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 REPLY 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 Reply Memorandum in Support of its Motion for Partial Accelerated Decision. The only material issues in this case are whether Respondents stored and treated hazardous waste and therefore were required to have a RCRA permit. Because Respondents confirm their admissions that Mercury Vapor Processing Technologies, Inc. (MVPT) and Laurence Kelly operated a hazardous waste storage and treatment facility without a RCRA permit, an accelerated decision on the issue of liability should be granted, finding that the EPA-authorized Illinois Subtitle C regulations apply to Respondents and that they are liable for storing and treating hazardous waste without a RCRA permit in violation of 35 IAC § 703.121(a)(1) (Counts 1 and 2 of the Amended Complaint).

A. RESPONDENTS HAVE NOT RAISED ANY GENUINE ISSUE OF MATERIAL FACT

Once the movant meets its burden of showing it is entitled to judgment as a matter of law, in order for the non-movant to defeat a motion for accelerated decision, it must show the existence of a genuine issue of material fact for resolution at hearing. *See, e.g., In re BWX Techs., Inc.*, 9 E.A.D. 61, 74-77 (EAB 2000). 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. *Id.* at 75. The non-movant may not simply rest on the pleadings or mere assertions, but must set forth specific facts, as through affidavits or as provided in the Consolidated Rules, showing that there is a genuine issue for hearing. *Id.* at 75-76. Here, Complainant has established that Respondents conducted a hazardous waste storage and treatment operation without a RCRA permit for the facility. Respondents have not set forth any specific facts contradicting Complainant's showing that the elements of the case are met.

1. Respondents' arguments regarding the actions of the Riverdale police and the condition of its premises at the time of the inspections do not create an issue of material fact.

Much of Respondents' Memorandum in Support of its Objection to Complainant's Motion is devoted to a recitation of incidents occurring prior to EPA's Compliance Evaluation Inspection at the Riverdale facility. Specifically, Respondents claim that MVPT was wrongfully denied a business license, that the Riverdale Police laid "siege" to the Riverdale warehouse, and that during the siege vandals entered the warehouse and crushed the lamps that EPA photographed, thereby creating the impression that Respondents were operating in a noncompliant manner. However, none of these claims are supported by affidavit; Respondents provide only certain records of the Village of Riverdale and unauthenticated photographs of

police cars and the facility property. More importantly, these claims and materials create no genuine issue of material fact. Whether the Village of Riverdale acted properly towards Respondents in the exercise of its local sovereign authority, and whether vandals caused the conditions that EPA observed, are completely irrelevant to the issue of whether Respondents were required to have a RCRA permit to store and treat spent fluorescent lamps. Respondents' claims make it no less likely that they stored and treated hazardous waste at the Riverdale facility.

2. Respondents' argument regarding Shannon Lamp Recycling's status as a separate entity from MVPT does not create a genuine issue of material fact.

Respondents clearly operated the Riverdale facility, and were responsible for compliance with RCRA. The issue of Shannon Lamp Recycling's purported independence from MVPT is not relevant to whether either entity was required to have a RCRA permit for its operations. The thrust of Respondents' argument appears to be that MVPT is merely a holding company, that Shannon Lamp Recycling is a separate entity that moved under, and then out from under, MVPT's "corporate umbrella," that one cannot be liable for the acts of the other, and that therefore, neither is liable. This is a transparent attempt to create the illusion of separate, legally cognizable entities which somehow independently undertook treatment of the hazardous wastes apart from MVPT and Laurence Kelly.

With respect to whether MVPT is a holding company that forms an "umbrella" over "Shannon Lamp Recyling," its June 3, 2008 response to Complainant's second information request is to the contrary. When asked to describe the relationship between Shannon Lamp Recycling and MVPT and to indicate whether Shannon Lamp Recycling is an assumed name of MVPT or of some other entity (CPX 5 No.7), MVPT states "Shannon Lamp Recycling (SLR) is a registered assumed name of Mercury Vapor Processing Technologies, Inc. with the State of

Illinois. SLR manages the mobile processing of Universal Waste destined for recycling." (CPX 6 No. 7). Similarly, MVPT stated in that response that River Shannon Recycling was an assumed name of MVPT. (CPX 6 No. 5). It appended to this response a page from the Illinois Secretary of State's web page, indicating that "River Shannon Recycling Technologies" and "S.L.R. Technologies" are active assumed names of the entity "Mercury Vapor Processing Technologies, Inc." (CPX 6 Att. 2). While Respondents now attempt to divide their activities among MVPT's assumed names (Respondent's memorandum at p. 13), an assumed name is not a legally cognizable entity separate from the entity using the name. The relevant statutory provision, Illinois's Assumed Business Name Act, 805 ILCS 405, prohibits persons from transacting business in Illinois under an assumed name, unless they follow the procedures set forth in subsection 405(1). The effect is not to create a separate legal entity, but instead to prevent fraud by putting creditors and other third parties on notice of the entity with whom they are in fact dealing. *See Regency Financial Corp. v. Meziere*, 1990 W.L. 103247 at. p. 3 (N.D. Ill.). Thus, by allowing corporations to register an assumed name, Illinois law permits a corporation to conduct its business using a name other than the corporation's legal name, provided the procedures are followed. *See Hoskins Chevrolet v. Hochberg*, 294 Ill. App. 3d 550, 555 (1998). It is not a device for shifting liability. Respondents' current strategy of assigning MVPT's activities to "MVP/RSR" and "SLR" does not affect MVPT 's liability for the alleged violations, since the sole lawful corporate entity is MVPT.

