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, IL 60827	)	
EPA ID No: ILD005234141, and	)	
	)	
Laurence Kelly	)	
Respondents	)	

RESPONDENTS' POST HEARING REBUTTAL

I. Introduction

After a 3 day hearing of which 2 days were used by the USEPA explaining their in depth knowledge of how RCRA works the USEPA has simply not offered up any evidence or corroborating testimony from potentially viable witnesses who could have corroborated Mr. Brown's opinions and assertions that MVP/RSR was not operating within the Illinois Universal Waste Rule although unauthorized. He interviewed but conspicuously did not call high level regulatory personnel at the IEPA as witnesses such as the manger of the Bureau of Land (Ms. Munie) or the Manager of the RCRA permit section at the IEPA (Mr. Crites) who could have lent significantly to Mr. Brown's contentions that MVP/RSR was operating an unpermitted RCRA TSDF. These are precisely the people who the Respondent, Mr. Kelly sought out and received correspondence and oral guidance from for the last 10 years relating to his methods and applicability of his methods and the issues relating to those methods being consistent with the Illinois rule.

Further the Respondents have proven that they continuously applied that guidance and reported their activities every 90 days for the last ten years to these very same individuals that Mr. Brown interviewed. The Respondents argue that if the regulatory personnel at the IEPA were not in agreement with Kelly's activities in the State of Illinois they would have been called as a witness to confirm that. The fact that absolutely no one was called as a witness or have not offered up any Sworn Affidavits to corroborate Mr. Brown's opinions and or understandings is conspicuous and compelling by its absence and leaves an obvious glaring hole in the quantum leap Mr. Brown makes that either Illinois is not authorized to manage its own published Universal Waste rule or MVP/RSR was not operating within the Illinois rules therefore MVP/RSR was subject to the full RCRA Subtle "C" rules as published at RCRA.

Mr. Brown stated under oath on several occasions during his RCRA presentation and testimony that if the Respondents were in compliance with the Illinois rule then he would not have recommended enforcement, one of those examples can be found on page 116 lines 11 through 15.

The Respondents argue that Mr. Brown and Complainants counsel have stated that MVP/RSR attempted to confuse the court by stating it acted as a co-generator, who carried out and fulfilled the duties CESQG and SQG in the State of Illinois. The Respondents performed this task with the full knowledge and guidance of the IEPA. Further, when interviewing the IEPA managers Mr. Brown was compelled to ask that question to them to confirm the Respondents many references to that fact. Again the absence of any contradiction by the IEPA pertaining to the Respondents protocols in the form of Sworn Affidavits or actual witnesses simply goes directly to the fact that Illinois is in agreement with MVP/RSR co-generator and Large Quantity Handler Protocols. The Respondent would also like to point out that the USEPA's own witness' file

(Graham) demonstrates that The Respondent was in open conversations not only with Illinois but also the Wisconsin DNR dating back as far as 2000 regarding co-generator responsibilities (memo CEX 47-03136) yet, Mr. Brown and Mr. Cahn have indicated that Mr. Kelly only recently brought up co-generator as a means to create "Smoke and Mirrors" and confuse the courts. The Respondent points to that Graham's own file exhibit's as proof that again Mr. Brown's attempts to paint The Respondents activities as something other than openly pro-active, is simply again not true.

The Respondent also would like to point out that there have been many conferences and meetings with the Respondents' regulatory professionals over the last ten years including their Environmental Lawyers, Environmental Engineers and Environmental Consultants with the IEPA regulators in an ongoing effort to stay consistent and perform to what the rules dictate and any additional areas that needed clarifications from time to time by IEPA managers and regulators.

There are several fully authorized states that include a Universal Waste rule and allow for handlers to volume reduce Universal Waste Lamps. Over the many years of corresponding, negotiating and arriving at agreed protocols on several of those occasions other states protocols were reviewed for the purpose of applicability, one of those fully authorized states is Colorado. The Colorado Universal Waste rule, which is fully authorized absolutely, mirrors the Illinois rule even including references to the OSHA guidelines for mercury emissions. "A small or large quantity handler of universal waste who crushes universal waste lamps must determine whether the crushed lamp, its residues and/or any other solid wastes generated (e.g., filters) exhibit one or more characteristics of hazardous waste. If the crushed lamps exhibit such a characteristic, they may continue to be managed as universal waste, or they may be managed in compliance with 6

CCR 1007-3 Parts 260-268, 99 and 100. If the crushed lamps are no longer managed as universal wastes, then the handler is considered the generator of the newly generated hazardous waste. If the residues or other solid wastes generated during the crushing process exhibit one or more characteristics of hazardous waste, the handler is considered the generator of the newly generated hazardous waste and must comply with all applicable sections of 6 CCR 1007-3 260-268, 99 and 100. Wastes generated during the crushing process, exclusive of the crushed lamps themselves, may not be managed as universal wastes. **If the crushed universal waste lamps, its residues and/or any other solid wastes generated do not exhibit any characteristics of hazardous waste, the handler may dispose of them as solid wastes."** (emphasis added)

The above captioned verbiage is directly out of the fully authorized Colorado Universal Waste Rules. Those statements are exactly the protocols that MVP/RSR negotiated, agreed to and precisely adhered to with Illinois regulatory personnel (both Munie and Crites) when managing lamps in Illinois. The Respondent has chose to point this out because the USEPA has insinuated that Illinois rule may never be authorized and MVP/RSR was acting as some sort of under the radar "Rogue" violator of the management of known hazardous waste in the State of Illinois. The Respondents argue to the contrary the protocols although not fully authorized in Illinois are being adhered to and these protocols are also in place in other fully authorized states around the country such as the above referenced State of Colorado among others.

This preponderance of evidence is based on the more convincing evidence and its probable truth or accuracy, and not on the amount of the purported evidence offered. The USEPA has accused MVP/RSR of using smoke and mirrors and the Respondent argues to the contrary. MVP/RSR has answered every information request as truthfully and as factually as possible at the time the question was posed. The USEPA primary witness has used allegations, innuendo, opinions, and

his purported understandings, but has not submitted one factual or relevant piece of evidence or one single witness that MVP/RSR was not acting as a Co-generator/Large Quantity Handler of Universal Waste in Illinois.

