UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| IN THE MATTER OF | ) | |
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| MERCURY VAPOR PROCESSING TECHNOLOGIES, INC., a/k/a RIVER SHANNON RECYCLING, AND LAURENCE C. KELLY, | ) | DOCKET NO. RCRA-05-2010-0015 |
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| | ) | |
| | ) | |
| RESPONDENTS | ) | |

# INITIAL DECISION (REDACTED)

**Issued:** December 14, 2012

**Before:** Barbara A. Gunning
Administrative Law Judge
U.S. Environmental Protection Agency

**Appearances:**

For Complainant:

Jeffrey A. Cahn, Associate Regional Counsel
Kasey Barton, Assistant Regional Counsel
Andre Daugaveitis, Associate Regional Counsel
U.S. Environmental Protection Agency, Region 5
Office of Regional Counsel
77 West Jackson Boulevard, Mail Code C-14J
Chicago, Illinois 60604

For Respondents:

Laurence C. Kelly
Mercury Vapor Processing Technologies,
d/b/a River Shannon Recycling
7144 North Harlem Avenue, Suite 303
Chicago, Illinois 60631

Lindsay Hemmer
5541 North Austin Avenue
Chicago, Illinois 60630

## I. PROCEDURAL BACKGROUND

### A. PRE-HEARING HISTORY

On April 23, 2010, the United States Environmental Protection Agency ("EPA," "USEPA," or "Agency"), Region 5 ("Complainant"), initiated this proceeding by filing a Complaint and Compliance Order ("Complaint") against Mercury Vapor Processing Technologies, Inc., a/k/a River Shannon Recycling ("Respondent MVPT" or "MVPT"), pursuant to its authority under Section 3008 of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928. Appearing *pro se*, Respondent MVPT, through its representative Laurence Kelly,[1/] filed an Answer in the form of a letter on May 20, 2010.

Pursuant to the Prehearing Order issued by the undersigned on June 15, 2010, Complainant and Respondent MVPT subsequently filed initial prehearing exchanges and Complainant filed a rebuttal to Respondent MVPT's Initial Prehearing Exchange.[2/] On December 22, 2010, Complainant filed a Motion for Leave to Amend Complaint and Compliance Order ("Motion to Amend"), a memorandum in support thereof, and a Proposed Amended Complaint and Compliance Order ("Proposed Amended Complaint"). On January 10, 2011, the undersigned received Respondent MVPT's Memorandum in Support of Complainant's Motion for Leave to Amend the Complaint and Compliance Order, which contained, *inter alia*, responses to each of the numbered paragraphs of the Proposed Amended Complaint.

By Order dated January 19, 2011, the undersigned granted the Motion to Amend. Complainant subsequently filed an Amended Complaint and Compliance Order ("Amended Complaint" or "Amd. Compl.") against Respondent MVPT and Mr. Kelly ("Respondent Kelly") on January 28, 2011. The Amended Complaint alleges in two counts that Respondents operated a hazardous waste storage and treatment facility in Riverdale, Illinois, without a permit, in violation of certain provisions of the Illinois Administrative Code ("IAC") promulgated pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b). For these alleged violations, the Amended Complaint requests issuance of a compliance order and proposes

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[1/] Throughout this proceeding, Laurence Kelly has also been referred to as Laurence C. Kelly and Larry Kelly.

[2/] The parties were subsequently granted leave to supplement their initial prehearing exchanges by Orders dated May 5, 2011, and July 15, 2011.

the assessment of a civil administrative penalty in the amount of $743,293 against Respondents.

Pursuant to the Order of January 19, 2011, Respondent MVPT's responses to the Proposed Amended Complaint were deemed to constitute Respondents' Answer to the Amended Complaint ("Amended Answer" or "Amd. Answer") and the filing date was designated to be the same as that of the Amended Complaint. In their Amended Answer, Respondents deny that they engaged in the storage and treatment of hazardous waste at the Riverdale property and raise a number of arguments in their defense.

The parties subsequently engaged in extensive motions practice. In particular, on February 8, 2011, Complainant filed a Motion for Partial Accelerated Decision as to Applicable Regulations and Liability ("Complainant's Motion for Accelerated Decision"), a memorandum in support thereof, and accompanying attachments. Thereafter, Respondents filed an opposition, and Complainant filed a reply. By Order dated May 5, 2011, the undersigned granted Complainant's Motion for Accelerated Decision as to the applicable law in this proceeding, holding that Respondents' handling of used light bulbs ("spent lamps") at the Riverdale property was governed by the general hazardous waste regulations adopted by the State of Illinois and authorized by EPA, as argued by Complainant, rather than Illinois's universal waste rule, which Illinois has adopted but is not yet authorized by EPA to administer and enforce as part of its approved hazardous waste program. The undersigned denied Complainant's Motion for Accelerated Decision, however, as to Respondents' liability for the alleged violations, finding, in pertinent part, that Respondents had essentially raised the affirmative defense of lack of fair notice and that Complainant should be afforded the opportunity to address that issue either at an evidentiary hearing or in post-hearing briefs.

In addition, on June 2, 2011, Respondents filed a Motion to Dismiss with Prejudice for Lack of Fair Notice and Convoluted Regulations ("Respondents' Motion to Dismiss"), a memorandum in support thereof, and accompanying attachments. Complainant filed its response on June 16, 2011, and Respondents filed their reply on July 5, 2011. By Order dated July 14, 2011, the undersigned deferred ruling on whether EPA had failed to provide fair notice that Illinois's general hazardous waste regulations applied to Respondents' operations until after the evidentiary hearing in this matter was conducted.

Finally, on July 8, 2011, Complainant filed a Motion to Amend Proposed Penalty, in which Complainant sought to revise the amount of the proposed penalty from $743,293 to $120,000 based upon Complainant's review of financial information provided by Respondents in connection with their ability to pay a civil penalty in this proceeding. Respondents did not file a response.

By Order dated July 15, 2011, the undersigned granted Complainant's Motion to Amend Proposed Penalty, holding that the Amended Complaint would remain in force and the original proposed penalty amount of $743,293 would thereafter be substituted with the revised proposed penalty amount of $120,000.

**B. EVIDENTIARY HEARING**

The evidentiary hearing in this matter commenced in Chicago, Illinois, on July 25, 2011, and concluded on July 27, 2011. Complainant presented the testimony of four witnesses at the hearing: Todd C. Brown, William K. Graham, Leonard S. Worth, and Mark Ewen. Complainant also proffered 52 documents that were received into evidence. These documents were marked as Complainant's Exhibits ("CEX") 1-9, 11-13, 15-16, 22-26, 29-42, 44-49, 55, 57-59, 59-R, 60-61, 61-R, 62-63, and 70, and Complainant's Rebuttal Exhibit ("CREX") 1.[3/] Respondents, in turn, presented the testimony of three witnesses: Laurence Kelly, Mary Allan, and Gary Westefer. Respondents also proffered 15 documents that were received into evidence and marked as Respondents' Exhibits ("REX") 2, 5-6, 8-10, 12, 14, 16, 22-23, 27-29, and 33.[4/]

At the request of Respondent Kelly, the undersigned agreed to treat certain financial matters discussed at the hearing as confidential business information ("CBI"). Accordingly, the undersigned closed the courtroom to the public during the presentation of certain testimony and agreed to keep Complainant's Exhibits 58, 59, and 61 under seal.

**C. POST-HEARING HISTORY**

Following the evidentiary hearing, Respondents filed two documents: 1) the single page admitted into evidence at the

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[3/] The document marked as Complainant's Rebuttal Exhibit 1 consists of a single page that appeared to be part of a longer Agency publication. It was originally attached to a responsive document filed by Respondents on July 5, 2011. While the undersigned accepted the document as proffered into evidence at the hearing, the undersigned acknowledged that judicial notice could be taken of the Agency publication in its entirety if tendered by the parties. Tr. at 649-656.

[4/] In addition, Respondents proffered a document marked as Respondents' Exhibit 13, which consisted of two cover sheets that appeared to have been prepared by Respondents and a single page that appeared to be part of a longer Agency publication. The undersigned deferred ruling on the admission of Respondents' Exhibit 13 until such time as Respondents provided a copy of the Agency publication in its entirety. Tr. at 559-63.

hearing as Complainant's Rebuttal Exhibit 1, along with a cover sheet that included an Internet address where that document could be found; and 2) a complete copy of an Agency publication entitled "Fluorescent Lamp Recycling, February 2009, EPA530-R-09-001," from which Respondents had obtained the single page marked as Respondents' Exhibit 13 at the hearing, along with a cover sheet that included an Internet address where that document could be found. Complainant subsequently filed a Motion to Supplement Hearing Record ("Motion to Supplement") on August 10, 2011, in which Complainant requests that the undersigned take judicial notice, and accept into evidence and the trial record in this matter, the two documents filed by Respondents, as well as four documents marked as Complainant's Exhibits 18, 19, 20, and 21 that Complainant produced in its prehearing exchange but failed to move into evidence at the hearing. Respondents did not respond to the Motion to Supplement. As discussed below, Complainant's Motion to Supplement is **GRANTED, in part, AND DENIED, in part.**

A transcript of the evidentiary hearing became available on August 15, 2011. Complainant subsequently filed a Motion to Conform Transcript on September 13, 2011, wherein Complainant seeks to conform the transcript to the actual testimony presented at the hearing as set forth in the table attached to their request. Respondent did not file a response. As discussed below, Complainant's Motion to Conform Transcript is **GRANTED.**

By Order dated September 29, 2011, the undersigned designated certain pages of the transcript as CBI and ordered that those passages would be kept confidential, in addition to Complainant's Exhibits 58, 59, and 61. The undersigned also directed the parties to file any proposed findings of fact, conclusions of law, proposed orders, and briefs in support thereof no later than November 7, 2011, and any reply briefs on or before November 21, 2011. Complainant and Respondents each filed post-hearing briefs and post-hearing reply briefs. On December 14, 2011, Complainant filed a Motion to Strike Respondents' Post Hearing Rebuttal and Respondents' Amended Post Hearing Rebuttal as Filed Untimely and, in the Alternative, Motion to Strike those Parts of Respondents' Post Hearing Rebuttal and Respondents' Amended Post Hearing Rebuttal that Contain Statements Not of Record ("Motion to Strike"). Respondent filed a response ("Respondents' Response" or "Rs' Response") on December 28, 2011, and Complainant filed a reply ("Complainant's Reply" or "C's Reply") on January 5, 2012. As discussed below, Complainant's Motion to Strike is **DENIED.**

## II. COMPLAINANT'S POST-HEARING MOTIONS

### A. MOTION TO SUPPLEMENT

As noted above, Respondents filed two documents following the evidentiary hearing: 1) the single page admitted into evidence at the hearing as Complainant's Rebuttal Exhibit 1, along with a cover sheet that included an Internet address where that document could be found; and 2) a complete copy of an Agency publication entitled "Fluorescent Lamp Recycling, February 2009, EPA530-R-09-001," from which Respondents had obtained the single page marked as Respondents' Exhibit 13 at the hearing, along with a cover sheet that included an Internet address where that document could be found. Complainant subsequently filed its Motion to Supplement on August 10, 2011, in which Complainant requests that the undersigned take judicial notice, and accept into evidence and the trial record in this matter, the two documents filed by Respondents, as well as four documents marked as Complainant's Exhibits 18, 19, 20, and 21 that Complainant produced in its prehearing exchange but failed to move into evidence at the hearing. Respondents did not file a response.

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. Section 22.22(f) of the Rules of Practice authorizes the undersigned to take official notice "of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency." 40 C.F.R. § 22.22(f). In turn, Rule 201 of the Federal Rules of Evidence Rule provides, in pertinent part, that Federal courts may take judicial notice of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Agency publications and judicial proceedings qualify as such sources. *See, e.g., Russell City Energy Center, LLC*, 15 E.A.D. ___, 2010 EPA App. LEXIS 45, *190 (EAB 2010) ("The [Environmental Appeals Board] generally takes 'official notice' of relevant non-record information contained in statutes, regulations, judicial proceedings, public records, and Agency records, including EPA guidance documents and memoranda."), *appeal denied in part, appeal dismissed in part sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 2012 U.S. App. LEXIS 9156 (9th Cir. 2012).

The Rules of Practice fail to address the appropriate standard for adjudicating motions to supplement the evidentiary record after adjournment of the hearing but prior to issuance of

the initial decision.[5/] While I may consult the Federal Rules of Civil Procedure for guidance in the absence of administrative rules on a subject, *see, e.g., Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002), the Federal Rules of Civil Procedure are similarly silent. My esteemed colleagues have persuasively ruled, however, that motions to supplement the evidentiary record after adjournment of the hearing but prior to issuance of the initial decision are subject to the discretion of the presiding Administrative Law Judge and that the "good cause" standard set forth at Section 22.28 of the Rules of Practice may be used as guidance in adjudicating such motions. *See, e.g., City of Wilkes-Barre, A.R. Popple, Inc., Wyoming S.&P., Inc.*, EPA Docket CAA-03-2005-0053, 2005 EPA ALJ LEXIS 76, at *14-15 (ALJ, Nov. 2, 2005) (Order Denying Complainant's Motion to Supplement Record); *Lake County, Montana*, EPA Docket No. CAA-8-99-11, 2001 EPA ALJ LEXIS 32, at *37-38 (ALJ, July 24, 2001); *Chempace Corp.*, EPA Docket No. 5-IFFRA-96-017, 1998 EPA ALJ LEXIS 123, at *4 (ALJ, Nov. 3, 1998)(Order Granting Motion to Supplement Record).

Here, Complainant first requests that the undersigned take judicial notice of, and accept into evidence and the trial record in this matter, the single page admitted into evidence at the hearing as Complainant's Rebuttal Exhibit 1. Inasmuch as this document was submitted by Respondents as an attachment to a document filed on July 5, 2011, and then admitted into evidence at the hearing, it is already a part of the record and I need not take judicial notice of it. Thus, Complainant's Motion to Supplement is deemed moot as to Complainant's Rebuttal Exhibit 1.

Complainant next requests that the undersigned take judicial notice of, and accept into evidence and the trial record in this matter, a complete copy of an Agency publication entitled "Fluorescent Lamp Recycling, February 2009, EPA530-R-09-001," from which Respondents had obtained the single page marked at the hearing as Respondents' Exhibit 13. As an Agency publication, this document falls within the category of documents of which "official notice" may be taken pursuant to 40 C.F.R. § 22.22(f). Respondents proffered a single page from this document at the hearing, and upon discussion, the undersigned ruled that it was subject to admission into the record once the document was tendered in its entirety. Tr. at 559-63. In accordance with that discussion, Respondents' Exhibit 13 is hereby deemed received into evidence by this Initial Decision and Complainant's Motion to Supplement is hereby **GRANTED** as to the Agency publication in its entirety.

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[5/] Conversely, the Rules of Practice provide that motions to supplement the evidentiary record after issuance of the initial decision must, among other things, "show good cause why such evidence was not adduced at the hearing." 40 C.F.R. § 22.28(a).

Finally, Complainant requests that the undersigned take judicial notice of, and accept into evidence and the trial record in this matter, four documents marked as Complainant's Exhibits 18, 19, 20, and 21 that Complainant produced in its prehearing exchange but failed to move into evidence at the hearing. These documents consist of official records from the United States District Court of the Northern District of Illinois concerning Respondent Kelly's criminal convictions and, as such, are the type of documents of which "official notice" may be taken pursuant to 40 C.F.R. § 22.22(f). While Respondent Kelly already admitted to his convictions at the hearing, Tr. at 602-03, Complainant requests that the undersigned take judicial notice of the documents "for purposes of ensuring a complete record in this case," Motion to Supplement at 3. Complainant fails, however, to identify any reason these documents were not introduced into evidence before the close of the hearing. Accordingly, in the exercise of my discretion, the Motion to Supplement is hereby **DENIED** as to the documents marked as Complainant's Exhibits 18, 19, 20, and 21.

## B. MOTION TO CONFORM TRANSCRIPT

In its Motion to Conform Transcript, filed September 13, 2011, Complainant seeks to conform the transcript to the actual testimony presented at the hearing as set forth in the table attached to the request. Section 22.25 of the Rules of Practice provides that "[a]ny party may file a motion to conform the transcript to the actual testimony within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner." 40 C.F.R. § 22.25. Complainant asserts that it received a copy of the transcript on August 15, 2011, and that the Motion to Conform Transcript was therefore timely. Respondent did not file a response.

Upon consideration, the undersigned accepts each correction proposed by Complainant in the Motion to Conform Transcript. These corrections comport with the undersigned's recollection and notes from the hearing, as well as common sense. Therefore, the Motion to Conform Transcript is hereby **GRANTED**, and the record of proceeding for the evidentiary hearing shall be modified accordingly.[6/]

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[6/] Consequently, all citations to the transcript in this Initial Decision refer to the transcript as amended to conform to the actual testimony.

## C. MOTION TO STRIKE

As noted above, the undersigned directed the parties to file any proposed findings of fact, conclusions of law, proposed orders, and briefs in support thereof no later than November 7, 2011, and any reply briefs on or before November 21, 2011. Complainant timely filed its Post-Hearing Brief ("C's Post-Hearing Brief") and Proposed Findings of Fact, Conclusions of Law, and Order on November 7, 2011. Respondents filed their Post-Hearing Brief ("Rs' Post-Hearing Brief") on November 8, 2011.

On November 21, 2011, Complainant filed its Post-Hearing Reply Brief ("C's Reply Brief"), in which Complainant moves to strike Respondents' Post-Hearing Brief on the ground that it was not timely filed. Without filing any response to Complainant's motion, Respondents filed their Post Hearing Rebuttal ("Respondents' Reply Brief") on November 22, 2011, and an Amended Post Hearing Rebuttal ("Respondents' Amended Reply Brief") on November 23, 2011.[7/] On December 14, 2011, Complainant filed its Motion to Strike, wherein Complainant renews its motion to strike Respondents' Post-Hearing Brief, moves to strike Respondents' Reply Brief and Amended Reply Brief (collectively referred to as "Respondents' Reply Briefs" or "Rs' Reply Briefs") as untimely, and alternatively, moves to strike those parts of Respondents' Reply Briefs that include purported facts not admitted into the evidentiary record in this matter. Complainant also claims in its Motion to Strike to renew a motion in its Reply Brief to strike those parts of Respondents' Post-Hearing Brief that include purported facts not admitted into the evidentiary record.[8/] Respondents filed their Response on December 28, 2011, and Complainant filed its Reply on January 5, 2012.

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[7/] As pointed out by Complainant, Respondents offer no explanation for amending their Reply Brief. Upon review, the only difference between Respondents' Reply Brief and Amended Reply Brief appears to be the substitution of the term "warehouse" for the term "facility" on certain pages of the Amended Reply Brief.

[8/] In its Reply Brief, Complainant contends that Respondents repeatedly refer to purported facts not found in the evidentiary record to support arguments raised in their Post-Hearing Brief. While Complainant implies that exclusion of such facts is appropriate, Complainant never explicitly moves to strike those portions of Respondents' Post-Hearing Brief. Nevertheless, I will treat Complainant's Motion to Strike as a request to strike the parts of both Respondents' Post-Hearing Brief and Respondents' Reply Briefs that include purported facts not admitted into the evidentiary record.

The Rules of Practice do not expressly authorize the use of motions to strike in administrative proceedings. However, such motions have been found to be permissible under Section 22.16 of the Rules of Practice, which governs the filing of motions generally. *See, e.g., Sheffield Steel Corp.*, EPA Docket No. EPCRA-V-96-017, 1997 EPA ALJ LEXIS 100, at *7-8 (ALJ, Nov. 21, 1997) (Order Denying Motions to Strike Answers and to Dismiss) ("Rule 22.16 . . . refers to motions without restriction and thus motions to strike have been held to be authorized by the rules.").

Because the Rules of Practice fail to address motions to strike specifically, I may consult the Federal Rules of Civil Procedure ("FRCP") and federal court practice for guidance. Rule 12(f) of the FRCP provides that "[a] court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."[9/] Fed. R. Civ. Pro. 12(f). Courts generally disfavor motions to strike under Rule 12(f), however, because of the drastic nature of the requested remedy, among other reasons. *See, e.g., Dearborn Refining Co.*, EPA Docket No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 10, at *6-7 (ALJ, Jan. 3, 2003) (Order on Complainant's Motion to Strike Defenses) ("Rule 12(f) motions to strike are generally viewed with disfavor because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic.") (internal quotations omitted); *County of Bergen* and *Betal Environmental Corp., Inc.*, EPA Docket Nos. RCRA-02-2001-7110 and -7108, 2002 EPA ALJ LEXIS 13, at *7-8 (ALJ, Mar. 7, 2002) (Order Denying Complainant's Motion to Strike) ("Motions to strike are generally disfavored because they are a drastic sanction and because they are often employed as a delay tactic.") (internal quotations omitted). Accordingly, courts will not grant such motions "unless the matters sought to be omitted have no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1261 (3d ed. rev. 2012).

