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

REPLY TO THE ATTENTION OF:

FEB 08 2011

C-14J

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED
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. d/b/a River Shannon Recycling, *et al.*
Docket No. RCRA-05-2010-015

Dear Judge Gunning:

Enclosed please find a file-stamped copy of the following Complainant's Motion for Partial Accelerated Decision as to Applicable Regulations and Liability, with a supporting Memorandum and attached Affidavits of Todd Brown and Gary Westefer, and a Certificate of Filing and Service. This supersedes the Complainant's earlier Motion for Partial Accelerated Decision, which was filed and served prior to your Honor's ruling on Complainant's Motion for Leave to Amend the Complaint and Compliance Order. By copy of this letter, the Respondent is being served today by certified mail.

Sincerely,

Thomas M. Williams
Associate Regional Counsel

Enclosures

cc (w/ enclosure): Mr. Laurence Kelly

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** **EPA ID No.: ILD005234141, and** **Laurence Kelly** **Respondents.**	)	**DOCKET NO. RCRA-05-2010-0015**

COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO THE APPLICABLE REGULATIONS AND LIABILITY

Complainant, the Director of the Land and Chemicals Division, United States Environmental Protection Agency, Region 5 (Complainant), pursuant to 40 C.F.R. §§ 22.16 and 22.20 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* ("Consolidated Rules" or "Rules"), hereby respectfully requests that the Presiding Officer enter an order granting an accelerated decision: (1) ruling that the EPA-authorized Illinois RCRA Subtitle C requirements apply to the Respondents; and (2) finding that the Respondents are liable for conducting a hazardous waste storage and treatment operation without a RCRA permit for the hazardous waste management facility in violation of 35 IAC § 703.121(a)(1) (Counts 1 and 2 of the Amended Complaint).

In support of this Motion for Partial Accelerated Decision as to the Applicable Regulations and Liability, Complainant relies on the Consolidated Rules, the pleadings and documents in the record, and the facts and law set forth in the attached Memorandum in Support of this Motion with the attached affidavits.

Additionally, Complainant wishes to notify the Presiding Officer and the Regional Hearing Clerk that, by letter dated December 21, 2010, U.S. EPA notified Respondent Mercury Vapor Processing Technologies, Inc., doing business as River Shannon Recycling, (MVPT) of its determination that MVPT had waived the claim of business confidentiality that it had asserted for responses to requests for information under Section 3007 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6907, for failing to substantiate its claim of confidentiality. Complainant's records show that a period exceeding the ten business days provided in 40 CFR § 2.205(f)(2) has passed since MVPT received that determination letter. Accordingly, the accompanying Memorandum in Support of the Motion for Partial Accelerated Decision as to the Applicable Regulations and Liability is being filed in unredacted form.

Respectfully submitted this 8th day of February 2011,

Kasey Barton

Kasey Barton
Assistant Regional Counsel
Thomas M. Williams
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Chicago, Illinois 60604

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** **EPA ID No.: ILD005234141, and**	)	**DOCKET NO. RCRA-05-2010-0015**
Laurence Kelly	)	
Respondents.	)	

COMPLAINANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL ACCELERATED DECISION AS TO THE APPLICABLE REGULATIONS AND LIABILITY

Complainant, pursuant to 40 C.F.R. §§ 22.16 and 22.20 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* ("Consolidated Rules" or "Rules"), offers this Memorandum in Support of its Motion for Partial Accelerated Decision respectfully requesting that the Presiding Officer enter an order: (1) ruling that the EPA-authorized Illinois RCRA Subtitle C requirements apply to the Respondents; and (2) finding that the Respondents are liable for conducting a hazardous waste storage and treatment operation without a RCRA permit for the hazardous waste management facility in violation of 35 IAC § 703.121(a)(1) (Counts 1 and 2 of the Amended Complaint).

I. RELEVANT STATUTORY, REGULATORY AND POLICY BACKGROUND

A. EPA Authorization of the Illinois Subtitle C RCRA Program.

The Resource and Conservation Recovery Act (RCRA) is a comprehensive environmental statute that authorizes EPA to regulate hazardous wastes from cradle to grave, in accordance with the safeguards and waste management procedures of Subtitle C, 42 U.S.C.

§§ 6921-6939. *See, e.g., Chicago v. Envtl. Defense Fund*, 511 U.S. 328, 331 (1994). Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and its implementing regulations at 40 C.F.R. Part 270, require each person owning or operating a facility for the treatment, storage or disposal of hazardous waste to have a hazardous waste management permit.

Section 3006 of RCRA, 42 U.S.C. § 6926, provides that EPA may authorize states to administer and enforce their own hazardous waste programs in lieu of the federal Subtitle C RCRA (hereinafter Subtitle C) program. EPA will approve a state's request for authorization if it determines, among other things, that the state's program is equivalent to and consistent with the federal one. 42 U.S.C. § 6926(b). Following its authorization of a state's regulatory program, EPA enforces the authorized state regulations in lieu of the federal regulations within that state. A violation of any state provision authorized pursuant to Section 3006 of RCRA constitutes a violation of RCRA subject to the assessment of civil penalties and issuance of compliance orders as provided in Section 3008 of RCRA, 42 U.S.C. § 6928. 42 U.S.C. § 6926(d).