The Respondents argue that after 4 years of what had to be an exhaustive investigation spending untold hours and US EPA assets interviewing a significant portion of MVP/RSR client base, interviewing their own Region V Liaison to Illinois then extracting a Sworn Affidavit and then not calling him as a witness, providing an owner of a company who admitted operating "destination warehouse" requiring that company to obtain a Part "B" permit because they must perform separation of various components of their lamp recycling process in order to achieve a non-hazardous materials. They introduced an engineer who testified that he worked for Larry Kelly a total of 29 hours over a 2 month period over 9 years ago, stating facts that by his own professional supporting file contradicts his sworn testimony, bordering on perjury. Providing the results of 12 samples indicating that 4 failed thus the Respondents were managing hazardous waste, but failing to point out that if averaged as the samples should have been they passed TCLP, or the fact that the MSDS submitted by Mr. Brown was flawed in its presentation.

The Respondents argue that the USEPA's allegations are voluminous but concocted allegations that take you nowhere unless you can prove them and the Respondents argue that the USEPA's complete lack of any supporting proof other than some lamps may fail TCLP is more than obvious or glaring, it borders on preposterous.

II. Liability

1. Respondents were not required to have a RCRA permit to conduct Universal Waste consolidation or volume reduction.

Universal waste handlers, including handlers that consolidate Universal Waste at their facilities, are not required to obtain a RCRA permit for their Universal Waste handling under the federal Universal Waste Rule or the Illinois Universal Waste Rule.

Complainant depicts Respondent's letter from the IEPA Manager of the Permit Section for the Bureau of Land as some type of warning letter issued to the Respondent. In fact, this letter issued to Mr. Kelly some 11 years ago by Joyce Munie the Manager of the Bureau of Land Pollution at the IEPA is the result of ongoing communication with the IEPA regarding the Respondent's management of Universal Waste. The letter does not state, as Complainants indicate on page 20-21, "the letter states that a warehouse that collects and crushes lamps from off-site generators at a location other than the site of generation would be fully regulated". The letter does state, as noted in Complainants footnote 17, "a warehouse that was collecting and crushing lamps from off-site generators would be fully regulated".

Respondent argues that if this letter was purportedly a warning letter signed by the Manager of the Bureau of Land IEPA and they in fact interviewed her, the Complainants had an obligation to bring her as a witness to the court and have her explain under oath actual reasons for issuing that letter that Mr. Kelly has abided by since its issuance. If that was not possible a Sworn Affidavit to that effect would have at least delineated her thought process. The Respondents argue that as a result of not extracting an affidavit or offering her as a witness the USEPA's statements are again

without any obvious corroborating evidence that could have easily been presented if in fact that was Ms. Munie's actual opinion and statement.

2. Respondents did not treat waste lamps at the warehouse

The Respondent argues that the trial record does not reflect the Respondent treated lamps at the Riverdale Warehouse. The Complainant has continuously used the word treatment throughout its presentation to the courts but the process of volume reducing spent lamps conducted by an authorized outsource company to safely manage that process is not treatment as that term relates to RCRA. The Respondent argues that in Illinois and other states including states that currently are fully authorized (e.g. Colorado) it is common place to volume reduce lamps. In Illinois when volume reducing if there may be a presence of mercury vapor during the course of performing volume reduction it is clearly mandated that the method being used must have the ability to preclude mercury vapors from entering the work place. That guideline is taken verbatim from OSHA health and safety guidelines found at 29 CFR 1910-1000.

Again the Respondent has never admitted that it crushed lamps at the Riverdale, warehouse (not Warehouse). The Respondent does admit to hiring an Illinois authorized outsource company (SLR) who brought their equipment to the warehouse as required from time to time to conduct an Illinois authorized method to safely volume reduce lamps in accordance with Illinois published Universal Waste Rules (not Hazardous Waste). That equipment which is solely owned by Mr. Kelly and authorized by the IEPA, when finished would de-mobilize the area and return its equipment back to its yard which was located in Morton Grove, Illinois over 33 miles from the Riverdale Warehouse (not Warehouse).

i. Treatment operations were not conducted at the Riverdale Warehouse

The Respondents argue that the record is not replete but to the contrary is significantly lacking any evidence which establishes that treatment was taking place at the Riverdale warehouse. To the contrary the record is replete with evidence that volume reduction was occurring at the Respondents LQH/Co-generation warehouse in accordance with 35 IAC 733.133. Volume reduction of universal waste lamps is not analogous to treatment of hazardous waste under Illinois regulations. Despite Mr. Brown's depiction of Mr. Kelly's explanation of the operations, found at TR. 139-140 and reiterated at Post Hearing Brief 23, Mr. Kelly has never applied the word "Treatment" to his operations, as it was not treatment. Further, Respondents take exception to the Complainants claim that "Respondents presented EPA with smoke and mirrors, in the form of information and arguments about assumed business names and different related entities in an attempt to avoid liability" found in the Post Hearing Brief page 24. Respondents have been forthright and cooperative in all answers to the EPA, and apprised the EPA of any and all changes to the corporate structures that occurred throughout the EPA's four year investigation, which directly contrasts the EPA's claim that Respondents are attempting to avoid liability. All information submitted to the EPA regarding business entities were accurate at the time of their submittal, as certified to by Mr. Kelly at the end of each response.

The Complainant argues that the record is not "replete" with evidence that the Respondent was conducting a treatment operation which resulted in creating hazardous waste. Mr. Browns' observations of poor housekeeping were a result of the fact that the Respondent had been withheld from entering the property for 55consecutive days up to the morning that the Respondent met Mr. Brown at the warehouse. After the Respondent spoke with the City of Riverdale Police and told them he had an appointment with The USEPA the City of Riverdale

removed their barricades allowing Mr. Kelly to enter the property before Mr. Brown appeared on the property entering the property. USEPA officials were already in the warehouse conducting their site safety investigation.

ii. MVPT did not treat waste lamps at the Riverdale Warehouse

Respondent again argues that MVP never treated lamps in Riverdale or any other place. SLR was hired to volume reduce lamps using SLR's owned and authorized mobile equipment and that service was provided at the MVP warehouse.

Further, The Respondent was under strict guidelines to certify to the correctness of their answers when responding to the Information Requests sent by the Complainant, and as of November 2007, SLR had been moved under the MVP corporate umbrella and MVP did own the mobile volume reduction equipment. However, historically this was not the case. From 2003 through September 28, 2007 (RX 27), SLR was operated as a sole proprietor by Mr. Larry Kelly. Respondents did not change their story, as stated by the Complainant in the Post Hearing Brief page 26. Respondent did change its' corporate structure, and did so one month prior (9-28-2007) to initial investigation conducted by the USEPA on 10-30-2007, not because of it, again at the direction of the Respondents' then legal representatives who were pursuing relief in the Federal Courts for Civil Rights violations created by the Village of Riverdale against both MVP/RSR and SLR/Mr. Kelly.

iii. Larry Kelly did not treat waste lamps at the Riverdale warehouse

SLR was a sole-proprietorship based out of Morton Grove, IL and operated by Larry Kelly. SLR was incorporated and added as an additional, separate assumed name under the MVP umbrella in September 2007 based on attorneys' advice regarding MVP/RSR's civil rights law suit against

the Village of Riverdale, IL. SLR was then removed from the MVP umbrella and incorporated in its' own right in December 2008. It should be noted that SLR did not perform any volume reduction services at the Riverdale warehouse while it was under the MVP corporate umbrella. The Complainant points to inconsistencies in the Respondent's responses to their information requests, (i.e., Page 132 lines 7-11 referencing CEX4), however, statements were accurate as of the time of their submittal to the USEPA, the accuracy of which Mr. Kelly certified to at the end of each response to the Complainant's information requests.