1. **Motion to Strike Respondents' Post-Hearing Brief and Reply Briefs in their Entirety**

In its Motion to Strike, Complainant first seeks to strike Respondents' Post-Hearing Brief and Reply Briefs in their

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[9/] Because Section 22.16 of the Rules of Practice does not restrict the subject matter of motions, the fact that Rule 12(f) of the FRCP confines motions to strike to pleadings is not controlling. *Catalina Yachts, Inc.*, EPA Docket No. EPCRA-09-94-0015, 1995 EPA ALJ LEXIS 73, at *5 n.2 (ALJ, Jan. 10, 1995) (Order Granting Motion for Accelerated Decision as to Liability and Denying Motion to Strike).

entirety on the basis that these documents were not timely filed. Under the Rules of Practice, "[a] document is filed when it is received by the appropriate Clerk." 40 C.F.R. § 22.5(a). Thus, in determining the timeliness of a given document, the undersigned relies upon the date on which the appropriate Clerk stamps the document as received.

Here, Respondents unquestionably filed their Post-Hearing Brief and Reply Briefs after the respective filing deadlines for those documents, as alleged by Complainant. The certificate of service attached to Respondents' Post-Hearing Brief reflects that on November 7, 2011, the original document was sent by registered mail to the Regional Hearing Clerk and a copy was sent by both registered mail and facsimile to Complainant and the undersigned. However, Respondents' Post-Hearing Brief was not stamped as received by the Regional Hearing Clerk until November 8, 2011, one day after the filing deadline. The certificate of service attached to Respondents' Reply Brief reflects that on November 21, 2011, the original document was sent by both registered mail and facsimile to the Regional Hearing Clerk and a copy was sent by both registered mail and facsimile to Complainant and the undersigned.[10/] The certificate of service attached to Respondents' Amended Reply Brief reflects that it also was sent on November 21, 2011, to the Regional Hearing Clerk, Complainant, and the undersigned, but only by facsimile.[11/] Respondents' Reply Brief and Amended Reply Brief were not stamped as received by the Regional Hearing Clerk until November 22, 2011, and November 23, 2011, respectively. Therefore, Respondents' Reply Brief was filed one day after the filing deadline, and Respondents' Amended Reply Brief was filed two days after the filing deadline.

In support of its request to strike these documents, Complainant argues that Respondents "are serial late filers of submittals in this matter" despite having "ample opportunity to learn the applicable procedural requirements and to seek an accommodation if they were unable to meet the requirements." Motion to Strike at 2-3. Citing the section of the Rules of Practice allowing for extensions of filing deadlines,[12/]

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[10/] The copy sent to the undersigned by facsimile was transmitted at approximately 4:50 a.m. Eastern Standard Time ("EST").

[11/] The copy sent to the undersigned by facsimile was transmitted at approximately 9:30 a.m. EST.

[12/] Section 22.7(b) of the Rules of Practice provides, in pertinent part, "The Environmental Appeals Board or the Presiding Officer may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause

(continued...)

Complainant contends that "a post hoc extension outside the bounds of this specific regulatory framework would deprive Complainant of its legal right to respond to proposed deviations from normal practice" and would "render[] the procedures for extensions essentially nugatory and optional." *Id.* at 4.

Respondents counter in their Response that they "were under the impression that a copy faxed to the clerk on the date designated by the presiding officer, followed by a hard copy, was sufficient for timely filing," but the Regional Hearing Clerk appears to have accepted and stamped the hard copies as received rather than the copies submitted by facsimile. Rs' Response at physical page 1.[13/] Respondents then point out that "all parties were provided faxed copies of the [Reply Briefs] on the date designated by the presiding officer." *Id.*

As indicated by Complainant, Respondents have technically failed to comply with the Rules of Practice and orders of the undersigned on multiple occasions during this proceeding. In addition to the instances at issue here, Respondents also failed to timely file a responsive document in relation to their Motion to Dismiss, filed June 2, 2011. Respondents claimed at the time that they miscalculated the filing deadline for that document, resulting in the document being filed one business day beyond the deadline. While Respondents do not offer any explanation for the late filing of their Post-Hearing Brief, Respondents attribute the late filing of their Reply Briefs to their belief that facsimile transmission of those documents on the date designated by the undersigned as the filing deadline, followed by mail delivery of hard copies, was sufficient for timely filing. At a minimum, this professed belief demonstrates a lack of attentiveness to Section 22.5(a)(1) of the Rules of Practice, which provides that "the Presiding Officer . . . may by order authorize facsimile or electronic filing, subject to any appropriate conditions and limitations." 40 C.F.R. § 22.5(a)(1). The record reflects that filing by such means has not been authorized in the present proceeding.

The undersigned does not condone a litigant's failure to abide strictly by the requirements of the Rules of Practice and the orders issued in the course of a proceeding. Nevertheless, the undersigned does not find that the drastic remedy of striking Respondents' Post-Hearing Brief and Reply Briefs in their entirety is appropriate. Similar to their previous instance of late filing, Respondents filed these documents merely one to two

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[12/] (...continued)
shown, and after consideration of prejudice to other parties; or upon its own initiative." 40 C.F.R. § 22.7(b).

[13/] Respondents' Response is not paginated.

days beyond the deadline set by the Order of September 29, 2011. In fact, if the undersigned were to overlook the absence of authorization for filing by facsimile transmission in this proceeding, Respondents' Reply Briefs would have been deemed timely filed. Nothing in the record suggests that the minor delay in filing caused any prejudice to Complainant. As pointed out by Respondents, Complainant received a copy of Respondents' Post-Hearing Brief and Reply Briefs by facsimile transmission on the date of the filing deadline. Finally, Respondents are appearing *pro se* in this proceeding. While all litigants, including those unrepresented by counsel, are subject to the Rules of Practice, the Environmental Appeals Board ("EAB" or "Board") has consistently recognized that "some lenience" is warranted with respect to *pro se* parties such as Respondents. *Rocking BS Ranch, Inc.*, CWA Appeal No. 09-04, 2010 EPA App. LEXIS 11, at *16-17 (EAB, Apr. 21, 2010) (citing *Jiffy Builders, Inc.*, 8 E.A.D. 315, 321 (EAB 1999), and *Rybond, Inc.*, 6 E.A.D. 614, 626-27 (EAB 1996)); *see also Town of Seabrook, N.H.*, 4 E.A.D. 806, 810 n.6 (EAB 1993) (excusing error of filing a reply brief without obtaining leave to file and denying motion to strike on the basis that the filing party was "a citizen petitioner unrepresented by counsel"), *aff'd sub nom. Adams v. EPA*, 38 F.3d 43 (1st Cir. 1994).

Based upon the facts presented in this proceeding, and in the interest of providing Respondents the fullest opportunity to advance their arguments in this proceeding, I find that such lenience is warranted here. Complainant's arguments to the contrary are not persuasive. Accordingly, Complainant's Motion to Strike is hereby **DENIED** with respect to its request to strike Respondents' Post-Hearing Brief and Reply Briefs in their entirety, and these documents will be considered in the adjudication of the matters at issue.

2. Motion to Strike Purported Facts in Respondents' Post-Hearing Brief and Reply Briefs

Alternatively, Complainant moves to strike the portions of Respondents' Post-Hearing Brief and Reply Briefs that contain assertions of fact that, according to Complainant, do not appear in the evidentiary record. While Complainant identifies numerous examples of such assertions in its Reply Brief and Motion to Strike, Complainant contends that "[t]here are too many instances . . . to list them all." C's Reply at 4 n.3. Nevertheless, Complainant requests that "[a]ll such statements appearing in Respondents' [Post-Hearing Brief] and Reply Briefs . . . be disregarded as irrelevant and stuck [sic] from [those documents]." Motion to Strike at 5. As grounds for this request, Complainant argues that it "will be prejudiced if Respondents are allowed to introduce through post-trial briefs information that is not part of the trial record in this matter"

and that the undersigned's consideration of such information "without the safeguards provided by trial would deprive Complainant of its right to a full and fair hearing in this matter." C's Reply at 7.

In their Response to the Motion to Strike, Respondents reply only to Complainant's request to strike certain assertions of fact from their Amended Reply Brief. Objecting to that request, Respondents cite portions of the record that allegedly support the assertions of fact at issue.

As noted by Complainant, numerous tribunals have exercised their discretion to strike assertions of fact found in post-hearing briefs that lack evidentiary support in the record. *See, e.g., Roger Barber, d/b/a Barber Trucking*, EPA Docket No. CWA-05-2005-0004, 2007 EPA ALJ LEXIS 17, at *19-25 (ALJ, May 11, 2007) (granting motion to strike certain assertions of fact contained in party's post-hearing reply brief that were not supported by any testimonial or documentary evidence in the record); *Hico, Inc.*, EPA Docket No. TSCA-III-389, 1991 EPA ALJ LEXIS 10, at *3-4 (ALJ, Nov. 21, 1991) (granting motion to strike matters in party's post-hearing reply brief that introduced evidence not admitted at the hearing). While a party's introduction of unsupported facts in its post-hearing briefs may prejudice the opposing party under certain circumstances, I do not find that such a danger exists here, as any lack of evidentiary support for a particular assertion of fact found in either Complainant's or Respondents' post-hearing briefs will result in little to no weight being attributed to that assertion. Accordingly, in my discretion in this proceeding, I hereby **DENY** Complainant's Motion to Strike with respect to the assertions of fact in Respondents' Post-Hearing Brief and Reply Briefs that allegedly lack support in the record.

Having disposed of these preliminary matters, I now turn to the statutory and regulatory background relevant to this proceeding.

## III. STATUTORY AND REGULATORY BACKGROUND

### A. SUBTITLE C OF RCRA AND THE IMPLEMENTING REGULATIONS

Congress enacted RCRA in 1976 as an amendment to the existing Solid Waste Disposal Act of 1965 in response to findings that increased industrial, commercial, and agricultural operations in this country had generated "a rising tide of scrap, discarded, and waste materials," which presented communities with "serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes" that were of national scope and concern. 42 U.S.C. § 6901(a). Congress was further motivated by findings that "disposal of solid waste and hazardous

waste . . . without careful planning and management can present a danger to human health and the environment"; that "alternatives to existing methods of land disposal must be developed" due to a shortage of suitable disposal sites; and that methods to extract usable materials and energy from solid waste were available. 42 U.S.C. § 6901(b)-(d).

In view of these findings, Congress designed RCRA to include two foundational programs: one governing "solid waste," the framework for which is set forth in Subtitle D of the statute, and one governing "hazardous waste," the framework for which is set forth in Subtitle C. Codified at 42 U.S.C. §§ 6921-6939f, Subtitle C was crafted "to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. § 6902(b)). To achieve this goal, RCRA "empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C . . . ." *City of Chicago v. Envtl. Defense Fund*, 511 U.S. 328, 331 (1994) ("*City of Chicago*").[14/] The regulations promulgated by EPA pursuant to this authority are found at 40 C.F.R. parts 260 through 279.

Of particular relevance to this proceeding, Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and the implementing regulations set forth 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 obtain a permit for its operation.

## B. ILLINOIS'S AUTHORIZED HAZARDOUS WASTE PROGRAM

Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, EPA may authorize states to administer and enforce their own statutes and regulations governing hazardous waste in lieu of Subtitle C and the implementing regulations promulgated thereunder. To obtain such authorization, a state hazardous waste program must 1) be the "equivalent" of the federal Subtitle C program; 2) be "consistent" with the federal Subtitle C program and the state programs applicable in other states; and 3) provide for "adequate enforcement." 42 U.S.C. § 6926(b). States are required to follow certain procedures set forth at 40 C.F.R. part 271 in order to apply for authorization of their base hazardous waste

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[14/] In contrast, non-hazardous solid wastes "are regulated much more loosely under Subtitle D [which is codified at] 42 U.S.C. §§ 6941-6949." *City of Chicago*, 511 U.S. at 331.

programs and any revisions thereto.[15/] Once EPA determines whether to approve or disapprove a state's application for authorization, it is required to notify the public of its determination in the Federal Register, among other means. 40 C.F.R. §§ 271.20(e), 271.21(b)(3) and (4). EPA subsequently codifies its authorization at 40 C.F.R. part 272.

Effective on January 31, 1986, EPA granted final authorization to the State of Illinois, pursuant to Section 3006(b) of RCRA, to administer and enforce its own hazardous waste program in lieu of the federal Subtitle C program.[16/] 40 C.F.R. § 272.700(a); 51 Fed. Reg. 3778 (January 30, 1986). EPA subsequently approved revisions to Illinois's program effective on March 5, 1988, 53 Fed. Reg. 126 (January 5, 1988); April 30, 1990, 55 Fed. Reg. 7320 (March 1, 1990); June 3, 1991, 56 Fed. Reg. 13,595 (April 3, 1991); August 15, 1994, 59 Fed. Reg. 30,525 (June 14, 1994); May 14, 1996, 61 Fed. Reg. 10,684 (March 15, 1996); and October 4, 1996, 61 Fed. Reg. 40,520 (Aug. 5, 1996). As part of an effort to "provide clearer notice to the public of the scope of the authorized program in each State," EPA has identified the state statutes and regulations that the State of Illinois is authorized to administer and enforce as part of its approved hazardous waste program at 40 C.F.R. § 272.701.[17/] 54 Fed. Reg. 37,649, 37,650 (Sept. 12, 1989). Set forth at 40 C.F.R. § 272.701(a), EPA has also incorporated by reference certain regulations comprising the program as part of Subtitle C of RCRA. *Id.*

Consistent with Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and the implementing regulations set forth at 40 C.F.R. part 270, the Illinois hazardous waste regulations provide, in pertinent part, that "[n]o person may conduct any hazardous waste storage, hazardous waste treatment, or hazardous waste disposal

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[15/] Revisions to a state's authorized program "may be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented. The State shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities." 40 C.F.R. § 271.21(a).

[16/] Illinois's authority to administer and enforce its hazardous waste program is subject to the Hazardous and Solid Waste Amendments of 1984. 40 C.F.R. § 272.700(a); 51 Fed. Reg. at 3778. This topic is discussed in greater detail in the section of this Initial Decision entitled "Liability."

[17/] EPA has not yet amended 40 C.F.R. § 272.701 to list the authorized revisions to Illinois's program effective on August 15, 1994, May 14, 1996, and October 4, 1996.

operation . . . [w]ithout a RCRA permit for the HWM (hazardous waste management) facility . . . ."[18/] 35 IAC § 703.121(a)(1).

Following final authorization of its base program and any revisions thereto, the State of Illinois holds primary responsibility for implementing and enforcing the program. 40 C.F.R. § 272.700(c). As EPA has codified Illinois's authorized hazardous waste program and incorporated by reference certain regulations comprising the program as part of Subtitle C of RCRA, EPA may also prosecute violations of the program pursuant to its enforcement authority found at Section 3008(a) of RCRA and 40 C.F.R. § 272.700(c).

## IV. FACTUAL BACKGROUND

Until its involuntary dissolution on or about March 10, 2010, Respondent MVPT was a corporation doing business in the State of Illinois, and Respondent Kelly served as its Vice President, among other roles. Amd. Compl. ¶¶ 5, 28, 64; Amd. Answer ¶¶ 5, 28, 64; Joint Stipulated Facts and Exhibits ("Joint Stipulations" or "Jt. Stips.") ¶ 3; CEX 6, Bates 02047-02048; Tr. at 553. At various times during its operations, Respondent MVPT conducted business under an assortment of assumed names, including River Shannon Recycling and S.L.R. Technologies.[19/]

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[18/] Pursuant to regulations set forth at 35 IAC part 733, the State of Illinois exempts "handlers" and "transporters" of certain widely-generated hazardous wastes known as "universal wastes" from the general requirement that a person engaging in the treatment, storage, or disposal of hazardous waste obtain a permit for its operations. This "universal waste rule," and the federal version upon which it is based, will be discussed in greater detail in the "Liability" section of this Initial Decision.

[19/] The record contains conflicting evidence as to the precise names of these business enterprises and their relationship to Respondents. For example, at the hearing, Respondents proffered a document entitled "Application to Adopt, Change or Cancel an Assumed Corporate Name," which reflects that "S.L.R. Technologies" became an assumed name of Respondent MVPT on or about September 28, 2007. REX 27. However, in the attached cover sheet that appears to have been prepared by Respondents, the document is described as an "Application to include Shannon Lamp Recycling (SLR) As part of the Mercury Vapor Processing Technologies Corporate Umbrella." Thus, Respondents appear to use the names "S.L.R. Technologies," "SLR," and "Shannon Lamp Recycling" interchangeably.

The relationship between S.L.R. Technologies and Respondents is similarly muddled. While the aforementioned document reflects that at one time S.L.R. Technologies was an assumed name of

(continued...)

Jt. Stips. ¶ 5; CEX 6, Bates 02047-02048, 02050; REX 27.

Conducting business as River Shannon Recycling, Respondent MVPT began operating at 13605 S. Halsted Street, Riverdale, Illinois ("Riverdale property"), in February of 2005. Amd. Compl. ¶¶ 17, 27; Amd. Answer at physical page 2,[20/] ¶¶ 17, 27; Jt. Stips. ¶ 6; Tr. at 580. The property consisted of a single-story brick building of approximately 28,000 square feet, a parking lot to the west of the building, and a fenced, asphalt-covered yard to the south of the building. CEX 42, Bates 03023. Among other activities performed at the Riverdale property, River Shannon Recycling collected spent lamps from third parties, accumulated those lamps at the Riverdale property, and sold or disposed of the constituents after the lamps had been processed. Amd. Compl. ¶¶ 32-34, 40, 41, 44, 47, 50, 51, 58-60, 76, 81, 83, 87, 88, 100; Amd. Answer at physical page 2, ¶¶ 32-34, 40, 41, 44, 47, 50, 51, 58-60, 76, 81, 83, 87, 88, 100; CEX 1, Bates 00004; CEX 6, Bates 02047; Tr. at 564. S.L.R. Technologies, in turn, processed the spent lamps at the Riverdale property using equipment designed by Respondent Kelly to "volume reduce" the lamps.[21/] Jt. Stips. ¶ 7; Amd. Compl. ¶¶ 30, 31, 37-40, 47, 61-63, 81, 96, 97, 98, 99, 102, 106, 107, 109; Amd. Answer at physical page 2, ¶¶ 30, 31, 37-40, 47, 61-63, 81, 96, 97, 98, 99, 102, 106, 107, 109; CEX 6, Bates 02048-02049.

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[19/] (...continued)
Respondent MVPT, Respondents maintain in their Amended Answer that River Shannon Recycling "employed a company known as SLR Technologies" and "SLR is and was solely owned by . . . Larry Kelly." Amd. Answer ¶ 40. In addition, documentary and testimonial evidence in the record reflects that S.L.R. Technologies, Inc., was incorporated in the State of Illinois on December 15, 2008, that Respondent Kelly was its President, and that it conducted business under the assumed name Shannon Lamp Recycling Technologies. CEX 39, Bates 03007; Tr. at 556. These inconsistencies call into question the precise relationship between S.L.R. Technologies and Respondents during the period relevant to the Amended Complaint.

[20/] The Amended Answer is not paginated. Any citation to a physical page number is a reference to the narrative found in the first three pages of the Amended Answer.

[21/] The record reflects that Respondents have used a variety of names for this equipment during the course of EPA's investigation and this proceeding. *See, e.g.*, CEX 4, Bates 00285 ("mercury vapor processing unit"); CEX 4, Bates 00311 ("mobile processing unit"); CEX 8, Bates 02061 ("mobile recycling unit"); Amd. Answer ¶ 30 ("mobile volume reduction equipment").

Respondent Kelly was responsible for the management of these activities. Jt. Stips. ¶ 4; CEX 6, Bates 02048. Neither Respondent MVPT nor Respondent Kelly held or applied for a permit or interim status to engage in the storage and treatment of hazardous waste. Amd. Compl. ¶¶ 52-63; Amd. Answer ¶¶ 52-63.

On or around October 24, 2007, the Village of Riverdale notified EPA of its intent to sue Respondent MVPT pursuant to Section 7002 of RCRA, 42 U.S.C. § 6972, which authorizes any person to initiate a civil action against an alleged violator of RCRA in the absence of action by EPA or an authorized state. Tr. at 74; CEX 1, Bates 00002; CEX 2, Bates 00055; CEX 29. The notice alleges that representatives of the Village conducted inspections of the Riverdale property on September 10, 2007, and October 4, 2007, and observed, among other materials, large quantities of intact and broken fluorescent and high intensity discharge lamps both inside and outside the building located on the property. CEX 29, Bates 02567-02568. The Village attached photographs to the notice as support for its allegations. CEX 29, Bates 02576-02592. The Chicago Tribune subsequently published an article on the subject on October 29, 2007. CEX 1, Bates 00002; CEX 2, Bates 00055.

