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

REPLY TO THE ATTENTION OF:

C-14J

July 7, 2011

VIA U.S. EPA POUCH MAIL

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

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

Dear Judge Gunning:

Enclosed please find a copy of the "COMPLAINANT'S REPLY TO RESPONDENTS' OBJECTIONS TO COMPLAINANT'S FIRST SUPPLEMENTAL PREHEARING EXCHANGE AND, ALTERNATIVELY, CROSS MOTION FOR RULING REGARDING ADMISSABILITY OF TESTIMONY AND EXHIBITS" that was filed today in the above-referenced matter.

Sincerely,

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 | ) | 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, Jeffrey A. Cahn, hereby certify that I caused a copy of the "COMPLAINANT'S REPLY TO RESPONDENTS' OBJECTIONS TO COMPLAINANT'S FIRST SUPPLEMENTAL PREHEARING EXCHANGE AND, ALTERNATIVELY, CROSS MOTION FOR RULING REGARDING ADMISSABILITY OF TESTIMONY AND EXHIBITS"to be served by United States Mail on July 7, 2011, upon the following:

Laurence Kelly
Mercury Vapor Processing Technolgies, Inc.
7144 North Harlem Avenue
Suite 303
Chicago, Illinois 60631

I further certify that I caused a copy of the "COMPLAINANT'S REPLY TO RESPONDENTS' OBJECTIONS TO COMPLAINANT'S FIRST SUPPLEMENTAL PREHEARING EXCHANGE AND, ALTERNATIVELY, CROSS MOTION FOR RULING REGARDING ADMISSABILITY OF TESTIMONY AND EXHIBITS" to be served by U.S. EPA Pouch Mail, on July 7, 2011, 2011, upon the following:

Honorable Barbara Gunning
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460-2001

I further certify that I caused the original and one copy of the "COMPLAINANT'S REPLY TO RESPONDENTS' OBJECTIONS TO COMPLAINANT'S FIRST SUPPLEMENTAL PREHEARING EXCHANGE AND, ALTERNATIVELY, CROSS MOTION FOR RULING REGARDING ADMISSABILITY OF TESTIMONY AND EXHIBITS" to be filed with the Regional Hearing Clerk, U.S. EPA, Region V, 19th Floor, 77 West Jackson Blvd., Chicago, Illinois 60604 on July 7, 2011.

Jeffrey A. Cahn
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Mail Code C-14J
77 West Jackson Blvd.
Chicago, Illinois 60604

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. | ) | |



**COMPLAINANT'S REPLY TO RESPONDENTS' OBJECTIONS TO COMPLAINANT'S FIRST SUPPLEMENTAL PREHEARING EXCHANGE AND, ALTERNATIVELY, CROSS MOTION FOR RULING REGARDING ADMISSABILITY OF TESTIMONY AND EXHIBITS**

Complainant, 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"), hereby sets forth reasons that the Presiding Officer should deny Respondents' Objections to Complainant's First Supplemental Prehearing Exchange ("Respondents' Objections") and grant Complainant's Motion For Leave To File Its First Supplemental Prehearing Exchange Instanter ("Motion For Leave To File"). Complainant is submitting this Reply to Respondents' June 25, 2011 response to Complainant's June 8, 2011 Motion for Leave to File in accordance with the requirements of 40 C.F.R. 22.16(b).

U.S. EPA's Motion For Leave to File must be granted, because the motion was timely filed; because its First Supplemental Prehearing Exchange was filed as a matter of right; and because Respondents did not, in fact object to the granting of the Motion for Leave to File.

U.S. EPA's Motion For Leave to File also must be granted, because U.S. EPA followed

the criteria set forth in Rules of Practice for prehearing exchanges, and because Respondents have identified no defects in the First Supplemental Prehearing Exchange. Indeed, Respondents have not identified any ground why the proposed materials are that do not meet the standard for inclusion in a prehearing exchange. Accordingly, Complainant's First Supplemental Prehearing Exchange should be accepted as having been filed, as of right, on June 8, 2011.

Finally, Respondents' Opposition should properly be deemed a motion in limine, in that it makes evidentiary arguments regarding the ultimate admissibility of the proposed testimony of certain U.S. EPA witnesses and exhibits. For the reasons set forth, all of the arguments of the Respondents regarding the exclusion of testimony and exhibits should be rejected, and Complainant respectfully moves this Court for a permissive order in limine affirmatively finding that the proposed testimony and exhibits objected to are, in fact, admissible.

