

the activities at issue herein, florescent bulb compacting, or crushing by generators and subsequent shipment by such generator as universal waste, as if non-hazrdous. Code of Maryland Regulations, 26.13.10.15(B)(3). Waste defined as Universal Waste under the rule of a given state such as Maryland, shipped interstate does not require a hazardous waste manifest or RCRA transporter within the initiating state but if it enters a state with a different rule, it may require a hazardous waste manifest and RCRA trucker but, once it enters a third state, could again travel without a manifest or RCRA trucker to a final destination facility in such state if such waste is defined as universal by the rule of the third receiving state. Federal Register: May 11, 1995 (Volume 60, Number 91, Page 25491-25551).

This case is brought within the context of this confusing regulatory system. At its heart lies the definition of universal waste, which is ambiguous in the context of the waste industry, as to which Respondent adopted and followed a reasonable meaning, until advised to the contrary.¹

If the Court determines that Cycle Chem had fair notice that its interpretation was unreasonable, and that EPA may legally impose a penalty, the second aspect of the proceeding will concern the application of the RCRA penalty policy. To EPA, the violations are of the major-major variety, and may also be charged as multiple violations. Respondent disputes both findings.

modified by the RCRA universal waste rule, 40 CFR, Part 273 (the "UWR"). The waste involved herein, florescent lamp bulbs, is a universal waste. 40 CFR § 273.9 defines :

¹ The fact pattern also shows that Respondent also adopted a reasonable interpretation of the New Jersey rule, based upon its New Jersey RCRA regulator's failure to object to long-standing practices. So far as EPA is concerned however, the New Jersey rule does not exist, and this is no defense to EPA's claim herein.

Universal Waste means any of the following hazardous wastes that are subject to the universal waste requirements of this part 273:

- (1) Batteries as described in §273.2;
- (2) Pesticides as described in §273.3;
- (3) Mercury-containing equipment as described in §273.4; and
- (4) Lamps as described in §273.5.

40 CFR §273.5 provides in part:

Lamp, also referred to as “universal waste lamp” is defined as the bulb or tube portion of an electric lighting device. A lamp is specifically designed to produce radiant energy, most often in the ultraviolet, visible, and infra-red regions of the electromagnetic spectrum. Examples of common universal waste electric lamps include, but are not limited to, fluorescent, high intensity discharge, neon, mercury vapor, high pressure sodium, and metal halide lamps.

EPA’s website contains an answer to a “Frequent Question”, stating that the definition of lamp under §273.9 is “not limited ... to intact lamps only”. See Respondent’s Ex. P.

Cycle Chem is subject to the UWR as a UWR handler. Per 40 CFR § 273.9 :

Universal Waste Handler:

(a) Means:

- (1) A generator (as defined in this section) of universal waste; or
- (2) The owner or operator of a facility, including all contiguous property, that receives universal waste from other universal waste handlers, accumulates universal waste, and sends universal waste to another universal waste handler, to a destination facility, or to a foreign destination.

(b) Does not mean:

- (1) A person who treats (except under the provisions of 40 CFR 273.13 (a) or (c), or 273.33 (a) or (c)), disposes of, or recycles universal waste; or
- (2) A person engaged in the off-site transportation of universal waste by air, rail, highway, or water, including a universal waste transfer facility.

Thus, at (b)(1), EPA excludes from the definition of a “universal waste handler” one who treats waste except for a few exceptions not directly relevant. The reason for this proceeding is

that, in accordance with EPA's websites, Cycle Chem interpreted a "lamp" to not be limited to "intact lamps only", and to include a glass tube, either intact, cracked, broken in two, broken in 10 or broken in 100 or 1000 pieces, whether the breakage was intentional or accidental.

This is an entirely reasonable interpretation. Cycle Chem receives universal waste. Some comes from generators as hazardous waste with a manifest and some comes from generators who are "universal waste handlers" without such manifest. In both cases, the waste would have the same RCRA waste code, D 009. Cycle Chem itself does not treat universal waste and thus is a universal waste handler, and believed that it, like any other universal waste handler, could ship universal waste either as hazardous waste or as universal hazardous waste.