Prompted by these events, representatives of EPA, including Todd C. Brown, an Environmental Scientist and Enforcement Officer from the RCRA Branch of Complainant's Land and Chemicals Division, visited the Riverdale property on October 29, 2007. CEX 2, Bates 00055. Because no employees of Respondent MVPT were present at the property at that time, the EPA representatives arranged with Respondent MVPT to return the following day on October 30, 2007, to perform a Compliance Evaluation Inspection ("CEI" or "inspection") pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927. Amd. Compl. ¶ 21; Amd. Answer ¶ 21; Tr. at 36, 78, 137; CEX 1, Bates 00001; CEX 2, Bates 00055-00056. Mr. Brown took notes and photographs during the inspection. Tr. at 135, 140; CEX 1, Bates 00005-00053; CEX 55. He subsequently prepared a written account of the inspection ("CEI Report") and included copies of these photographs. Tr. at 78; CEX 1, Bates 00001.

During the CEI, Mr. Brown observed cardboard boxes, drums, roll-off containers, and semi-truck trailers containing spent lamps at or adjacent to the Riverdale property. Amd. Compl. ¶ 22, Amd. Answer ¶ 22. Mr. Brown also interviewed Respondent Kelly at that time. Tr. at 137, 139; CEX 1, Bates 0004-0005; CEX 55, Bates 03996.

On November 14, 2007, Mr. Brown collected 12 samples of intact lamps from the Riverdale property and delivered them to EPA's Central Regional Laboratory for analysis using the Toxicity Characteristic Leaching Procedure ("TCLP") described at 35 IAC § 721.124. Tr. at 79-80; Amd. Compl. ¶ 50; Amd. Answer ¶ 50; Jt. Stips ¶ 32. The analysis revealed that four of the 12 samples

collected by Mr. Brown exhibited the characteristic of toxicity for mercury, as defined by 35 IAC § 721.124. Amd. Compl. ¶ 51; Amd. Answer ¶ 51; Jt. Stips. ¶ 11. Mr. Brown subsequently prepared a written account of the sampling he performed on November 14, 2007, and the analysis conducted by the Central Regional Laboratory ("Sampling Report"), to which he attached numerous documents, including the report prepared by the Central Regional Laboratory. Tr. at 80; CEX 2.

On November 5, 2007, EPA issued a Request for Information to Respondent MVPT, doing business as River Shannon Recycling, pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927 ("First Information Request"). Tr. at 78-79; Amd. Compl. ¶ 24; Amd. Answer ¶ 24; CEX 3. Respondent MVPT submitted a response on or about November 26, 2007 ("Respondent MVPT's First Response"). Tr. at 80; Amd. Compl. ¶ 25; Amd. Answer ¶ 25; CEX 4. On May 20, 2008, EPA issued a second Request for Information to Respondent MVPT, doing business as River Shannon Recycling ("Second Information Request"), concerning, among other subjects, the precise relationship between Respondent MVPT and other business enterprises affiliated with Respondent Kelly. Tr. at 81; Amd. Compl. ¶ 24; Amd. Answer ¶ 24; CEX 5. Respondent MVPT submitted a response on or about June 3, 2008 ("Respondent MVPT's Second Response"). Tr. at 81; Amd. Compl. ¶ 25; Amd. Answer ¶ 25; CEX 6. On October 3, 2008, EPA issued a final Request for Information to Respondent MVPT, doing business as River Shannon Recycling ("Third Information Request"), concerning, among other subjects, the spent lamps observed at the Riverdale property during the CEI. Tr. at 82; Amd. Compl. ¶ 24; Amd. Answer ¶ 24; CEX 7. Respondent MVPT submitted a response on or about October 20, 2008 ("Respondent MVPT's Third Response"). Tr. at 82; Amd. Compl. ¶ 25; Amd. Answer ¶ 25; CEX 8.

Prior to initiating this action, EPA notified the State of Illinois and Respondent MVPT of its intent to issue a complaint against Respondent MVPT. Tr. at 82-83, 125-26; CEX 32. After issuing the Complaint on April 23, 2010, EPA continued its investigation by issuing Requests for Information to Shannon Lamp Recycling on July 6, 2010, and November 24, 2010. Tr. at 84; CEX 38, 40. Shannon Lamp Recycling submitted responses on or about August 4, 2010, and December 9, 2010. Tr. at 84; CEX 39, 41.

Finally, Mr. Brown conducted another inspection of the Riverdale property on May 26, 2011, during which he took photographs of the property. Tr. at 84; CEX 42. He subsequently prepared a written account of the inspection ("Inspection Report") and attached copies of the photographs. Tr. at 84; CEX 42.

## V. BURDEN OF PROOF

Pursuant to Section 22.24(a) of the Rules of Practice:

> The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

40 C.F.R. § 22.24(a).

In carrying their respective burdens of proof, the parties are subject to a preponderance of the evidence standard. 40 C.F.R. § 22.24(b). To prevail under this standard, a party must demonstrate that the facts the party seeks to establish are more likely than not to be true. *See, e.g., Smith Farm Enterprises, LLC*, CWA Appeal No. 08-02, 2011 EPA App. LEXIS 10, *14 (EAB, Mar. 16, 2011) ("A factual determination meets the preponderance of the evidence standard if the fact finder concludes that it is more likely true than not.") (citing *Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 507 n.20 (EAB 2004); *Lyon County Landfill*, 10 E.A.D. 416, 427 n.10 (EAB 2002), *aff'd*, No. Civ-02-907, 2004 WL 1278523 (D. Minn. June 7, 2004), *aff'd*, 406 F.3d 981 (8th Cir. 2005); and *Bullen Cos., Inc.*, 9 E.A.D. 620, 632 (EAB 2001)).

## VI. LIABILITY

### A. APPLICABLE LAW

Since the outset of this proceeding, Respondents' defenses to liability have largely rested upon their contention that they were subject to Illinois's universal waste rule, rather than Illinois's general hazardous waste regulations, and that they conducted their operations in compliance with that rule. As a result, Respondents consistently describe their operations with reference to Illinois's universal waste rule throughout the record.

By Order dated May 5, 2011, I held that Illinois's general hazardous waste regulations govern this proceeding, contrary to Respondents' position. Even after this ruling, however, the parties continued to devote significant attention to the subject of "universal waste." Because the evidentiary record is so replete with references to Illinois's universal waste rule and the federal version upon which it is based, I find that revisiting the subject is appropriate at this time. I will then turn to Complainant's *prima facie* case in this matter.

1. Federal Universal Waste Rule

Set forth at 40 C.F.R. part 273, the federal universal waste rule governs the collection and management of certain widely-generated hazardous wastes referred to as "universal wastes." 60 Fed. Reg. 25,492, 25,503 (May 11, 1995). When first promulgated in 1995, the rule designated three categories of waste as universal wastes: hazardous waste batteries, certain hazardous waste pesticides, and mercury-containing thermostats. 60 Fed. Reg. at 25,492. Effective on January 6, 2000, hazardous waste lamps were added to the federal universal waste rule. 64 Fed. Reg. 36,466 (July 6, 1999). Effective on August 5, 2005, the category of universal wastes consisting of mercury-containing thermostats was expanded to include other types of spent mercury-containing equipment. 70 Fed. Reg. 45,508 (Aug. 5, 2005).

The federal universal waste rule applies only to "transporters" and "handlers" of universal waste and imposes less stringent standards than those governing other types of hazardous waste under the general Subtitle C regulations. 64 Fed. Reg. at 36,468. The term "universal waste transporter" is defined as "a person engaged in the off-site transportation of universal waste by air, rail, highway, or water." 40 C.F.R. § 273.9. The term "universal waste handler" is defined as:

> (1) A generator . . . of universal waste; or
>
> (2) The owner or operator of a facility, including all contiguous property, that receives universal waste from other universal waste handlers, accumulates universal waste, and sends universal waste to another universal waste handler, to a destination facility, or to a foreign destination.

*Id.* The definition further states, in pertinent part, that a universal waste handler is not "[a] person who treats . . ., disposes of, or recycles universal waste . . . ." *Id.*

In turn, the term "generator" is defined as any person, by site, whose act or process produces hazardous waste listed in 40 C.F.R. part 261 or whose act first causes a hazardous waste to become subject to regulation.[22/] 40 C.F.R. § 273.9. Subject to certain exceptions, the term "destination facility" is defined as "a facility that treats, disposes of, or recycles a particular category of universal waste." *Id.* The definition further states that "[a] facility at which a particular category of universal waste is only accumulated, is not a destination facility for purposes of managing that category of universal waste." *Id.*

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[22/] This definition is identical to the definition found in the general Subtitle C regulations at 40 C.F.R. § 260.10.

Destination facilities are subject to the full requirements applicable to hazardous waste storage, treatment, and disposal facilities under Subtitle C of RCRA and must obtain a permit for such activities. *See* 40 C.F.R. § 273.60.

Pursuant to 40 C.F.R. §§ 273.11 and 273.31, any handlers of universal waste are prohibited from 1) disposing of universal waste and 2) diluting or treating universal waste.

2. Applicability of the Federal Universal Waste Rule in Authorized States

The preamble to the final federal universal waste rule instructs that prior to the enactment of the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), a state that had received final authorization of its hazardous waste program (an "authorized state") administered its program entirely in lieu of the federal Subtitle C program. 60 Fed. Reg. at 25,536. Federal requirements no longer applied in the authorized state, and any new, more stringent federal requirements promulgated by EPA did not take effect in the authorized state until it adopted equivalent requirements as state law. *Id.*

Since the enactment of HSWA, any new requirements and prohibitions promulgated pursuant to HSWA take effect in authorized states on the same date they take effect as federal law in unauthorized states. 60 Fed. Reg. at 25,536 (citing 42 U.S.C. § 6926(g)). Authorized states are required to adopt any such requirements and prohibitions as state law and obtain final authorization to administer and enforce them. *Id.* In the interim, however, the provisions are administered and enforced solely by EPA. *Id.*

In contrast, any new requirements and prohibitions not promulgated pursuant to HSWA do not apply in authorized states until those states revise their hazardous waste programs to adopt equivalent requirements and prohibitions as state law and receive final authorization from EPA for the revisions. *See* 60 Fed. Reg. at 25,536. Authorized states are required to modify their programs only when the new requirements and prohibitions promulgated by EPA are more stringent or broader in scope than existing federal standards. *Id.*

In the preamble to the final federal universal waste rule, EPA noted that the rule was not promulgated pursuant to HSWA and, therefore, it would not take effect in an authorized state until the state revised its hazardous waste program to adopt equivalent requirements under state law and obtained authorization from EPA to administer its version of the rule. 60 Fed. Reg. at 25,536. EPA further noted that because the federal universal waste rule is less stringent than existing requirements for the management of hazardous waste, authorized states are not required to modify

their hazardous waste programs to adopt requirements equivalent to the provisions contained in the rule. *Id.* The Agency "strongly encourages" states to do so, however. *Id.*; *see also* CEX 44, Bates 003107 ("EPA encourages states to adopt and become authorized for the universal waste regulations since these streamlined requirements encourage recycling of commonly generated wastestreams.").

### 3. Illinois's Universal Waste Rule

The State of Illinois adopted its own universal waste rule effective on August 1, 1996. 20 Ill. Reg. 11,291 (Aug. 16, 1996). The main body of Illinois's universal waste rule is codified at 35 IAC part 733, and like the federal version upon which it is based, it consists of "a set of alternative, less burdensome rules applicable to certain activities with regard to certain enumerated hazardous waste deemed 'universal waste.'" 20 Ill. Reg. at 11,297.

As discussed above, because the federal universal waste rule was promulgated pursuant to statutory authorities other than HWSA, the State of Illinois is required to obtain authorization from EPA in order to administer and enforce its version of the universal waste rule as part of its approved hazardous waste program. The procedures for obtaining authorization of revisions to approved state hazardous waste programs are described at 40 C.F.R. § 271.21. This provision provides that such revisions become effective either 60 days or immediately after publication of EPA's approval in the Federal Register, depending upon the particular approval procedure used by the Agency. 40 C.F.R. § 271.21(b)(3)(iii), (b)(4)(iii).

While Illinois's universal waste rule is indistinguishable from its federal counterpart in many respects,[23/] EPA has not yet

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[23/] For purposes of this proceeding, the most notable difference is that Illinois's universal waste rule authorizes transporters and handlers of universal waste lamps to "treat those lamps for volume reduction at the site where they were generated," subject to certain conditions, without a permit for that activity. 35 IAC §§ 733.113(d)(3), 733.133(d)(3), 733.151(b). One such condition is that the lamps must be "crushed" in a closed system designed and operated in such a manner that any emission of mercury from the crushing system cannot exceed a certain regulatory level. 35 IAC §§ 733.113(d)(3)(A), 733.133(d)(3)(A), 733.151(b)(1).

Conversely, in the preamble to the final rule adding hazardous waste lamps to the federal universal waste rule, the Agency advised that handlers of universal waste should not treat universal wastes because they are not required to comply with the full Subtitle C

(continued...)

authorized the State of Illinois to administer and enforce the rule as part of its approved hazardous waste program, as evidenced by the Federal Register.[24/] Since Illinois's universal waste rule took effect as state law on August 1, 1996, the Agency has published its approval of a revision to Illinois's authorized hazardous waste program in the Federal Register only once, on August 5, 1996. The Federal Register notice of that approved revision reflects that it was unrelated to Illinois's promulgation of the universal waste rule or the management of certain types of hazardous waste as universal waste. *See* 61 Fed. Reg. at 40,521. The only conclusion to draw is that the Agency has never approved Illinois's universal waste rule as a revision to its authorized hazardous waste program pursuant to the procedures for approval of program revisions set forth at 40 C.F.R. § 271.21.

As previously noted, the main body of Illinois's universal waste rule is codified at 35 IAC part 733. Other sections of the Illinois Administrative Code also purport to exempt universal waste from the full hazardous waste regulations. In particular, the regulations at 35 IAC § 721.109 provide:

> 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:

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[23/] (...continued)
regulations. 64 Fed. Reg. at 36,477. The Agency further instructed:

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

*Id.* at 36,478.

[24/] The parties have not posited why the State of Illinois has not yet obtained and/or EPA has not yet granted it the authorization to administer its own universal waste rule.

> 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. Additionally, the regulations at 35 IAC § 703.123(h) provide:

> The following persons are among those that are not required to obtain a RCRA permit:
>
> * * *
>
> h) A universal waste handler or universal waste transporter (as defined in 35 Ill. Adm. Code 720.110) . . . . Such a handler or transporter is subject to regulation pursuant to 35 Ill. Adm. Code 733.

35 IAC § 703.123(h).

As set forth in the proposed rulemaking for Illinois's universal waste rule, those provisions were promulgated by the state in order to implement the rule:

> USEPA adopted a major new body of alternative hazardous waste management regulations on May 11, 1995, at 60 Fed. Reg. 25492, as 40 CFR 273. These new regulations, called the "universal waste rule," modify the RCRA Subtitle C program to streamline the system as it applies to these widely-generated wastes.
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> * * *
>
> The [Illinois Pollution Control] Board has incorporated the universal waste rule into the Illinois hazardous waste regulations with minimal, nonsubstantive deviation from the federal text. This incorporation adds Part 733 and Sections 720.123 and 721.109 to the rules and the amendment of Sections 703.123, 720.110, 720.120, 721.105, 721.106, 722.110, 722.111, 724.101, 725.101, 726.180, 728.101.

RCRA Update, USEPA Regulations (1-1-95 through 6-30-95, 7-7-95, 9-29-95, 11-13-95 & 6-6-96) (Feb. 1, 1996), R95-20.

While the Federal Register contains no notice that Illinois has been authorized by EPA to administer the universal waste rule as part of its hazardous waste program, the Agency listed sections 703.123 and 721.109 in the series of Illinois regulations codified by EPA at 40 C.F.R. § 272.701(a)(1)(i):

> The following Illinois regulations and statutes are incorporated by reference with the approval of the Director of the Federal Register . . . as part of the hazardous waste management program under Subtitle C of RCRA . . . .
>
> > (i) Illinois Administrative Code, Title 35, . . . Part 703, Sections 703.100-703.126, 703.140-703.246; . . . Part 721, Sections 721.101-721.133 . . . (Illinois Administrative Code, January 1, 1985, as amended January 1, 1986, January 1, 1987, and January 1, 1988).

40 C.F.R. § 272.701(a)(1)(i). Therefore, at first glance, the provisions exempting universal waste from regulation as hazardous waste appear to be authorized by EPA as part of Illinois's approved hazardous waste program.

Such a reading is flawed, however. As pointed out by Complainant in its Post-Hearing Brief, the regulations at 40 C.F.R. § 272.701(a)(1)(i) seemingly codify the Illinois regulations as last amended on January 1, 1988, which is well before the State of Illinois promulgated its universal waste rule and 35 IAC §§ 721.109 and 703.123(h) were adopted in their current form. C's Post-Hearing Brief at 13-14. Moreover, a review of the Federal Register reveals that, notwithstanding the listing of 35 IAC § 721.109 at 40 C.F.R. § 272.701(a)(1)(i), that provision has never been authorized in any form by EPA as part of Illinois's hazardous waste program. Along with the main body of the universal waste rule, section 721.109 was added to the Illinois Administrative Code effective on August 1, 1996. 20 Ill. Reg. 10,963 (Aug. 16, 1996). The last approval of a revision to Illinois's authorized hazardous waste program, published by EPA in the Federal Register on August 5, 1996, does not authorize the implementation of 35 IAC § 721.109 as part of the program. *See* 61 Fed. Reg. at 40,521.

In turn, EPA last authorized the implementation of 35 IAC § 703.123, as amended, effective on August 15, 1994. *See* 59 Fed. Reg. at 30,525. The State of Illinois did not amend that provision to include an exemption from permitting requirements for universal waste handlers and transporters at subsection (h) until it adopted the universal waste rule effective on August 1, 1996. 20 Ill. Reg. 11,225 (Aug. 16, 1996). Once again, the last approval of a revision to Illinois's authorized hazardous waste program, published by EPA in the Federal Register on August 5,

1996, did not authorize the implementation of this amendment to 35 IAC § 703.123. *See* 61 Fed. Reg. at 40,521.

Complainant persuasively contends in its Post-Hearing Brief that "[i]f states such as Illinois could simply insert all program revisions in between previously authorized provisions listed at Section 272.701(a)(1)(i) or as amendments to already authorized regulatory provisions . . ., it would functionally void the authorization process . . . ." C's Post-Hearing Brief at 14-15. I agree. Based upon the foregoing discussion, I find that none of the Illinois regulations relating to the management of universal waste, including those outside the main body of the rule at 35 IAC part 733, such as 35 IAC § 721.109 and 35 IAC § 703.123(h), have been approved by EPA as part of Illinois's authorized hazardous waste program. In the absence of such approval, the full hazardous waste regulations adopted by Illinois and authorized by EPA continue to govern those categories of waste known as universal waste for purposes of federal enforcement, as held in the Order of May 5, 2011. And as clarified here, those regulations do not include any exemptions for universal waste from regulation as hazardous waste.

**B. COMPLAINANT'S *PRIMA FACIE* CASE**

The Amended Complaint alleges in two counts that between at least February of 2005 and November 14, 2007, Respondents operated a hazardous waste storage and treatment facility in Riverdale, Illinois, without a permit, in violation of 35 IAC § 703.121(a)(1).[25/] As noted above, this provision provides that "[n]o person may conduct any hazardous waste storage, hazardous waste treatment, or hazardous waste disposal operation . . . [w]ithout a RCRA permit for the HWM (hazardous waste management) facility . . . ."[26/] 35 IAC § 703.121(a)(1). Thus, to satisfy

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[25/] While the Amended Complaint alleges that Respondent MVPT's violation of 35 IAC § 703.121(a)(1) continued until at least November 14, 2007, it does not specify a date on which Respondent Kelly's alleged violation of 35 IAC § 703.121(a)(1) ended. Complainant fails to explain this omission. Arguably, however, Complainant may not have specified a date on which Respondent Kelly's alleged violation of 35 IAC § 703.121(a)(1) ended because of its contention that Respondent Kelly continues to engage in the violative conduct through various business entities at another location. For purposes of this proceeding, I will treat the Amended Complaint as alleging that Respondent Kelly's violation of 35 IAC § 703.121(a)(1) at the Riverdale property ceased on November 14, 2007.

[26/] As originally enacted by the State of Illinois and authorized by EPA, 35 IAC § 703.121(a)(1) read as follows: "No (continued...)

its burden as to Respondents' liability in this proceeding, Complainant must demonstrate by a preponderance of the evidence that between at least February of 2005 and November 14, 2007:

(1) each Respondent was a "person," as that term is defined by the EPA-approved Illinois hazardous waste program;

(2) each Respondent engaged in "storage," "treatment," or "disposal" operations at the Riverdale property, as those terms are defined by the EPA-approved Illinois hazardous waste program;

(3) the materials subject to storage, treatment, or disposal at the Riverdale property constituted "hazardous waste," as that term is defined by the EPA-approved Illinois hazardous waste program;

(4) neither Respondent possessed a RCRA permit to engage in such activities; and

(5) the Riverdale property was a "hazardous waste management facility" as that term is defined by the Illinois hazardous waste regulations.