In addition, Respondents' attempt to draw a distinction between MVPT and "SLR," or "Shannon Lamp Recycling," does nothing to shield MVPT or Laurence Kelly from liability. In this respect, Respondent MVPT's prehearing exchange identifies Shannon Lamp Recycling as a sole proprietorship operated by Laurence Kelly, and states that this entity actually performed the

"volume reduction" of lamps. 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). The consequence of this admission is to concede that Laurence Kelly actually engaged in the crushing of spent lamps, since he controlled the crushing process. Respondents offer no evidence to support their present assertion that MVPT was a holding corporation with Shannon Lamp Recycling moving "in" and "out" of the "corporate umbrella" (Respondents' Memorandum pp. 3 and 13). Thus, it is merely an after-the-fact attempt to escape liability.

Even if one were to view "Shannon Lamp Recycling" as a legitimate contractor operating independently of MVPT, MVPT would still be liable for operating a treatment facility, because a facility operator cannot escape RCRA liability by contracting with a third party to enter the premises and engage in some or all of the regulated activity. *See In re Southern Timber Prods.,* 3 E.A.D. 880, 890-95 (1992)(finding that a facility may have more than one operator where the overall operation is shared by two or more persons). To the contrary, liability under RCRA is strict, and a party otherwise falling within the definition of "owner" or "operator" cannot escape liability by contracting out the regulated activities on site, when that party is making the decision to store and treat the waste and still maintains overall control of the facility. This is especially true when, as is the case here, the individual serving variously as Vice President and Health and Safety Officer (CPX 4 no. 1), Chief Operating Officer (CPX 6 Nos. 1 and 3), and President (CPX 8 No.1) of the company makes the decision to hire himself as a sole proprietorship to treat hazardous waste. [1]

[1] Indeed, the very arrangement Respondents describe, that of a corporation's principal designating himself in his individual capacity as an independent contractor, is rife with opportunity for abuse of the corporate form. To conduct business in this manner is merely to structure a self-dealing employment arrangement, enabling the corporation and its principal to engage in unlawful activity and point fingers at each other after the fact, thereby misleading third parties and frustrating law enforcement.

3. Respondents argument that "intact spent lamps do not fail the TCLP test" is incorrect and does not create a genuine issue of material fact.

Respondents argue in their Memorandum that a "whole fluorescent lamp will not demonstrate TCLP" and that when broken in a confined space, most or all lamps "will exhibit TCLP." (Respondent's Memorandum, p, 12) . These statements are incorrect, irrelevant, and engender confusion about what "TCLP" means. The Toxicity Characteristic Leaching Procedure, or TCLP, is the procedure used to determine whether a solid waste possesses the characteristic of toxicity (40 C.F.R. § 261.24). It can be used to determine the toxicity of all spent mercury-containing lamps, whether intact or broken. Whether a spent lamp possesses the characteristic of toxicity is not dependent on whether it is crushed in a confined space. If a spent lamp is subjected to the TCLP, and the extract obtained from the TCLP contains mercury at a concentration of 0.2 mg/L or greater, then the spent lamp possesses the characteristic of toxicity, and is a hazardous waste (40 C.F.R. § 261.24). EPA subjected spent lamps that Respondents were storing at the Riverdale facility to the TCLP, and some of them yielded mercury concentrations in their TCLP extracts at or above the regulatory limit for mercury. (CPX 2). Respondents submit no evidence that contradicts this. Thus, Respondents were storing hazardous wastes at the Riverdale facility.

4. Respondents admit to storing and treating hazardous waste in their Memorandum.

Respondents' Memorandum in Objection to the present motion contains information supporting the conclusion that they are liable under RCRA. For example, at p. 7 of their Memorandum, they state:

> ***RSR supplied structurally sound containers w/covers to various small quantity generators. Upon request, it safely transported those containers to a consolidation point located in Riverdale Illinois. The containers were dated for tracking purposes***

> ***and placed in a dry and passive area awaiting a volume reduction process and the eventual reuse of the non-hazardous residual material.*** (italics and boldface in the original).