Respondent again argues that MVP never treated lamps in Riverdale or any other place. SLR was hired to volume reduce lamps using SLR's owned and authorized mobile equipment and that service was provided at the MVP warehouse.

Respondent argues that any activities conducted by SLR for the purpose of safely volume reducing lamps at the Riverdale warehouse or any other co-generator location falls specifically under the Universal Waste program and protocols that were negotiated with the Illinois EPA.

iv. Conclusion regarding Respondents' operations

Respondents argue that in order to conduct volume reduction the physical characteristic would naturally be changed. That is consistent with the Universal Waste Rule as that relates to volume reduction.

Further, the Complainants argue that MVP and Larry Kelly have created inconsistencies in their various answers to complainants request for information specifically having to do with SLR mobile volume reduction equipment (footnote15-Page 20 and footnote 27-Page 31) of the Complainants Post Hearing Brief. The Respondents argue that the names used to describe the equipment are irrelevant, however the description of the equipment and process remain

consistent. Further the Respondents believe that the Complainants exception to identifying the mobile volume reduction equipment is again hyperbole and does not go to the issue at hand.

3. Respondent stored Universal Waste Lamps at the Riverdale warehouse

Respondent again argues that the warehouse located in Riverdale was not a warehouse as defined in RCRA. The Respondent also argues that the waste lamps that were warehoused or consolidated at the Riverdale warehouse were at all times managed as Universal Waste in accordance with the Illinois Universal Waste Rule and MVP was acting as identified Large Quantity Handler (LQG) and co-generator of these lamps. It should be noted that the Illinois Universal Waste Rule allows for registered and identified LQG's to store lamps for up to one year in accordance with 35IAC 733.135 (a).

The Respondents argue that Mr. Browns report is true and correct however he fails to address the fact that the Respondent had been precluded from entering that building from September 6th to the date of the initial investigation which Brown, when asked under oath confirmed (Page 405 line 24 and 406 lines 1&2) . Those 55 days precluded MVP's personnel and Larry Kelly from protecting the warehouse from the significant vandalism that it was exposed to over that period of time. The Respondent argues that Ms. Mary Allen the recycling coordinator for the Solid Waste Agency of Northern Cook County had conducted a site specific regulatory walk through of the Respondents warehouse on September 5th, one day before MVP was locked out. She testified that "I don't remember seeing any exposed bulbs that were not containerized" and "there was no evidence that any of the bulbs were broken." She was the last non-employee to enter the building prior to the lockout that very next day. Respondents argue that it maintained the property in pristine condition prior to the 55 day illegal lockout by the Village of Riverdale.

Further, the Respondents argue the USEPA has again offered no substantiating proof that the housekeeping nightmare that is depicted in the pictures has any bearing on any potential environmental insults to the property and the surrounding area and nothing was offered by the USEPA investigator other than innuendo but again he never offered analytical results from sampling the soil, dust or volume reduced lamps which would be normal protocol and would have easily corroborated Mr. Browns opinions.

The Respondents argue to the contrary that the day those pictures in question were taken the USEPA sent a team of inspectors to the warehouse and conducted an in-depth investigation of their own culminating not in one but two separate Press Releases stating that the property and its contents offered no potential to human health or safety both inside and outside the warehouse. Subsequently, an inspector from TSCA and The IEPA went to the warehouse to specifically monitor and inspect for any evidence of potential PCB contamination that could have been present during the course of safely consolidating and managing used Ballast that investigation resulted in "No Further Action". .

4. The lamps consolidated and volume reduced by SLR's Illinois' authorized volume reduction equipment at the Riverdale warehouse were Universal Waste Lamps subject to the Illinois Universal Waste Regulations

Hazardous waste must first meet the definition of solid waste (35 IAC 721.103), and universal waste must first meet the definition of hazardous waste (35 IAC 733.109). In Illinois, universal waste is exempt from RCRA regulations found at 35 IAC 702, 703, 722 through726 and 728, and is subject to separate regulations found at 35 IAC 733, per the regulation found at 35 IAC 721.109, which mirrors the federal regulation found at 40 CFR 261.9 and states:

Section 721.109 Requirements for Universal Waste: The wastes listed in this Section are exempt from regulation under 35 Ill. Adm. Code 702, 703, 722 through 726, and 728, except as specified in 35 Ill. Adm. Code 733, and are therefore not fully regulated as hazardous waste. The following wastes are subject to regulation under 35 Ill. Adm. Code 733:

a) Batteries, as described in 35 Ill. Adm. Code 733.102;

b) Pesticides, as described in 35 Ill. Adm. Code 733.103;

c) Mercury-containing equipment, as described in 35 Ill. Adm. Code 733.104; and

d) Lamps, as described in 35 Ill. Adm. Code 733.105.

35 IAC 721.109 carries the appearance of being authorized at 40 CFR 272 Subpart O, although this appearance of authorization is "not necessarily accurate", per counsel for the Complainant.

The Respondents again deny that it ever treated, stored or disposed of hazardous waste. It followed guidance published by the USEPA and as directed adhered to its own states published rules and subsequent management guidance that was offered to them through many months of negotiations both orally and written offered as direction and safe practices by the IEPA when managing Universal Waste Spent lamps in Illinois.

5. The Riverdale property is not a hazardous waste management warehouse subject to EPA-authorized Illinois hazardous waste program

The Illinois authorized Hazardous waste program includes a section that exempts Universal Waste from hazardous waste regulations. That section has been part of the Illinois published rules for 10 years and there has been no guidance, memos and/or alerts of any kind from the USEPA or the IEPA to the contrary. In fact all guidance relating to Universal Waste found at the USEPA's web sites directs the question to and instructs whoever has posed the question to

follow Illinois published rules or seek additional guidance from the IEPA regarding the proper management of Universal Waste in the State of Illinois.

The Respondent rejects and denies the USEPA's position that MVP/RSR was intentionally and knowingly operating and unauthorized and unpermitted TSDF at their Riverdale warehouse.