For the reasons that follow, I find that Complainant has met its burden of demonstrating by a preponderance of the evidence that Respondents are liable for a violation of 35 IAC § 703.121(a)(1).[27/]

1. **Each Respondent was a "Person."**

The first element that Complainant is required to demonstrate by a preponderance of the evidence in order to establish Respondents' liability is that each Respondent was a "person," as that term is defined by the Illinois hazardous waste regulations, between February of 2005 and November 14, 2007. Under the regulations, the term "person" is defined as "any individual, partnership, co-partnership, firm, company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity,

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[26/] (...continued)
person shall conduct any hazardous waste storage, hazardous waste treatment or hazardous waste disposal operation . . .[w]ithout a RCRA permit for the HWM (hazardous waste management) facility . . . ." The difference between this language and the current language of 35 IAC § 703.121(a)(1) is not legally significant.

[27/] Arguments raised by the parties that are not specifically addressed by this Initial Decision were either rejected or considered unnecessary to specifically address.

or their legal representative, agency, or assigns." 35 IAC § 702.110.

Respondents do not contest the facts supporting this element. In their Amended Answer, Respondents admit that they satisfied the definition of the term "person" during the relevant time period. Amd. Answer ¶¶ 15, 16. Respondents further admit that Respondent MVPT was incorporated in the State of Illinois in October of 2003 and that it was involuntarily dissolved on or about March 10, 2010. Amd. Compl. ¶ 64; Amd. Answer at physical page 2, ¶ 64. Finally, Respondents entered into stipulations with Complainant that Respondent Kelly is a person residing in the State of Illinois and that Respondent MVPT was a corporation organized under the laws of Illinois. Jt. Stip. ¶¶ 1, 2. Accordingly, the preponderance of the evidence supports a finding that each Respondent constituted a "person," as that term is defined by 35 IAC § 702.110, between February of 2005 and November 14, 2007.

### 2. Each Respondent Engaged in "Storage" and "Treatment" Operations at the Riverdale Property.

The second element that Complainant is required to demonstrate by a preponderance of the evidence is that each Respondent engaged in "storage," "treatment," or "disposal" operations at the Riverdale facility, as those terms are defined by the Illinois hazardous waste regulations, between February of 2005 and November 14, 2007. The Amended Complaint alleges that Respondents engaged in both "storage" and "treatment" operations at the Riverdale property. Amd. Complaint ¶¶ 87, 89, 105, 107. While Respondents largely admit to the conduct underlying these allegations, they steadfastly deny engaging in "storage" and "treatment" operations, as those terms are defined by the Illinois hazardous waste regulations, on the grounds that they were not subject to that particular set of regulations.

As discussed in greater detail below, I find that Complainant has adequately demonstrated that "storage" and "treatment" operations occurred at the Riverdale property within the regulatory meaning of those terms and that each Respondent is liable for those activities. However, the record supports a finding that only the "storage" operations occurred during the period of violation alleged in the Amended Complaint, while the "treatment" operations ceased on or around September 13, 2007.

#### a. "Storage" Operations at the Riverdale Property

The Illinois hazardous waste regulations define the term "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 § 702.110. Consistent with their position in this proceeding that they were subject to,

and operating in compliance with, Illinois's universal waste rule, Respondents deny engaging in any "storage" operations at the Riverdale property, as that term is defined by the Illinois hazardous waste regulations. Amd. Compl. ¶¶ 87, 105; Amd. Answer ¶¶ 87, 105.

Respondents do not dispute, however, that spent lamps were collected from third parties and accumulated at the Riverdale property for processing. Amd. Compl. ¶¶ 50, 51; Amd. Answer ¶¶ 50, 51. As Mr. Brown recorded in the CEI Report, Respondent Kelly informed him at the conclusion of the CEI on October 30, 2007, that spent lamps acquired from certain customers were transported to the Riverdale property and stored for up to 10 days pending treatment. CEX 1, Bates 00004; *see also* CEX 55, Bates 04001-04002. Respondent MVPT confirmed this practice in its First Response, asserting that "[c]onsolidated spent lamps collected from generators are staged inside the Riverdale facility, placarded and processed periodically depending on volumes." CEX 4, Bates 00314, 00506, 00596; *see also* CEX 4, Bates 00597 (depicting a "spent lamp staging" area in a hand-drawn representation of the Riverdale property). In describing the activities of Respondent MVPT, operating as River Shannon Recycling, Respondent Kelly testified that "River Shannon safely staged spent mercury-containing lamps awaiting a volume reduction process . . . ." Tr. at 557. Finally, under the heading "Respondent stored Universal Waste Lamps at the Riverdale warehouse," Respondents discuss in their Reply Briefs the waste lamps "that were warehoused or consolidated at the Riverdale warehouse." Rs' Reply Briefs at 11. Such activities unquestionably fall within the regulatory definition of the term "storage."

The record also contains sufficient evidence that these activities occurred during the period of violation alleged in the Amended Complaint. While Respondents object to Complainant's use of certain terminology in the Amended Complaint based upon their position that Illinois's universal waste rule applied to their activities, Respondents admit in their Amended Answer that spent lamps were collected from third parties and accumulated at the Riverdale property between February of 2005 and October 30, 2007, as alleged in the Amended Complaint. *See* Amd. Compl. ¶¶ 32-34, 76; Amd. Answer ¶¶ 32-34, 76. Documentary and testimonial evidence in the record confirms that large quantities of spent lamps, the majority of which were observed in cardboard boxes, drums, roll-off containers, and semi-truck trailers, were present at the Riverdale property during the CEI on October 30, 3007, and during the sampling activities performed by EPA representatives on November 14, 2007. *See, e.g.*, Amd. Compl. ¶ 22; Amd. Answer ¶ 22; CEX 1, Bates 00003-00004, 00007-00025, 00038-00050; CEX 2, Bates 00056, 00065-00086; Tr. at 140-141. When questioned by EPA about the ultimate disposition of those lamps, Respondent MVPT explained in its Third Response that between July and September

of 2008, the lamps were transported to a "temporary staging area" before being "processed using SLR mobile unit and sent to Land and Lakes [landfill]." CEX 8, Bates 02060-02063.

Based upon the foregoing discussion, the undersigned finds that the preponderance of the evidence in this proceeding establishes that "storage" operations were performed at the Riverdale property, as that term is defined by the Illinois hazardous waste regulations, between February of 2005 and November 14, 2007.

**b. "Treatment" Operations at the Riverdale Property**

The Illinois hazardous waste regulations define the term "treatment" as:

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

35 IAC § 702.110. While the specific language used by Respondents to describe their activities at the Riverdale property varies throughout the record, I find that each description satisfies the regulatory definition of the term "treatment."

First, at the hearing in this matter, Mr. Brown testified that as he documented in the CEI Report, he conducted an interview of Respondent Kelly at the conclusion of the CEI, during which Respondent Kelly described the operation of a mobile treatment unit used to remove mercury from spent lamps at the Riverdale property:

> [O]n page 4 [of the CEI Report] is where I write up my interview with Mr. Kelly during the inspection. And he explains how the mobile treatment unit works, how it's used to remove the mercury from the lamps, and how it does so by *crushing* the glass in the unit and absorbing the mercury in the carbon filters . . . . I recorded how he explains that lamps were stored on site for a maximum of ten days prior to being treated in the unit. He explains at that time that the unit is also operated at the sites of River Shannon's customers, and that it is generally the smaller customers who send lamps to the Riverdale facility, and that River Shannon served as a transporter of those lamps.

Tr. at 139-140 (emphasis added); *see also* CEX 1, Bates 00004; CEX 55, Bates 04001.

Respondent MVPT offered a more detailed explanation of this process in its First Response:

> The mercury vapor processing unit is fed by hydraulic elevators that introduces and *crushes* spent lamps under a vacuum air principle that moves the mercury vapor over a series of activated carbon filters which immediately captures the mercury vapor in the form of a mercuric sulfide.
>
> * * *
>
> After the materials are safely in place, the hydraulic ram slowly compresses the lamps allowing for the controlled movement of mercury vapor to pass over the sulfur impregnated carbon filters thus allowing the carbon to absorb the mercury vapor forming a *non-hazardous* mercuric sulfide.
>
> After the process has taken place and the extraction of mercury vapor has been completed, the *now non-hazardous* re-usable glass and aluminum by-products are automatically moved to a 6 yard on-board storage area (6,000 lamps). When the unit is full it is downloaded into a lined and covered roll-off and stored for reuse or disposal depending on the markets.

CEX 4, Bates 00285 (emphasis added). Respondent MVPT also attached copies of reports submitted to the Illinois Environmental Protection Agency ("IEPA") on a quarterly basis between December 31, 2004, and October 2, 2007, that identify the total number of lamps "crushed" during the reporting period. CEX 4, Bates 00603-27.

In its ordinary usage, the term "crush" means to change the physical structure of a given object. Merriam Webster's Collegiate Dictionary 280 (10th ed. 1997) (defining the term "crush" as "to squeeze or force by pressure so as to alter or destroy structure"). Thus, by Respondents' own admissions, the equipment used at the Riverdale property was designed to alter the physical character of the spent lamps so as to remove the mercury contained therein and render the lamps non-hazardous. This process falls squarely within the regulatory definition of the term "treatment," which includes "any method, technique, [or] process . . . designed to change the physical, chemical, or biological character or composition of any 'hazardous waste' . . . so as to render such wastes non-hazardous or less hazardous . . . ." 35 IAC § 702.110; *see also* 64 Fed. Reg. at 36,477 ("The

crushing of spent mercury-containing lamps clearly falls within [the] definition [of the term 'treatment' under RCRA].").

Once Complainant initiated this enforcement action, Respondents began to use slightly different terms to describe their activities at the Riverdale property. In particular, Respondents explain in their Amended Answer that "mobile volume reduction equipment" was used at the Riverdale property to "reduce[] the volume of the lamps and capture[] mercury vapor in a series of activated carbon filters . . . ." Amd. Answer ¶ 31. Respondents continued to characterize the activity performed at the Riverdale property as "volume reduction" for the remainder of this proceeding. *See, e.g.*, Jt. Stip. ¶ 7; Tr. at 550-553, 557, 563. The distinction is not legally significant, however, as the regulatory definition of the term "treatment" includes "any method, technique, [or] process . . . designed to change the physical, chemical, or biological character or composition of any 'hazardous waste' . . . so as to render such wastes . . . reduced in volume." 35 IAC § 702.110. Respondents admit in their Amended Answer that the "volume reduction" process altered the physical characteristics of the spent lamps so as to reduce their volume. Amd. Compl. ¶ 96; Amd. Answer ¶ 96. Respondents further admit that the "volume reduction" process rendered the spent lamps non-hazardous and safer to dispose of. Amd. Compl. ¶¶ 97, 98; Amd. Answer ¶¶ 97, 98. This process clearly constitutes "treatment."

Respondents concede in their Reply Briefs that "the record is replete with evidence that volume reduction was occurring at Respondents . . . warehouse . . . ." Reply Briefs at 8. However, consistent with their position that they were operating in compliance with Illinois's universal waste rule, Respondents then claim that "[v]olume reduction of universal waste lamps is not analogous to treatment of hazardous waste under Illinois regulations" and "the process of volume reducing spent lamps conducted by an authorized outsource company [S.L.R. Technologies] to safely manage that process is not treatment as that term relates to RCRA." Rs' Reply Briefs at 7-8. Such arguments conflict with not only the applicable regulations but also an earlier admission by Respondents in their Post-Hearing Brief, wherein Respondents acknowledge that "[w]hen framed in the RCRA scheme, the volume reduction of lamps could be construed as 'treatment.'" Rs' Post-Hearing Brief at 14.

Based upon the foregoing discussion, the undersigned finds that the processing of spent lamps at the Riverdale property constituted "treatment," as that term is defined by 35 IAC § 702.110. The next question to consider is whether treatment of spent lamps occurred at the Riverdale property during the alleged period of violation. In the Amended Complaint, Complainant specifically alleges that Respondents crushed waste lamps at the Riverdale property "[a]t various times, including the period

between February 2005 and October 30, 2007," the date on which EPA representatives conducted the CEI at the Riverdale property. Amd. Compl. ¶¶ 32, 35, 37. As documented by Mr. Brown in his CEI Report, two containers holding broken lamps and other debris were observed on the south and west sides of the Riverdale property during the CEI on October 30, 2007. CEX 1, Bates 00003-00004, 00007-00010, 00020-00021, 00040-00042. This evidence does not necessarily support a finding that Respondents were actively engaged in treatment operations at that time, however.

To the contrary, the record contains unrefuted evidence that Respondents suspended their treatment of spent lamps at the Riverdale property in September of 2007 and that at least some of the broken lamps observed during the CEI were the result of vandalism. As Mr. Brown recorded in the CEI Report, Respondent Kelly informed him at the conclusion of the CEI that an incident of vandalism had occurred at the Riverdale property on September 4, 2007, which included the breaking of spent lamps on the property; that Respondent MVPT did not discover the vandalism until September 10, 2007; and that the Village of Riverdale had, in the meantime, issued a cease and desist order to Respondent MVPT on September 6, 2007. CEX 1, Bates 00005.

Respondent MVPT expounded upon these claims in its First Response, explaining that between September 6 and September 11, 2007, the Village of Riverdale barred Respondents from entering the Riverdale property and numerous acts of vandalism occurred. CEX 4, Bates 00351, 00629. Respondent MVPT further asserted that the dumpsters observed by Mr. Brown on the south and west sides of the Riverdale property during the CEI contained fragments of windows and spent lamps broken by vandals during that period. CEX 4, Bates 00329, 00351.

As support for these assertions, Respondent MVPT attached to its First Response a copy of a civil complaint it brought against the Village of Riverdale on or around October 26, 2007. CEX 4, Bates 00329-00350. The civil complaint alleges, among other claims, that 1) the Village failed to respond to Respondent MVPT's reports of vandalism at the Riverdale property on September 4, 2007; 2) the Village issued a Cease and Desist Order to Respondent Kelly on September 6, 2007, directing Respondent MVPT to cease its operations at the Riverdale property immediately; 3) the Village subsequently barred Respondent MVPT from entering the property until September 10, 2007; 4) the incidence of vandalism at the property increased between September 6 and 11, 2007, and included damage to containers of spent lamps and numerous windows on the west side of the building located on the Riverdale property; and 5) acts of vandalism at the property continued unabated thereafter. CEX 4, Bates 00329-00350. The civil complaint also notes that on October 18, 2007, "River Shannon employees were on the [Riverdale property] preparing to move its equipment and materials from the [property]

because River Shannon [had] been unlawfully precluded from doing business at that location." CEX 4, Bates 00342. When questioned about containers of intact lamps observed inside trailers at the Riverdale property during the CEI, Respondent MVPT asserted in its First Response that "[s]ince September 13th, 2007, River Shannon has been forced to stage lamps and not proactively process lamps, as would have been consistent with our operating protocols. The trailers have been utilized for storage since September 13th, 2007, so as to maintain organization relating to housekeeping inside the facility." CEX 4, Bates 00358.

In responding to the allegations in the Amended Complaint, Respondents again claimed that the conditions observed at the Riverdale property during the CEI stemmed from vandalism. In particular, Respondents allege that open and unlabelled boxes of spent lamps observed during the CEI:

> were the results of continuous clean-up efforts due to a 43 day siege on its property lifted one day prior to the USEPA site investigation and the ongoing vandalism that occurred during this period at the Riverdale property. Vandalism of the Riverdale property increased significantly subsequent to [Respondent MVPT's] inability and limited ability to access the property after it was locked out by the Village of Riverdale on September 6, 2007 and it continued at a significantly increased rate from September 6, 2007 up until the time [Respondent MVPT] turned the property back to their landlord in a cleaned and in broom swept condition [in 2008].

Amd. Answer ¶ 23.

Undoubtedly, Respondents' assertions are self-serving. The Board has consistently held that such self-serving statements are entitled to little weight. *See, e.g., Cent. Paint & Body Shop*, 2 E.A.D. 309, 315 (EAB 1987) ("Self-serving declarations are entitled to little weight."); *A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 426 (EAB 1987) ("[U]ncorroborated self-serving statements . . . are entitled to little weight."). Additionally, as previously noted on page 8 of this Initial Decision, Respondent Kelly admitted at the hearing that he has been convicted of a number of criminal offenses, such as mail fraud and racketeering. Tr. at 602-03.

With regard to this issue, I do not attribute any significant weight to Respondent Kelly's convictions. Moreover, I note that Complainant failed to present any persuasive evidence to rebut Respondents' claims. While Respondents entered into stipulations that Respondent MVPT maintained a website in November of 2007 that advertised services for recycling spent lamps, Jt. Stips. ¶ 8, the record lacks any evidence that Respondents were performing such services at the Riverdale

property at that time. Further, Complainant appears to concede that Respondents were not actively engaged in treatment operations at the Riverdale property on October 30, 2007, as demonstrated by counsel for Complainant's questioning of Respondent Kelly at the hearing:

> Q: At the time of EPA's 2007 inspection [on October 30, 2007], the Mercury Vapor Processing Technologies facility was closed, correct?
>
> A: Yes, it was.
>
> Q: And at the time of the air sampling the EPA's on-site coordinators performed, the facility wasn't in operation at that time, was it?
>
> A: You're right.

Tr. at 603. Additionally, in the penalty computation worksheet and accompanying narrative prepared by Mr. Brown for purposes of calculating the proposed penalty in this proceeding, Mr. Brown acknowledges Respondents' claims that treatment operations ceased at the Riverdale property in September of 2007 without challenge. *See, e.g.*, CEX 62, Bates 04093 ("Respondents reportedly ceased operations at its facility in September of 2007. However, this appears to be a result of action taken by the Village of Riverdale . . . .").

In the absence of any probative evidence to the contrary, the undersigned finds that the treatment operations at the Riverdale property ceased on or around September 13, 2007, and did not resume by the end of the alleged period of violation on November 14, 2007. Having found that both "storage" and "treatment" operations were performed at the Riverdale property, I must now consider whether Complainant has demonstrated by a preponderance of the evidence that both Respondents are liable for those activities.

### c. Both Respondents are Liable for the "Storage" and "Treatment" Operations at the Riverdale Property

The Amended Complaint alleges that both Respondent MVPT and Respondent Kelly engaged in "storage" and "treatment" operations at the Riverdale property. Amd. Compl. ¶¶ 87, 89, 105, 107. While Respondents deny these charges in their Amended Answer, Amd. Answer ¶¶ 87, 89, 105, 107, they maintain that Respondent MVPT only accumulated spent lamps at the Riverdale property pending volume reduction and that Respondent Kelly, acting as a sole proprietor of S.L.R. Technologies, periodically performed the volume reduction of the lamps at the Riverdale property at Respondent MVPT's request pursuant to a verbal contract, *see, e.g.*, Amd. Answer at physical page 2, ¶¶ 27, 30-34, 37-40, 44,

47. Respondents also entered into stipulations with Complainant that "[f]rom time to time, SLR Technologies' equipment, managed by Laurence Kelly, arrived at the property at 13605 S. Halsted St. in Riverdale, Illinois, mobilized and engaged in volume reduction of spent fluorescent lamps." Jt. Stips. ¶ 7. Thus, by their own admissions, Respondent MVPT conducted activities found to constitute "storage," and Respondent Kelly individually conducted activities found to constitute "treatment," as those terms are defined by the applicable regulations.

Accordingly, the only remaining issues to be resolved with respect to this element of Complainant's *prima facie* case are whether Respondent MVPT may be held liable for the "treatment" operations, and whether Respondent Kelly may be held liable for the "storage" operations, performed at the Riverdale property.

**i. Respondent MVPT's liability for the "treatment" operations**

Complainant presents two alternative arguments to support its position that Respondent MVPT engaged in the "treatment" operations at the Riverdale property. C's Post-Hearing Brief at 24-27. The first argument is premised on the Second Response submitted by Respondent MVPT during EPA's investigation, in which Respondent MVPT claims that S.L.R. Technologies was a registered assumed name of Respondent MVPT and that S.L.R. Technologies managed the mobile processing of spent lamps. C's Post-Hearing Brief at 24-25 (citing CEX 6, Bates 02048, 02050, and Tr. at 155-56). Complainant also points out that Respondent MVPT explains in its First Response that it leased the Riverdale property pursuant to "oral agreements with written contracts to follow" and that it owns the equipment used to process spent lamps accumulated at the Riverdale property. C's Post-Hearing Brief at 24 (citing CEX 4, Bates 00311, 00637, and Tr. at 146-47). Finally, Complainant relies upon Respondent MVPT's assertion in its Third Response that it "commissioned Shannon Lamp Recycling (SLR) to perform recycling services using the SLR mobile recycling unit" on the spent lamps observed at the Riverdale property by Agency personnel on October 30 and November 14, 2007. C's Post-Hearing Brief at 25 (citing CEX 8, Bates 02061-62).