Cycle Chem's interpretation draws a distinction between an action; the processing of the thing, which defines the status of the person who performs the processing, which status determines if the UWR applies to such person, versus EPA's view herein, that the status of the person who ships to Cycle Chem actually modifies the definition of "universal waste". Cycle Chem's interpretation is supported by the structure of the rule.

In Cycle Chem's view, a person who "processes" hazardous waste, is a TSD, a treatment facility. By UWR definition, such a person is not universal waste handler ("UWH"). Rules and regulations apply to that person, because of its status as a type of person; viz.; a TSD person, and not a UWH person. Lamp universal hazardous waste has a RCRA classification code, "D 009". The waste is D 009 in the possession of a TSD person or a UWH person. The waste classification is the same regardless of the status of the person.

This, in Cycle Chem's experience, is how the hazardous waste business operates.

First, a waste must be hazardous². The regulatory scheme imposes varying degrees of

² As noted below, Cycle Chem believes that Complainant will suffer a failure of proof in carrying its threshold burden that the material involved in the subject shipments was "hazardous".

responsibility for and powers over the hazardous waste based upon the status of the person in possession of the waste.

Small Quantity Generators are “Conditionally Exempt”, and operate much as households. (EPA employed a definition of hazardous waste to exclude household waste). Large Quantity Generators have requirements found in 40 CFR Part 262 (registration, storage area, 90 day accumulation) and can gain rights, by changing status, i.e becoming a TSD. The identity of the waste in the hands of a person with a status of CESQG, LQG or TSD, does not change because the person’s status changes.

The waste is the waste. It has a code which addresses the waste’s chemical properties. Flammable solvent, F001, can be stored or treated but remains F001. Some treatment can change the nature of the waste. Waste can be deactivated by combination with chemical agents. RCRA has very specific rules as to when the nature of the waste changes, and the process of “delisting” wastes. Ethanol for example, D 001, may be reclaimed and lose its definitional classification as a “hazardous waste”.

Complainant’s Exhibit 2 reflects Cycle Chem’s position. The final sentence of the fourth paragraph reads:

Therefore a generator of hazardous waste lamps would not be able to crush the lamps and still manage the crushed lamps as a Universal Waste.

From Cycle Chem’s perspective; the reason for the statement is obvious: a generator who crushes is not a universal waste handler, and thus the UWR does not apply to *that generator*.

Cycle Chem did not process lamps in the relevant time frame and considered itself a universal hazardous waste handler, when it was in possession of D 009 lamp waste received from other UWH’s, and accumulated universal waste received from generators. As a universal

hazardous waste handler, it could chose to ship the D 009 lamp waste to any receiving facility authorized to accept it, and could utilize as a transporter, any trucker authorized to transport universal hazardous waste. The receiving facility could be a TSD authorized to receive D 009 waste; or a universal waste handler, or a destination facility. In the time period, involved, Cycle Chem shipped D 009 waste (including processed bulbs) to a hazardous TSD (Veiola, WI) using a hazardous transporter, see Respondent's Exhibit O; allegedly without a hazardous waste manifest to a large quantity universal waste handler (Supreme NJ) using a universal waste transporter as transporter and a non-hazardous bill of lading, and allegedly to a hazardous waste TSD using a hazardous transporter but not using a hazardous manifest.

Count IV of the Complaint alleges that "on at least four occasions", Cycle Chem sent crushed bulbs to a RCRA licensed TSD, by means of a RCRA transporter without a RCRA manifest. The TSD held itself out as a bulb recycling center, presumably expert in rules regarding waste lamps. Yet, the TSD and RCRA transporter accepted crushed bulbs shipped with a Bill of Lading describing crushed bulbs as universal hazardous waste.

Similarly, Cycle Chem received bulbs on both bills of lading and hazardous manifests. But in the case of hazardous manifests the bulbs were frequently noted "non RCRA, non DOT" Towson University's Environmental Health and Safety Office so characterized "florescent light bulbs". see Respondent's Exhibit N. Conversely, unprocessed tubes were shipped in as hazardous waste. *id.* "Broken florescent light bulbs" from bulb clean up were shipped as hazardous. *id.* Cycle Chem clearly could reship intact or accidentally broken bulbs as universal waste regardless of the method by which Cycle Chem received the waste, which was purely a matter of choice to any party with UWH status.