EPA publishes its authorization of state programs in the Federal Register and codifies them at 40 C.F.R. Part 272, and incorporates by reference therein the state statutes and regulations that EPA will enforce under Section 3008 of RCRA in order to provide notice to the public of the scope of the authorized program in every state. *See, e.g.*, 57 Fed. Reg. 45575 (Oct. 2, 1992). EPA granted Illinois final authorization to administer a Subtitle C program effective January 31, 1986. 40 C.F.R. § 272.700; 51 Fed. Reg. 3778 (Jan. 31, 1986)[1]. The Illinois statutes and regulations that have been authorized as part of the Subtitle C hazardous waste management

[1] EPA authorized revisions to the originally approved program effective March 5, 1988, 53 Fed. Reg. 126 (January 5, 1998); April 30, 1990, 55 Fed. Reg. 7320 (March 1, 1990); June 3, 1991, 56 Fed. Reg. 13595 (April 3, 1991); August 15, 1994, 59 Fed. Reg. 30525 (June 14, 1994); May 14, 1996, 61 Fed. Reg. 10684 (March 15, 1996); and on October 4, 1996, 61 Fed. Reg. 40520 (August 5, 1996).

program are published in the Federal Register and are codified at 40 C.F.R. § 272.700[2].

B. Applicability of federally promulgated RCRA rules in authorized states.

The Hazardous and Solid Waste Amendments of 1984 (HSWA) made significant changes to the management of hazardous wastes, and to the applicability of certain federally promulgated rules in authorized states. *See* Hazardous Waste Management System; Final Codification Rule, 50 Fed. Reg. 28702, 28729 (July 15, 1985). The preamble to the universal waste rule, 60 Fed. Reg. 25492 (May 11, 1995), compares the differences in applicability of federal requirements promulgated pursuant to HSWA to those promulgated under pre-HSWA RCRA statutory authorities[3]. *See* 60 Fed. Reg. 25492, 25536 (May 11, 1995).

Prior to the enactment of HSWA, a state with final RCRA authorization administered its hazardous waste program in lieu of the federal program in that state. EPA retained authority to enforce the authorized state regulations under RCRA Section 3008. New federal RCRA requirements did not take effect in an authorized state, *i.e.*, were not enforceable by EPA within the state, until the state adopted the equivalent requirements under state law and was authorized by EPA for the new requirements. In contrast, under RCRA Section 3006(g), 42 U.S.C. 6926(g), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect as part of the RCRA program in authorized states, and are enforceable by EPA, as soon they become federal law. While the states must still adopt HSWA related provisions as state law to retain final authorization, EPA implements the HSWA provisions in authorized states until the states do so. Federal RCRA rules that are promulgated after HSWA's passage, but which are promulgated pursuant to pre-HSWA RCRA authorities, do not take effect as part

[2] The EPA-authorized revisions to the Illinois Subtitle C program that have not yet been codified at 40 C.F.R. Part 272.700 are published at: 59 Fed. Reg. 30525 (June 14, 1994); 61 Fed. Reg. 10684 (March 15, 1996); and 61 Fed. Reg. 40520 (August 5, 1996). These EPA-authorized revisions do not include provisions for universal waste management.

[3] As discussed in I.C.2. *infra*, the federal universal waste rule was promulgated pursuant to pre-HSWA RCRA statutory authority.

of the Subtitle C program in authorized states until the state adopts and becomes authorized by EPA for the state counterpart to such rules. 60 Fed. Reg. 25492 at 25536.

C. The Universal Waste Rule.

1. Background of the universal waste rule.

The universal waste rule became effective on May 11, 1995. 60 Fed. Reg. 25492[4] (codified at 40 C.F.R. Part 273). This rule created streamlined hazardous waste management requirements for collecting and managing certain widely generated hazardous wastes[5] in order to encourage resource conservation, improve implementation of the Subtitle C regulatory program, and to provide incentives for the collection of common universal wastes and remove them from non-hazardous waste management systems. 60 Fed. Reg. 25492 at 25501.

The universal waste regulations create categories of large and small quantity universal waste "handlers," which include "generators" of universal waste and collection facilities. *See* 40 C.F.R. § 273.9. Universal waste handlers who generate or temporarily hold items designated as universal waste are exempt from RCRA permitting and certain other requirements that would otherwise apply to hazardous waste management, and instead are subject to the requirements of 40 C.F.R. Part 273, which include, among other things, streamlined standards for storing universal waste, labeling and marking waste or containers, preparing and sending shipments of universal wastes off-site, employee training, and response to releases. 64 Fed. Reg. 36466, 36468 (July 6, 1999).