Citing Sections 4.15 and 3.10(b) of the Illinois Business Corporation Act, 805 Ill. Comp. Stat. 5/4.15, 3.10(b) (1983), Complainant contends that regardless of any assumed names under which it conducts business, Respondent MVPT is "the true corporate name and the corporation that was organized under Illinois law." C's Post-Hearing Brief at 25-26. As such, Complainant argues, Respondent MVPT is "the legal entity with the power to be sued and incur liabilities," and it "assumes the liability for each business name that it uses to conduct business," including S.L.R. Technologies. *Id.*

The second argument raised by Complainant in favor of holding Respondent MVPT liable for the "treatment" operations relates to Respondents' claim that Respondent MVPT was responsible only for receiving spent lamps from third parties, transporting the lamps to the Riverdale property, and arranging for their disposal, while S.L.R. Technologies operated as a sole proprietorship to perform the volume reduction of the lamps. Complainant surmises that "Respondents seem to be arguing that MVPT is not liable for treating waste lamps because it 'contracted out' those responsibilities to a sole proprietorship . . . ." C's Post-Hearing Brief at 26. Assuming the veracity of this claim, Complainant contends:

> [Th]is scenario is merely a contractual arrangement whereby the facility operator engaged an individual to enter the premises and perform part of the operator's work. MVPT still had control of the premises as lessee, control of the treatment being performed, and authority to decide whether and when to contact Respondent Kelly to perform the crushing activities.

C's Post-Hearing Brief at 27.

By exercising such control, Complainant argues, Respondent MVPT was an "operator" of the Riverdale property. C's Post-Hearing Brief at 41-42. The term "operator" is defined as "the person responsible for the overall operation of a facility." 35 IAC § 720.110. Citing various legal authorities, Complainant maintains that an operator such as Respondent MVPT is not shielded from liability for activities performed at the facility merely because the operator engaged a third party to perform the activities. C's Post-Hearing Brief at 41-42 (citing *United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1381 (8th Cir. 1989); *United States v. JG-24, Inc.*, 331 F.Supp.2d 14, 74 (D.P.R. 2004), *aff'd*, 478 F.3d 28 (1st Cir. 2007); and *Zaclon, Inc.*, EPA Docket No. RCRA-05-2004-0019, 2006 EPA ALJ LEXIS 19, *18 (ALJ, Apr. 21, 2006)(Order Denying Complainant's Motion for Leave to File Third Amended Complaint)).

In response to these arguments, Respondents defend their claim that Respondent MVPT did not conduct any activities related to the crushing or volume reduction of spent lamps at the Riverdale property but, rather, hired S.L.R. Technologies as a sole proprietorship to perform those services. In particular, Respondents explain that Respondent MVPT informed EPA in its responses to EPA's Information Requests that Respondent MVPT owned the mobile processing equipment and that S.L.R. Technologies was an assumed name of Respondent MVPT because that information was accurate as of the dates of the responses:

> [Respondent MVPT] 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 [when EPA issued, and Respondent MVPT responded to, the First Information Request], 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 . . ., SLR was operated as a sole proprietor [sic] by Mr. Larry Kelly. Respondents did not change their story, as stated by the Complainant . . . . Respondent did change its' [sic] corporate structure and did so one month prior (9-28-2007) to initial investigation conducted by the USEPA on 10-30-2007 . . . .

Rs' Reply Briefs at 9.

This explanation is plausible. Moreover, some documentary and testimonial evidence in the record supports Respondents' claim. Respondents' Exhibit 27 reflects that "S.L.R. Technologies" became an assumed name of Respondent MVPT on or about September 28, 2007. REX 27. Similarly, Respondent Kelly testified at the hearing that "SLR was a sole proprietorship, owned and operated by me," until "September 27, 2007, [when] SLR was incorporated as a d/b/a, under the Mercury Vapor Processing umbrella." Tr. at 554. Respondent Kelly further testified:

> SLR was a sole-owned company that had been dormant for approximately one year prior to agreeing to work with the company known as MVP/RSR. It maintained a location in Morton Grove, where it rented space to house its patented and state authorized method of performing mobile volume reduction of spent mercury-containing lamps . . . .
>
> SLR began to work with Mercury Vapor Processing and River Shannon Recycling in October of 2003 to October of 2007. SLR also mobilized its equipment at other generator sites during that period of time . . . . SLR only volume reduced lamps for others using its mobile equipment, and has done so for the last 11 years.
>
> SLR owns its equipment. Prior to September of [sic] 27th of 2007, and subsequent to December 15th of 2008, the equipment was owned by SLR. In a response to a request for information by U.S. EPA, it was explained that MVP and RSR owned the equipment at the time of our answering the questions. At the time of the request, SLR was under the MVP corporate umbrella, and was operating as a legal assumed name of Shannon Lamp Recycling . . . .

Tr. at 572-74. Respondent Kelly also testified that "SLR did not perform any volume reduction operations at the Riverdale

warehouse while it was under the MVP corporate umbrella."[28] *Id.* at 555. This statement is consistent with the finding above that "treatment" operations at the Riverdale property ceased on or around September 13, 2007. Finally, Mark Ewen, a witness qualified as an expert in the area of financial analysis, explained at the hearing that he inferred from Respondent MVPT's financial documents that it paid S.L.R. Technologies a fee related to the processing of lamps in the amount of $19,939.83 in 2007.[29] Tr. at 746-48.

I need not render a finding of fact on this issue as Complainant has persuasively argued that Respondent MVPT may be held liable for the crushing or volume reduction of lamps at the Riverdale property during the period of violation under either theory of liability advanced in its Post-Hearing Brief. Assuming, *arguendo*, that S.L.R. Technologies was an assumed name of Respondent MVPT during the period of violation, Respondent MVPT was the "true corporate name" and the legal entity with the power "to sue and be sued, complain and defend," in that name, pursuant to Sections 4.15 and 3.10(b) of the Illinois Business Corporation Act. 805 Ill. Comp. Stat. 5/4.15, 3.10(b) (1983). As an assumed name, S.L.R. Technologies was not a distinct legal entity. *See Peterson v. Big W. Indus., Inc.*, No. 95 C 7007, 1997 U.S. Dist. LEXIS 12913, at *3 (N.D. Ill. Aug. 25, 1997); *Regency Fin. Corp. v. Meziere*, No. 90 C 428, 1990 U.S. Dist. LEXIS 8715, at *7-9 (N.D. Ill. July 13, 1990). Accordingly, Respondent MVPT assumed liability for the activities of S.L.R. Technologies, as argued by Complainant, including the volume reduction of spent lamps at the Riverdale property.

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[28] Respondent Kelly appeared to believe that certain requirements would have been triggered if S.L.R. Technologies performed such activities while operating as an assumed name of Respondent MVPT:

> I explained [at the time he was approached to join Respondent MVPT] that my technology could be used, but it could not be part of the consolidation or handling company, because of what I knew to be obvious issues with the state of Illinois, relating to transporting, staging, and then volume reducing lamps at the same location, creating TSDF [treatment, storage, and disposal facility] issues.

Tr. at 551.

[29] Respondents contradict this inference in their Reply Briefs, asserting that "Mr. Kelly was not compensated for the services he offered to MVP/RSR." Rs' Reply Briefs at 19.

Assuming, *arguendo*, that S.L.R. Technologies was operating as a sole proprietorship during the period of violation, as claimed by Respondents, the record contains ample evidence that Respondent MVPT maintained control of the lamps and the volume reduction process, even though it may not have physically performed that activity. For example, in addition to the evidence cited by Complainant, Respondent Kelly testified at the hearing that "RSR maintained title [to the lamps] throughout the time they picked up the lamps through the time that they attempted to market it . . . ." Tr. at 568. I agree with Complainant's reasoning that given the level of control asserted by Respondent MVPT, it is not absolved of liability simply because it engaged S.L.R. Technologies to perform the violative conduct.

Based upon the foregoing discussion, I find that Respondent MVPT is liable for the "treatment" operations conducted at the Riverdale property.

**ii. Respondent Kelly's liability for the "storage" operations**

Arguing in favor of Respondent Kelly's liability for the "storage" operations at the Riverdale property, Complainant claims in its Post-Hearing Brief that Respondent Kelly was "the person who oversaw and made the decisions regarding the transporting of waste lamps from customers and storing them at the Riverdale facility pending treatment." C's Post-Hearing Brief at 33. Complainant does not cite any evidence in the record to support this claim. I note, however, that Respondent MVPT described Respondent Kelly's duties as the Vice President and Chief Operating Officer of Respondent MVPT in its Second Response, explaining that "Mr. Kelly manages day to day marketing, sales and client relations. Mr. Kelly conducts processing and manages the care, custody and control of the facility and inventory." CEX 6, Bates 02048. In addition, Respondents entered into the following stipulation: "Mr. Laurence Kelly had day-to-day responsibility for managing spent fluorescent lamps at the [Riverdale property]." Jt. Stips. ¶ 4. Finally, Respondent Kelly described his position at Respondent MVPT in the following manner at the hearing:

> I had several duties, such as writing a site specific health and safety plan, designing containers that would accommodate used mercury-containing lamps, and the proper placarding for containers that were going to be distributed to small quantity generators throughout the Chicago area. Because the intent was to service small-quantity generators, in order to entice these entities into becoming proactive towards lamp recycling, our approach was to supply the proper containers, pick up their lamps when the containers were full, replace the

> containers with fresh ones, take title to the lamps, and transport them back to our facility, under non-hazardous bills of lading, where they would be held awaiting the volume reduction process to occur.

Tr. at 553.

This evidence establishes that Respondent Kelly oversaw and was actively involved in the "storage" operations at the Riverdale property in his capacity as a corporate officer of Respondent MVPT. While Respondents deny that Respondent Kelly engaged in the holding of spent lamps at the Riverdale property, *see, e.g.*, Amd. Compl. ¶¶ 47, 95; Amd. Answer ¶¶ 47, 95, they failed to present any legal or evidentiary support for their position. Such bald denials are insufficient to rebut the evidence in the record demonstrating Respondent Kelly's involvement in the storage of spent lamps at the Riverdale property as part of his management duties.

The EAB has held that corporate officers may be held personally liable for the wrongful acts of the corporation in which they actively participated. *Roger Antikiewicz & Pest Elimination Prods. of Am.*, 8 E.A.D. 218, 230 (EAB 1999). Here, as similarly found in *Antikiewicz*, Respondent Kelly, a corporate officer, was the "guiding spirit" and "central figure" in Respondent MVPT's activities. CEX 37, Bates 02919-20. The record reflects that Respondent Kelly was in control, making decisions and conducting day-to-day operations of Respondent MVPT. Accordingly, I find that Respondent Kelly is liable for the "storage" operations conducted at the Riverdale property.

### 3. The Spent Lamps Constituted "Hazardous Waste."

The third element that Complainant is required to demonstrate by a preponderance of the evidence is that the spent lamps at the Riverdale property constituted "hazardous waste." The Illinois hazardous waste regulations define the term "hazardous waste," in pertinent part, as a "solid waste" that exhibits any of the characteristics of hazardous waste identified by 35 IAC part 721, subpart C. 35 IAC §§ 702.110, 720.110, 721.103(a)(2)(A). This definition clearly reflects that in order for a given material to constitute a "hazardous waste," it must first qualify as a "solid waste."

#### a. The Spent Lamps Qualified as "Solid Waste"

The Illinois hazardous waste regulations define the term "solid waste" as "any discarded material" not excluded by regulation. 35 IAC § 721.102(a)(1). The term "discarded material" is defined, in turn, as including any material that is

"abandoned."[30] 35 IAC § 721.102(a)(2). A given material qualifies as a "solid waste" if it is abandoned in one of the following ways: 1) by being "disposed of"; 2) by being "burned or incinerated"; or 3) by being "accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated." 35 IAC § 721.102(b).

In the present proceeding, Complainant alleges that the spent lamps at the Riverdale property were abandoned because they were stored and treated at the Riverdale property prior to their disposal in a solid waste landfill. Amd. Compl. ¶¶ 83, 101; C's Post-Hearing Brief at 34. As a result, Complainant alleges, the spent lamps constituted "solid waste," as that term is defined by 35 IAC § 721.102. Amd. Compl. ¶¶ 84, 102; C's Post-Hearing Brief at 34.

Having already found that spent lamps were stored and treated at the Riverdale property, the only remaining question to consider for purposes of determining whether the spent lamps were "abandoned," as alleged by Complainant, is whether the spent lamps were "disposed of" subsequent to their storage and treatment.[31] While Respondents deny the allegations that the spent lamps constituted "solid waste," they consistently admit that the volume reduction of spent lamps at the Riverdale property produced glass and metal materials that were disposed of as "non-hazardous waste" in landfills when Respondent MVPT was unable to locate a market for their reuse. Amd. Answer ¶¶ 40, 41, 81, 83, 84, 100-02; CEX 1, Bates 00004; CEX 4, Bates 00285-86; Tr. at 564, 566.

Respondent MVPT described this practice in detail in its First Response:

> After the [volume reduction] process has taken place and the extraction of mercury vapor has been completed, the now non-hazardous re-usable glass and aluminum by-products are automatically moved to a 6 yard on-board storage area (6,000 lamps). When the unit is full it is

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[30] The regulatory definition of "discarded material" also includes any material that is "recycled," "considered inherently waste-like," or "a military munition identified as a solid waste in [35 IAC § 726.302]." 35 IAC § 721.102(a)(2)(A). Complainant has not alleged that the spent lamps fall within any of these categories of "discarded material."

[31] Another outstanding issue to be resolved is the point at which the spent lamps were "generated." As discussed in a subsequent section of this Initial Decision, I find that the spent lamps were generated as "solid waste" at the time they were removed from service by third parties.

> downloaded into a lined and covered roll-off and stored for reuse or disposal depending on the markets. The roll-off can store up to 40,000 non-hazardous processed Universal Waste lamps before removal of materials is needed. Full roll-offs are then transported under Bill of Lading by Land of Lakes equipment to their permitted special waste landfill . . . .

CEX 4, Bates 00285-86. Respondent MVPT also identified two solid waste landfills, "LAND AND LAKES" and "CID," as the facilities to which it sent wastes generated at the Riverdale property. CEX 4, Bates 00317. Records attached to the First Response reflect that shipments of materials from the Riverdale property to these facilities occurred during the relevant time period. CEX 4, Bates 00318-27. In addition, as Mr. Brown recorded in his CEI Report, Respondent Kelly informed him at the conclusion of the CEI on October 30, 2007, that the "waste streams generated by the mobile treatment unit" were stored at the Riverdale property for up to one year and that "the wastes [were] disposed of mainly at the nearby Lake and Lakes landfill." CEX 4, Bates 00004-00005.

As noted above, Respondents claim that they sought a market for the reuse of the glass and metal materials. To illustrate these efforts, Respondents produced e-mail messages at the hearing in which third parties responded to Respondent Kelly's invitation to purchase the materials. Tr. at 564-66; REX 10. The probative value of this evidence is limited because the messages are dated April 15, 2009, and July 13, 2010, well beyond the period of violation alleged in this proceeding. REX 10. Even if the messages had been generated during the alleged period of violation, they reflect that the third parties declined the invitation to purchase the materials. REX 10. I note, moreover, that Respondent Kelly admitted during questioning by counsel for Complainant that despite "reasonable attempts" to recycle the materials, nothing was in fact recycled. Tr. at 603. Accordingly, the preponderance of the evidence supports a finding that Respondents disposed of all of the glass and metal materials generated by the volume reduction process in solid waste landfills during the alleged period of violation and that these materials, therefore, constituted "solid waste" by virtue of being "abandoned."

The record reflects that in addition to the glass and metal materials, the volume reduction process also released mercury vapor from the spent lamps, which Respondents captured in activated carbon filters. *See, e.g.*, CEX 4, Bates 00285-86. Complainant alleges that these carbon filters were stored at the Riverdale property pending disposal at a solid waste landfill. Amd. Compl. ¶ 82. The record contains conflicting evidence with respect to these materials, however. In its First Response, Respondent MVPT asserts:

> [D]uring the adsorption process, mercury is attracted to the activated carbon surface where it is adsorbed in the form of mercuric sulfide. The sulfide is then retained in the pores of the carbon granule. This process precludes that ability to retort the carbon for the purpose of extraction, however, the residual spent carbon qualifies for and can be safely land-filled as a non-hazardous industrial waste. The landfill this material is currently permitted to go to is Land of Lakes . . . . To date we have staged only 200 lbs. of non hazardous spent carbon at our facility.

CEX 4, Bates 00286; *see also* CEX 4, Bates 00287. When asked to provide the names and addresses of all facilities to which the recovered mercury was sent, Respondent MVPT replied only that "[t]he spent carbon is currently permitted for disposal as non-hazardous at Land and Lakes facility." CEX 4, Bates 00317. Finally, in response to a request for all records of shipments of the recovered mercury to a third party, Respondent MVPT replied, "Although permitted into Land of Lakes for the disposal of the non-hazardous spent carbon, we have yet to move the accumulated 200 lbs. to the landfill for disposal." CEX 4, Bates 00318.

These statements may reasonably be interpreted as demonstrating that Respondent MVPT stored the spent carbon at the Riverdale property with the intention of disposing of it at the Land and Lakes facility at an indeterminate time. Respondents deny such an interpretation in their Amended Answer, however, and claim that while S.L.R. Technologies was permitted to dispose of the spent carbon at a landfill such as the Land and Lakes facility, Respondent MVPT "never disposed of any spent carbon at any landfill." Amd. Answer ¶ 82. Rather, Respondents assert, "the spent carbon . . . can be retorted or exchanged for new carbon at the manufacturer . . . ." *Id.* Respondent Kelly reiterated this claim at the hearing, testifying that "historically, SLR has traded our spent carbon for fresh, regenerated carbon. However, to date, SLR is currently staging 200 pounds of spent, non-hazardous carbon, which at some point will be traded out to our supplier for fresh carbon." Tr. at 574. Respondent Kelly acknowledged that this account is inconsistent with the assertions of Respondent MVPT in its First Response. Tr. at 575-76. He maintained, however, that those assertions were "somewhat of an incorrect history. SLR's history has never been to landfill any spent carbon." Tr. at 575-76.

To corroborate this testimony, Respondents proffered a document entitled "Reactivation Process and Advantages," which, according to Respondent Kelly, was obtained from the website of one of Respondents' carbon suppliers. Tr. at 574-75; REX 12. This document states:

> After an activated carbon's adsorptive capacity has been exhausted, it can be returned to Calgon Carbon for thermal reactivation. In the reactivation process, the spent activated carbon is heated in furnaces devoid of oxygen using steam as a selective oxidant. The adsorbed organics are either volatilized from the activated carbon or pyrolysed to a carbon char. The volatilized organics are destroyed in the furnace's afterburner and acid gases are removed by means of a chemical scrubber. The high-temperature reaction with steam serves to restore the adsorptive capacity of the activated carbon.

REX 12.

I need not render a determination as to the ultimate disposition of the released mercury vapor because either scenario supports a finding that the released mercury vapor fell within the regulatory definition of "abandoned." If Respondents stored the spent carbon at the Riverdale property pending disposal at the Land and Lakes landfill, as argued by Complainant, the spent carbon undoubtedly qualifies as "abandoned" under the regulations. If Respondents' later account is deemed credible, the mercury vapor captured by the carbon filters appears to be incinerated during the reactivation process, according to the document proffered by Respondents. This too falls within the regulatory definition of the term "abandoned."

I also note that the preamble to the final rule adding hazardous waste lamps to the federal universal waste rule advises that "[s]pent hazardous waste lamps sent for reclamation are considered spent materials . . . and are therefore solid wastes." 64 Fed. Reg. at 36,467. The Illinois hazardous waste regulations define the term "spent material" as "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." 35 IAC § 721.101(c)(1). In turn, "[a] material is 'reclaimed' if it is processed to recover a usable product, or if it is regenerated." 35 IAC § 721.101(c)(4). Arguably, the spent lamps at the Riverdale property were "reclaimed," thereby qualifying as "spent materials" and "solid wastes," in accordance with the guidance provided by the Agency in the preamble to the final rule.

In accordance with the foregoing discussion, I find that the spent lamps qualified as "solid waste," as that term is defined by the Illinois hazardous waste regulations.

**b. The Spent Lamps Qualified as "Hazardous Waste"**

Having found that the spent lamps constituted "solid waste," I must now consider whether the lamps qualified as "hazardous waste." As noted above, the Illinois hazardous waste regulations define the term "hazardous waste," in pertinent part, as a "solid

waste" that exhibits any of the characteristics of hazardous waste identified by 35 IAC part 721, subpart C. 35 IAC §§ 702.110, 721.103(a)(2)(A). Specifically, a "solid waste" constitutes a "hazardous waste" if it exhibits the characteristics of ignitability, corrosivity, reactivity, or toxicity as described by 35 IAC §§ 721.121-.124.