## I. Respondents' "Objection" Does Not, In Fact, Oppose U.S. EPA's Motion For Leave To Supplement Its Prehearing Exchange Instanter

Respondents have set forth no grounds for the denial of Complainant's Motion for Leave to File its First Supplemental Prehearing Exchange Instanter. Complainant's Motion for Leave to File met the requirements of 40 C.F.R. 22.16(a): it was in writing; it stated the grounds for its submission as 40 C.F.R. §§ 22.19(a) and (f) and 22.16 of the Consolidated Rules, the Presiding Officer's November 19, 2010, Order Scheduling Hearing and February 23, 2011, Order Rescheduling Hearing, and a telephone conference held on May 19, 2011; it set forth the relief sought as permission to supplement Complainant's prehearing exchanges with new information bearing on allegations in the Complaint and Compliance Order and Respondents' liability;[1] and

[1] As explained in U.S. EPA's Motion For Leave to Supplement:

it was accompanied by a Certificate of Filing and Service. Most significantly, the First Supplemental Prehearing Exchange was filed consistent with the Presiding Officer's November 19, 2010, Order Scheduling Hearing states that "the parties retain the right to supplement their prehearing exchanges no later than fifteen (15) days before the hearing date."[2] *See,* 40 C.F.R. § 22.22(a)(1). During a telephone conference on May 19, 2011, the Presiding Officer indicated

---

> Complainant's motion for leave to file instanter a supplemental prehearing exchange should be granted because Complainant is submitting this motion within the timeframes allowed by the Consolidated Rules, the Presiding Officer's Order and the May 19, 2011 telephone conference. Additionally, the Consolidated Rules require a party to supplement its prehearing exchange upon learning that it is incomplete, inaccurate, or outdated. 40 C.F.R. § 22.20(f).
>
> Since the filing of the initial Complaint and Compliance Order and the Presiding Officer's Order granting Complainant's Motion for Leave to Amend Complaint and Compliance Order, EPA has continued to investigate the facts of this matter. EPA has acquired new information during the course of its investigation that bears on the allegations in the Complaint and Compliance Order and Respondents' liability. In addition to the new information, all of the above-listed information is appropriate for consideration by the Presiding Officer in ruling on Complainant's allegations against Respondents and determining an appropriate penalty in this matter.
>
> Additionally, there is no prejudice to Respondents by allowing Complainant to include the above-listed documents in its supplemental prehearing exchange. The hearing in this matter is nearly two months away (July 25 through 29, 2011), which gives Respondents ample time in which to review the information. [Footnote omittied.] All of the listed documents fall into different categories of public records, are part of the official record in this matter, have been produced by Respondent, or were prepared by a former consultant to now-defunct company that one of the Respondents was once the president of, and thus are documents that Respondent(s) are, or should be, already specifically aware of.

Motion For Leave to Supplement at 4-5.

[2] The November 19, 2010 Order also states that "the parties are advised that every motion filed this proceeding must be served in sufficient time to permit the filing of a response by the non-moving party and to permit the issuance of an order on the motion before the deadlines set by this Order."

that all motions in this matter must be filed no later than July 8, 2011, in order for the non-moving party to file a response and to permit the issuance of an order on the motion.

Complainant's Motion for Leave to File met the four requirements for the submission of a prehearing motion under 40 C.F.R. § 22.19(a). More telling, Respondent's have provided no reason why U.S. EPA lost, or did not "retain[,] the right to supplement [its] prehearing exchanges no later than fifteen (15) days before the hearing date." U.S. EPA Motion For Leave to Supplement its Fitrst Supplemental Prehearing Exchange must be granted because the filing of the First Supplemental Prehearing Exchange was made "as of right."

Further, Respondents' response does not actually seek the denial of Complainant's Motion for Leave to File. Accordingly, U.S. EPA's Motion For Leave to File its First Supplemental Prehearing Exchange Instanter must be granted, because Respondents' response failed to set forth any ground for the denial of Complainant's Motion for Leave to File.

