



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

REPLY TO THE ATTENTION OF:

AUG 10 2011

C-14J

VIA U.S. MAIL

Hon. Barbara Gunning
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Re: Mercury Vapor Processing Technologies, Inc. a/k/a River Shannon Recycling
and Laurence Kelly
Docket No. RCRA-05-2010-015

Dear Judge Gunning:

Enclosed please find a copy of COMPLAINANT'S MOTION TO SUPPLEMENT
HEARING RECORD, that was filed today in the above-referenced matter.

Sincerely,

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

Jeffrey A. Cahn
Associate Regional Counsel

Enclosure

cc: Mr. Laurence Kelly (w/ enclosure)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)

Mercury Vapor Processing)
Technologies Inc., a/k/a/ River Shannon)
Recycling)
13605 S. Halsted)
Riverdale, Illinois 60827)
U.S. EPA ID No.: ILD005234141 and)

) DOCKET NO. RCRA-05-2010-0015

Laurence Kelly)

Respondents.)

2011 AUG 10 PM 12: 28
U.S. EPA REGION 5
CHICAGO, ILLINOIS

COMPLAINANT'S MOTION TO SUPPLEMENT
HEARING RECORD

Complainant, the United States Environmental Protection Agency, Region 5 (Complainant or EPA), pursuant to 40 C.F.R. § 22.16 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules or CROP), and consistent with the Presiding Officer's July 27, 2011, direction to the parties at the hearing in this matter¹, hereby moves for leave to supplement the trial record in this matter. Specifically, Complainant respectfully requests that that the Court take judicial notice (consistent with 40 C.F.R. § 22.22(f) of the CROP), and accept into evidence and the trial record in this matter, the U.S. EPA publication titled "Flourescent Lamp Recycling, February 2009, EPA530-R-09-001" and Complainant's Rebuttal Exhibit 1 (which is a complete copy of one exhibit that was offered by the Respondents at hearing, and a second exhibit that was an attachment to one of the Respondents' motions and that the Court asked U.S. EPA to address during the trial), as well as Complainant's exhibits

¹ The hearing in this matter was held in Chicago on July 25, 26, and 27, 2001.

CEX-18, CEX-19, CEX-20, and CEX-21 (which relate to the criminal conviction of Respondent, Mr. Kelly). For the reasons set forth below, Complainant respectfully requests that the Presiding Officer grant this Motion, and admit into evidence and include in the trial record these documents and exhibits.

I. Background

The trial in this matter was held in Chicago on July 25, 26, and 27, 2011. At trial, Respondent offered an exhibit, Respondent's Exhibit 13, that consisted of what appeared to be a homemade cover sheet and a single copied page taken from what appears to be a much longer U.S. EPA guidance document. U.S. EPA objected to the introduction of that exhibit at hearing on the ground that no foundation had been laid for use of the document and on the ground that it could not be authenticated. U.S. EPA agreed, however, that if a complete copy of the original document could be located, then the Court could be asked to take judicial notice of the content of the official U.S. EPA published version of the complete document. At trial, the Court also asked U.S. EPA to address an attachment to one of the pre-trial motions filed by the Respondents. Complainant attempted to respond to the Court's request that Complainant address a document produced by Respondent pre-trial (but not marked or introduced by any party at hearing), but in attempting to authenticate what was marked at hearing as U.S. EPA's Rebuttal Exhibit-1, it became clear that U.S. EPA's witness could not state with any certainty the nature or source of an exhibit consisting of a document originally produced by the Respondents. Again, U.S. EPA stated that if a complete copy of the original document could be located, then the Court could be asked to take judicial notice of the content of the official U.S. EPA published version of the complete document.

With respect to both of the exhibits, the Court acknowledged that it could take judicial

notice of the content of these exhibits and thereby include the exhibits in the trial record.

Finally, U.S. EPA cross-examined one of the Respondents, Mr. Laurence Kelly, regarding his criminal convictions in federal Court for mail fraud, tax fraud, and racketeering. Mr. Kelly agreed that he was convicted of each one of these crimes. Although produced in the prehearing exchanges before trial and included in the trial binders and marked as U.S. EPA exhibits CEX-18, CEX-19, CEX-20, and CEX-21, U.S. EPA did not move these exhibits into evidence. U.S. EPA believes that for purposes of ensuring a complete record in this case, it is appropriate to ask the Court to take judicial notice of these exhibits, because they reflect the contents of the official U.S. District Court records of Mr. Kelly's criminal convictions.