The final rule adding mercury-containing hazardous waste lamps ("waste lamps" or "spent lamps") to the universal waste rule became effective on January 6, 2000. 64 Fed. Reg.

[4] A copy of the final universal waste rule is attached to this Motion for the Presiding Officer's convenience as Attach. A.

[5] The following were initially designated as universal wastes under the new rule: hazardous waste batteries, hazardous waste pesticides that are either recalled or collected in waste pesticide collection programs and hazardous waste thermostats. On July 6, 1999, EPA published the final rule adding hazardous waste lamps to the federal universal waste rule, effective January 6, 2000. 64 Fed. Reg. 36466.

36466 (July 6, 1999). In the preamble to the rule, EPA stated that universal waste handlers should not treat universal waste because handlers are not subject to the full Subtitle C management standards. 64 Fed. Reg. 36466, 36477 (July 6, 1999). EPA emphasized its concern with the treatment of mercury-containing lamps by crushing, stating that:

> The prohibition against treatment includes a prohibition of crushing of lamps. EPA is particularly concerned that uncontrolled crushing of universal waste lamps in containers meeting only the general performance standards of the universal waste rule would not sufficiently protect human health and the environment. As stated earlier, the prevention of mercury emissions during collection and transport is one of the principal reasons that the Agency selected the universal waste approach. Allowing uncontrolled crushing would be inconsistent with this goal.

Id. EPA stated that it would consider authorization of state programs that include provisions for controlling treatment or crushing of universal waste lamps where the state program application includes a demonstration of equivalency to the federal prohibition. *Id.*

2. Applicability of the universal waste rule in Illinois.

The federal universal waste rule was not promulgated pursuant to HSWA. 60 Fed. Reg. 25492 at 25536. Therefore, the federal universal waste regulations became effective as part of the authorized Subtitle C program only in states that did *not* have final RCRA authorization for the base Subtitle C program as of May 11, 1995, when the rule went into effect.

Illinois's authorized Subtitle C program became effective on January 31, 1986, before the universal waste rule was promulgated. Therefore, EPA enforces the authorized Illinois Subtitle C regulations with regard to the management of hazardous waste lamps until Illinois obtains authorization to implement a state-adopted universal waste program which EPA determines is at least as stringent as the federal universal waste rule[6].

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[6]Respondents argue that universal wastes are listed as exempt from Subtitle C under 35 IAC § 721.109, which is similar to 40 C.F.R. § 261.9. However, 40 C.F.R. § 261.9 and the universal waste rule were promulgated concurrently on May 11, 1995 (60 Fed. Reg. 25541), after the Subtitle C program was authorized in Illinois. EPA has not authorized Illinois to implement the universal waste rule. Therefore, the provisions exempting universal

D. EPA Policy on enforcing the federal universal waste regulations at 40 C.F.R. Part 273 in states that are not authorized to implement the universal waste rule.

On April 10, 1996, EPA stated its policy regarding enforcement against universal waste handlers and transporters in states that are authorized for the Subtitle C program, but are not yet authorized to implement the universal waste regulations. Memorandum from Steve Herman, Assistant Administrator of the Office of Enforcement and Compliance Assurance and Elliott Laws, Assistant Administrator of the Office of Solid Waste and Emergency Response, to the Regional Administrators, *Universal Waste Rule - Implementation;* (Herman Memo) (Respondents' Prehearing Exchange Exhibit (RPX) 4a). The policy directs EPA, under specified circumstances, to exercise discretion not to enforce the authorized Subtitle C regulations against handlers and transporters of universal wastes in such states. In recognition of EPA's position that managing wastes in compliance with the universal waste regulations at 40 C.F.R. Part 273 is environmentally protective, the Herman Memo provides that EPA "*should take enforcement actions involving universal wastes only where handlers of such wastes are not in full compliance with the Part 273 standards.*" *Id.* (emphasis added).

II. RELEVANT FACTUAL BACKGROUND

A. Illinois is not authorized for the universal waste rule.

Illinois initially submitted a package for authorization of its version of the universal waste rule on October 30, 1996. (Westefer Aff. Attach. B). EPA has not yet authorized the Illinois version of the universal waste rule. *Id.* EPA provides notice, through publication in the Federal Register and at 40 C.F.R. Part 272 Subpart O, of the Illinois regulations that have been approved as part of the authorized Subtitle C program. They do not include Illinois' universal waste regulations. Thus, consistent with the Herman Memo, EPA takes enforcement actions

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waste from Subtitle C at 35 IAC § 721.109 have not been authorized by EPA.

against handlers of universal wastes in Illinois when handlers are not in full compliance with the regulations at 40 C.F.R. Part 273. As explained in IV.C. *infra*, Respondents are not in compliance with the requirements of 40 C.F.R. Part 273. Therefore, EPA enforces the authorized Illinois Subtitle C regulations against the Respondents. Both 40 C.F.R. Part 273 and the authorized Subtitle C regulations required Respondents to have a RCRA permit for their hazardous waste management operation.