Respondents argue that there are many court rulings and subsequent written decisions relating to the mismanagement of Hazardous waste and subsequent enforcements actions. Most of these cases clearly represent hazardous waste streams with no alternative methods of properly managing these streams. This issue does not fit into any of the USEPA's examples. The Respondents argue that they complied with published rules and guidance it received by the IEPA and published guidance on the USEPA's web site directing the regulated community in Illinois to follow Illinois' rules.

The Riverdale property was not a hazardous waste management warehouse, as contended by the Complainants. The Riverdale warehouse was a Universal Waste LQH/Co-generator warehouse where Respondent MVP/RSR staged their co-generated materials. Respondents have never changed the location where the mobile treatment unit was stored. The mobile volume reduction unit was always staged for future use at SLR's location in Morton Grove, Illinois pending future mobilization at a generator location. Respondents clarified this with an affidavit during pre-hearing exchange from SLR's landlord in Morton Grove, IL. The ownership of the mobile treatment unit is not confusing, and has been clearly explained. SLR has undergone 1 change throughout the Complainants four year investigation. The unit was initially owned by Larry Kelly who operated as SLR, a sole-proprietorship. For reason not having to do with this

Complaint, SLR was then incorporated under the MVP/RSR umbrella one month prior to any hint of the USEPA's enforcement action talking place, and was subsequently moved from that corporate umbrella after the Civil Rights litigation was resolved 12-2008. Respondents have apprised the Complainant of these changes as they occurred. The Complainants feigned confusion is merely an attempt to depict the Respondents as less than truthful. Respondents have always maintained that Mr. Kelly was the sole operator of the mobile treatment unit up to the filing of a Civil Rights action against the Village of Riverdale. Respondents hold that the mobile treatment unit was in no way integrally related to the co-generator consolidation of Universal Waste at the Riverdale warehouse and is not part of the day to day warehouse operations. Further, after SLR was brought in under the MVP/RSR corporate umbrella, per legal counsels' directions, there was never any volume reduction of lamps ever performed again at the Riverdale warehouse.

6. Liability Conclusion

As explained above, the EPA has not proven their case that Respondents conducted a hazardous waste storage and treatment operation without a RCRA permit for the Riverdale warehouse in violation of the authorized Illinois RCRA program.

B. The USEPA has not proven their case, and the preponderance of evidence does not support the penalty and/or Compliance Order requested.

As noted in the Complainant's Post Hearing Brief Page 44, the purpose of the RCRA Penalty Policy is to "ensure that RCRA civil penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for

noncompliance with RCRA deter persons from intentionally committing RCRA violations; and that compliance is expeditiously achieved and maintained." The Complainant has not proven their case, and the penalty proposed does not meet the purpose of the RCRA Penalty Policy. Further, Respondent finds that the authority in this matter lies with the administrative law judge presiding over this Complaint, despite the Complainant's reminder in their Post Hearing Brief Page 44, that "The Board will closely scrutinize a penalty decision where the penalty policy has not been followed."

1. The Evidence does not support the assessment of the penalty and issuance of Compliance Order

i. Potential for harm

a. Risk of Exposure

At the time there were no dwellings or businesses within 4 blocks of the warehouse so even if every lamp broke at once the mercury that would be emitted would disseminate causing no potential harm to Human Health and Safety. And more importantly no insult to land or soil at the Riverdale warehouse or surrounding area could be caused by airborne mercury vapor.

Respondents' warehouse in Riverdale created no Risk of Exposure. The Complainant, subsequent to the initial inspection of the property, stated "They found no evidence that River Shannon posed a public health threat from mercury emissions." RX 16.

Further, the Complainants Post Hearing Brief Page 49 states "Mr. Brown testified that he observed and took pictures of cracks in the floor of the warehouse, which potentially could allow

solid mercury to enter and absorb into the underlying soil." Respondents deny there having been cracks in the floor at the time they exited the property some two and half years prior to the pictures being taken by Mr. Brown. Also the Respondents would like to point out that the spent fluorescent bulbs contain mercury vapor, not solid mercury as testified to by Mr. Brown when he was attempting to explain the toxicology report (CEX 49). As mentioned above, the Agency has already concluded that there were no threats to Human Health and Safety. Further, there is no evidence to corroborate Browns insinuation that solid mercury was ever present at the MVP/RSR warehouse and Browns description of solid mercury being present at the warehouse is again not factual and is pure hyperbole.

Further yet, despite the Complainant's attempt to depict residences in the vicinity of the Riverdale property (CX 42) the Riverdale warehouse stood alone, between and abandoned building owned by the village to the West and blocks upon blocks of uninhabited and uninhabitable row houses to the East, upon which gentrification was just beginning as MVP/RSR was exiting the property in December of 2008. To the South of the property was an open field where a drive in movie theater formerly resided, and to the North was a rail yard. MVP/RSR's warehouse was the only inhabited property within the vicinity, which contributed to the ongoing and increasing vandalism MVP/RSR incurred while occupying the Riverdale warehouse.

Respondents agree that mercury is a highly toxic substance, and when mercury vapor is bio-accumulated in sufficient levels, can cause harmful effects. This is why the Respondents performed their operations, to prevent the release of mercury vapors into the atmosphere. Respondents treated every spent fluorescent bulb as potentially hazardous. Despite the fact that the Complainants testing results depicted only four of the twelve tested bulbs (CEX-2) as

containing mercury vapor levels above regulatory limits, each bulb contains mercury vapor, and Respondents managed them as such. SLR's volumes reduction equipment was engineered to manage the presence of mercury vapor only which is what all spent mercury containing lamps emit if broken.

b. Harm to the RCRA regulatory program

Universal Waste and Universal Waste Handlers are not subject to RCRA requirements when operating under the Illinois Universal Waste Rule, and therefore could not have caused harm to the RCRA regulatory program. Respondents were in constant contact with the Illinois EPA, both the Bureau of Air and the RCRA permit section, both of which did have an opportunity to evaluate their operations and found them to be within the Illinois Universal Waste Rule. Respondents reported their operations to the Illinois RCRA Permit Manager every three months during their operations. (CEX 4 – Bates stamped 604- 627)

ii. Extent of deviation

Respondents did not apply for or receive a permit for their Universal Waste management activities. Under Illinois law, they were not required to, which Respondents confirmed with the Illinois EPA.

iii. Placement in matrix and adjustment within cell for total gravity based penalty

The Complainant's Post Hearing Brief highlights the fact that Mr. Kelly is still conducting Universal Waste Management under new corporations. Respondents point to the fact that again, the Respondents have been nothing but forthright in their answers to the Agency. Mr. Kelly

continues to manage Universal Waste utilizing its Illinois authorized mobile reduction equipment at other generator locations from time to time under the Illinois Universal Waste Rule, pending the outcome of this enforcement action.

iv. Economic benefit

Respondents realized no economic benefit from their operations. Neither Respondent made any money by their operations. MVP/RSR was operating at a loss, and Mr. Kelly was not compensated for the services he offered to MVP/RSR. Respondents, specifically Mr. Kelly, would not have risked their unblemished regulatory history by openly operating an unpermitted TSDF for the total economic benefit of $21,596. Here again the position taken by the USEPA is absolutely preposterous and truly does not deserve to be commented on other than for the purpose of pointing out how ridiculous the position taken by the USEPA truly is.