## II. Respondents' "Objection" Does Not Explain How The Proposed Testimony Of U.S. EPA Witnesses And The Proposed Exhibits Do Not Meet The Standard For Inclusion In Prehearing Exchanges Under 40 C.F.R. §§ 22.19 and 22.22

Respondents have not provided a basis for the exclusion of the materials contained in Complainant's First Supplemental Prehearing Exchange. Respondents do not request relief via the exclusion of Complainant's materials from Complainant's prehearing exchanges, but merely object to the materials as admissible evidence.[3] Respondents' Objections essentially set forth

---

[3] Respondents' Objections include a number of photographs and documents as attachments. Respondents have not moved to supplement their prehearing exchange with those photographs and documents. Complainant will evaluate whether it objects to Respondents moving to supplement their prehearing exchange with these materials is, and when, they make such a motion and file such a supplement. U.S. EPA reserves its arguments regarding the admissibility of these materials.

arguments as to the ultimate admissibility of the evidence, not to its inclusion in a prehearing exchange. Respondents' response should be denied for failure to set forth any ground for the exclusion of materials contained in Complainant's Motion for Leave to File.

The Consolidated Rules, at 40 C.F.R. § 22.19(a), provide that each party shall file a prehearing information exchange containing witnesses' names and a brief narrative summary of their expected testimony, or a statement that no witnesses will appear, and copies of all documents and exhibits intended for introduction as evidence. Under 40 C.F.R. § 22.19(f), each party must also promptly supplement or correct any prior exchange that becomes incomplete, inaccurate or outdated if the additional or correctional information has not been disclosed to the other party. 40 C.F.R. § 22.22(a) penalizes the failure to engage in prehearing information exchanges:

> If…a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

The Consolidated Rules mandate the exchange of information prior to hearing and disallow the introduction of certain evidence without good cause if that evidence has not been included in a prehearing exchange.

The Presiding Officer required the parties to engage in prehearing information exchanges consistent with 40 C.F.R. 22.19(a) in her June 15, 2010, Prehearing Order. Respondents and Complainant filed their initial prehearing exchanges on October 27, 2010, and November 10, 2010, respectively. The Presiding Officer's subsequent November 23, 2010, Order Scheduling

Hearing and Order Granting Respondent's Motion for Amendment of Answer directed the parties to comply with regulations governing supplemental prehearing exchanges:

> Section 22.19(f) of the Rules of Practice, 40 C.F.R. § 22.19(f), requires parties to promptly supplement their initial prehearing exchanges when they learn that the information therein is incomplete, inaccurate, or outdated, and the additional information has not otherwise been disclosed to the opposing party. The parties retain the right to make a motion to supplement their prehearing exchanges no later than fifteen (15) days before the hearing date.

[Emphasis added.]

Finally, Pursuant to 40 C.F.R. §§ 22.19(f) and 22.22(a), Respondents and Complainant must supplement their initial prehearing information exchanges with any information that will enhance the completeness, accuracy, or timeliness of their exchanges within 15 days of the July 25, 2011, hearing.

Respondents have not identified any ground why the proposed materials are that do not meet the standard for inclusion in a prehearing exchange. Accordingly, Complainant's First Supplemental Prehearing Exchange should be accepted as having been filed, as of right, on June 8, 2011.

## III. Respondents' Objections are Properly Viewed As A Motion In Limine, Which Must Be Denied And, If Denied, Complainant Moves For An Affirmative Finding of Admissability

Respondent's Objections argue that specified information in Complainant's First Supplemental Prehearing Exchange is "irrelevant, unreliable, unduly repetitious or of no probative value." After setting forth their "objections" in this regard with respect to ten items from Complainant's First Supplemental Prehearing Exchange (Complainant addresses the ten items below), however, Respondents ask for no relief. If the Presiding Officer does find a cognizable request for relief in Respondents' Objections, then it must be that the Respondents

are asking for an order in limine, holding that the proposed testimony and exhibits that they object to are inadmissible on evidentiary basis. For the reasons explained below, however, the information presented in Complainant's First Supplemental Prehearing Exchange is relevant and admissible under the Rules of Pracitice. Accordingly, U.S. EPA makes a cross motion for an permissive order in limine finding that the proposed testimony and exhibits are admissible.