B. EPA's inspection of the Riverdale facility.

On October 30, 2007, EPA conducted an inspection of the facility where Mercury Vapor Processing Technologies, Inc., doing business as "River Shannon Recycling," (MVPT) conducted its operations, located at 13605 S. Halsted Street, in Riverdale, Illinois (the Riverdale facility or facility). (Complainant's Prehearing Exchange Exhibit (CPX) 1). Inside the building at the facility, EPA observed more than 33 open containers of spent fluorescent lamps. *Id.* Some of the containers were unlabeled, and some were marked: "Regulated Universal Waste Destined for Recycling." (CPX 1 Attach. A Photos. 20-21). There were containers of intact fluorescent lamps, and containers with broken fluorescent lamps inside the facility. (CPX 1 Attach. A Photos. 1-4,7-19). There were also three semi-trailers containing intact waste lamps parked in the yard of the facility. (CPX 1 Attach. A Photos. 4-4, 42-42, 38-41, 45). Two uncovered roll-off boxes containing crushed glass and metal ends were also present. (CPX 1 Attach. A Photos. 1-4, 35-37). The MVPT representative present, Respondent Laurence Kelly, informed EPA that Respondents used a "mobile treatment unit" to crush the waste lamps they picked up from customers. (CPX 1). Respondent Kelly further explained that some waste lamps were stored at the Riverdale facility prior to being treated at the facility. *Id.*

C. EPA's sampling and analysis of waste lamps at the Riverdale facility.

Illinois and the federal regulations define "hazardous wastes," in part, as "solid wastes" that exhibit certain characteristics, including the characteristic of toxicity. 35 IAC §§ 721.103(a), 721.124; 40 C.F.R. § 261.24. The regulatory threshold concentration for the toxicity characteristic of mercury is 0.2 mg/L. 35 IAC § 721.124(b); 40 C.F.R. § 261.24. On November 14, 2007, EPA collected twelve samples of intact waste lamps that MVPT was storing at the Riverdale facility in order to determine whether any of the lamps possessed the toxicity characteristic for mercury. (Brown Aff. Attach. C; CPX 2). Using the Toxicity Characteristic Leaching Procedure (TCLP), four of the twelve waste lamp samples yielded mercury concentrations in their TCLP extracts at or above the regulatory limit for mercury (0.2 mg/ml). *Id.* Therefore, some of the lamps stored at the Riverdale facility were hazardous wastes.

D. Respondent MVPT's website.

During its operation, MVPT, using its assumed name River Shannon Recycling, maintained a website at http://www.rsrecycling.com. (CPX 10). Respondent's website offered recycling services to customers for various universal and electronic wastes, including different types of fluorescent lamps. *Id.* MVPT's website advertised that it would come to its customers' facility and rid them of their generator liability for managing hazardous wastes by "recycling" and taking title to the wastes. The website also referred to the hazards associated with improper handling of hazardous wastes such as spent lamps. *Id.*

E. Respondent MVPT's Responses to EPA's Information Requests.

EPA sent MVPT three information requests pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927 on the following dates: November 5, 2007 (CPX 3), May 20, 2008 (CPX 5), and October 3, 2008 (CPX 7). MVPT dated its responses to the information requests on the

following dates: November 26, 2007 (First Response) (CPX 4), June 3, 2008 (Second Response) (CPX 6), and October 20, 2008 (Third Response) (CPX 8). A summary of MVPT's Responses are provided below in order to show that although Respondents continued to change their description of operations in an apparent attempt to demonstrate compliance with the federal and state universal waste regulations, there is no genuine issue of material fact that both MVPT and Laurence Kelly conducted a hazardous waste storage and treatment operation without a permit.

1. Respondent MVPT's First Response.

MVPT's First Response identified Respondent Laurence Kelly as "Vice President and Health and Safety Officer." (CPX 4 No. 1). MVPT stated that it leased the Riverdale facility by unwritten agreement. (CPX 4 No. 18). It also described in detail its process for "processing" spent mercury containing lamps as follows: MVPT loads spent lamps into the processing unit, and the "mercury vapor processing unit is fed by hydraulic elevators that introduces [sic] and *crushes* spent lamps" and a series of active carbon filters capture the mercury vapor in the form of mercuric sulfide. (CPX 4 No. 2) (emphasis added). Once the process has taken place and "the extraction of mercury vapor has been completed," crushed glass and aluminum by-products are stored for reuse or disposal "depending on the markets." *Id.* MVPT provided bills of lading showing that during the time it operated at the Riverdale facility, MVPT sent tons of the crushed glass and aluminum from the Riverdale facility to solid waste landfills, and also showing that Respondent Laurence Kelly arranged for the disposal of the wastes. *Id.* at 2(i). MVPT stated that it owned the "mobile processing unit" that it used to crush waste lamps. (CPX 4 No. 2(e)). MVPT also stated that "consolidated spent lamps collected from generators are staged inside the Riverdale facility . . .and processed periodically depending on volumes." (CPX 4 No. 2(g)). Regarding the intact waste lamps EPA observed during its inspection of the Riverdale facility,

MVPT stated that it planned to "immediately process" the lamps. (CPX 4 No. 4(c)).