The Complainant then refers to the testimony of Mr. Worth (Fluorecycle). Mr. Worth testified that he began the application process for RCRA permitting 2 years before the Uinversal Waste was even promulgated at the federal level. He also testified that in order for his equipment to function properly it was necessary to separate, retort or distill the crushed lamps. He also separated Glass from Metal ends all those procedures requires Part "B" permits as a "Destination Warehouse". These operations are not relevant to the MVP/RSR warehouse operations because MVP/RSR does not separate or distill any of the non-hazardous volume reduced glass and metal ends. The operations being performed by Mr. Worth are certainly subject to RCRA permitting as a destination warehouse.

v. Adjustment factors

a. Good faith efforts to comply

The Respondents argue that MVP/RSR used every opportunity to seek clear guidance from published USEPA guidance documents and continuous contact with Illinois regulators (reporting activity conducted every 3 months as a large quantity handler and co-generator) that resulted in both precise printed and oral guidance that allowed MVP/RSR to carry out the duties of a co-generator precisely to maintain a safe, compliant and user friendly method of managing spent Universal Waste Lamps in Illinois for Conditionally Exempt Small Quantity Generators and Small Quantity Generators. The Respondents have in fact proved that with the evidence it has presented and the absolute complete lack of relevant evidence offered to the courts by the Complainant.

b. Degree of willfulness/negligence

The Respondents argue that it is clear that they were confident they had received concise and regulatory compliant guidance when they open their warehouse in Riverdale in 2005. MVP/RSR ran an open door policy and was the subject of many site specific regulatory audits at the Riverdale Warehouse. Mr. Kelly was present for the majority of these site visits and subsequently a very high percentage of the regulatory personnel sent to the warehouse after reviewing and confirming the MVP/RSR protocols found that operation to be regulatory compliant thus recommending that their company proceed to allow MVP/RSR to become their co-generator ally. The Respondents argue that does not demonstrate any degree of willfulness and/or negligence to avoid or intentionally break the law. To the contrary this demonstrates the Respondents intent upon precisely following the published rules and guidelines it gleaned

through many years of contact, open dialogue and guidance it received through Mr. Kelly's ongoing discussions with Illinois regulatory personnel.

c. History of non-compliance

MVP/RSR has no history of non-compliance over the short period of time that it operated its warehouse in Riverdale. Further, the Respondents argue that Mr. Kelly has operated in the highly regulated hazardous waste arena for over 5 decades and has managed to maintain an unblemished regulatory history up until this unfortunate enforcement action started in October of 2007.

d. Other unique factors

i. Enforcement Discretion

Respondents were in compliance with the Illinois Universal Waste Rule, which Mr. Brown acknowledges as "almost exactly the same as the federal rule" TR266, and met the criteria delineated in the Herman Memo. Respondents should have been afforded the enforcement discretion it delineates.

ii. Respondents are in compliance with the federal universal waste regulations

Respondents are in compliance with the federal universal waste regulations. The federal regulations clearly allow universal waste handlers to store universal waste lamps for up to one year, per 40 CFR 273.35. The federal rule does not have allowances for the crushing of waste lamps, however, does leave the decision to allow for crushing under controlled conditions up to each individual state. Several states, including Colorado, have authorized Universal Waste Rules

that do allow for crushing. The Illinois Universal Waste Rule also allows for crushing. The crushing allowance in the Illinois Universal Waste Rule is not the reason that the Illinois Universal Waste Rule has not received authorization. The Illinois Universal Waste Rule has not received authorization due to its rule was packaged with some 60 other environmental regulations, and authorization is being withheld due to other aspects of Illinois law, per the affidavit submitted by Mr. Westefer of the USEPA Region V. Under Universal Waste Rules, "crushing" is not akin to "treatment" under RCRA.

iii. MVPT is not a co-generator or handler under the universal waste regulations

Respondents are certainly not attempting to confuse matters by asserting that MVP/RSR is a co-generator of Universal Waste. CEX 47 – 03136 clearly indicates that Respondents have been operating under a co-generator status since January 2002. The decision to operate on behalf of Conditionally Exempt and Small Quantity Handlers emanates from the written opinion of Mr. Joyce Munie, Manager, Permit Section, Bureau of Land, IEPA, dated October 16, 2000 and stating in part, "As a handler of universal waste, SLRT may receive the lamps at its facility for accumulation without a permit" and "a facility that was collecting and crushing lamps from off-site generators would be fully regulated". While the Complainant may characterize these statements as a "warning" from the IEPA, this letter is actually a response to the Respondents ongoing communication with the IEPA to receive clarification and ensure compliance. Subsequent to receiving this opinion, Respondents received opinions from the IEPA that their mobile treatment equipment could operate at the site of a co-generator who consolidated lamps from conditionally exempt and small quantity handlers and carried out the duties of the generator, consistent with the recommendation in the federal register (45 FR 72024), however,

consistent with the opinion stated in the October 16, 2000 letter, the same company could not both consolidate and perform the volume reduction. Respondents complied with this recommendation and operated the co-generator consolidation separately from the volume reduction operations. By January of 2002, Respondents had begun to seek guidance from the Wisconsin DNR on their opinion of Respondents' ability to operate as a co-generator in Wisconsin, based on the aforementioned guidance received from the Illinois EPA.

Respondents concur with the presiding officer's question TR 664, "Isn't that a rather fine distinction between taking it out of a light fixture, and picking it up on the loading dock?" Complainant points to 58 Fed. Reg. 8102, 8115 and quotes in their Post Hearing Brief page 76 "For batteries, a used battery generally becomes a solid waste when a generator permanently removes it from service (for example, by removing it from the appliance or equipment in which it has been used). An unused battery becomes a solid waste when a generator decides to throw it away (for example, by disposing of the batter (sic) on the land or incinerating it)." Complainant then states "Clearly, a generator is the person who removes, or is responsible for the removal of, a lamp from its socket at the location and at the point in time the lamp is first removed from service. " Respondents argue that the Federal Register distinctly provides this statement as an *example*, and not an absolute definition, as the Complainant attempts to characterize it.