The Consolidated Rules, at 40 C.F.R. § 22.22(a), provide that the Presiding Officer "shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." A lenient standard of admissibility is applied to evidence in administrative proceedings. See *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980) ("[S[trict rules of evidence do not apply in the administrative context."). Specifically, the rules of evidence applicable to administrative hearings "tend to be more liberal than in proceedings in other courts, and normally err towards over-inclusion rather than under-inclusion." *In re CDT Landfill Corp*, 2003 WL 21500412 (E.P.A.), 17. The Consolidated Rules grant the Presiding Officer broad discretion in determining the admissibility of evidence. *Id* at 15. Evidence will be deemed inadmissible only if it meets the criteria for exclusion under 40 C.F.R. § 22.22(a).

Respondents claim that certain exhibits in Complainant's first supplemental prehearing exchange violate the standards of admissibility under 40 C.F.R. § 22.22(a). Respondents' Objections may be considered a motion in limine, defined by Black's Law Dictionary as a "pretrial request that certain inadmissible evidence not be referred to or offered at trial." However, Respondents have not made a claim for relief. Respondents' failure to request the exclusion of the documents and proposed testimony identified by Complainant in its First Supplemental Prehearing Exchange is fatal to any potential consideration of Respondents' Objections as a motion in limine. Accordingly, Respondents' Objections are more appropriately

treated as a response to Complainant's First Supplemental Prehearing Exchange than as a plea for relief.

If the Presiding Officer finds that Respondents' Objections constitute a motion in limine, then Respondents must demonstrate that all of the evidence to which they object is clearly inadmissible. Motions in limine are only granted if evidence is clearly inadmissible on all grounds; otherwise, "evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Hawthorne Partners v. AT & T Technologies*, 831 F.Supp. 1398, 1400 (1993). A motion in limine must be denied unless the moving party meets its high burden of proof. The evidence may still be considered for inadmissibility when an objection arises at trial, but the presiding judge will only alter the in limine determination and exclude the evidence "in the exercise of sound judicial discretion." *Luce v. U.S.*, 469 U.S. 38, 41 (1984). Motions in limine are typically disfavored so that potentially admissible evidence is not excluded without adequate consideration. The denial of Respondents' Objections would be appropriate in this matter because Complainant's Motion for Leave to File and the materials included in Complainant's prehearing exchanges are admissible, as explained below.

### A. The Information Provided in Complainant's First Supplemental Prehearing Exchange is Admissible under 40 C.F.R. § 22.22(a)

#### a. Identify William K. Graham, P.E. as a potential witness to testify regarding consulting work done for Spent Lamp Recycling Technologies

Respondents claim that testimony concerning consultant services performed for Spent Lamp Recycling Technologies is irrelevant because Spent Lamp Recycling Technologies is not a party to this matter. As Complainant indicated in its June 23, 2011 Request for Execution of

Subpoenas, Mr. Graham's testimony is relevant and material to Laurence Kelly's credibility and culpability. Mr. Graham provided guidance to Laurence Kelly on compliance with RCRA and the Illinois Universal Waste Rule. Mr. Graham's guidance was based on his conversations with Laurence Kelly and his observations of a now-defunct company owned and operated by Laurence Kelly that also purportedly stored mercury-containing lamps as a large quantity handler of universal waste. Based on Mr. Graham's consulting, Laurence Kelly knew or should have known of applicable federal and state laws under which a facility managing mercury lamps would be regulated. In their May 27, 2011 Memorandum in Support of Motion to Dismiss with Prejudice for Lack of Fair Notice and Convoluted Regulations, Respondents claimed that an unclear differentiation between the federal and state universal waste rules created a regulatory trap. Mr. Graham's testimony is relevant to Laurence Kelly's credibility with respect to Mr. Kelly's claims concerning universal waste regulations.

**b. Identify Leonard Worth, President of Flourecycle, Inc., as a potential witness**

Although the heading for this Objection pertains to Leonard Worth as a testifying witness, Respondents describe their Objection as the unreliability of the fact that Fluorecycle, Inc. advertises itself as the only IEPA RCRA-permitted destination facility authorized to process spent mercury lamps without documentation to support its claim. Respondents' Objection confuses a description of Fluorecycle, Inc. with Leonard Worth's testimony. The status of Fluorecycle, Inc. as a RCRA-permitted facility is not being offered into evidence in this matter. During the hearing, Complainant will offer into evidence the testimony of Leonard Worth, president of Fluorecycle, Inc., concerning "the costs of complying with the federal hazardous waste regulations imposed on mercury lamp recyclers." (See Complainant's June 23, 2011