2. Respondent MVPT's Second Response.

Throughout MVPT's Second Response, it referred to "processing" and "mobile recycling" of waste lamps. (CPX 6 Nos. 7, 8). MVPT identified Respondent Kelly as its "Chief Operating Officer," as well as its Vice President and Health and Safety Officer. (CPX 6 Nos. 1,3). MVPT stated that it was given permission by the Illinois Environmental Protection Agency (IEPA) to receive lamps at its facility for accumulation without a permit, provided the lamps are only accepted for accumulation and then shipped to a fully regulated "destination facility[7]." (CPX 6 No. 12). MVPT also stated that one of its assumed names is "Shannon Lamp Recycling" and that "the destination facility is our mobile processing unit." *Id.*

3. Respondent MVPT's Third Response.

In MVPT's third response, it made a reference to itself, for the first time, as a "generator/handler" and identifies Respondent Kelly as its President. (CPX 8 Nos. 1, 3(b)). MVPT continued to admit that what it now called a "mobile recycling unit" processed spent lamps. *Id.* at No. 3(b). It also stated that it "commissioned Shannon Lamp Recycling," which it had identified in its Second Response as one of its assumed names, to "perform recycling services using the SLR mobile recycling unit. . ." *Id.* Respondent stated that the spent lamps present during EPA's inspection were transported to a different location and processed using "SLR's personnel and mobile unit to process the Universal Waste," with the glass and metal then being sent to a solid waste landfill. *Id.* at 3b.

[7] This statement presumably refers to a letter that MVPT has submitted as part of its prehearing exchange from the IEPA to a predecessor company dated October 16, 2000. (RPX 9). The letter states that the predecessor corporation may receive lamps at its facility without a permit "provided the lamps are only accepted for accumulation and subsequent shipment to the destination facility." The letter notes that the Illinois universal waste rule requires that lamps be crushed at the site of generation only, and expressly states that "the destination facility, where component separation occurs, is also fully regulated." Even if this letter applied to the Respondents, which it does not, Respondents ignored the letter's express limitations by crushing waste lamps at the Riverdale facility and operating a "destination facility."

F. The parties' prehearing exchange and addition of Respondent Laurence Kelly.

MVPT included with its prehearing exchange a "Statement Regarding Compliance and Penalty (Statement)." (RPX Attach.). In Respondent's Statement, it stated again that it is a "generator." However, MVPT asserted the new argument that it was only responsible for picking up waste lamps and transporting them to the Riverdale facility. *Id.* MVPT asserted that Shannon Lamp Recycling or "SLR", which it had identified earlier as one of its assumed names (CPX 6 No. 7), is a sole proprietorship operated by Respondent Laurence Kelly, who was also the Chief Operating Officer of MVPT, and who established the protocols and managed day-to-day activities regarding the storing, processing, and disposing of universal waste. (CPX 6 No. 8). MVPT asserted that it would transport waste lamps to the Riverdale facility, arrange for Respondent Kelly to process lamps in the mobile treatment unit, and then MVPT would seek "known end users" to take the glass and metal, and if there were none, send the glass and metal to a landfill. (Statement para. 1). MVPT used yet another term to describe its operations, stating that Respondent Kelly "*volume reduced*[8]" lamps using his "*volume reduction*" equipment. *Id.* (emphasis added).

The Presiding Officer granted Complainant's Motion for Leave to Amend the Complaint and Compliance Order to include Mr. Laurence Kelly as a party to this action on January 19, 2011[9].

[8] The term "volume reduce" may be an attempt by the Respondents to claim that they are in compliance with the unauthorized Illinois universal waste regulations at 35 IAC § 733.133(d)(3), which allows large quantity handlers of universal waste lamps to volume reduce lamps *at the site of generation only*, with certain procedures and controls in place. (emphasis added). However, Respondents have admittedly brought waste lamps to the Riverdale facility and "volume reduced" them at that location, and therefore are not in compliance with the unauthorized Illinois rule.

[9] MVPT did not object to Complainant's Motion, stating that Laurence Kelly acted as a sole proprietor operating on a "verbal contract to volume reduce" MVPT's universal waste. (Respondent's Memorandum in Support of Complainant's Motion).

III. STANDARD OF REVIEW

Accelerated decision is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a). Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (FRCP). *See, e.g., In re BWX Techs., Inc.*, 9 E.A.D. 61, 74-77 (EAB 2000); *Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (ALJ Sept. 11, 2002). The movant has the initial burden of showing "no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). Once the movant meets its burden, the non-movant must come forward with specific facts showing there is a genuine issue for hearing. *See BWX Techs., Inc.*, 9 E.A.D. at 75. All of the evidence must be viewed in a light most favorable to the non-movant. *SMS Demag Aktiengesellschaft v. Material Scis. Corp.*, 565 F.3d 365, 368 (7th Cir. 2009) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). However, in order to raise a genuine issue of material fact, the non-movant must present significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. *BWS Techs., Inc.*, 9 E.A.D. at 75; *In re FRM Chem, Inc., et al.* Docket No. FIFRA-07-2008-0035, 2010 EPA ALJ LEXIS 18 at *8 (ALJ Sept. 13, 2010).