In the present proceeding, Complainant alleges that spent lamps present at the Riverdale property qualified as "hazardous waste" by virtue of exhibiting the characteristic of toxicity for mercury. Amd. Compl. ¶¶ 48-51, 85, 103. According to 35 IAC § 721.124, a solid waste exhibits the characteristic of toxicity if a representative sample of the waste is subjected to the Toxicity Characteristic Leaching Procedure described in subsection (a) of the regulation and found to contain any of the contaminants enumerated in a table in subsection (b) of the regulation at a concentration equal to or greater than the respective value set forth therein. The table sets the maximum concentration for mercury at 0.2 milligrams per liter. 35 IAC § 721.124(b).

Complainant's contention that spent lamps at the Riverdale property exhibited the characteristic of toxicity for mercury is well-supported by the evidentiary record. As Mr. Brown documented in the Sampling Report and confirmed at the hearing, he collected 12 samples of intact lamps stored at the Riverdale property on November 14, 2007, and delivered the lamps to EPA's Central Regional Laboratory for analysis using the Toxicity Characteristic Leaching Procedure ("TCLP") described at 35 IAC § 721.124. CEX 2, Bates 00056-57; Tr. at 79-80, 187-88. This analysis revealed that four of the 12 samples contained concentrations of mercury at or above the regulatory limit of 0.2 milligrams per liter for toxicity, thereby exhibiting the characteristic of toxicity for mercury as defined by 35 IAC § 721.124. CEX 2, Bates 00058, 00098-99; Tr. at 189. This evidence compels a finding that at least some of spent lamps at the Riverdale property qualified as "hazardous waste."

Mr. Brown testified that he also reviewed guidance that he obtained from the websites of various manufacturers of lamps, such as General Electric, Osram Sylvania, and Philips Lighting Company, as part of his investigation into the hazardous nature of the spent lamps at the Riverdale property. Tr. at 187-88, 192-94; CEX 9, Bates 02094-2119. Similar to Material Safety Data Sheets, these documents describe the materials comprising a given lamp, identify any health hazards, and recommend procedures for disposal. *See* CEX 9, Bates 02094-2119. In particular, the document obtained from General Electric's website, entitled "Lamp Material Information Sheet," provides that "[a] Toxicity Characteristic Leaching Procedure (TCLP) conducted on traditional fluorescent lamp designs for mercury would most likely cause the lamps to be classified as a hazardous waste due to the mercury content." CEX 9, Bates 02094-95. The document further provides

that "[r]educed mercury fluorescent lamps that consistently pass the TCLP are available and marketed under the Ecolux trade name." CEX 9, Bates 02095.

In turn, the document obtained from Osram Sylvania's website, entitled "Product Safety Data Sheet," advises that "[i]t is the responsibility of the waste generator to ensure proper classification and disposal of waste products. To that end, TCLP tests should be conducted on all waste products, including this one, to determine the ultimate disposition in accordance with applicable federal, state and local regulations." CEX 9, Bates 02096, 02098.

The documents obtained from Philips Lighting Company's website offer similar guidance. CEX 9, Bates 02099-2119. The first, entitled "Lamp Material Data Sheet," provides:

> All fluorescent lamps contain some amount of mercury. When a fluorescent lamp is to be disposed, it is subject to the current EPA Toxicity Characteristic Leaching Procedure (TCLP) disposal criteria. This test is used to determine if an item can be managed as hazardous or non-hazardous waste.
>
> Philips low-mercury ALTO fluorescent lamps are identifiable by their characteristic green end caps. Phillips ALTO lamps are TCLP compliant and can be managed as non-hazardous waste . . . .
>
> Philips non-ALTO lamps (with silver end caps) are not TCLP compliant and should be managed as a hazardous waste under the EPA Universal Waste Rules for fluorescent lamps.

CEX 9, Bates 02100. Each of the remaining documents obtained from Philips is entitled "Material Safety Data Sheet" and pertains to a particular set of lamps manufactured by the company. CEX 9, Bates 02101-2119. Each of these documents advises, "These lamps would fail the TCLP test and would be considered hazardous under the Universal Waste Rules." CEX 9, Bates 02102, 02106, 02108, 02112, 02115, 02119.

Relying upon photographs taken by Mr. Brown on October 30 and November 14, 2007, Complainant contends in its Post-Hearing Brief that many "traditional" lamps or lamps with "silver end caps" manufactured by General Electric, Osram Sylvania, and Philips were observed at the Riverdale property on those dates. C's Post-Hearing Brief at 39 (citing CEX 1, Bates 00017-19, 00023; CEX 2, Bates 00070-71, 00074-75, 00077-80, 00085-86). The photographs undoubtedly depict "traditional" lamps or lamps with

"silver end caps."[32/] In addition, Mr. Brown recorded in the CEI Report and Sampling Report that several brands of lamps, included ones manufactured by General Electric, Osram Sylvania, and Philips, were observed at the Riverdale property on October 30 and November 14, 2007. CEX 1, Bates 00003; CEX 2, Bates 000056.

While this evidence establishes that lamps manufactured by those companies were present at the Riverdale property, the guidance obtained from the companies' websites is not particularly compelling that the lamps were hazardous by virtue of their mercury content. The results of the TCLP analysis is instructive on this issue. Specifically, while the Lamp Material Information Sheet obtained from General Electric's website advises that "traditional" lamps would "most likely" be characterized as hazardous waste because of their mercury content, only one of the four General Electric lamps collected by Mr. Brown on November 14, 2007, was found to contain concentrations of mercury at or above the regulatory limit for toxicity when subjected to the TCLP analysis. CEX 9, Bates 02095; CEX 2, Bates 00058. In addition, the results of the TCLP analysis reflect that lamps from the same manufacturer and of the same brand did not necessarily contain the same concentrations of mercury. *See* CEX 2, Bates 00058. For example, Mr. Brown collected two lamps, both identified as "4 ft. fluorescent lamps, Phillips [sic] Universal/H-Vision, F32T8/TL750," from the same container at the Riverdale property. CEX 2, Bates 00058, 00081. While one of the lamps was found to contain a concentration of mercury below the regulatory limit for toxicity, the other was found to contain a concentration above the limit. CEX 2, Bates 00058. An explanation for this difference is not evident from the record.

Although the documents obtained from the websites of General Electric, Osram Sylvania, and Philips Lighting Company are not *per se* evidence of the hazardous nature of the spent lamps at the Riverdale property, I place some reliance on the documents as corroborating evidence. Accordingly, they further support a finding that at least some spent lamps at the Riverdale property qualified as "hazardous waste."

Respondents failed to offer any probative evidence or raise any meritorious arguments in opposition to such a finding. Respondents entered into stipulations as to the concentrations of mercury found in the 12 samples of spent lamps collected by Mr.

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[32/] I am unable to discern the manufacturer of any of the lamps portrayed in the photographs, however, with the exception of three photographs in which the logo of General Electric is visible on the lamps or Mr. Brown identified the manufacturer as General Electric in the photograph's caption. *See* CEX 1, Bates 00017, 00019, 00023.

Brown at the Riverdale property on November 14, 2007. Jt. Stips. ¶ 11; *see also* Rs' Post-Hearing Brief at 4. Nevertheless, Respondents deny the allegations in the Amended Complaint relating to this element of Complainant's prima facie case. Amd. Compl. ¶¶ 48-51; Amd. Answer ¶¶ 48-51. As grounds for their denial, Respondents contend that "mercury containing lamps will fail TCLP if broken in a controlled environment" but "[w]hole lamps will not fail TCLP." Amd. Answer ¶¶ 48-49; *see also* Rs' Post-Hearing Brief at 4. Respondents cite the Agency publication entitled "Fluorescent Lamp Recycling, February 2009, EPA530-R-09-001," as support for their position. *Id.* As pointed out by Respondents, this document advises that "[m]ercury is not released when lamps are intact or in use; exposure is possible only when a lamps has been broken." REX 13. Thus, Respondents maintain, "[a] spent lamp does not exhibit any potential toxicity until or unless it is broken, allowing the mercury inside to be released." Rs' Post-Hearing Brief at 4. Based upon this reasoning, "[t]he whole, intact lamps accumulated at the Riverdale, IL property did not demonstrate toxicity," according to Respondents. Amd. Answer ¶¶ 48-49. Respondents further argue that the glass and metal materials produced by the volume reduction process also "do not fail TCLP," as evidenced by testing performed on those materials. *Id.* (citing REX 14).

Complainant counters this argument in its Post-Hearing Brief:

> Respondents' first argument is based on the misconception that subjecting a lamp to the TCLP is what makes it a hazardous waste. This argument is misplaced; the TCLP is a procedure that is used to determine if a waste possesses the toxicity characteristic, which is one method of determining whether the material is a hazardous waste. If a lamp "fails" the TCLP (meaning the TCLP extracts contain mercury at or above the regulatory limit for mercury of 0.2 mg/L), then the lamp possesses the toxicity characteristic for mercury and, therefore, the lamp is a hazardous waste.

C's Post-Hearing Brief at 39. I agree that Respondents' reasoning is flawed. While Respondents correctly point out that mercury is not released from a fluorescent lamp until the lamp is broken, a spent lamp that contains a concentration of mercury above the regulatory limit for toxicity is not rendered a "hazardous waste" only at the time it is broken and the mercury is released. Such a lamp constitutes a "hazardous waste" even when it is intact because the concentration of mercury within the lamp poses a sufficient threat *if* released that more stringent

regulation of the lamp as hazardous is warranted.[33/] The goal of RCRA to ensure the proper storage, treatment, and disposal of hazardous waste in order to minimize its threat to human health and the environment would be thwarted if regulation of the waste could not occur until the hazardous constituent had been released and the threat had already been realized. Thus, a lamp may qualify as "hazardous waste" even when it is intact, contrary to Respondents' position.

In accordance with the foregoing discussion, I find that based upon the results of the TCLP analysis performed in this proceeding, at least some of the spent lamps stored and treated at the Riverdale property constituted "hazardous waste," as that term is defined by the Illinois hazardous waste regulations.

**4. Neither Respondent Possessed a RCRA Permit.**

The fourth element that Complainant is required to demonstrate by a preponderance of the evidence is that neither Respondent possessed a RCRA permit. The record contains ample evidence supporting this element of Complainant's prima facie case. In their Amended Answer, Respondents admit that they did not apply for or possess a permit to engage in the storage or treatment of hazardous waste at the Riverdale facility. Amd. Answer ¶¶ 52-63. Respondents further admit that they did not apply for or possess interim status to engage in the storage or treatment of hazardous waste at the Riverdale facility. *Id.* In addition, Mr. Brown testified at the hearing that he performed a search of Agency databases and found no record of Respondents having obtained or applied for a permit. Tr. at 130-31. Accordingly, I find that Complainant has sufficiently demonstrated that neither Respondent possessed a RCRA permit.

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[33/] This notion is not without its dilemmas. As Respondents point out in their Post-Hearing Brief, "there is no way to tell which fluorescent lamps are hazardous and which are not without subjecting each individual lamp to TCLP testing." Rs' Post-Hearing Brief at 6. A member of the regulated community cannot necessarily rely upon guidance from the manufacturer of the lamp in question because of the varying concentrations of mercury contained in lamps of the same manufacturer and brand, as illustrated by the results of the TCLP analysis performed in this proceeding. Thus, members of the regulated community may be required to treat all spent lamps as "hazardous waste," even though "most [do] not contain levels that [are] technically above the ceiling limit that defines them as hazardous." Rs' Post-Hearing Brief at 6-7.

5. The Riverdale Property is a "Hazardous Waste Management Facility."

Finally, Complainant is required to demonstrate by a preponderance of the evidence that the Riverdale property qualifies as a "hazardous waste management facility." As documented by Mr. Brown in the CEI Report, the Riverdale property consisted of a single-story brick building and a paved area outside the building. CEX 1, Bates 00002-00004, 00007, 00011-00012, 00041-00044, 00048; CEX 42, Bates 03023. The phrase "hazardous waste management facility" is defined by the Illinois hazardous waste regulations as "all contiguous land and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste." 35 IAC § 702.110.

As discussed above, the record establishes that Respondents engaged in the treatment of hazardous waste at the Riverdale property between at least February of 2005 and September 13, 2007, and that Respondents engaged in the storage of hazardous waste at the Riverdale property between at least February of 2005 and November 14, 2007. Accordingly, the Riverdale property fell within the regulatory definition of "hazardous waste management facility" during the period of violation alleged in the Amended Complaint. While Respondents deny that the Riverdale property consisted of a "facility," Respondents frame their position in the context of Illinois's universal waste rule. *See, e.g.*, Amd. Compl. ¶¶ 17-22, 27-28; Amd. Answer ¶¶ 17-22, 27-28. As previously discussed, such an argument lacks merit because of the inapplicability of that rule. Therefore, I find that Complainant has met its burden of demonstrating by a preponderance that the Riverdale property consisted of a "hazardous waste management facility" between at least February of 2005 and November 14, 2007.

C. RESPONDENTS' DEFENSES TO LIABILITY

Having found that Complainant satisfied its burden of demonstrating each element of its *prima facie* case, I now turn to the defenses to liability raised by Respondents in this proceeding.

1. Enforcement Discretion

As previously discussed, Respondents' defenses to liability largely rest upon their contention that they were subject to Illinois's universal waste rule, rather than Illinois's general hazardous waste regulations, and that they conducted their operations in compliance with that rule. Based upon this position, Respondents contend that Agency policy, set forth in an April 10, 1996 memorandum addressed to the Regional Administrators from Steve Herman, Assistant Administrator of the

Office of Enforcement and Compliance Assurance, and Elliot Laws, Assistant Administrator of the Office of Solid Waste and Emergency Response ("Herman Memo"), entitles them to the exercise of enforcement discretion in their favor. Rs' Post-Hearing Brief at 20-21. The Herman Memo instructs:

> By finalizing 40 C.F.R. Part 273, EPA has taken the position that managing wastes in compliance with those standards is environmentally protective. Therefore, where [authorized] States are implementing the Part 273 standards but have not yet received authorization [to do so as part of their approved hazardous waste programs], Regions should take enforcement actions involving universal wastes only where handlers of such wastes are not in full compliance with the Part 273 standards.

CEX 45, Bates 03112. Citing the testimony of Mr. Brown that Illinois's universal waste rule is "almost exactly the same" as the federal version of the rule, Respondents claim that they operated in compliance with the state rule and, therefore, should have been afforded the enforcement discretion described in the Herman Memo. Rs' Post-Hearing Brief at 21 (citing Tr. at 266); Rs' Reply Briefs at 21 (citing Tr. at 266). Complainant disputes this claim, arguing that Respondents failed to comply with either version of the universal waste rule and that this action was therefore an appropriate exercise of EPA's enforcement discretion. C's Post-Hearing Brief at 72-80.

As previously held in the Order of May 5, 2011, I need not consider the merits of Respondents' claim. While guidance documents such as the Herman Memo may instruct representatives of the Agency as to whether they should enforce a particular requirement or prohibition, such discretion is not dispositive of whether the Agency is authorized to enforce it. As long as an agency possesses such enforcement authority, the agency's refusal to exercise enforcement discretion in favor of a respondent is insufficient to absolve the respondent of liability. Moreover, to the extent that consideration of whether this action was an appropriate exercise of EPA's enforcement discretion would require a determination as to Respondents' compliance with regulations that did not govern their activities - namely, the federal and state versions of the universal waste rule - I would, in effect, be rendering an advisory opinion, which I am disinclined to provide.[34/] Accordingly, Respondents' argument

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[34/] Throughout this proceeding, Respondents have rigorously argued that they operated in compliance with Illinois's universal waste rule based upon a number of considerations, including guidance and authorizations allegedly received from state and local regulatory agencies. Without rendering a ruling on this issue, I (continued...)

that they were entitled to the enforcement discretion described by the Herman Memo is hereby rejected.

2. Fair Notice

By Order dated May 5, 2011, I held that Illinois's general hazardous waste regulations govern this proceeding, contrary to Respondents' position that they were subject to Illinois's universal waste rule. I found, however, that Respondents had essentially claimed that they lacked fair notice of the standards governing their operations. By Order dated July 14, 2011, I deferred a ruling on the issue until after the evidentiary hearing in this matter was conducted.

**a. Legal Standard for Adjudicating a Fair Notice Defense**

The law "is well established that it is contrary to the constitutional principle of due process for an agency to penalize a party for violating a regulation when that party has not received adequate notice of what the regulation requires." *Howmet Corp.*, 13 E.A.D. 272, 303 (EAB 2007) (citing *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)), *aff'd*, 614 F.3d 544 (D.C. Cir. 2010). The D.C. Circuit has explained that adequate notice is provided in many cases by an agency's efforts to promote compliance prior to the initiation of any enforcement action:

> If, for example, an agency informs a regulated party that it must seek a permit for a particular process, but the party begins processing without seeking a permit, the agency's pre-violation contact with the regulated party has provided notice, and . . . a finding of liability

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[34/] (...continued)
note that Complainant proffered a report dated July 30, 2007, and entitled "River Shannon Recycling, 13605 South Halsted Street, Riverdale, Illinois 60827; Lack of CCDEC Certificate of Operation (C.O.), and Hazardous Air Emissions," which was provided to EPA by the Cook County Department of Environmental Control ("CCDEC"). CEX 36. Included in this report are three letters on CCDEC letterhead, dated April 15, 2005, February 13, 2007, and June 6, 2007, each of which contain the following language: "Regarding the above referenced company, River Shannon Recycling, we have conducted our annual regulatory compliance survey and have found River Shannon Recycling to be in compliance with both Illinois and Cook County recycling regulations pertaining to the recycling of universal waste, commonly known as mercury containing lamps . . . ." CEX 36, Bates 02896, 02898, 02899. Upon review of the record, Complainant does not appear to address these documents.

> [will be enforced] as long as the agency's interpretation was permissible.

*Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

Where no such contact has occurred between the agency and regulated party, the D.C. Circuit has applied an "ascertainable certainty" standard to determine whether the agency provided fair notice of its regulatory interpretations:

> [W]e must ask whether the regulated party received, or should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.

*Gen. Elec. Co.*, 53 F.3d at 1329 (citing *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)).

The EAB has described this standard in the following manner:

> [P]roviding fair notice does not mean that a regulation must be altogether free from ambiguity. Indeed, the case law shows that even where regulatory ambiguity exists, the regulations can still satisfy due process considerations . . . . Thus, the question is not whether a regulation is susceptible to only one possible interpretation, but rather, whether the particular interpretation advanced by the regulator was ascertainable by the regulated community.

*Howmet*, 13 E.A.D. at 304-05 (quoting *Coast Wood Preserving, Inc.*, 11 E.A.D. 59, 81 (EAB 2003)). The EAB has also identified a number of factors to consider in determining whether a regulation provides adequate notice of the required or prohibited conduct:

> In some cases, the plain language of the regulation may suffice to show fair notice. The agency's other public statements also bear on the fair notice inquiry . . . . Significant difference of opinion within the agency as to the proper interpretation of the agency's regulation may also be considered in evaluating whether the regulatory text provides fair notice . . . . In addition, courts often consider whether or not an allegedly confused defendant inquires about the meaning of the regulation at issue.

*Id.* at 305 (quoting *Morton L. Friedman & Schmitt Constr. Co.*, 11 E.A.D. 302, 319-20 (EAB 2004) (citations omitted), *aff'd*, 220 Fed. Appx. 678 (9th Cir. 2007)).

Because this issue constitutes an affirmative defense to liability, Respondents bear the burden of establishing a lack of fair notice. *Howmet*, 13 E.A.D. at 303 (citing *Morton & Schmitt*, 11 E.A.D. at 320); 40 C.F.R. § 22.24(a).

**b. Respondents' Position**

Respondents contend that "they have not received fair notice to manage [spent lamps] under the Illinois RCRA program." Rs' Reply Briefs at 27. As support for this position, Respondents point to three sources of information in their Post-Hearing Brief. Rs' Post-Hearing Brief at 19-20. First, Respondents rely upon a webpage of the Agency entitled "Where You Live". *Id.* at 19; *see* Rs' Reply Briefs at 27. Under the subheading "State-Specific Universal Waste Regulations," this webpage depicts a color-coded map of the United States and a table providing the name of each state, a link to each state's set of universal waste regulations, if the state has promulgated such regulations, and a statement as to whether the state has "adopted the rule" and been "authorized for the rule." REX 2. For the State of Illinois in particular, the table provides a link to the main body of the state's universal waste rule and indicates that the state has adopted the rule but that it is not authorized for it. *Id.* Respondents argue that by providing a link to the state's universal waste rule, the webpage "clearly implies that citizens in Illinois should follow these adopted regulations, and provide[s] no implication that in actuality, Illinois' authorized RCRA subtitle C regulations are the regulations that currently apply to this material and must be followed when handling spent mercury containing lamps." Rs' Post-Hearing Brief at 19-20.