Request for Execution of Subpoenas.) Mr. Worth's testimony is relevant and material to the nature, gravity and extent of Respondents' violations, and the economic benefit derived by Respndt's non-compliance with the applicable law and regulations. His testimony regarding a mercury lamp recycling facility's costs of complying with federal hazardous waste regulations is relevant to the economic benefit component of Complainant's penalty determination. Mr. Worth's knowledge and experience from his work with Fluorecycle, Inc., as well as his membership in the Association of Lighting and Mercury Recyclers, make his testimony reliable. Pursuant to 40 C.F.R. § 22.22(a), the Presiding Officer must admit all evidence that is not irrelevant or unreliable. Mr. Worth's testimony is both relevant and reliable and therefore should not be excluded.

**c. Security Exchange Commission Registration Statement under The Securities Act of 1933, for VX Technologies, Inc., parent of Spent Lamp Recycling Technologies, Inc., dated February 11, 2002**

Respondents claim that the SEC Registration Statement for VT Technologies, Inc., parent of Spent Lamp Recycling Technologies, Inc., is irrelevant because neither party to whom the document relates is a party in this matter. However, the Registration Statement is relevant to Laurence Kelly's credibility and his claimed lack of knowledge regarding the applicable laws and regulations. The February 2002 Registration Statement, pages 17-18 of 58, describes Laurence Kelly's experiences as follows:

> [Laurence C. Kelly] has over 20 years of waste hauling, site remediation and environmental consulting experience. Through the course of his experience in the environmental business he has compiled a working knowledge of regulatory guidelines. Because he was in the business of waste hauling on or about the time the Resource Conservation Recovery Act became law, he has been in a position to track and maintain an ongoing understanding of all aspects of business operations under that and all other relevant regulations. He also has the ability to apply that understanding to the spirit of the new "*Universal Waste Rule*" pertaining to spent mercury-containing lamps. [emphasis in original]

The Registration Statement states that Laurence Kelly has working knowledge of both RCRA and the Illinois Universal Waste Rule. This indicates Mr. Kelly possesses sufficient understanding of federal and state universal waste regulations to avoid a so-called "regulatory trap" (see Respondents' June 2, 2011 Motion to Dismiss with Prejudice for Lack of Fair Notice and Convoluted Regulations). Mr. Kelly also appears to have sufficient experience and knowledge to recognize which regulations apply to a facility managing spent mercury-containing lamps. The Registration Statement contains relevant information about Laurence Kelly's credibility in the context of universal waste management.

**d. Information request under RCRA Section 3007 to S.L.R. Technologies, Inc., d/b/a Shannon Lamp Recycling, dated July 6, 2010**

Respondents claim that that the July 6, 2010 RCRA § 3007 information request is irrelevant because S.L.R. Technologies, Inc. is not a party to this proceeding. The information request contains the list of questions to which Shannon Lamp Recycling submitted responses dated August 4, 2010. Shannon Lamp Recycling's responses contain relevant information bearing on the allegations in Complainant's April 23, 2010 Administrative Complaint and Compliance Order. The July 6, 2010 RCRA § 3007 information request submitted to S.L.R. Technologies, Inc., d/b/a Shannon Lamp Recycling, is therefore relevant as the background questionnaire to which the company responded on August 4, 2010.

**e. Response to July 6, 2010 Information Request from S.L.R. Technologies, Inc., d/b/a Shannon Lamp Recycling, dated August 4, 2010**

Respondents claim that the August 4, 2010 response from S.L.R. Technologies, Inc., d/b/a/ Shannon Lamp Recycling, to EPA's July 6, 2010 RCRA § 3007 information request is

irrelevant because S.L.R. Technologies, Inc. is not a party to this proceeding. However, Shannon Lamp Recycling's responses to the RCRA § 3007 information request were prepared by Laurence Kelly, the company's president, which he states is a sole proprietorship. Mr. Kelly's responses are relevant to his knowledge and understanding that universal waste is subject to particular regulations. Mr. Kelly's August 4, 2010 responses include a letter from the Illinois Environmental Protection Agency detailing IEPA's understanding of the operation of Mr. Kelly's mobile lamp-crushing unit. Mr. Kelly's statements and the inclusion of IEPA's October 16, 2000 letter in the August 4, 2010 responses are indicative of Mr. Kelly's knowledge that specific regulatory requirements apply to specific universal waste management practices. Shannon Lamp Recycling's responses also contain other relevant information bearing on the allegations in Complainant's April 23, 2010 Administrative Complaint and Compliance Order.