By placing the containers at the Riverdale facility to await volume reduction, Respondents admit that they temporarily held spent lamps pending treatment. Illinois 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," 35 IAC § 720.110 (40 C.F.R. § 260.10). Thus, because the spent lamps were hazardous waste, and those wastes were afterward treated and disposed of in landfills, Respondents' own description of their activities concedes liability.

Further, Respondents indisputably treated spent lamps. Their implicit attempt to distinguish "volume reduction" from treatment is unavailing. In this respect, at p. 6 of their memorandum, they state "***RSR never diluted, treated and or processed any UW. Volume reduction of the UW lamps was managed by a state authorized mobile reduction unit that was owned by Larry Kelly***" (italics and boldface in the original). Yet reduction in volume falls directly within the regulatory definition of treatment. "Treatment" is defined at 35 IAC § 702.110 (40 C.F.R. § 260.10) as

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

In MVPT's first information request response, it describes the operation of its mobile unit, in which a "hydraulic ram slowly compresses the lamps." (CPX 4 No. 2.a.). This plainly would change a spent lamp's physical characteristics by reducing its volume. (CPX 4). Thus, dispensing with the term "crushing" in favor of "volume reduction" in describing their process

does not help Respondents: they treated spent lamps by reducing their volume.[2]

Respondents nonetheless seek to escape liability by claiming to be a "generator/handler" of universal waste, pointing to their purported notice to EPA of hazardous waste activity and receipt of a RCRA identification number. First, Respondents cannot be "generators" of the spent lamps. In this respect, 40 C.F.R. §§ 260.10 and 273.9 define "generator" as " ...any person, by site, whose act or process produces hazardous waste identified or listed in part 261 of this chapter, or whose act first causes a hazardous waste to become subject to regulation." In turn, under 40 C.F.R. § 273.5(c)(1), a used lamp "becomes a waste on the date it is discarded." Here, plainly, the generators of the spent lamps were MVPT's customers identified in the bills of lading accompanying its first information response (CPX 4, atts. to No. 4.b), since they discarded the lamps by giving them to MVPT for accumulation and treatment prior to disposal. In support of their argument, Respondents provide only a cover letter to the Illinois Environmental Protection Agency (IEPA) requesting a change in the name associated with the Riverdale facility's address, and what purports to be an enclosed "Bureau of Land Inventory Data Input Form" with the words "name change" handwritten on it (RPX 5). Apparently, Respondents are suggesting that because IEPA processed Mr. Kelly's request that it amend its records by changing the name of the Riverdale facility's operator, EPA is now prohibited from seeking civil relief arising from the activities in which Respondents undisputedly engaged. Yet Respondents have already admitted that MVPT collected spent lamps from customers.

Furthermore, Respondents cannot be "handlers" of spent lamps. The definition of

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[2] Furthermore, Respondents also purport to have rendered the lamps non-hazardous. In the first information response, after describing the treatment process, MVPT states that after "...the extraction of mercury vapor has been completed, the *now non-hazardous* reuseable glass and aluminum by-products are automatically moved to a 6 yard on-board storage area (6,000 lamps)." (CPX 4 No. 2.b. under "Answer - Processed Lamps")(emphasis added). Assuming for present purposes that the process actually did render the crushed lamps non-hazardous, the activity would fall within the definition of "treatment."

"universal waste handler" at 40 C.F.R. § 273.9 excludes, at subparagraph (b)(2), a person that treats (with two exceptions not relevant here), disposes of, or recycles universal waste. Again, Respondents treated spent lamps at the Riverdale facility by crushing them. Entities that treat universal wastes are "destination facilities" under 40 C.F.R. § 273.9. Under 40 C.F.R. § 273.60, destination facilities are subject to all applicable requirements of 40 C.F.R. Parts 264, 265, 266, 268, 270 and 124, and must therefore obtain RCRA hazardous waste management permits.

5. The October 2000 letter from IEPA does not authorize Respondents' activities.

Throughout their submissions to Complainant and the Presiding Officer, MVPT and Mr. Kelly cite to an October 16, 2000 letter from Joyce Munie of the IEPA to Mr. Kelly, marked as RPX 9, as support for the proposition that IEPA authorized their actions. This letter actually supports Complainant's position. The letter is addressed to Spent Lamp Recycling Technologies[3], and is premised on, among other things, IEPA's understanding that components of crushed lamps were actually sent to recyclers or used as production feedstock. As recited in Complainant's opening Memorandum, Respondents have not produced any evidence that they actually recycled any components of the crushed lamps. To the contrary, it is undisputed that Respondents sent tons of crushed glass and metal caps to solid waste landfills. (CPX 4, atts. to No. 2.i.). Moreover, the letter expressly states that Spent Lamp Recycling Technologies can only crush lamps *at the site of generation*:

> Please note that the Universal Waste Rule requires that lamps must be crushed at the site of generation. Therefore, a facility that was collecting and crushing lamps from off-site generators would be fully regulated as indicated in the April 18, 2000 letter. Also note that the destination facility, where component separation occurs, is also fully regulated. (RPX 9 p. 2).