The Respondents argue that the true definition of a co-generator is the entity that carries out and fulfills the obligations of all other potential generators involved in managing a given waste stream. MVP/RSR offered a co-generator service to companies that were neither mandated to recycling lamps (CESQG) or who had the ability to self certify stating that their lamps were non-hazardous thus allowing those two types of generators to simply throw their lamps in the

garbage. Whether the lamps fail TCLP or not is not the issue. All lamps contain mercury or they will not strike. If a lamp passed TCLP it still contains levels of mercury that will vaporize when the lamps are broken in the garbage and will contribute air polluting environmental insults every time one of the potentially tens of millions of these lamps break on a daily basis.

MVP/RSR offered a full service to these entities by distributing specifically design containers with the correct placards attached to stage their spent lamps in. These containers when full would be picked up by MVP/RSR's owned trained technicians using trucks owned by MVP/RSR and transported using a non-hazardous Bill of Lading to a common warehouse that was identified with both the USEPA and the IEPA as a Large Quantity Generator location specifically for the purpose of the consolidation Universal Waste.

MVP/RSR was fortunate to have an ally and a partner who owned state authorized equipment that could safely perform volume reduction of these lamps (SLR/Kelly) from time to time when necessary. After the volume reduction service was performed and its ally safely staged the mixed glass and metal into covered and lined Roll-offs and they left the warehouse, MVP/RSR would then begin shopping known markets for companies that were permitted to separate the mixed non-hazardous metal and glass and resell those materials when the materials were in demand. However, to avoid "Speculative Accumulation" issues if those markets were not readily available the non-hazardous mixed material was safely sent to a non-hazardous landfill where the material had been legally profiled for disposal.

All of this activity was tracked, reported and precise records were maintained in accordance with both the USEPA Universal Waste rules and IEPA Universal Waste rules. That reporting was performed every 90 days and sent to the Manager of The RCRA Permit Section at the IEPA.

iv. Respondents are in compliance with the Illinois unauthorized universal waste regulations

Complainant attempts to confuse the issue by combining the operations of the Respondents. The Respondents are two separate and distinct companies that performed separate and distinct services under the Illinois Universal Waste Rule and the guidance of the Illinois EPA, to whom they reported on a quarterly basis.

3. Penalty Conclusion

For the reasons discussed above, the Respondents cannot be held liable for violating the Illinois hazardous waste program while operating within the Illinois Universal Waste Rule, under the guidance of the USEPA and IEPA to do so. Respondents have never mismanaged hazardous waste.

4. The Compliance Order is inappropriate and should not be issued to the Respondents

Respondents should not be required to perform closure at the Riverdale warehouse. Respondents exited the Riverdale warehouse in December of 2008, after having cleaned it to the satisfaction of the environmental attorney for the Village of Riverdale and the UNITED STATES DISTRICT COURT FOR THE Northern District of Illinois-Eastern Division. The Complainant was apprised of the Respondent's exit of the property and were certainly free to evaluate the warehouse at that time. Respondents cannot be held accountable for the condition of the building two and a half years after their exit. The Respondents do not own the waste purportedly onsite during the inspection on May 26, 2011, and based on the photographs CEX 42, it appears to be a de minimus, conditionally exempt amount of waste caused by what appears to be an unattended

building left for scavengers and vandals to have their way with. The Complainants own overview of the property when he went there two and half years after MVP/RSR had agreed to move leaving the building in a clean and broom swept condition also describes what is obviously the remnants of a building completely left unattended. (CEX 42- 03024)

Further, RCRA closure is inappropriate. The Complainant cites "Mr. Brown testified that he observed and took pictures of cracks in the floor of the facility, which potentially could allow *solid mercury* to enter and absorb into the underlying soil" in the Post Hearing Brief page 49 (emphasis added). This line of thinking is flawed, in that the hazardous constituent in spent fluorescent lamps is mercury vapor, not solid mercury, which is consistent with Mr. Browns exhibit (CEX- 49) and explanation of how and why mercury vapors are potentially dangerous if mismanaged.

Respondents are not out of compliance with RCRA. Respondents are in compliance with the Illinois Universal Waste Rule, which is exempt from RCRA regulations. Respondents have not demonstrated an unwillingness to come into compliance nor a willful intention to continue to operate out of compliance. Respondents have merely demonstrated they operated under the Illinois Universal Waste Rule based on all guidance and publications from both the USEPA and IEPA, and should not be held liable for following the guidance they provide.

III. Affirmative defenses

A. Respondents have not proved the affirmative defense of "fair notice"

1. EPA has not provided fair notice that Illinois must manage Universal Waste as Hazardous Waste under Illinois RCRA regulations

The record does not establish that the EPA has provided fair notice that the universal waste regulations are unauthorized in Illinois and that the full Subtitle C requirements are enforced when a party is not in compliance with the federal universal waste regulations.

The Complaint brought against the Respondents centers on the fact that Illinois is not authorized for their Universal Waste Regulations and therefore Illinois' authorized Subtitle C RCRA requirements apply to their operations. It is not until the Respondents requested enforcement discretion as detailed in the Herman memo, did the Complainants began to incorrectly claim that the Respondents were also operating outside the Illinois Universal Waste Rule as well. That does not change the fact that the original Complaint, as filed and amended, claims that the Illinois Universal Waste Rule is unauthorized, and therefore, as ruled, the Illinois RCRA program applies to this material. Respondents have not received fair notice to manage this material under the Illinois RCRA program. As noted by the Complainant (Rebuttal page 84), "Generally, a particular interpretation advanced by a regulator is ascertainable so long as there are (1) no contradictions and (2) no major ambiguities in the agency' communications." Respondents point to significant ambiguities in the agency's communications, particularly on the agency's website, which provides state by state guidance for managing Universal Waste, and provides direct links to the Illinois Universal Waste Rule. It is impossible to ascertain that because Illinois maintains an adopted status for their Universal Waste Rule, spent fluorescent lamps should be managed under Illinois' RCRA regulations, when the agency clearly directs constituents of Illinois to the Illinois Universal Waste Rule. The Illinois Universal Waste Rule,

as noted by Mr. Westefer of the USEPA in his affidavit, has been enforceable under Illinois law since the date it was published. Further, the USEPA publishes in 40 CFR Part 272, Subpart O, the regulations where Illinois exempts Universal Waste from management under RCRA as authorized regulations, although this is "not necessarily accurate" (Transcript page 32 lines 1-3), which clearly creates major ambiguity. The USEPA has a responsibility to correct these ambiguities and notify the regulated community in Illinois that this publication under the Illinois authorized regulations is incorrect and has been corrected. By directing citizens of Illinois to the Illinois Universal Waste Rule and providing authorization to the regulations that exempt this material from RCRA management, it is impossible for a regulated party acting in good faith to ascertain that this material must be managed as RCRA waste, as claimed in the Complainant's complaint.