II. Legal Standards

The Consolidated Rules provide that “[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value” 40 C.F.R. § 22.22(a).

Section 22.22(f) of the CROP in pertinent part provides that “[o]fficial notice may be taken of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency.” 40 C.F.R. § 22.22(f). Federal Rule of Evidence Rule 201(b)(2) provides that “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) . . . or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” 28 U.S.C. § 201(b). It is well established that Courts will take judicial notice of court proceedings against one of the parties in a case. Powers v. Schwartz, 448 F.Supp. 54 (S.D. Fla. 1978)(judicial notice taken of current status of state criminal proceedings). Judicial notice is also taken of government matters and public records. Massachusetts v. Westcott, 431 U.S. 322 (1977); International Brotherhood

of Teamsters v. Zantrop Air Transport Corp., F.2d 36 (6th Cir. 1968); Haye v. U.S., 461 F.Supp. 1168 (C.D. Cal. 1978); U.S. v. Salzman, 417 F.Supp. 1139 (E.D.N.Y. 1976).

With respect to allowing the parties to supplement the trial record after the hearing, but before the issuance of the Initial Decision, the CROP is silent. Decisions in cases before the Court hold, however, allowing the record to be supplemented after hearing, but before issuance of the Initial Decision, “is addressed to the sound discretion of the ALJ,” and that the “good cause” standard of Section 22.28 of the CROP (which regards reopening the trial record to accept evidence after the issuance of the Initial Decision) has been used as guidance for when to exercise that discretion. In the Matter of: City of Wilkes-Barre, A.R. Popple, Wyoming S. &P, Inc., Docket No. CAA-03-2005-0053, at 5-6 (Nov. 2, 2005)(motion to supplement trial record with weather data denied, where relevance of weather data relating to a City other than the one where the alleged violation occurred was not established); In the Matter of Lake County, Montana, Docket No. CAA-8-99-11, at 28-34 (July 24, 2011)(at page 34 citing the decision in Chempace, motion to supplement trial record with evidence gather post-trial denied, because for policy reasons “good cause” should not be construed in way to allow parties to continue a search for new evidence after close of the record). The decision in In the Matter of Chempace Corporation, Docket No. 5-FIFRA-96-017 (Nov. 3, 1998) is particularly instructive in this case in providing guidance as to the “good cause” that warrants a Court’s exercise of its “sound discretion” to allow the record to be supplemented post-trial. In Chempace, a motion to supplement the trial record with copy of “buy-out” agreement entered into between the Respondent corporation and a former principal shareholder was granted. The salient facts constituting “good cause” were that the document sought to be introduced predated the hearing; the document concerned a matter about which there was testimony at the trial that would be

clarified through admission of the document; and allowing introduction of the document into the record would not prejudice the parties.

III. Discussion

Attached is a complete copy of the document containing the page that was originally marked as Respondent's Exhibit 13. It is a document originally prepared and published by U.S. EPA on its website. Under the standards set forth in the CROP and under the relevant case law addressing the admissibility of evidence and the type of government records and materials that the Court may take judicial notice of, this a document that the Court could have taken judicial notice of at hearing if the Exhibit had been produced in its entirety. Further, having been discussed at trial, accepting the entire document into the trial record after the close of the hearing, but before issuance of the Initial Decision, falls squarely within the sound discretion of the Court and meets the standard for inclusion in the record articulated in Chempace.

Attached is a copy of what was marked by Complainant at hearing as Rebuttal Exhibit-1. It is a document originally prepared and published by U.S. EPA on its website. U.S. EPA was able to locate this Exhibit by following these web-links:

<http://www.epa.gov/osw/hazard/wastetypes/universal/lamps/>

Then select: Review the text of the laws, regulation and guidance that govern how these bulbs are regulated under RCRA.

Then scroll down and select:

07/01/2004 Contractors as Cogenerators of Universal Waste Lamps (PDF) (1 pg, 33K).