Further, Mr. Kelly has claimed that S.L.R. operated the "mobile treatment unit" at the Riverdale facility.

**f. Information request under RCRA Section 3007 to S.L.R. Technologies, Inc., d/b/a Shannon Lamp Recycling, dated November 11, 2010**

Respondents claim that that the November 11, 2010 RCRA § 3007 information request is irrelevant because S.L.R. Technologies, Inc. is not a party to this proceeding. The information request contains the list of questions to which Shannon Lamp Recycling submitted responses dated December 24, 2010. Shannon Lamp Recycling's responses contain relevant information bearing on the allegations in Complainant's April 23, 2010 Administrative Complaint and Compliance Order. The November 11, 2010 RCRA § 3007 information request submitted to S.L.R. Technologies, Inc., d/b/a Shannon Lamp Recycling, is therefore relevant as the background questionnaire to which the company responded on December 24, 2010.

**g. Response to November 11, 2010 Information Request from S.L.R. Technologies, Inc., d/b/a Shannon Lamp Recycling, dated December 24, 2010**

Respondents claim that the December 24 2010 response from S.L.R. Technologies, Inc., d/b/a/ Shannon Lamp Recycling, to EPA's November 11, 2010 RCRA § 3007 information request is irrelevant because S.L.R. Technologies, Inc. is not a party to this proceeding. However, Shannon Lamp Recycling's responses to the RCRA § 3007 information request were prepared by Laurence Kelly, the company's president, which he states is a sole proprietorship. Mr. Kelly's responses are relevant to his knowledge and understanding that universal waste is subject to specific regulations. Mr. Kelly cites Title 35 of the Illinois Administrative Code and Title 40 of the Code of Federal Regulations, the respective state and federal standards for environmental protection, in response to questions concerning Shannon Lamp Recycling's management of mercury-containing lamps. These references are indicative of Mr. Kelly's awareness of separate state and federal regulatory schemes for universal waste. Mr. Kelly's statements refute his claims of a lack of fair notice and convoluted regulations concerning the federal and Illinois universal waste rules. Laurence Kelly's statements in the December 24, 2010 responses submitted on behalf of Shannon Lamp Recycling are therefore relevant to Mr. Kelly's credibility concerning his understanding of universal waste regulations. Shannon Lamp Recycling's responses also contain other relevant information bearing on the allegations in Complainant's April 23, 2010 Administrative Complaint and Compliance Order. Further, Mr. Kelly has claimed that S.L.R. operated the "mobile treatment unit" at the Riverdale facility.

**h. EPA inspection report on current conditions of Riverdale Warehouse, located at 13605 S. Halsted Street, Riverdale, Illinois, dated May 26, 2011**

Respondents claim that EPA's May 26, 2011 inspection report on the Riverdale

Warehouse is irrelevant and of no probative value because "River Shannon Recycling cannot be held accountable for the current condition of the property after a nearly three year vacancy, and nearly three years of uncontrolled vandalism and disrepair." Respondents assert that they relinquished the property back to its owner in December 2008. However, Complainant's May 2011 inspection report contains information that is relevant and of probative value to Complainant's allegations. In Complainant's April 23, 2010 Administrative Complaint and Compliance Order, Respondents are charged with conducting hazardous waste storage, treatment and disposal operations at a hazardous waste management facility without a RCRA permit. The inspection report's description of "[t]wo piles of broken fluorescent lamp materials," "discarded lamp end caps in several locations," and a broken piece of tubular glass "appearing to be the remnant of a broken linear fluorescent lamp," as well as numerous photographs included with the report, are relevant evidence of Respondents' treatment, storage and/or disposal of mercury-containing lamps at the Riverdale Warehouse. There is no indication that another entity managed fluorescent lamps on the premises after Respondents. The presence of abandoned fluorescent lamp materials at the Riverdale Warehouse three years after Respondents relinquished the property therefore indicates Respondents violated state and federal regulations applicable to the treatment, storage and disposal of hazardous waste, including proper closure of a hazardous waste management facility. (See 35 IAC § 724.212, 40 C.F.R. § 264.112). The information in the inspection report is probative in that it tends to prove that Respondents treated, stored and/or disposed of hazardous waste at a hazardous waste management facility without a RCRA permit. The inspection report is both relevant and of probative value to Complainant's assertions regarding Respondents' liability. The inspection report also establishes that the facility has not gone through RCRA closure – which is part of the relief (in the form of a

compliance order) requested by U.S. EPA.