Respondent is inspected twice monthly by NJ DEP RCRA personnel. All of its records

are open, and inspectors did review documents concerning shipment out of D 009 crushed bulb waste on Bills of Landing. No objection or notice was taken until the April 3, 2008 bi-weekly inspection (see Complainant's Ex. 7) when NJ DEP advised that crushed lamps could not be shipped from Cycle Chem as universal hazardous waste under the New Jersey rule. This notice was given following EPA's inspection of the Supreme facility on October 15-16, 2008. See Complainant's Ex.8.

Cycle Chem's interpretation is wholly consistent with the UWR. Subpart C of the UWR at §42 CFR § 273 (d) provides:

Subpart C—Standards for Large Quantity Handlers of Universal Waste § 273.30 Applicability.
This subpart applies to large quantity handlers of universal waste (as defined in § 273.9).
[64 FR 36489, July 6, 1999]... § 273.33 Waste management.
(d) Lamps. A large quantity handler of universal waste must manage lamps in a way that prevents releases of any universal waste or component of a universal waste to the environment.
(Emphasis supplied)

Like EPA's web page answer discussed above that includes non-intact bulbs within the definition of a universal waste lamp, the regulation recognizes that the waste consists of its components. The waste does not lose its universal status because it is separated into components by breakage.

The regulatory response to bulb crushing was focused upon danger of release by non-expert processing handler, and did not reference a change in the definition of lamp waste as non-universal. The danger identified was the escape of particulate matter during processing. Processing is treatment, but a treated universal waste is still a universal waste. The issue is whether an entity's status permitted it to treat the waste. Bulb crushing, however, reduces volume and is treatment under RCRA, which is prohibited to UWH handlers and to generators

who are not TSD's. Treatment by a TSD does not change the classification of the waste. Absent specific authorization, the waste code of a waste is the same after treatment as prior to treatment. Instead of dancing around the question, EPA could simply have changed the definition of universal waste to exclude bulbs which have been processed for the purpose of compacting volume. It has not done so, and clearly this enforcement proceeding is not the method for doing so under the Administrative Procedure Act.

All universal hazardous waste may be shipped on a hazardous waste manifest to a TSD, but that act does not make the waste any less universal. The TSD is free to mix the universal hazardous waste with other like waste, consolidate the waste, and, if it is a UWH, may ship it as either universal hazardous waste or hazardous waste. In addition to lamps, batteries, thermometers and pesticides may be prepared for shipment, consolidated, repacked, and otherwise treated, without losing their status as universal waste.

Respondent's position is that its interpretation of the regulation was reasonable.

II. EPA Has No Proof That The Materials Are Hazardous

Both the preamble to the UWR and the testing performed by EPA on material at Supreme demonstrate that fluorescent bulbs are rarely hazardous waste. The TCLP result is determined from a given weight of waste. The method for testing a bulb is to crush it. Numerous parts of the bulb have no mercury content, such as metals and glass.

EPA's own results indicate a failure of proof. It tested 31 samples from 17 drums, with three exceedences. It tested 14 samples from 7 bulbs and found 4 exceedences but the average was well below regulatory levels. Indeed, EPA itself permits disposal of bulbs in landfills, intact or broken, where bulldozers and heavy equipment compact the waste. EPA's testing procedure is

flawed as it is clear that to obtain the exceedences EPA tested only the finest powder, and ignored the ballast and glass, which is a significant contributor in weight.

EPA's assertion that Cycle Chem improperly shipped hazardous waste on seven occasions is unsupported by any evidence.