2. Respondents could not have ascertained that Universal Waste must be managed as Hazardous Waste under Illinois RCRA regulations.

Mr. Kelly has an extensive regulatory background, and has never encountered any regulation that is published (has been for over ten years) in an authorized RCRA state that in fact was never authorized only adopted, without at least some sort of warning or caveat attached to it. Based on his communications and meetings with the Illinois EPA, as well as guidance provided by the USEPA, Mr. Kelly could not have concluded that in Illinois, Universal Waste must be managed as RCRA waste. Mr. Kelly is clear on the definition of a destination warehouse, and therefore did not treat or separate any Universal Waste. Mr. Kelly, as the sole proprietor of SLR, complied with the standards for a Large Quantity Handler, as directed by the Illinois EPA, and performed volume reduction at his clients locations, as allowed by the Illinois EPA. Mr. Kelly,

even with his extensive regulatory background, went so far as to hire consultants to assist in complying with the Illinois Universal Waste Rule. Neither Mr. Kelly, nor any of the consultants he employed, including the consultant provided by the USEPA, were able to ascertain that spent fluorescent lamps must be managed as RCRA waste in Illinois, as claimed in the amended Complaint.

Mr. Kelly would not have jeopardized the unblemished regulatory history that he spent five decades building by knowingly and openly operating and unpermitted TSD warehouse.

B. Respondents have proven the affirmative defense of inability to pay the proposed penalty

Respondents have willingly provided all possible information to the USEPA regarding ability to pay. Without direct contact with the USEPA's financial analysis expert, Respondents were forced to rely on the USEPA to relay any requests for additional information that the expert may require to complete his analysis.

1. Mr. Kelly provided all available financial information

Mr. Kelly provided the two types of necessary information required to assess an individual's financial status, tax returns and information about his expenses, assets and liabilities. Additionally, Mr. Kelly signed authorization for the USEPA to obtain additional copies of his tax returns directly from the IRS. Mr. Kelly cannot be held accountable for the IRS's inability to provide these copies to the Agency. Both the Complainant and the Witness Mr. Ewen note that each of Mr. Kelly's tax returns were signed and dated on February 8, 2011 (TR 734), but fail to mention that Mr. Kelly signed and dated those returns at the request of the court, as his own

personal copies were not signed and the Agency demanded signed copies of the returns. In May of 2011 the Agency widened its' scope of financial evaluation to extend beyond Mr. Kelly's personal tax returns to the companies he is involved with. Mr. Kelly was unable to provide tax returns for these companies, as they had not yet been filed, but provided balance sheets and profit and loss statements for each. These companies are not publicly traded, and therefore are not required to maintain audited balance sheets or profit and loss statements, nor could they afford to acquire audits.

Mr. Kelly did not report any income from a sole proprietorship on any of his income tax returns, as he made no income from his sole proprietorship. MVP/RSR was in fact doing well in 2007, but was not actually yet profitable, and therefore Mr. Kelly's sole proprietorship was providing its services under agreement but at no charge until MVP/RSR was profitable and able to pay for the services provided.

Mr. Kelly sold his home to his partner for $650,000 Mr. James Molidor in 2003 not 2005, which retired Kelly's mortgage that he owed the bank at that time. Mr. James Molidor then took out a new mortgage of $1,000,000 and invested the difference ($350,000) back into the startup company known as MVP/RSR which all occurred in 2003 not 2005. The records of this sale were unfortunately destroyed in a flood at the law office of Mr. Kelly's legal representative in the matter of the home sale. Mr. Kelly provided the name, address and phone number of his lawyer, to verify the loss of records. However, Mr. Kelly did note that documents such as that could readily be examined or procured from the Cook County Recorder of Deeds.

Further, Mr. Molidor allowed Mr. Kelly to remain at his residence while their corporation grew, under a ten year buy back agreement. MVP/RSR was dissolved in 2008, and the home fell into

foreclosure. The home that Mr. Kelly has lived in for over 30 years and raised his family in has been foreclosed on and is now bank owned. Mr. Kelly and his family is still residing there for the time being, however, no rent is being paid and Mr. Kelly has been summoned to appear in The Circuit Court of Cook County Illinois on November 29th to receive an eviction date which could be as early as mid-December (Case # 11M1-726897). Mr. Ewen testifies (TR 749) "I'm looking at about a $5,000 difference between his income, personal income and expenses." Yet Mr. Ewen further notes (TR 751):

Q: And I think you've talked about this a little bit, but what are the assumptions in that range?

A: Well, they're important. I mean, they basically, A., that is household income, the difference between household income and expenses stays consistent. …

Mr. Ewen notes that Mr. Kelly is paying no rent (TR 736), an additional expense Mr. Kelly will begin to incur around the first of the year.

Mr. Ewen goes on to state (TR 749 - 750) "if we adjust, or reconcile, the net income figures from Citywide, SLR, the active SLR, and MercPak, reconcile the net income to a measure of cash flow, I can – I can get about $7,000 in annual cash flow out of these three enterprises, I think." This figure fails to take into consideration that Mr. Kelly is not the sole owner of Citywide Elevator Inspection Services, Inc., and in fact owns 50 percent of this company. Yet Mr. Ewen's figure of about $7,000 in annual cash flow is based primarily on the "positive net income of $6,767 in 2010" (TR 723) earned by Citywide Elevator Inspection Services, Inc.

Mr. Ewen's depiction of Mr. Kelly's assets as "there's no checking accounts of material value, savings accounts of material value, no retirement accounts of material value. Doesn't own the

home in which he lives and has --- I guess that – you know, does own a few vehicles for driving purposes, and the has some credit card debt outstanding" (TR733) is an accurate depiction of Mr. Kelly's personal finances and financial ability.

2. MVPT provided all available financial information.

Mr. Kelly did not sell his house to Mr. Molidor for one million dollars. Mr. Kelly sold his house to Mr. Molidor for $650,000, the amount owed on the mortgage, and Mr. Molidor re-mortgaged the home and invested $350, 000 he received from the new loan into MVP/RSR, which was a loan to be repaid in part by Mr. Kelly.

Mr. Ewen, as an expert witness, testified (TR 743)

Q: Based on the information provided by MVPT, what is your opinion of its ability to pay the proposed penalty?