**i. "Universal Waste Rule – Implementation" memorandum from Steve Herman, Assistant Administrator, dated April 10, 1996**

Respondents claim that the introduction of Steve Herman's April 10, 1996 memorandum into evidence is redundant. However, redundancy is not a basis for the exclusion of evidence. Pursuant to 40 C.F.R. 22.22(a), evidence is admissible unless it is "irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." Even if the memorandum repeats information contained in another evidentiary document, Respondents have not shown that Complainant's introduction of the memorandum into evidence is unduly repetitious.

**j. William K. Graham's consulting file for Laurence C. Kelly and Spent Lamp Recycling Technologies, Inc.**

Respondents claim that the introduction of documents prepared by William Graham, an environmental consultant for Spent Lamp Recycling Technologies, Inc., is irrelevant because Spent Lamp Recycling Technologies, Inc. is not a party to this matter. However, the information contained in Mr. Graham's consulting file is indicative of the consulting he provided to Laurence Kelly on state and federal environmental laws and is therefore relevant and material to Mr. Kelly's credibility and culpability. Mr. Graham has stated to counsel for Complainant that he was hired by Laurence Kelly to provide guidance on letters sent from the Illinois Environmental Protection Agency to Spent Lamp Recycling Technologies, Inc., dated April 9, 1997 and April 18, 2000. The consulting file details Mr. Graham's regulatory evaluation of Spent Lamp Recycling Technologies, Inc.'s purported procedures for on-site processing of universal waste and regulations applicable to these activities. Based on Mr. Graham's communications with Laurence Kelly concerning mercury lamp management, the content of which can be gleaned from the documents in his consulting file, Mr. Kelly knew or should have known of applicable

rules under which his facility's described activities would be regulated. However, Mr. Kelly also should have been aware that the facility's deviation from these activities could require a RCRA permit. Laurence Kelly's familiarity with universal waste regulations is therefore relevant to his credibility concerning claims about the requirements of RCRA and the Illinois Universal Waste Rule.

Respondents also claim that the correspondence between William Graham and Spent Lamp Recycling Technologies, Inc. should be considered privileged and confidential. U.S. EPA is unaware of and "privilege" that attaches to communications between a business and its consultant (other than, perhaps, an expert witness hired in preparation of litigation). Respondent's have made no such claim. Nor have they made a business confidentiality claim.

### B. The Testimony of Complaint's Proposed Witnesses And The Identified Exhibits Are Admissable Under 40 C.F.R. § 22.22 And Comp[lainint Is Entitled To A Permissive Order In Limine Holding That The Proposed Testimony And Exhibits Are Admissable

40 C.F.R. § 22.22(a), provide that the Presiding Officer "shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." For all of the reasons discussed above, the proposed testimony and exhibits discussed above are admissible. Accordingly, Complainant makes its cross motion for a Permissive Order In Limine affirmatively finding that the proposed testimony and exhibits are admissible in this matter.

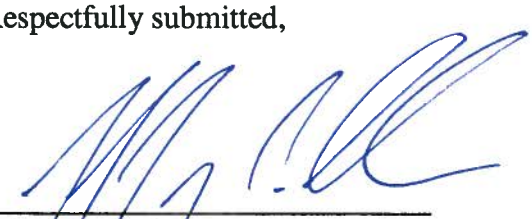
## IV. Conclusion

Respondents' Objections seek no relief, and as set forth above, no relief to the submission of this prehearing exchange information would be appropriate in any event. As also set forth above, each specified item in Complainant's First Supplemental Prehearing Exchange should be found admissible at hearing when offered into evidence. If the Presiding Officer finds a

cognizable request for relief in Respondents' Objections, then, for the reasons set forth above, Complainant respectfully requests that the Presiding Officer deny such request.

Further, Complainant respectfully moves this Court for a Permissive Order In Limine affirmatively finding that the proposed testimony and exhibits discussed in this filing are admissible in this matter.

Respectfully submitted,



Jeffrey A. Cahn
Kasey Barton
Office of Regional Counsel
U. S. Environmental Protection Agency,
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604