III. Legal Positions

A. Fair Notice

As set forth in *General Elec. Co. v. United States EPA*, 53 F.3d 1324, 1328-1329 (D.C. Cir. 1995):

Due process requires that parties receive fair notice before being deprived of property. *See, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950). The due process clause thus "prevents ... deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 252 U.S. App. D.C. 332, 790 F.2d 154, 156 (D.C. Cir. 1986). In the absence of notice--for example, where the regulation is not sufficiently clear to warn a party about what is expected of it--an agency may not deprive a party of property by imposing civil or criminal [*1329] liability. Of course, it is in the context of criminal liability that this "no punishment without notice" rule is most commonly applied. *See, e.g., United States v. National Dairy Corp.*, 372 U.S. 29, 32-33, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963) ("Criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed."). But as long ago as [**13] 1968, we recognized HN7this "fair notice" requirement in the civil administrative context. In *Radio Athens, Inc. v. FCC*, we held that when sanctions are drastic--in that case, the FCC dismissed the petitioner's application for a radio station license--"elementary fairness compels clarity" in the statements and regulations setting forth the actions with which the agency expects the public to comply. 130 U.S. App. D.C. 333, 401 F.2d 398, 404 (D.C. Cir. 1968); *see also Maxcell Telecom Plus, Inc. v. FCC*, 259 U.S. App. D.C. 350, 815 F.2d 1551, 1558 (D.C. Cir. 1987) (describing FCC's legal duty to provide adequate notice of requirements). This requirement has now been thoroughly "incorporated into administrative law."

Satellite Broadcasting Co. v. FCC, 262 U.S. App. D.C. 274, 824 F.2d 1, 3 (D.C. Cir. 1987); *see also Rollins*, 937 F.2d at 654 n.1, 655 (Edwards, J., dissenting in part and concurring in part) (principle is not constitutional, but "basic hornbook law in the administrative context," and "simple principle of administrative law").

Here, respondent interpreted the prohibition to be on the act of processing, which deprives a generator of the status of a universal waste handler, not that the waste itself was transformed into a different classification entirely. The requirement that the processing generator ship as if the waste were not universal waste is a consequence of its status, because only a UWH has the option under the UWR to ship universal waste as if it were not hazardous. Until respondent received notification from New Jersey on November 3, 2008, it did not know of their position, and that EPA prosecutorial discretion would be affected by NJDEP's right to interpret its own regulations. Only in this proceeding has EPA made its own position clear. Direct, pre-enforcement communication may suffice in lieu of a public statement, but none was given. Thus, even if Region II's interpretation prevails and must be complied with, (as Respondent is presently complying), past alleged violations such as those alleged herein, which occurred prior to the November 3, 2008 notice, may not be punished.

B. Penalty

The Penalty Policy should not be followed. It need not be, where the ALJ states her reasons for not following it. Here, the penalty should be zero. Cycle Chem reasonably relied on an interpretation of the regulation that had a definite plausibility. The regulation set forth in Complainant's Ex. 1, was state, not federal and addressed the impact of processing upon a

generator which is that such a generator loses UWH status. EPA's stake in regulating Cycle Chem here is so attenuated as to justify no penalty at all for such a technical violation. A Compliance Order is sufficient. The statute requires that in determining the amount of a civil penalty, the EPA "shall take into account the nature, circumstances, extent, and gravity of the violation . . . and with respect to the violator . . . the degree of culpability, and such other matters as justice may require." 42 U.S.C. § 6928. In light of the ambiguity of the regulation, the nature of the actions taken by Cycle Chem, and the absence of deleterious consequences, imposing a monetary penalty on Cycle Chem would be without justification. This conclusion is further justified in view of the negligible seriousness of the violation as measured by the potential for human and environmental harm resulting from the violations and the negligible extent of deviation from the regulatory requirements.

Complainant's Penalty Policy provides for: a gravity based component + a multiday component + adjustments + economic benefit. The ALJ should not accept Complainant's analysis, since the Policy requires counsel to resolve any doubts against Cycle Chem, whereas the statute and Rules of Procedure require proof by a preponderance of the evidence. Subsumed in the concept of gravity based penalty are the potential for harm and extent of deviation. Potential for harm is minor here.

