained in Paragraph 53 of the complaint to the extent that the allegation finds that failure to follow every provision of the universal waste regulations subjects a small quantity generator of universal waste to full regulation under 6 NYCRR §§370-376. EPA also notes that high intensity lamps were stored in a locked storage room in cardboard boxes. The Crossgates Respondents respectfully refer all questions and conclusions of law to the Court.

54. To the extent that Paragraph 54 of the complaint contains a conclusion of law it does not require an answer. The Crossgates Respondents deny the allegations

contained in Paragraph 54 of the complaint to the extent that the allegation finds that 6 NYCRR §373-2.3(b) standards applicable to permitted hazardous waste treatment, storage and disposal facilities are applicable to a conditionally exempt small quantity generator of hazardous waste. The Crossgates Respondents respectfully refer all questions and conclusions of law to the Court.

55. To the extent that Paragraph 55 of the complaint contains a conclusion of law it does not require an answer.

56. To the extent that Paragraph 56 of the complaint contains a conclusion of law it does not require an answer.

57. The Crossgates Respondents deny some of the allegations contained in Paragraph 57 of the complaint in that their belief that incandescent bulbs do not contain mercury and are not considered a universal waste under §374-3.2(d)(4). As noted in Paragraph 19, 22, and 23 a recycling program for spent lamps was in place prior to the inspection for large change-outs of bulbs in 2005 and 2006. In addition, EPA notes in its Notice of Violation dated on or about April 19, 2007 that at the time of EPA's inspection on or about March 15, 2007 only two spent fluorescent tubes were not contained in a box. EPA also notes that high intensity lamps were stored in a locked storage room in cardboard boxes. The Crossgates Respondent provided documentation to EPA on or about May 18, 2007 that documented compliance with the universal waste program following EPA's inspection.

58. To the extent the allegations in Paragraph 58 allege improper disposal of bulbs, the Crossgates Respondents incorporate their responses to those allegations as set forth above. To the extent that the allegations reference conclusions regarding the trash

compactor's actions and actual releases, the Crossgates Respondents deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 58.

59. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 59. To the extent that the allegations conclude that the bulbs stored in boxes in the locked storage room would be broken and cause an actual release, the Crossgates Respondents deny the conclusion as conjecture.

60. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 60 but note that EPA's Notice of Violation dated April 19, 2007 only identifies two spent lamps not contained in a box.

61. To the extent that Paragraph 61 of the complaint contains a conclusion of law it does not require an answer. The Crossgates Respondents deny knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in Paragraph 61.

62. The Crossgates Respondents neither admit nor deny the allegations contained in Paragraph 62 but note that EPA's Notice of Violation dated April 19, 2007 only identifies two spent lamps not contained in a box. .

63. The Crossgates Respondents deny the allegations contained in Paragraph 63 of the complaint to the extent that the allegation finds that 6 NYCRR §373-2.3(b) standards applicable to permitted hazardous waste treatment, storage and disposal facilities are applicable to a conditionally exempt small quantity generator of hazardous waste. The Crossgates Respondents respectfully refer all questions and conclusions of law to the Court.

64. To the extent any allegations set forth in Paragraphs 1 through 63 of this complaint are not specifically responded to in this answer, the Crossgates Respondents deny such allegations.

AFFIRMATIVE DEFENSES

65. The Crossgates Respondents reserve the right to assert affirmative defenses upon completion of informal settlement discussions if these are unsuccessful in resolving the complaint.

66. Although the Crossgates Respondents expect to resolve the complaint during informal settlement discussions, the Crossgates Respondents reserve the right to request a formal hearing in the event that the complaint cannot be resolved informally.

PROPOSED PENALTY

67. The complainant has proposed a penalty in the amount of \$45,500 based on EPA's RCRA Civil Penalty Policy and penalty calculations worksheets. The Crossgates Respondents respectfully request reconsideration and reduction of the proposed penalty for the following reasons listed below.

68. The potential for harm from the majority of the spent bulbs was low since these were from major change-outs; which EPA acknowledges were intended for and were actually recycled.

69. The bulbs during storage were kept in a locked closed storage room and all but two were noted during EPA's inspection on or about March 15, 2007 as stored in boxes.

70. There was no identification of broken bulbs or actual releases to the environment or actual harm to the environment.

the gravity based penalty from the matrix be considered minor.

72. For the extent of deviation penalty factor EPA acknowledges the large number of bulbs recycled in accordance with the universal waste regulations; including in 2005 and 2006.

73. During the EPA inspection on or about March 15, 2007 EPA primarily identified issues related to a couple of bulbs not stored in boxes, and/or boxes not being labeled and dated, and/or open, but EPA acknowledged that the majority of bulbs were stored in boxes in a closed locked area of the facility which would minimize any breakage or release to the environment.

74. Based on the above, the Crossgates Respondents respectfully request that the gravity based penalty from the matrix be considered minor.

75. In addition to the above factors, the Crossgates Respondents respectfully request that the Court consider the cooperation and good faith of the respondents including its prompt follow-up and corrective actions, which were documented and submitted to EPA, including training, development of standard operating procedures, notifications and information to mall tenants, and meetings with mall tenants.

76. Finally, the Crossgates Respondents respectfully request that the Court note its status as a conditionally exempt hazardous waste generator whose primary hazardous waste is spent bulbs and also its compliance history including the lack of previous hazardous waste violations.