Respondents next point to the exemptions for universal waste from regulation as hazardous waste contained in 35 IAC §§ 721.109 and 703.123. Rs' Post-Hearing Brief at 20; *see* Rs' Reply Briefs at 28. Respondents argue that "[t]hese regulations fall directly within the Illinois RCRA regulations that USEPA lists as authorized at 40 CFR 272.701" and "[t]he authorization of these regulations are assumed to be accurate as of the date most recently amended, in this case April 9, 2004,[35/] well after Illinois published and began implementing their Universal Waste Rule." *Id.* Citing counsel for Complainant's statement at the hearing that this appearance of authorization is "not necessarily accurate," Respondents claim that the characterization of these regulations as authorized by 40 C.F.R. § 272.701 "creates a regulatory trap into which the Respondents have fallen." *Id.*

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[35/] The source of this date is unclear from the record.

(citing Tr. at 32). Because of these "significant ambiguities in the [A]gency's communications," Respondents maintain, "it is impossible for a regulated party acting in good faith to ascertain that this material must be managed as RCRA waste." Rs' Reply Briefs at 28.

Finally, Respondents rely upon a webpage of the IEPA entitled "How to Manage Used Fluorescent and High-Intensity-Discharge Lamps as Universal Wastes." Rs' Post-Hearing Brief at 20. This webpage provides, among other information, a series of questions and answers concerning the management of hazardous waste lamps. REX 29. As pointed out by Respondents, the webpage states, in pertinent part:

> **What are my options for managing hazardous lamps?**
>
> In Illinois, you may follow the Universal Waste Rule described in this fact sheet (and in state regulations) or you may follow RCRA requirements for hazardous-waste handling storage, treatment and disposal. You must choose one of these options.

REX 29 (emphasis in original).

In conclusion, Respondents argue that even with his "extensive regulatory background," Respondent Kelly was unable to ascertain that spent lamps must be managed as hazardous waste in the State of Illinois. Rs' Reply Briefs at 28-29.

**c. Complainant's Position**

Complainant counters that "[t]he record establishes that 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." C's Post-Hearing Brief at 84. As support for this position, Complainant relies upon the preambles to the federal universal waste rule and the final rule adding hazardous waste lamps, in which the Agency advises that the universal waste rule is effective in an authorized state only when the state adopts equivalent requirements and is authorized by EPA to implement and enforce the requirements as part of its approved hazardous waste program. C's Post-Hearing Brief at 85. In view of this guidance, Complainant argues, "a 'regulated party acting in good faith' would be able to readily discern that they need to determine whether a particular state has been authorized for the universal waste rule." *Id.* Pointing out that the Agency notifies the public of its approval of state hazardous waste programs and any revisions thereto in the Federal Register and Code of Federal Regulations, Complainant contends that a review of these sources and the Agency's website reflects that EPA has never authorized Illinois for the universal waste rule, a

position which it has never contradicted. *Id.* Complainant further contends that the Herman Memo advises the public of EPA's policy to enforce the Subtitle C requirements against regulated entities that have failed to comply with the federal universal rule. *Id.*

As additional support for its position that EPA provided notice that the general hazardous waste regulations applied to Respondents' activities, Complainant argues that both the federal and state versions of the universal waste rule clearly provide that storage, treatment, and disposal facilities - referred to as "destination facilities" by these rules - are fully regulated under Subtitle C of RCRA. C's Post-Hearing Brief at 86 (citing 40 C.F.R. § 273.60(a), 35 IAC § 733.160). Thus, Complainant contends, both versions of the rule "require a RCRA permit for the off-site storage and treatment of hazardous wastes, which is exactly the type of operations that Respondents engaged in." *Id.*

Complainant also argues that a number of considerations support a finding that Respondents possessed "actual knowledge" of the applicable regulations. C's Post-Hearing Brief at 86-88. First, Complainant argues that Respondent Kelly's purported experience in the hazardous waste industry is inconsistent with the claim that Respondents were unable to ascertain that Illinois's universal waste rule was not yet authorized by EPA and that the general hazardous waste regulations applied to their operations. *Id.* at 86-87 (citing CEX 37, Bates 02920; Tr. at 327-330, 544-50). Complainant further contends that Respondent Kelly had been informed by the IEPA of the activities subject to the general hazardous waste regulations and that he knew that the activities at the Riverdale property were outside the scope of Illinois's universal waste rule. *Id.* at 87-88.

In particular, Complainant points to a letter dated October 16, 2000, from Joyce L. Munie, P.E., of the IEPA to Respondent Kelly in his capacity as the president of the business entity Spent Lamp Recycling Technologies, Inc. ("SLRT").[36/] C's Post-Hearing Brief at 63-64. This letter described the IEPA's understanding of the "mobile lamp-crushing unit" operated by SLRT in the following manner:

> 1. Lamps are placed into a rectangular chamber in the mobile crushing unit.
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> * * *
>
> 3. When crushing is complete, the chamber is opened and material in the chamber, consisting of glass, aluminum

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[36/] The parties stipulated that SLRT was dissolved by the State of Illinois in September of 2003. Jt. Stips. ¶ 9.

> and brass, and phosphor powder, is scooped out into a container.
>
> 4. This container is shipped to SLRT's facility for storage.
>
> 5. When sufficient quantities are accumulated at SLRT's facility, the material is sent to a destination facility, where components are separated.
>
> 6. After component separation, components are sent to recyclers . . . .

CEX 72, Bates 04216. Based upon this understanding, the letter advised that the operation of the "mobile lamp-crushing unit" complied with the state's universal waste rule and SLRT could operate this equipment as a large quantity handler of universal waste. CEX 72, Bates 04217. The letter further advised:

> As a handler of universal waste, SLRT may receive the lamps at its facility for accumulation without a permit provided the lamps are only accepted for accumulation and subsequent shipment to a destination facility. 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* . . . . Also note that the destination facility, where component separation occurs, is also fully regulated.

CEX 72, Bates 04217 (emphasis added). Complainant contends that Respondents were not crushing spent lamps at the site of generation but, rather, were collecting and crushing lamps from off-site generators at the Riverdale property, which IEPA had advised was a fully-regulated activity. C's Post-Hearing Brief at 63, 65.

Complainant also relies upon the testimony of William K. Graham as support for its argument that Respondents had "actual knowledge" that their operations were governed by the general hazardous waste regulations. C's Post-Hearing Brief at 66-69, 88. A registered professional engineer and certified professional environmental auditor, Mr. Graham has at least 20 years of experience as an environmental consultant. Tr. at 446-50, 454-57. The record reflects that Mr. Graham was hired by Respondent Kelly to serve in that capacity at SLRT for three months in 2002. Tr. at 462-63, 467; CEX 47, Bates 03118.

As pointed out by Complainant, Mr. Graham testified that one of his responsibilities was to confer with employees of IEPA about the meaning of letters that the employees had sent to SLRT

in response to questions about the nature of SLRT's operations.[37/] Tr. at 464-65, 470; *see also* CEX 47, Bates 03119-20, 03122-25. According to Mr. Graham, these letters "created some dilemmas" for SLRT, and he was therefore asked to communicate with IEPA to determine whether "there [was] some way around the statements that were made in the letter[s]." Tr. at 465.

In particular, Mr. Graham testified "it was clear" to him and Respondent Kelly that the October 16, 2000 letter described above meant that spent lamps remain a universal waste after undergoing volume reduction and, consequently, that the crushed lamps must be handled at a destination facility. Tr. at 473. Mr. Graham further testified that he discussed with Respondent Kelly the obligation that volume reduction be performed at the "generator location," or the location at which the given lamp was removed from service, which Mr. Graham described as a "very clear" requirement of Illinois's universal waste rule. Tr. at 474-75. Mr. Graham explained that these views conflicted with the manner in which SLRT sought to operate its business, namely, that SLRT "really wanted to operate in a way that the [crushed] material was no longer a waste." Tr. at 469. Accordingly, Mr. Graham maintained, he "was hired to see if we could resolve this issue by talking with the state further, and clarify that the material was not a waste." Tr. at 470. When questioned as to why he ceased working for SLRT, Mr. Graham testified that, among other reasons, he suspected that SLRT was knowingly violating the applicable standards by crushing spent lamps at locations other than the site of generation and separating the components of the crushed lamps at an unpermitted destination facility. Tr. at 473, 475-78.

Complainant contends that the testimony of Mr. Graham establishes that Respondent Kelly, and in turn, Respondent MVPT, were aware of the requirements imposed by Illinois's universal waste rule, of the requirement that they obtain a permit for their activities at the Riverdale property, and of their failure to comply. C's Post-Hearing Brief at 69. Complainant maintains:

> In conclusion, there is no genuine "fair notice" issue because (1) EPA provides notice to the regulated community as to its authorization of state program and revisions through the Federal Register; (2) the preamble to the universal waste rule states that it does not take effect in states until they are authorized by EPA for the rule; (3) EPA has set forth guidance as to how it will

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[37/] At the hearing, Complainant proffered a copy of the file maintained by Mr. Graham during his employment by SLRT, which documented the work Mr. Graham performed for SLRT and contained a number of letters exchanged between employees of SLRT and IEPA. Tr. at 465-67; CEX 47, Bates 03118-59.

> enforce the universal waste rule in states that are implementing but have not yet been authorized for the rule; (4) Respondents have pointed to no material confusion which is relevant to the actual allegations of the Complaint (treatment requires a permit under both Illinois's authorized program and under Illinois's unauthorized universal waste rule); and (5) Mr. Kelly was informed by IEPA that processing waste lamps off-site is fully regulated under Subtitle C.

C's Post-Hearing Brief at 88-89.

**d. Discussion**

Upon consideration, I find that Respondents have failed to satisfy their burden of proof as to their affirmative defense of fair notice. First, as argued by Complainant, the evidentiary record supports a finding that Respondent Kelly was informed by a regulatory agency that activities such as those performed at the Riverdale property were subject to the full Illinois hazardous waste regulations. The October 16, 2000 letter from IEPA specifically advises Respondent Kelly in his capacity as president of SLRT that "the [Illinois] 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 . . . ." CEX 72, Bates 04217. This guidance is unambiguous. Moreover, as set forth above, the testimony of Mr. Graham demonstrates that Respondent Kelly understood the contents of the letter and the regulatory requirements applicable to operations such as those conducted at the Riverdale property. The file maintained by Mr. Graham during his employment by SLRT corroborates his testimony. For example, a memorandum dated March 12, 2002, documents a telephone conversation between Mr. Graham and an employee of IEPA, Mark Crites, and reflects that Mr. Graham described SLRT's operations to Mr. Crites in an effort to persuade him that crushed lamps were not subject to regulation as hazardous waste, contrary to IEPA's letter of October 16, 2000. CEX 47, Bates 03122.

Respondents failed to offer any persuasive evidence in rebuttal. While they point out in their Post-Hearing Brief that "Mr. Graham briefly worked for a company that Mr. Kelly was involved with nearly 9 years ago," Rs' Post-Hearing Brief at 7, Respondent Kelly declined to question Mr. Graham at the hearing:

> Your Honor, at this time, I've racked my brain trying to remember what Mr. Graham did for us. I do remember his face, I see some - the documents here, but he worked apparently for our company for three months, nine years ago. I can't remember or recall how that - why he left

> or whatever, but bottom line is, I don't have any questions.
>
> * * *
>
> [I]n 2000, we started to look at the rule real closely, and we were going back and forth with the U.S. EPA, but I don't recall exactly who was involved and who wasn't. Obviously Mr. Graham was involved for a while, but I just don't have any questions for him that would be relevant to this case here.

Tr. at 482.

Respondents also argue that "ongoing discussions [between Respondent Kelly and IEPA] resulted in an understanding with IEPA regulatory personnel" that spent lamps could be managed as universal waste. Rs' Post-Hearing Brief at 9. Describing the October 16, 2000 letter from IEPA as a "letter of authorization," Respondents claim that it was generated as part of those ongoing communications, that it approved activities such as those performed by Respondent MVPT and S.L.R. Technologies at the Riverdale property, and that Respondents strictly adhered to the guidance provided therein. Rs' Post-Hearing Brief at 14-16. Respondents argue that if the letter's purpose was to serve as a "warning letter," as maintained by Complainant, then Complainant had an obligation to present the testimony or an affidavit of the author of the letter to corroborate that claim. Rs' Reply Briefs at 6-7. Respondents overlook, however, that they bear the burden of proof on this issue. Thus, Complainant did not have any obligation to present evidence to substantiate the meaning it attached to the October 16, 2000 letter; rather, Respondents did, and they failed to do so.

In accordance with the foregoing discussion, I find that the October 16, 2000 letter from IEPA fairly notified Respondent Kelly, and in turn, Respondent MVPT, that a permit was required for their activities at the Riverdale property. For the reasons described by Complainant in its Post-Hearing Brief and set forth above, I also find that EPA provided adequate notice that Illinois's universal waste rule was not authorized by EPA and that the full hazardous waste regulations are enforced by EPA in the absence of such authorization. In fairness to Respondents, the characterization of 35 IAC §§ 721.109 and 703.123, which contain exemptions for universal waste from regulation under RCRA, as authorized by 40 C.F.R. § 272.701 is somewhat confusing. However, based upon the sources of information identified by Complainant, including the preamble to the federal universal waste rule, the preamble to the final rule designating hazardous waste lamps as universal waste, and the Federal Register, the interpretation advanced by Complainant is ascertainable by regulated entities. Accordingly, Respondents'

claim that they lacked fair notice of the standards governing their operations is hereby rejected.

3. Exemptions for "Generators"

Tangential to their claim that their activities were governed by Illinois's universal waste rule, Respondents argue that Respondent MVPT was a "co-generator" of spent lamps and that the Riverdale property, in essence, was a site of co-generation. Rs' Post-Hearing Brief at 7-11, 13. By raising such a claim, Respondents presumably seek to advance the argument that they were operating in compliance with either the state or federal version of the universal waste rule. As noted above, Illinois's universal waste rule authorizes transporters and handlers of universal waste lamps, including generators, to "treat those lamps for volume reduction *at the site where they were generated*" without a permit. 35 IAC §§ 733.113(d)(3), 733.133(d)(3), 733.151(b) (emphasis added). In turn, the federal universal waste rule authorizes handlers of universal waste, including generators, to receive and accumulate universal waste, and then send it to another handler or to a destination facility, without a permit for such activities.[38] *See* 40 C.F.R. §§ 273.9, 273.11, 273.31.

As the universal waste rule does not apply to this proceeding, any consideration of Respondents' activities in the context of that rule cannot absolve Respondents of liability. I note, however, that Illinois's authorized hazardous waste program exempts generators from the requirement to obtain a RCRA permit under certain conditions. Specifically, 35 IAC § 703.123(a) provides that a generator that accumulates hazardous waste on-site for less than the time periods provided in 35 IAC § 722.134 is exempt from the requirement to obtain a RCRA permit. In order for Respondents to qualify for such an exemption, the first question to consider is whether Respondents qualify as "generators." Under the applicable hazardous waste regulations, the term "generator" is defined as "any person, by site, whose act or process produces hazardous waste . . . or whose act first causes a hazardous waste to become subject to regulation."[39] 35 IAC § 720.110.

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[38] By arguing that Respondent MVPT was responsible for only the accumulation of spent lamps at the Riverdale property, Respondents appear to claim that Respondent MVPT falls within the federal universal waste rule's exemption for handlers from the permitting requirements, while either Shannon Lamp Recycling or the mobile equipment itself qualified as the destination facility. *See* CEX 6, Bates 02049 ("The destination facility is our mobile processing unit.").

[39] The regulations do not define the term "co-generator."

As support for their argument that Respondent MVPT was a "co-generator" of spent lamps, Respondents first identify all of the tasks performed by Respondent MVPT, such as reporting its activities to IEPA, obtaining a generator identification number, and providing containers to clients for the accumulation of the spent lamps at its clients' locations. Rs' Post-Hearing Brief at 8. Respondents contend that these tasks "define the duties of a generator" and that the discharge of those duties "clearly puts MVP/RSR within the co-generator definition." *Id.* at 9. Respondents maintain, "[T]he 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." Rs' Reply Briefs at 23.

Citing the file maintained by Mr. Graham, Respondents further contend that Respondent Kelly engaged in "continuous negotiations" with IEPA that advised Respondent Kelly on the proper measures for managing spent lamps as a co-generator. Rs' Post-Hearing Brief at 9, 10 (citing CEX 47, Bates 03136). Respondents claim that subsequent to Respondent Kelly's receipt of the October 16, 2000 letter from IEPA, "Respondents received opinions from the IEPA that their mobile treatment equipment could operate at the site of a co-generator who consolidated lamps [Respondent MVPT] . . . . [H]owever, consistent with the opinion stated in the October 16, 2000 letter, the same company could not both consolidate and perform the volume reduction." Rs' Reply Briefs at 22-23. Accordingly, Respondents claim, Respondent MVPT consolidated spent lamps as a co-generator, while Shannon Lamp Recycling performed the volume reduction of the lamps. *See id.* at 23.

Finally, Respondents rely upon the preamble to the final rule modifying the definition of the term "generator" in the federal Subtitle C regulations. Rs' Post-Hearing Brief at 11 (citing 45 Fed. Reg. 72,024, 72,026 (October 30, 1980)). In the context of hazardous wastes that are generated in manufacturing process units, or in product or raw material storage tanks, transport vehicles, or vessels, the preamble explains that three categories of entities may fall within the definition of "generator": 1) the operator of a manufacturing process unit, or a product or raw material storage tank, transport vehicle, or vessel; 2) the owner of the product or raw material being stored or transported and the owner of the materials being manufactured; and 3) the person who removes the hazardous waste from a manufacturing process unit, or a product or raw material storage tank, transport vehicle, or vessel. 45 Fed. Reg. at 72,026. Noting that each of these parties contributes to the generation of the hazardous waste and because none stands out as the predominant contributor, the preamble advises that the three parties will be jointly and severally liable as generators. *Id.* The preamble further advises:

> The Agency will, of course, be satisfied if one of the three parties assumes and performs the duties of the generator on behalf of all of the parties. In fact, the Agency prefers and encourages such action and recommends that, where two or more parties are involved, they should mutually agree to have one party perform the generator duties. Where this is done, the Agency will look to that designated party to perform the generator responsibilities.

*Id.* Citing this language, Respondents contend that "it was agreed with the IEPA that it would only make since [sic] for our company to act as their co-generator because Respondent inessence [sic] has taken ownership [of the spent lamps] and inherited those responsibilities which Respondent adhered to precisely." Rs' Post-Hearing Brief at 11.

Upon consideration, I find that Respondents have failed to satisfy their burden of proof that Respondent MVPT constituted a "generator," as that term is defined by Illinois's hazardous waste regulations. First, as noted above, Respondents fail to point to any evidence in the record corroborating their claim that IEPA approved the operations described by Respondents. Second, Respondents fail to cite any legal authority to support their claim that a "generator" is any entity that agrees to discharge the duties of a generator.

To the contrary, the document in the record that discusses the concept of "co-generation," the regulatory history upon which it relies, and the regulatory history of other pertinent regulations do not appear to contemplate such an interpretation. In particular, the document admitted as Complainant's Rebuttal Exhibit 1 describes the circumstances under which a contractor may be considered a "cogenerator" of universal waste lamps. CREX 1. As an example, the document advises that when a school decides to replace its light fixtures as part of a renovation, and it hires a contractor to remove the spent hazardous waste lamps, the school is a "generator" because it "used the lamps and made the determination to discard them." *Id.* The document further advises that "[t]he contractor that actually removes the universal waste lamps from service is considered a . . . generator of the waste[,] making the school and the contractor cogenerators." *Id.* (citing 64 Fed. Reg. at 36,474). Finally, the document explains, "EPA recommends that when two or more parties meet the definition of generator they should mutually agree to have one party perform the generator duties." CREX 1 (citing 45 Fed. Reg. at 72,026). This guidance clearly indicates that only when two or more parties satisfy the definition of the term "generator" should one party assume responsibility for the generator duties. Nothing suggests that the mere performance of those duties qualifies the party as a generator, as argued by Respondents. Furthermore, Respondents do not qualify as a

"cogenerator" as that term is described in the document, as Respondent did not determine that the spent lamps at issue in this proceeding were no longer usable, nor did they remove the lamps from service.

The rulemakings cited by the document also do not support the interpretation advocated by Respondents. Most notably, the document refers to the preamble to the final rule modifying the definition of the term "generator" in the federal Subtitle C regulations, upon which Respondents also rely. As discussed above, this guidance describes three categories of parties as qualifying as "generators":

> Both the operator of a manufacturing process unit, or a product or raw material storage tank, transport vehicle or vessel, and the owner of the product or raw material act jointly to produce the hazardous waste generated therein, and the person who removes the hazardous waste from a tank, vehicle, vessel or manufacturing process unit subjects it to regulation. All three parties are involved and EPA believes that all three (and any others who fit the definition of "generator") have the responsibilities of a generator.