IV. ARGUMENT

A. The EPA-authorized Illinois Subtitle C regulations apply to the Respondents.

The crux of Respondents' argument is simple: they are not required to have a RCRA operating permit because they are in compliance with the Illinois universal waste rule at 35 IAC Part 733 and the federal universal waste rule at 40 C.F.R. Part 273. In fact, Respondents' denials of the allegations in the Amended Complaint are entirely based on their assertions that they were

in compliance with the universal waste regulations. However, Respondents' assertions are incorrect both legally and factually. Both the federal universal regulations and the applicable Subtitle C regulations prohibited them from storing and treating hazardous wastes without obtaining a RCRA permit.

As discussed in II.A. *supra*, Illinois's universal waste regulations have not been authorized as part of the Subtitle C program in Illinois. Until EPA authorizes Illinois for the universal waste rule, it is not effective as part of the Subtitle C program in Illinois because the federal universal waste rule was not promulgated pursuant to HSWA. *Id.* As a matter of law, the only Subtitle C regulations applicable to the management of hazardous waste lamps in Illinois are those in effect and authorized by EPA.

To the extent Respondents rely on the Herman Memo as an equitable defense to EPA's enforcement action, they do not meet the criteria under which the Memo directs EPA to forego enforcement of the authorized Subtitle C regulations. Respondents are not in compliance with 40 C.F.R. Part 273. Part IV.C, *infra*, discusses Respondents' compliance status with Part 273 and demonstrates beyond any factual dispute that Respondents' operations are out of compliance with the federal universal waste rule.

B. Respondents are liable for conducting a hazardous waste storage and treatment operation without a RCRA permit for the hazardous waste management facility.

By their own admissions, Respondents held and crushed spent lamps at the Riverdale facility and then arranged for the disposal of the crushed glass and metal as solid waste. Thus, this case is not about universal waste recycling. Throughout EPA's investigation of this matter and in the presentation on MVPT's website, Respondents attempted to create the impression that their activities constituted an effort to return the components of spent lamps to productive use. However, the undisputed facts establish that the crushed glass and metal have been sent to solid

waste landfills and so-called "spent carbon filters" are stockpiled pending disposal at a solid waste landfill. (CPX 4,6). Respondents have produced no evidence documenting that any portion of the spent lamps has ever been recycled.

Pursuant to 35 IAC § 703.121(a)(1), no person may conduct any hazardous waste storage, treatment or disposal operation without a RCRA permit for the hazard waste management facility. The following shows there is no genuine issue of material fact that Respondents operated a hazardous waste storage and treatment facility without a RCRA permit.

1. Respondents MVPT and Laurence Kelly are each a "person" under the EPA-authorized Illinois Subtitle C program.

Under 35 IAC § 702.110, "person" means "any individual, partnership . . . firm, company, corporation . . . or any other legal entity." Respondents admit that they are each a "person" as defined by 35 IAC § 702.110. (Amended Answer (AA) Paras. 15-16). As a corporation organized under the laws of Illinois, MVPT clearly falls within this definition. Laurence Kelly is an individual residing in Illinois and therefore is also a "person" under 35 IAC § 702.110.

2. The Riverdale property was a "facility" under the EPA-authorized Illinois Subtitle C program.

Under 35 IAC § 702.110, facility means "all contiguous land and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste." Based on EPA's inspection, the Riverdale property consisted of a building and a paved outdoor area. (CPX 1). Intact waste lamps and crushed waste lamps were stored in cardboard boxes, drums, roll-off boxes and in semi-trailer trucks at the facility. *Id.* Throughout Respondent MVPT's Responses to information requests, it identified the Riverdale property as a location to which it brought waste lamps and as the location where either it or Respondent Kelly

used equipment to crush or "volume reduce" waste lamps. Therefore, the Riverdale property was clearly a "facility" under 35 IAC 702.110.

3. The waste lamps stored and treated at the Riverdale Facility were hazardous wastes.

Respondents admit that universal waste meets the definition of hazardous waste. (AA Paras. 73, 74). Four of the twelve waste lamp samples EPA analyzed from the Riverdale facility contained mercury concentrations in their TCLP extracts at or above the RCRA toxicity level of 0.2 mg/L. (CPX 2). Respondents deny that the waste lamps EPA sampled and tested at the Riverdale facility were hazardous. However, Respondents do not point to any failure with EPA's testing methods. Respondents instead seem to argue that their "volume reduced" glass and metal are not hazardous. Yet the hazardous character of the wastes following the crushing process is irrelevant to the issue of whether Respondents needed a permit to store the wastes and subject them to that process. There is no question that at least some of the waste stored at the Riverdale facility was hazardous. MVPT even acknowledges this, basing its internet advertising on the risks that spent lamps can pose, and warning that lamp users should avoid "generator liability." (II.D. *supra).* Respondents admit arranging for processing waste lamps that they collected from customers and held at the Riverdale facility. (CPX 4). Therefore, Respondents managed waste lamps that were hazardous when they arrived at the Riverdale facility.

