

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2**

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In the Matter of :
: Hon. Barbara A. Gunning
: Presiding Officer
:
: **REPLY PREHEARING EXCHANGE**
Cycle Chem Inc. :
Respondent :
: Docket Number RCRA-02-2011-7101
Proceeding under Section 3008 of the :
Solid Waste Disposal Act, as amended. :
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**U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2011 DEC 22 A 9 27
REGIONAL HEARING
CLERK**

Reply Pre-Hearing Exchange

In Respondent's Initial Prehearing Exchange, Respondent in its preliminary statement provided a detailed description of its understanding of the interaction between the Universal Waste Regulations found at 40 C.F.R. Part 273 and the Hazardous Waste Regulations found at 40 C.F.R. Parts 262 – 265. Respondent's description is not fully accurate nor is it applicable to this instant matter for the reasons stated below. This case is based solely on Respondent's failures to follow the authorized and approved hazardous waste regulations relating to the management of hazardous waste.

I. Preliminary Statement

A. EPA Authorization of the New Jersey 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. Env'tl. 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 or in lieu of any previously authorized state regulations. 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 granted New Jersey final authorization to administer a Subtitle C program effective 1999.¹ 64 Fed. Reg. 41823 (August 2, 1999). There were later changes in the scope of the authorized State Program as a result of EPA's authorization of New Jersey's regulations incorporating by reference changes to the federal program promulgated by EPA between July 2, 1993 and July 31, 1998. 67 Fed. Reg. 76995 (December 16, 2002). These changes in the authorized program became effective February 14, 2003.

¹ The New Jersey Hazardous Waste Program was initially authorized by EPA in 1985. 50 Fed. Reg. 5260 (Feb. 7, 1985). However, New Jersey subsequently revoked its hazardous waste regulations and, with some minor modifications, adopted by incorporation, as its hazardous waste regulations, the 1993 federal regulations found at 40 C.F.R. 40 Parts 260 – 266, 268, 270 and 124.

Prior to February 14, 2003, the authorized State Program incorporated by reference, with some minor modifications, the federal program at 40 Code of Federal Regulations (C.F.R.) Parts 124, 260-266, 268 and 270, as set forth in the 1993 edition. As of February 14, 2003, the authorized State Program, with some minor modifications, essentially incorporates by reference the regulations in the 1998 edition of the same Parts of Title 40 of the C.F.R. New Jersey's authorized regulations comprising the original State Program, authorized in 1999, can be found in the New Jersey Register. See 28 N.J.R. 4606 (October 21, 1996). The regulations authorized in 2003 can be found at 31 N.J.R. 166 (January 19, 1999). New Jersey is not yet authorized for any HSWA regulations adopted by EPA after July 31, 1998.

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 authorities². *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 requirements issued pursuant to RCRA did not take effect in an authorized state, and were not enforceable by EPA within the state, until the state adopted the equivalent requirements under state law and was

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

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 obtain final authorization, EPA implements the HSWA provisions in authorized states until the states do so. Federal rules that are promulgated after HSWA's passage, but which are promulgated pursuant to pre-HSWA RCRA authorities, do not become applicable in authorized states until the state adopts and becomes authorized for the state counterpart to such rules. 60 Fed. Reg. 25492 at 25536.

C. The Universal Waste Rule.

The universal waste rule was issued by EPA on May 11, 1995. 60 Fed. Reg. 25492 (codified at 40 C.F.R. Part 273). The final rule adding mercury-containing hazardous waste lamps ("waste lamps" or "spent lamps") to the universal waste rule was issued on July 6, 1999. 64 Fed. Reg. 36466 (July 6, 1999). Significantly, neither of these rules were promulgated pursuant to HSWA. 60 Fed. Reg. 25492 at 25536 and 64 Fed. Reg. 36466 at 36482. Therefore, the federal universal waste regulations for waste lamps became applicable and federally enforceable only in (a) states that did *not* have final RCRA authorization for the base Subtitle C program as of January 6, 2000, when the rule went into effect or (b) states that decided to seek and obtain authorization for a comparable rule. New Jersey does not fall into either of these categories. New Jersey's revised authorized Subtitle C program became effective on August 2, 1999, before the universal waste rule was promulgated. Therefore, EPA enforces the previously authorized New Jersey Subtitle C regulations with regard to the management of hazardous waste lamps until the time when New Jersey decides to seek and obtains authorization to implement a

state-adopted universal waste program which EPA determines is at least as stringent as the federal universal waste rule. New Jersey has not applied for and is not yet authorized for the universal waste rule and the waste lamp rule. *See: New Jersey Final Authorization of State Hazardous Waste Program Revision*, 67 Fed. Reg. 76995 (Dec. 16, 2002).

D. New Jersey's Universal Waste Regulations do not apply

Notwithstanding Respondent's blatant attempt to characterize this case as involving universal waste and to shift the focus to the unauthorized state rule, as noted in Complainant's Initial Prehearing Exchange, crushed fluorescent light bulbs are not considered universal waste under the universal waste regulations promulgated and enforced by New Jersey. (See proposed testimony of Sue Cosgrove and Complainant's Exhibits 1 and 2 attached thereto and incorporated into this Reply Prehearing Exchange.). Thus, even under state law, generators in New Jersey who crush fluorescent light bulbs must treat such waste *not* under New Jersey's Universal Waste Regulations,³ but under the more stringent New Jersey hazardous waste regulations that were authorized and approved by EPA.