Under the standards set forth in the CROP and under the relevant case law addressing the admissibility of evidence and the type of government records and materials that the Court may take judicial notice of, this a document that the Court could have taken judicial notice of at

hearing. Further, having been discussed at trial, accepting the document into the trial record after the close of the hearing, but before issuance of the Initial Decision, falls squarely within the sound discretion of the Court and meets the standard for inclusion in the record articulated in Chempace.

Attached are copies of U.S. EPA exhibits CEX-18, CEX-19, CEX-20, and CEX-21. These are documents contained in the Court files of the U.S. District Court for the Northern District of Illinois and regard the criminal convictions of Respondent Mr. Kelly in federal Court for mail fraud, tax fraud, and racketeering. At trial, Mr. Kelly agreed that he was convicted of each one of these crimes. Under the standards set forth in the CROP and under the relevant case law addressing the admissibility of evidence and the type of government records and materials that the Court may take judicial notice of, these are documents that the Court could have taken judicial notice of at hearing. Further, having been discussed at trial, accepting these documents into the trial record after the close of the hearing, but before issuance of the Initial Decision, falls squarely within the sound discretion of the Court and meets the standard for inclusion in the record articulated in Chempace.

IV. Conclusion

Complainant respectfully requests that that the Court take judicial notice of (consistent with 40 C.F.R. § 22.22(f) of the CROP), and accept into evidence and the trial record in this matter, the U.S. EPA publication titled “Flourescent Lamp Recycling, February 2009, EPA530-R-09-001” and Complainant’s Rebuttal Exhibit 1 (which are complete copies of one exhibit that was offered by the Respondents at hearing, and a second exhibit that was an attachment to one of the Respondents’ motions and that the Court asked U.S. EPA to address during the trial), as well as Complainant’s exhibits CEX-18, CEX-19, CEX-20, and CEX-21 (which relate to the criminal

convection of Respondent, Mr. Kelly). Admission of these documents and exhibits is appropriate, because U.S. EPA has demonstrated that it has satisfied the standards set forth in the CROP and the relevant case law addressing the admissibility of evidence (including post-trial admission) and because they are the type of government records and materials that the Court may take judicial notice of. Complainant respectfully requests that the Presiding Officer grant this Motion, and to admit into evidence and include these documents and exhibits in the trial record.

Respectfully submitted,

DATED: _____

8/10/2011



Jeffrey A. Cahn
Associate Regional Counsel
Kasey Barton
Assistant Regional Counsel
U.S. Environmental Protection Agency

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

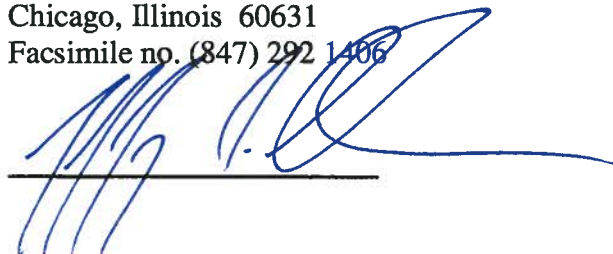
IN THE MATTER OF:)
)
Mercury Vapor Processing) **DOCKET NO. RCRA-05-2010-0015**
Technologies Inc., a/k/a/ River Shannon)
Recycling)
13605 S. Halsted)
Riverdale, Illinois 60827)
U.S. EPA ID No.: ILD005234141, and)
)
Laurence Kelly)
)
Respondents.)
_____)

CERTIFICATE OF FILING AND SERVICE

I hereby certify that today I filed personally with the Region 5 Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, 77 West Jackson Boulevard (E-19J), Chicago, Illinois, 60604-3590, the original and one copy of the document entitled **COMPLAINANT'S MOTION TO SUPPLEMENT HEARING RECORD**, and that I caused to be served, by first class mail, a copy of the original document on the Presiding Officer and the Respondent:

Honorable Barbara Gunning
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
Facsimile no. (202) 565 0044

Mr. Larry Kelly
Mercury Vapor Processing Technologies, Inc.
7144 North Harlem Avenue
Suite 303
Chicago, Illinois 60631
Facsimile no. (847) 292 1406



Date: August 10, 2011