Crushed lamps are no different than intact lamps other than in the size of the pieces. Shipment of crushed bulbs in a sealed metal drum is far safer than the open cardboard packaging utilized with intact bulbs. The Extent of Deviation should be minor, not major. Cycle Chem managed crushed lamps as universal waste in good conscience, after due-diligence and against a backdrop of lack of specific regulations. This case is not the result of improper waste reclassification by Cycle Chem, but rather a belated and strained interpretation advanced by

EPA. Finally, the inclusion of a multi-count penalty is inappropriate. As detailed above, all the items listed in Counts 1 –4 result from Cycle Chem’s honest and well-researched belief that recycled ‘crushed lamps’ can be managed as universal waste. Therefore, a multi-count penalty for the very same issue is inappropriate under Complainant’s own Penalty Policy. That Policy provides that multi-count penalties are disfavored unless “independent acts” are “substantially distinguishable from any other claim in the complaint.”

IV. Discovery Request and Anticipated Motion for a Subpoena

Cycle Chem intends to move for a discovery order against EPA if it does not voluntarily produce the following documents which Cycle Chem may offer in evidence, for which this part of the prehearing Exchange will serve as an informal request:

Any and all documents in EPA custody and control from January 1, 2005-December 31, 2009 relating to Supreme, including, but not limited to:

1. names and addresses of all parties who shipped waste to Supreme
2. documents relating to said shipments, including manifests, logs of incoming and outgoing shipments, inventory control records, regulatory filing records
3. documents relating to litigation and/or penalty proceedings, including pleadings, transcripts, exhibits and settlement documents
4. documents relating to fluorescent light bulbs
5. documents relating to the crushing of fluorescent light bulbs

Cycle Chem also intends to move Judge Gunning to issue a subpoena to NJDEP seeking the same documents, which again Cycle Chem may offer in evidence.

V. Witnesses

Cycle Chem will present one or two witnesses, James Butler, its Elizabeth Compliance officer, or its president, Mr. Michael Persico. Their addresses and telephone numbers are each in care of Respondent at its Elizabeth facility located at 201 South First Street, Elizabeth, NJ 07206, (908) 355-5800. The following refers to Mr. Butler, but if Mr. Butler does not testify, Mr. Persico will testify to the same effect.

Mr. Butler is expected to testify that his understanding was that the regulatory prohibition concerning classification of processed bulbs as universal waste was a definitional result of the act of processing fluorescent light bulbs, not that, despite their continuing identity as fluorescent light bulbs, they were transformed into a different classification entirely, from universal to hazardous waste. Until the witness received notification from New Jersey, he did not know of their position, and EPA's position in this proceeding is the first inkling that he has of EPA's interpretation of the UWR. Thus, respondent had no fair notice under *General Elec. Co. v. United States EPA*, 53 F.3d 1324, 1328-1329 (D.C. Cir. 1995). Also, EPA prosecutorial discretion should be guided by NJDEP's right to interpret its own regulations. Complainant's Ex. 1 is a generator guidance and does not address Mr. Butler's belief that that a subsequent recipient of the material who held the status of UWH could ship the material as universal hazardous waste. It merely states the obvious; that a generator who processes bulbs is not a universal waste handler and thus must ship the crushed bulbs as hazardous waste and must also obtain an air permit to operate a bulb crusher. The guidance solely concerned the marketing of bulb crushing machines and reminded the regulated community that one who processed bulbs must obtain an air permit and ship the processed material out as a hazardous waste, and not as a

universal hazardous waste, because the act of processing forecloses the application of the UWR to such a processor.

No one at respondent had reason to know about New Jersey's unique interpretation of the regulation before Mr. Butler was so advised on November 8, 2008, and to his knowledge no one did, and it was the routine practice and policy for other employees to inform Mr. Butler of any new regulatory positions of the government to him. The material cited by EPA in no way conflicts with Mr. Butler's interpretation. EPA cited respondent with violations which occurred seemingly prior to NJDEP's adoption of the interpretation (which was reached apparently after EPA visited Supreme) and manifestly before NJ DEP's explanation to Mr. Butler on behalf of respondent. Thus, even if Region II's interpretation prevails and respondent must comply, (as it is presently complying), past violations may not be punished on such defective notice.

Mr. Butler will testify that the RCRA licensed transporter, and the RCRA licensed "bulb reclamation facility" referred to in Count IV accepted shipments of processed crushed bulbs on a bill of lading identifying the waste as universal waste.