Respondent admits that it is a Treatment, Storage and Disposal Facility that received a permit from the State of New Jersey for the operation of a hazardous waste TSD at its Elizabeth facility. (Respondent's Answer at 16, 17) EPA is specifically alleging, and as described in the proposed testimony of Mr. Abdool Jabar in Complainant's Initial Prehearing Exchange, that on at least seven occasions, Respondent received from generators crushed fluorescent light bulbs that the generator had characterized as a D009 hazardous waste and shipped to Cycle Chem accompanied by uniform hazardous waste manifests as proscribed by New Jersey regulations. (Complaint's Initial Pre-Hearing Exchange Exhibit 11). These shipments of hazardous waste

³ Similarly, in the preamble to Federal universal waste regulations, EPA has stated that crushed fluorescent light bulbs are to be treated as hazardous waste and such crushed fluorescent light bulbs are not to be regulated under the universal waste regulations.

were received by Cycle Chem as evidenced by its signature on the uniform hazardous waste manifests and Cycle Chem has provided no tests or analyses done at the Cycle Chem facility that the crushed fluorescent light bulbs it had received from these seven generators were not hazardous wastes. As such, Cycle Chem was obligated to continue to manage these crushed fluorescent light bulbs as hazardous waste. Cycle Chem's violations arose from its failures to ship these crushed fluorescent light bulbs off-site as hazardous waste using a Uniform Hazardous Waste Manifest and to ship these hazardous wastes via an authorized hazardous waste transporter to an authorized hazardous waste TSD.

II. Fair Notice

Although the Respondent attempts to make a fair notice argument with respect to universal waste and crushed fluorescent light bulbs, Complainant does not believe that this argument has any merit or is even applicable to the instant case. To begin, as noted above, Respondent, on at least seven occasions, had received hazardous waste that was described as crushed fluorescent light bulbs on uniform hazardous waste manifests. Instead of treating this material as a hazardous waste, which was how the Respondent received it, Cycle Chem, *sua sponte*, decided to treat this hazardous waste as something other than a hazardous waste and to send it off-site using Bills of Lading and an unauthorized transporter to an unauthorized TSD facility. The Federal Registers in which EPA issued the original universal waste and the later "waste lamp" rule made it clear that these federal rules did not take legal effect until a state, which had previously been authorized for the RCRA base program, was authorized for the new universal waste rule. As a result, Complainant believes that there was fair notice.

Moreover, even, assuming, *arguendo*, that New Jersey's unauthorized state rule on universal wastes is legally relevant, Respondent had fair notice that New Jersey considered

fluorescent light bulbs crushed by generators to be a hazardous waste. As noted in Exhibits 1 of Complainant's Initial Prehearing Exchange, the DEP has stated:

In order for lamps to be managed under the Universal Waste rule, "treatment" by handlers or transporters is not allowed. Under federal regulations, crushing is considered a type of treatment. Generators who treat their own lamps may do so, but when they do the lamps lose their "Universal Waste" status and are considered fully regulated hazardous waste subject to numerous more stringent federal and state standards than Universal Wastes. . .(Id.)(emphasis added)

This document was issued on October 5, 2005 and updated on July 2006 prior to the times EPA alleges that Respondent made its illegal shipments. At the time of issuance and updating, as Ms. Cosgrove will testify,⁴ the document was posted to the DEP website. Thus, Respondent was clearly put on notice prior to its shipment of the crushed fluorescent light bulbs off-site in 2007 and 2008 that crushed fluorescent light bulbs had to be managed as hazardous waste. Similarly, in August 2007, the New Jersey Department of Environmental Protection ("DEP"), as noted in Exhibit 2 of Complainant's Initial Prehearing Exchange, issued a fact sheet stating:

The processing of universal waste is not allowed under the New Jersey Universal Waste Rule without an approval from the Department. The use of any lamp crushing device would be considered processing. Therefore a generator of hazardous waste lamps would not be able to crush the lamps and still manage the crushed lamps as a Universal Waste. (emphasis added)

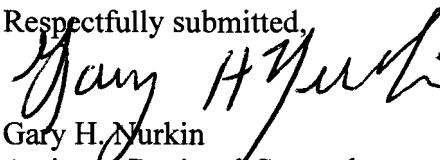
This fact sheet was similarly posted on its website and was posted prior to some of Cycle Chem's shipments off-site of crushed fluorescent light bulbs. This fact sheet corroborated what the DEP had previously posted in 2005. Thus, even assuming the unauthorized state rule is legally relevant to the EPA's complaint, Respondent had fair notice that crushed fluorescent light bulbs must be treated and handled as hazardous waste and could not be subject to the less stringent universal waste requirements in effect as state law in New Jersey.

⁴ See proposed testimony of Ms. Cosgrove in Complainant's Initial Prehearing Exchange.

III. Informal Discovery

The Complainant will separately respond to Respondent's Informal Discovery Request.

Respectfully submitted,



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Dated:

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