4. Respondents conducted a hazardous waste storage operation.

35 IAC § 702.110 defines "storage" as "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere." EPA's inspection revealed a large quantity of lamps stored at the facility, both intact and crushed. (II.B. *supra*). Respondent MVPT admitted at the time of inspection, in its Responses, and in its prehearing exchange that it took waste lamps from its customers and stored them at the

Riverdale facility before the waste lamps were processed. (II. *supra*). Since waste lamps were temporarily held pending treatment, they were being stored within the regulatory definition's meaning.

Respondent Laurence Kelly is also liable for conducting an unpermitted hazardous waste storage operation because, as MVPT's chief operating officer with control over the inventory, he made the decision to store waste lamps at the Riverdale facility. (CPX 6). An individual cannot shield himself from liability for operating a hazardous waste facility merely by being an officer or shareholder of a corporation that also operates the facility. *Browning-Ferris Indus., Inc., et al. v. Richard Ter Maat et al.,* 195 F.3d 953, 955 (7th Cir. 1999). "The EAB has affirmed an ALJ's holding that "a corporate officer may be held liable in civil as well as criminal actions, for wrongful acts of the corporation in which he participated." *In re Roger Antikiewicz & Pest Elimination Prods. Of Am.*, 8 E.A.D. 218, 230 (EAB 1999); *see also U.S. v. NE Pharma. & Chem. Co., Inc.* 810 F.2d 726 (8th Cir. 1986) (holding that a corporate officer can be individually liable if they were "personally involved in or directly responsible for corporate acts in violation of RCRA"). As the person who oversaw and made the decisions regarding the transporting of waste lamps from customers and storing them at the Riverdale facility pending treatment, Respondent Laurence Kelly is personally liable as an operator of MVPT.

5. Respondents conducted a hazardous waste treatment operation.

Under 35 IAC § 702.110, "treatment" means

> any method, technique, process, including neutralization, designed to change the physical, chemical, or biological character or composition of any "hazardous waste" so as to neutralize such wastes, or so as to recover energy or material resources from the waste, or so as to render such wastes non-hazardous or less hazardous; safer to transport, store or dispose of; or amenable for recovery, amenable for storage, or reduced in volume.

Respondents clearly used processes designed to change the physical and chemical character of

the hazardous waste lamps. Respondents admit that the "mobile unit" "crushed, "processed," and "volume reduced" waste lamps, all of which are clearly "treatment" under 35 IAC § 702.110. That the lamp crushing process purportedly rendered the waste lamps nonhazardous or safe to dispose of, as MVPT suggested on its website, is also considered "treatment." Initially, MVPT stated that it had a "mobile processing unit" that "crushed" waste lamps. (II.E.1 *supra*). Then, MVPT "processed" waste lamps at a "destination facility", which was the "mobile processing unit." (Part II.E.2 *supra*). Apparently realizing that this description subjected it to the RCRA operating permit requirement, MVPT then stated that it was a "generator" and operated a "mobile volume reduction unit" and only "volume reduced" waste lamps. (II.E.3, F, *supra).* Then MVPT changed its story yet again, claiming that Respondent Kelly, using one of MVPT's assumed names, operated a sole proprietorship that crushed waste lamps and MVPT only picked up waste lamps, accumulated them at the Riverdale facility and sought unsuccessfully for purchasers before arranging for disposal. (II.F, *supra).* However, no matter what slant on the story Respondents attempt to make, they remain liable because their various descriptions of spent lamp processing at the Riverdale facility are all considered "treatment" under 35 IAC § 702.110.

Respondent Kelly is liable as an operator of an unpermitted hazardous waste treatment facility. By his own admission, Respondent Kelly made all of the decisions regarding the handling, transporting, storage, treatment and disposal of the hazardous waste lamps taken to and crushed at the Riverdale facility and is therefore liable as an operator (*see* discussion on operator liability, *supra).* Assuming Respondent Kelly's statements that he acted as a sole proprietor of a business that crushed spent lamps for MVPT to be true, Respondent Kelly is also individually liable. A sole proprietorship has no legal identity apart from the person who owns it. *Moriarty*

v. Svec, 164 F.3d 323, 335 (7th Cir. 1998). Regardless of whether Respondent Kelly was treating waste lamps as a sole proprietor of a different company or as the operator of MVPT, Respondent Kelly is liable for treating hazardous waste without a permit.