Mr. Butler will testify that Cycle Chem keeps records in the same fashion respecting materials shipped as universal hazardous waste or as non-universal hazardous waste and that no injury to the RCRA regulatory system, nor increased potential injury to human health or the environment, was occasioned by the violations alleged herein, and will testify as to facts tending to show that the gravity of the violation was minor and that the extent of deviation was minor and that the amount selected within the range of the minor-minor cell should be the lowest, and that the penalty should be determined as if but one violation had occurred.

Mr. Butler will testify that Cycle Chem's shipments of drums of bulbs were done in an open and obvious fashion, that the trailers were being loaded with such drums were openly and

obviously not RCRA licensed transport vehicles and that such activities were visible to Cycle Chem's bi-monthly RCRA inspectors from NJ DEP, and that all records of shipments were available to review by inspectors and that such inspectors did periodically review the Bills of Lading, and that prior to November 3, 2008, no comment was made by the RCRA inspectors even suggesting that shipment of processed lamp waste as universal hazardous waste was improper. Mr. Butler will testify that he interacts with the inspectors throughout the multi-day bi-weekly inspections.

Mr. Butler will testify as to his discussions in the ordinary course of business with Maryland Department of Environment confirming that under the Maryland UWR, Small Quantity generators may process lamps through a bulb crusher, and that the resultant crushed bulbs are considered universal waste and maybe shipped by such processing generator as a universal waste, as if non-hazardous, under the Maryland UWR.

VI. Exhibits

Cycle Chem will introduce exhibits consisting of Bills of Lading and Hazardous Waste Manifests showing that Cycle Chem received intact, broken and intentionally processed bulbs on Bills of Lading, on hazardous manifests checked as hazardous and on such manifests checked as non-hazardous, and that Cycle Chem shipped put processed bulbs on Bills of Lading, both with licensed RCRA transporters and non-RCRA transporters, and with hazardous waste manifests with RCRA licensed transporters or with bills of lading with universal waste transporters. Such evidence corroborates Cycle Chem's view that as a universal waste handler, it had the option to elect whether to ship processed bulbs as hazardous waste or as universal waste. Mr. Butler will also testify as to Cycle Chem's practice of receipt of intact bulbs on hazardous waste manifests

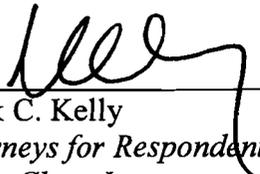
and reshipping such bulbs as universal waste; and Cycle Chem's practice of receipt of broken bulbs on hazardous waste manifests and reshipping such bulbs as universal waste.

Cycle Chem will introduce an answer from EPA's frequently asked questions web site which notes that the definition of "lamp" is not limited to intact lamps.

Respondent will introduce the balance of the exhibits set forth on its list of exhibits herein as evidence in support of its legal position.

Dated: New York, New York
December 8, 2011

KELLY & HAZEN

By: 
Mark C. Kelly
Attorneys for Respondent
Cycle Chem Inc.
122 East 42nd Street
New York, New York 10168
(212) 953-2626

Respondent's Exhibit List

- A Florescent Bulb Disposal and Recycling in EPA Region 2
- B Maine Compact Florescent Lamp Study 2008
- C Survey and Initial Evaluation Small onsite Florescent Lamp Crushers
- D Maine Fluorescent Lamp Study Final report 2001
- E Mercury Emissions From the Disposal of Florescent Lamps Revised Model Final Report
- F Mercury Content of Lamps
- G Mercury Speciation in Fluorescent Lamps by Thermal Release Analysis
- H Airside, Bulb Recycling & Universal Waste Disposal
- I EPA, Mercury Lamp Drum-Top Crusher Study
- J Mercury Mass Balance Calculation
- K Maryland Register Online, 26.13.10.15, Small Quantity Handlers of Universal Waste Lamps — Specific Management Standards.
- L Air Cycle, Fluorescent Bulb Recycling and Universal Waste Disposal
- M Counter Penalty Worksheet
- N Incoming Manifests of D 009 Waste to Cycle Chem
- O Outgoing Manifests from Cycle Chem to Veiola, WI
- P EPA Website Answer to Frequent Question Re Lamp Definition