In the instant case, there is no reasonable dispute that MVPT was collecting lamps from third-

[3] Respondents admit that "Spent Lamp Recycling Technologies" is a separate entity, and was dissolved prior to MVPT's incorporation. (CPX 6 Nos. 10-12).

party generators and, at least on some occasions, transporting them to the Riverdale facility for crushing. Respondent Laurence Kelly admitted this to EPA during the October 2007 inspection, and MVPT admits this in its first information request response. (CPX 2.g.). Because the letter confirms that a facility that collects and crushes lamps from off-site generators would be fully regulated, and because Respondents did not obtain a RCRA permit to store and crush spent lamps, the October 16, 2000, letter supports Respondents' liability.

B. RESPONDENTS HAVE NOT CONTRADICTED COMPLAINANT'S CONTENTION THAT ILLINOIS' AUTHORIZED SUBTITLE C PROGRAM APPLIES TO THEIR ACTIVITIES

As Complainant submitted in its opening Memorandum, Illinois is not yet authorized for the universal waste rule, and because the rule is not mandated by HSWA and is less stringent than the state's RCRA Subtitle C program, EPA enforces Illinois's authorized Subtitle C program. However, as Respondents seem to agree, EPA has taken the position that in states that have applied for but not yet received authorization to implement their universal waste regulations, EPA "should take enforcement actions involving universal wastes only where *handlers* of such wastes are not in full compliance with the Part 273 standards." (RPX 4a)(emphasis added). Accordingly, because Illinois has not yet been authorized for the rule, EPA measures universal waste *handlers*' compliance against Part 273's provisions in Illinois.

This is of no avail to Respondents because, as recited above, there is no genuine dispute that they are not "handlers." Again, to come within the definition of "handler," an entity cannot engage in activity that constitutes treatment. 40 C.F.R. § 273.9, definition of "universal waste handler," subparagraph (b)(1). Here, Respondents admit to having crushed, or to use their term, "volume reduced" spent mercury-containing lamps at the facility. Thus, they cannot be viewed as "handlers" under the universal waste rule, but are instead operators of a "destination facility"

and subject to the requirement of a RCRA permit[4].

In view of this Respondents' argument that universal waste is not a RCRA Subtitle C waste, and is thus exempt from the RCRA permit program, is simply false. The exclusion on which Respondents rely, at 40 C.F.R. § 270.1(c)(2)(viii), is addressed to universal waste handlers and universal waste transporters. Like the other provisions in section 270.1(c)(2), this subparagraph excludes *persons* engaging in specified activities It does not purport to exclude universal wastes from all hazardous waste regulation.

C. CONCLUSION

Respondents' admissions that they stored and volume reduced spent mercury-containing lamps at the Riverdale facility support accelerated decision that Respondents stored treated hazardous waste, and were required to have a RCRA permit to do so. Respondents' assertions about being "under siege" by the Riverdale Police and reported vandalism are not relevant to the issues raised by the pleadings. Additionally, Respondents' claims that "whole lamps do not demonstrate TCLP" and that "SLR" moved "in and out" of MVPT "corporate umbrella" are both factually and legally incorrect. Essentially, Respondents' defense revolves around the contentions that a corporation can escape liability by assigning activities to its assumed names, that there is a distinction between "volume reduction" and treatment, and that an entity can be a "universal waste handler" even though it treats hazardous waste. None of these contentions has merit. Respondents have raised no genuine issues of material fact. Accordingly, accelerated decision should be granted, finding that the EPA-authorized Illinois Subtitle C regulations apply to Respondents and that they are liable for storing and treating hazardous waste without a RCRA

[4] Even if Illinois's version of the universal waste rule at 35 IAC § 733 comprised the applicable regulations, Complainant suggests that the same outcome would prevail, since IAC 733.109 defines "destination facility," "generator," and "universal waste handler" in materially the same terms as 40 C.F.R. § 273.9). See A.5, *supra*.

permit in violation of 35 IAC § 703.121(a)(1) (Counts 1 and 2 of the Amended Complaint).

Respectfully submitted this 14th day of March, 2011,

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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and	)	
	)	
Laurence Kelly,	)	
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	)	

CERTIFICATE OF FILING AND SERVICE

I hereby certify that this day I filed with the Regional Hearing Clerk the original and one copy of the foregoing Complainant's Reply Memorandum in Support of Motion for Partial Accelerated Decision, and further, that I caused to be sent, postage prepaid, copies to the following persons, by the indicated method:

By First Class Mail:

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Date: March 14, 2011

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