Additionally, MVPT's First Response states that MVPT was the lessee of the Riverdale facility, and was at that time the owner of the mobile treatment unit. Respondents now make the assertion that MVPT would accumulate spent lamps, contact Respondent Kelly in his individual capacity (operating using one of the MVPT's assumed names) to crush lamps at the Riverdale facility, with MVPT resuming custody of the crushed glass and metal. Even assuming Respondents' new assertions are true, this scenario is merely a contractual employment arrangement whereby the facility operator engaged an individual to enter the premises and perform part of the operator's work. MVPT still had control of the premises as lessee, control of the treatment being performed, and authority to decide whether and when to contact Respondent Kelly to perform the crushing activities.

6. Respondents did not have a RCRA Subtitle C permit for the hazardous waste management facility.

Respondents admit that they did not have a permit to store or treat hazardous waste. (Amended Answer Paras. 52-63). EPA has requested Respondents provide any RCRA permits that they have received, and they have provided none. (CPX 4 8). Additionally, EPA searched the informational database RCRAinfo and found no information indicating MVPT, Laurence Kelly, or any of the assumed names Respondents have used throughout EPA's investigation have ever received a RCRA hazardous waste management permit for the facility. (Brown Aff. Attach. C[10]).

[10] Similarly, there appears to be no record of RCRA permit covering the other location at which Respondent admits to having processed spent lamps, 1750 West 75th, Chicago, Illinois. (Brown Aff. Attach. C).

C. Respondents were not in compliance with the federal universal waste rule and are not eligible for enforcement discretion under the Herman Memo.

The federal universal waste regulations were created in part to relieve universal waste "handlers" of certain Subtitle C requirements, so long as they either send the waste to another handler or to a fully regulated destination facility. The universal waste rule defines a "universal waste handler" as: "(1) a generator (as defined in this section) of universal waste; or (2) the owner or operator of a facility . . . that receives universal waste from other universal waste handlers, accumulates universal waste, and sends universal waste to another universal waste handler, or to a destination facility, or to a foreign destination. 40 C.F.R. § 273.9. The definition further provides that a universal waste handler *does not mean a person who treats, disposes of, or recycles universal waste* (and lists exceptions not relevant here) (emphasis added). *Id.* All universal waste handlers are prohibited from treating universal waste. 40 C.F.R. §§ 273.11, 273.31. A "generator" means "any person, by site, whose act or process produces hazardous waste . . . or whose act first causes a hazardous waste to become subject to regulation." *Id.* A "destination facility" is "a facility that treats, disposes of, or recycles a particular category of universal waste." 40 C.F.R. § 273.9. Universal waste destination facilities are subject to all requirements for hazardous waste treatment, storage, and disposal facilities and must receive a RCRA permit for such activities. 40 C.F.R. § 273.60; 64 Fed. Reg. 36466, 36469.

As discussed above, Respondents picked up universal waste lamps from customers, stored the lamps at the Riverdale facility, crushed them at the facility, and then sent the crushed glass and aluminum to solid waste landfills. Respondents were not handlers because they treated waste lamps at the Riverdale facility. By treating waste lamps, Respondents operated a "destination facility" as defined in 40 C.F.R § 237.9 and therefore were required to have a permit for their hazardous waste management operation. 40 C.F.R. § 273.60(a). Respondent MVPT

has also expressly admitted to operating a destination facility. (CPX 6 No.12). Since neither MVPT nor Laurence Kelly had a permit to treat hazardous waste, they were out of compliance with the federal universal waste rule.

V. CONCLUSION

There is no genuine issue of material fact as to the applicable regulations in this matter or Respondents' liability because Respondents have admitted that they stored and treated hazardous wastes at the Riverdale facility without a RCRA permit. Illinois has not been authorized to implement the universal waste rule, and since Respondents are not in compliance with the 40 C.F.R. Part 273 provisions for universal waste handlers, the authorized Illinois Subtitle C regulations apply to them. Based on EPA's inspection of the Riverdale facility, the results of sampling and Respondents' own admissions, it is more likely than not that Respondents' stored and treated hazardous wastes without a permit in violation of 35 IAC § 703.121(a)(1). Complainant respectfully requests the Presiding Officer grant its Motion for Partial Accelerated Decision and enter an order : (1) ruling that the EPA-authorized Illinois RCRA Subtitle C requirements apply to the Respondents; and (2) finding that the Respondents are liable for operating a hazardous waste storage and treatment facility without a RCRA permit in violation of 35 IAC § 703.121(a)(1) (Counts 1 and 2 of the Amended Complaint).

Respectfully submitted this 8th day of February 2011,

Kasey Barton

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

CERTIFICATE OF FILING AND SERVICE

I hereby certify that today I filed personally with the 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 for Partial Accelerated Decision as to the Applicable Regulations and Liability** and the Memorandum in support thereof, and that I caused to be served, by overnight delivery service, copies of the original documents 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

Mr. Larry Kelly
Mercury Vapor Processing Technologies, Inc.
7144 North Harlem Avenue
Suite 303
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Date:February 8, 2011

Nina Johnson
Administrative Program Assistant
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