A: Well, the – I mean, the – that corporate entity, the MVPT corporate entity, you know, there's – doesn't appear to be anything left there. It's not operating. It doesn't have any capital assets remaining, or it's represented they're all destroyed; and it has – you know, at least it doesn't owe debt to independent third parties, but it still does own a debt – owe a debt to a related party in MVC. So I just don't see MVPT as having any viable sources of funds available, directly available to it for penalty payment here.

Conclusions

The USEPA is an extremely powerful agency and was awarded authority and empowered to manage and enforce very important regulations that relate to the Health and Safety of the entire population in the United States of America that potentially also effects the rest of the world's population. With that empowerment comes a responsibility to apply a degree of discretion and reasonableness before bringing the full force of its authority on a regulated company such as MVP/RSR using draconian methods. The Complainant has vigorously pursued this enforcement action applying the most stringent rules used for the management of waste streams that are deemed to be extremely or acutely hazardous. However, in the mid 90's The Federal rule makers came to an understanding that Spent Mercury Containing Lamps did not fall into that category known as RCRA Subtle "C" hazardous waste. They understood that spent lamps could be managed much more safely and efficiently under a much less stringent set of guidelines known as the Universal Waste rule.

Initially the Complainant's brought their enforcement action based on two facts one of which was known to the general regulated community in Illinois "Some mercury containing lamps fail TCLP" and one that was not known "Illinois had Adopted the Universal Waste rule but although managing its rule for over 10 years with the full knowledge of the USEPA apparently never obtained full Authorization from the USEPA". (Westefer Affidavit submitted by USEPA in accelerated decision motion)

At the outset of this enforcement action for allegedly storing hazardous waste without a permit from the Environmental Protection Agency (EPA) and through the entire 4 year investigation the Complainants were adamant that MVP/RSR was in violation of managing Subtle "C" hazardous

waste without obtaining a RCRA permit. Consistent with their entire investigation when presenting their case at the hearing it was apparent that was the genesis of their enforcement action. However, during those proceedings when questioned under oath the lead investigator admitted under oath, two very significant facts (1) Illinois' published Universal Waste rule (35 IAC Part 733) was virtually identical to the USEPA's rule (40 CFR Part 273) (2) that if MVP/RSR was in compliance with the published but not authorized Illinois Universal Waste rule he would not have recommended enforcement.

These statements were made through the course of the Complainants day and a half long RCRA clinic that was well rehearsed, presented by counsel and verified by their investigator (Mr. Brown) and served to reintroduce the stringent guidelines of 40 CFR Part 261 otherwise known as RCRA. No evidence, no witnesses, no affidavits, no lab analysis of volume reduced material or dust samples or wipe samples that could have fortified or established the driver behind their enforcement action that MVP/RSR was in violation of RCRA, other than some whole lamps when broken did in fact fail TCLP. The Respondents have attempted to point out that the results of that testing is the very reason and the driver behind the Universal Waste rule and the reason the regulators added Lamps to the rule.

The Respondents argue that there is simply no proof in the form of evidence, witnesses or sworn affidavits that would lead any reasonable person with a basic understanding of RCRA vs. Universal Waste whether that be at the Federal level or The State of Illinois, to conclude that MVP/RSR somehow breached the Illinois Pollution Control Boards (IPCB) published rules and managed by the IEPA for over 10 years relating to the proper management of Universal Waste in Illinois.

Respondents argue that The USEPA investigators have had over four years (4) years to produce something that justifies their quantum leap from the management of Spent Lamps under The Universal Waste Rule to full Subtle "C" RCRA enforcement other than "Some Lamps Fail TCLP", but again Respondents argue that fact is the actual reasoning behind adding lamps to the Universal Waste Rule both at the Federal and State level. That specific reasoning can be found throughout the USEPA and the IEPA published guidance documents including the Federal Register.

The Respondent has demonstrated that it attempted to follow published rules and took guidance from not only the IEPA but the Federal EPA when seeking information off the USEPA web site. The Respondents or any other person of reasonable competence and knowledge following the USEPA web site, then as instructed taking guidance from the IEPA could not have had anything other than beyond a reasonable reliance that if performing a service pertaining to the Universal Waste Rule in Illinois it was to follow the Illinois rules.

The Respondents argue that this whole matter was a rush to judgment which is not supported by any facts, direct testimony (other than Browns opinions and suppositions) or any sworn affidavits and therefore the Complainant simply has not proven their case. Respondents ask that the courts conclude that the USEPA enforcement action simply has not brought its case above the bar of reasoning, especially since their lead investigator testified that if MVP/RSR was in compliance with Illinois' published Universal Waste rules and protocols they would not have sought out enforcement. However, the USEPA never brought any evidence much less a preponderance of evidence to prove that MVP/ RSR was operating outside the Illinois rules. The Respondents

argue to the contrary, the obvious fact that The USEPA after admittedly interviewing the very managers at the IEPA that the Respondents MVP/RSR and Mr. Kelly correspond with on a quarterly basis the USEPA never saw fit to offer their testimony in the court or even secure a Sworn Affidavit to corroborate the USEPA's assertions and accusations. There can only be one conclusion made from that absence of any corroborating testimony related to this complaint and that is the Illinois regulators did not agree with Mr. Brown's quantum leap from MVP/RSR adhering to Illinois published rules to Illinois is not authorized and therefore Spent Lamps in Illinois must be managed as RCRA Subtle "C" hazardous waste. This whole action is lacking any enforcement discretion as stipulated to in the Herman memo or basic reasoning and again the Respondents believe this case should be dismissed in its entirety on those facts alone. Further, the Respondents argue the fact that Mr. Brown testified under oath that he would not have brought an enforcement action against MVP/RSR if they were in compliance with the Illinois unauthorized Universal Waste rule but never brought any corroborating evidence, witnesses or sworn affidavits to ever support his contention that MVP/RSR was in fact operating outside the Universal Waste Rule as published in Illinois. Also the failure to notify issue was prevalent throughout this hearing establishing in several areas of testimony that there was apparent authority given to Illinois by the USEPA's actions and inactions over the last ten years. The Complainant has not met the Preponderance of evidence bench mark in order to prevail in an enforcement matter such as this. For all the above reasons the Respondent asks the court to dismiss the enforcement action against MVP/RSR and Larry Kelly.

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, IL 60827	)	
EPA ID No: ILD005234141, and	)	
	)	
Laurence Kelly	)	
	)	
Respondents	)	

CERTIFICATE OF SERVICE

I certify that the foregoing Respondents' Post-Hearing Rebuttal was sent this day, November 21, 2011 in the following manner to the addressees listed below:

Original by Registered Mail and facsimile to:

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The Honorable Judge Gunning
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