45 Fed. Reg. at 72,026. This excerpt reflects that the Agency contemplated entities other than the three parties identified therein as potentially fitting the definition of the term "generator." However, it is also clear that a given party must either produce the hazardous waste or cause it to become subject to regulation, consistent with the definition of the term "generator." The record does not support a finding that Respondents fell within those categories.

For the foregoing reasons, I conclude that neither Respondent qualifies as a "generator," as that term is defined by Illinois's hazardous waste regulations. Accordingly, Respondents are unable to avail themselves of the exemption found in 35 IAC § 703.123(a) for generators.

## VII. CIVIL PENALTY AND COMPLIANCE ORDER

As liability has been established, I must now consider the appropriate relief to award in this proceeding. Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1), authorizes the Administrator to assess civil administrative penalties for violations of RCRA and its implementing regulations and to issue orders requiring compliance within a specified time period. Pursuant to this provision, Complainant seeks the assessment of a civil administrative penalty of $120,000 and the issuance of a compliance order. I will address each of these requests in turn.

## A. CIVIL PENALTY

### 1. Statutory and Regulatory Penalty Criteria

Section 3008(a)(3) of RCRA provides that "[a]ny penalty assessed . . . shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subtitle . . . ." 42 U.S.C. § 6928(a)(3). Set forth at 40 C.F.R. part 19, the rules for Adjustment of Civil Monetary Penalties for Inflation[40/] increased the maximum allowable penalty assessed under Section 3008(a)(3) of RCRA to $32,500 per day of noncompliance for each violation occurring after March 15, 2004, through January 12, 2009.

Within that framework, the statutory and regulatory provisions governing this proceeding impose a number of considerations for the determination of an appropriate penalty. In particular, the statute provides that, in assessing a penalty pursuant to Section 3008(a)(3), "the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." 42 U.S.C. § 6928(a)(3). In turn, the Rules of Practice provide:

> If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty imposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b).

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[40/] EPA promulgated these rules pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990) (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321-373 (1996) (codified at 31 U.S.C. § 3701 note) ("DCIA"). These statutes direct federal agencies such as EPA to adjust the maximum civil penalties that may be imposed pursuant to the agency's statutory authorities on a periodic basis to reflect inflation. Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7,121, 7,121 (Feb. 13, 2004) ("2004 Penalty Inflation Rule").

2. Methodology of the RCRA Penalty Policy

In proposing the civil administrative penalty to be assessed against Respondents, Complainant considered the statutory criteria set forth at Section 3008(a)(3) of RCRA, in addition to employing EPA's RCRA Civil Penalty Policy, dated June 2003 ("RCRA Penalty Policy," "Penalty Policy," or "Policy"). Amd. Compl. ¶ 12, Attachment A; Tr. at 279-80, 290. The RCRA Penalty Policy was designed by EPA to guide its implementation of the statutory criteria. *Carroll Oil Co.*, 10 E.A.D. 635, 653 (EAB 2002) ("*Carroll Oil*"). Its stated purposes are to ensure the following:

> [T]hat RCRA civil penalties are assessed in a manner consistent with Section 3008; that 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 requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained.

CEX 15, Bates 02250. While the Policy is not binding on Administrative Law Judges, *see* 40 C.F.R. § 22.27(b), the EAB has emphasized "that the Agency's penalty policies should be applied whenever possible because such policies 'assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner,'" *Carroll Oil*, 10 E.A.D. at 656 (quoting *M.A. Bruder & Sons, Inc., d/b/a M.A.B. Paints, Inc.*, 10 E.A.D. 598, 613 (EAB 2002)).

A penalty calculation employing the RCRA Penalty Policy calls for the following steps: (1) determining a gravity-based component for each violation to measure the seriousness of the violation; (2) adding a multi-day component, as appropriate, to account for a violation's duration or multiple violations of the same statutory or regulatory requirement; (3) adjusting the sum of the gravity-based and multi-day components upward or downward based upon case specific circumstances; and (4) adding to this amount the appropriate economic benefit gained by the violator due to its failure to comply. CEX 15 at Bates 02246-02248, 02267.

More specifically, the gravity-based component required by the Policy considers two factors, the potential for harm resulting from the given violation and the extent of deviation from the statutory or regulatory requirement, each of which forms an axis of the "penalty assessment matrix" provided in the Policy. CEX 15, Bates 02247, 02257-02264. The gravity-based component is determined by ranking the potential for harm factor and extent of deviation factor as "major," "moderate," or

"minor"; locating the cell of the matrix where those rankings intersect; and selecting a dollar figure from the penalty range specified in the appropriate cell. *Id.* The Policy instructs that an assessment of the potential for harm resulting from the given violation should be based on two criteria: (1) the risk of human or environmental exposure to hazardous waste and (2) the adverse effect that the violation may have on the implementation of the RCRA regulatory program. CEX 15, Bates 02257-02261. In turn, an assessment of the extent of deviation resulting from the violation "relates to the degree to which the violation renders inoperative the requirement violated." CEX 15, Bates 02261.

Where the duration of a particular violation exceeds one day, a multi-day component may be calculated by (1) determining the length of time the violation continued; (2) determining whether a multi-day penalty is mandatory, presumed, or discretionary in accordance with the guidance provided by the Policy; (3) selecting the same matrix cell location in the "multi-day matrix" that was used to calculate the gravity-based component;[41/] and (4) multiplying the dollar amount selected from the appropriate cell by the number of days the violation continued beyond the first day, which is assessed at the gravity-based penalty rate. CEX 15, Bates 02247, 02265-02272. The Policy advises that where multiple violations of the same

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[41/] Pursuant to the 2004 Penalty Inflation Rule, the maximum allowable penalty that may be imposed pursuant to the Agency's statutory authorities was increased by 17.23 percent for violations occurring after the effective date of the Rule, March 15, 2004, to account for inflation. *See* 69 Fed. Reg. at 7,121. Issued prior to the promulgation of the 2004 Penalty Inflation Rule, the RCRA Penalty Policy and its penalty assessment and multi-day matrices do not reflect this 17.23 percent inflationary increase. However, by memorandum dated September 21, 2004, EPA's Office of Enforcement and Compliance Assurance ("OECA") modified the Agency's existing civil penalty policies, including the RCRA Penalty Policy, to increase the initial gravity-based component of the penalty calculation by 17.23 percent to conform to the 2004 Penalty Inflation Rule for those violations subject to the Rule. Memorandum from Thomas V. Skinner, Acting Assistant Administrator, OECA, U.S. EPA, to Regional Administrators, U.S. EPA, "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004)" (Sept. 21, 2004). Subsequently, by memorandum dated January 11, 2005, OECA revised the dollar figures contained in the RCRA Penalty Policy's penalty assessment and multi-day matrices to reflect the 17.23 percent inflationary increase. CEX 33. Complainant employed these revised matrices in proposing the civil administrative penalty to be assessed against Respondents. Tr. at 287-88, 290.

statutory or regulatory requirement have occurred, each violation after the first in the series may also be treated as a multi-day violation. CEX 15, Bates 02267-02268.

Once the gravity-based and multi-day components have been calculated for a given violation, a number of factors may be applied to adjust the sum of those components. CEX 15, Bates 02248, 02278-02287. The purpose of these factors is to "to make adjustments that reflect legitimate differences between separate violations of the same provision." CEX 15, Bates 02278. The Policy identifies several adjustment factors to consider, including good faith efforts to comply/lack of good faith, degree of willfulness and/or negligence, history of noncompliance, ability to pay, environmentally beneficial projects to be performed by the violator, and other unique factors. CEX 15, Bates 02248, 02280-02286.

Finally, the Policy directs that an economic benefit component should be added to the penalty for a given violation where the violation results in a "significant" economic benefit to the violator, as that term is defined by the Policy. CEX 15, Bates 02248, 02273-02278. Several types of economic benefit may accrue to a violator, including the benefit of delayed costs, which are expenditures that are deferred by the violation but will be incurred in order to achieve compliance, and the benefit of avoided costs, which are the periodic operational and maintenance expenditures that a violator should have incurred but did not because of the violation. CEX 15, Bates 02274-02275. The Policy identifies two methodologies for calculating the economic benefit from delayed or avoided costs, the BEN computer model or the "rule of thumb" approach, which are available to Agency personnel. CEX 15, Bates 02275-02277.

### 3. Appropriate Civil Penalty Amount

#### a. Penalty Proposed by Complainant

##### i. Gravity-based component

In calculating the gravity-based component of the proposed penalty, Complainant considered the potential for harm of the alleged violations to be major. Amd. Compl. at Attachment A; CEX 62, Bates 04088; C's Post-Hearing Brief at 47-54. As noted above, the RCRA Penalty Policy divides this factor into two components: (1) the risk of human or environmental exposure to hazardous waste and (2) the adverse effect that the violation may have on the implementation of the RCRA regulatory program. CEX 15, Bates 02257-02261. Where the violation involves the actual management of waste, the Policy further divides the first component, risk of exposure, into two subcomponents: (1) the probability that the violation could have resulted in, or has

resulted in, a release of hazardous waste and (2) the degree of harm that would result from such a release. CEX 15, Bates 02258.

Complainant relies upon each of these considerations to support its determination that the potential for harm of the alleged violations was major. CEX 62, Bates 04089-92; C's Post-Hearing Brief at 48-54. Specifically, in assessing the risk of exposure presented by the alleged violations, Complainant argues that the probability of a release of hazardous waste at the Riverdale property was high, as evidenced by Mr. Brown's observation on October 30, 2007, of large amounts of broken lamps being stored in open containers inside and outside the building at the Riverdale property, as well as intact lamps being stored in unsealed, structurally-unsound containers and loose inside the building. C's Post-Hearing Brief at 48-50 (citing Tr. at 297-98; CEX 1, Bates 00007, 00020, 00024, 00025, 00039-42).

In addition, Mr. Brown observed remnants of broken lamps inside and outside the building during the inspection he performed on May 26, 2011, for the purpose of assessing the current condition of the property. Tr. at 313; CEX 42, Bates 03023-25, 03043-44, 03048, 03050-65, 03071. When questioned about the risk of exposure posed by those materials, Mr. Brown explained that their presence demonstrates that "lamps had been broken in an uncontained manner, and that the releases were not necessarily cleaned up adequately." Tr. at 314-15. Mr. Brown also observed cracks in the floor of the building. Tr. at 313; CEX 42, Bates 03030-34, 03036-37, 03040-42, 03046-47. He testified, "[T]here are matters in which solid mercury could potentially be absorbed onto the phosphor powder that had been associated into the lamps, or the glass could possibly enter the underlying soil." Tr. at 313.

As further evidence of the probability of a release at the Riverdale property, Complainant cites a copy of a report provided to EPA by the Cook County Department of Environmental Control ("CCDEC") and Mr. Brown's testimony concerning this document. C's Post-Hearing Brief at 48-49 (citing Tr. 309, 311; CEX 36, Bates 02805-06). Dated July 30, 2007, the report describes an inspection of the Riverdale property performed by an engineer for the CCDEC on July 5, 2007, and subsequent related events. CEX 36, Bates 02805-09. Complainant relies upon the following excerpt from the report in particular:

> Engineer noted crushed mercury filled bulbs . . . in the bottom of the metal dumpster with a Siamese shaped metal container "plunger" structurally supported above. The so-called "plunger" apparently is lowered into the receiving metal dumpster below containing fluorescent bulbs to be crushed by the "plunger." Engineer did not observe any physical evidence of either pollution control devices for containment, other mechanical connectors,

> metal piping, rubber hoses, or electrical power appurtenances . . . Engineer was in the vicinity of the southeast corner of the facility near an open overhead door in the south masonry wall of building when Engineer discovered a massive pile of randomly, broken mercury filled fluorescent bulbs. The pile of fluorescent bulbs did not contain any paper waste. The pile is estimated to measure two feet wide, fifteen feet long, and two feet high.

C's Post-Hearing Brief at 48-49 (quoting CEX 36, Bates 02806).

Complainant next evaluated the second subcomponent of the risk of exposure, the degree of harm that would result in the event of a release. Citing the Policy's direction to consider such factors as the "quantity and toxicity of wastes (potentially) released" and the "likelihood or fact of transport by way of environmental media (*e.g.*, air and groundwater)," Complainant points to evidence in the record of the quantity of spent lamps managed by Respondents at the Riverdale property during the period of violation. CEX 62, Bates 04092; C's Post-Hearing Brief at 50 (citing CEX 15, Bates 02258). This evidence includes shipping records submitted by Respondent MVPT as part of its First Response, which reflect the number of spent lamps received by Respondent MVPT from third parties and transported to the Riverdale property, CEX 4, Bates 00640-02039, and the following testimony by Mr. Brown at the hearing:

> When you look at the bills of lading that record shipments to the Respondent's facility in Riverdale; when you look at just four-foot lamps, lamps that are under four-foot, or over four-foot, I did a calculation of how many of those lamps were transported in the record, and it -- the bills of lading indicated that it was greater than 600,000 lamps. So this is a significant amount of waste that was managed without a permit.

Tr. at 293.

Complainant also identifies ample evidence in the record of the highly toxic and volatile nature of mercury. CEX 62, Bates 04092; C's Post-Hearing Brief at 51-52. For example, the preamble to the final rule adding waste lamps to the federal universal waste rule advises:

> Mercury is easily volatilized; it can be dispersed widely through the air and transported thousands of miles. It undergoes complex chemical and physical changes as it cycles among air, land, and water. Humans, plants, and animals may be exposed to mercury and accumulate it during this cycle, potentially resulting in ecological and human health impacts. The primary health effects

> from mercury are on the neurological development of children exposed through fish consumption and on fetuses exposed through their mother's consumption of fish . . . When spent mercury-containing lamps break, the elemental mercury inside becomes available for evaporation, adsorption, or reaction . . . Mercury may also be released to the environment as a result of lamp crushing operations. Available studies show that emission percentages from drum top crushing range from 10 to 100 percent of the total elemental mercury in the lamps, depending on the operating conditions and supplemental controls used.

64 Fed. Reg. at 36,470-71. In addition, the U.S. Department of Health and Human Services prepared a document entitled "Toxicological Profile for Mercury," which explains, "Inhalation of sufficient levels of metallic mercury vapor has been associated with systemic toxicity in both humans and animals. The major target organs of metallic mercury-induced toxicity are the kidneys and the central nervous system. At high exposure levels, respiratory, cardiovascular, and gastrointestinal effects also occur." CEX 49, Bates 03218.

With respect to the adverse effect that the violation may have on the implementation of the RCRA regulatory program, Complainant describes the obligation to obtain a RCRA permit as "a critically essential procedure" because it enables regulatory authorities to "evaluat[e] [an applicant's] operations and ensur[e] that basic and important requirements applicable to treatment, storage and disposal facilities . . . [are] in place, and sufficient to protect human health and the environment." CEX 62, Bates 04089. As support for this characterization, Complainant refers to the RCRA Penalty Policy, which advises that certain violations may have "serious implications" and "undermine[] the statutory or regulatory purposes or procedures for implementing the RCRA program." C's Post-Hearing Brief (citing CEX 15, Bates 02259). The Policy identifies operating without a permit as an example of this type of regulatory harm. *Id.* (citing CEX 15, Bates 02259). After listing a number of requirements associated with the process of obtaining a RCRA permit, Complainant argues, "By not obtaining an RCRA permit for the Riverdale facility, the RCRA program had no way of knowing that Respondents were operating a hazardous waste storage and treatment facility, and there was no mechanism in place to ensure these important requirements were met." C's Post-Hearing Brief at 53-54 (citing CEX 62, Bates 04089, 04091; Tr. at 320). Consequently, Complainant concludes, "the violations had a substantial adverse effect on the statutory and regulatory procedures for implementing the RCRA program." *Id.* at 54.

Based upon the foregoing evidentiary and legal support, Complainant deemed the potential for harm of the alleged

violations to be major. Turning to the extent of deviation factor of the gravity-based component, Complainant considered this factor to be major as well. C's Post-Hearing Brief at 54-55; CEX 62, Bates 04092. The RCRA Penalty Policy advises that where a violator deviates from statutory or regulatory requirements to such a degree that most of the requirements are not met, the extent of deviation from the given requirement falls within the "major" category. CEX 15, 00262. Complainant argues that because Respondents failed to apply or obtain a permit for their operations, they never complied with any of the related requirements. C's Post-Hearing Brief at 54-55. Accordingly, Complainant reasons, the appropriate characterization of the extent of deviation is major. *Id.* at 55.

Complainant selected the mid-point of the corresponding cell of the penalty assessment matrix, $29,146, as the gravity-based component of the penalty calculation. Amd. Compl. at Attachment A; C's Post-Hearing Brief at 55; CEX 62, Bates 04093. The Policy advises that enforcement personnel have the discretion to select the exact penalty amount from the range of numbers provided in each matrix cell but urges them to consider certain case-specific factors in exercising that discretion, such as the degree of cooperation and efforts of remediation exhibited by the facility and the size and sophistication of the violator. CEX 15, Bates 002264.

Mr. Brown testified that he initially chooses the mid-point of the appropriate matrix cell as a matter of general practice:

> I start in the middle of the cell range, so as not to be biased one way or the other, to be too conservative, or too harsh, and I consider those factors and decide whether or not it needs to be increased or decreased, i.e., a larger amount or a lower amount needs to be selected, as opposed to just the middle.

Tr. at 323-34. Mr. Brown subsequently considered a number of case-specific factors identified by the Penalty Policy. CEX 62, Bates 04093. For example, Mr. Brown testified that Respondent Kelly was cooperative during the course of EPA's investigation. Tr. at 334; *see also* CEX 62, Bates 04093. However, he also noted the lack of evidence that Respondents have conducted any closure activities at the Riverdale property, as required by RCRA. Tr. at 334-35; *see also* CEX 62, Bates 04093.

In addition, Mr. Brown testified that documentary evidence in the record reflects the sophistication of Respondent Kelly. Tr. at 324. In particular, a Securities and Exchange Commission filing dated February 2, 2002, for a company called VX Technologies, Inc., contains a description of Respondent Kelly's background:

> Laurence C. Kelly, prior to founding Spent Lamp Recycling Technologies in April, 1997, was the president and managing partner of a nation wide environmental manpower and consulting company, EEMI Consulting, Inc., which specialized in due diligence, quantification and remediation projects across the United States. He has been in the environmental business since 1978. During that time he founded and operated a hazardous waste hauling company, which he sold in 1983. He was a partner in a *"Waste to Energy"* facility in western Illinois until he sold his interest in 1989 when he formed EEMI Consulting, Inc. In January of 1997 he sold his interest in EEMI Consulting, Inc. to pursue researching, developing and the patenting of what is today known as Spent Lamps Recycling Technologies. He has over 20 years of waste hauling, site remediation and environmental consulting experience. Through the course of his experience in the environmental business he has compiled a working knowledge of regulatory guidelines. Because he was in the business of waste hauling on or about the time the Resource Conservation Recovery Act became law, he has been in a position to track and maintain an ongoing understanding of all aspects of business operations under that and all other relevant regulations. He also has the ability to apply that understanding to the spirit of the new *"Universal Waste Rule"* pertaining to spent mercury-containing lamps. Mr. Kelly has been President and a Director of VX Technologies, Inc. since our merger with DFR Associates I, Inc. Mr. Kelly formed our predecessor Spent Lamps Recycling Technologies in 1997 and was its president and a director until it merged into us.

CEX 37, Bates 02919-20. Mr. Brown testified that this excerpt demonstrates the considerable experience of Respondent Kelly in the waste industry. Tr. at 330.

Complainant contends that based upon the case-specific factors evaluated by Mr. Brown, $29,146 is an appropriate amount within the appropriate matrix cell. C's Post-Hearing Brief at 59.

### ii. Multi-day component

The RCRA Penalty Policy advises that the calculation of a multi-day component is mandatory for the second through the 180th day of a violation when the potential for harm and extent of deviation of a violation are both deemed to be major, while the calculation of a multi-day component for any subsequent days is discretionary. CEX 15, Bates 02270. At the hearing, Mr. Brown described his application of this guidance in the present proceeding:

A: Because this was -- we viewed this as a continuing violation that -- the facility operated beginning at some point in February, 2005, until at least the time of my inspection, October 30th, 2007. Though if I'm correct, if you look at the third information request response to -- for Mercury Vapor Processing Technologies, it wasn't until some point in time in 2008 when the lamps that were -- were finally removed from the Riverdale facility for good.

* * *

Q: How many days of violation did you use in your calculation?

A: 179 days added on to the day one, which gets the initial gravity-based penalty. So there's 179 days worth of additional multi-day penalties added.

Q: Why did you cap at 179 days?

A: The penalty policy instructs us that for a continuing violation that falls within the major potential for harm, major extent of deviation, that multi-day penalties are mandatory for days two through 180 of the violation, therefore 179 days, and from that point forward, they are discretionary. I used my discretion to stop calculating multi-day penalties after that point.

Tr. at 344-45. Mr. Brown testified that he selected the mid-point of the appropriate cell of the multi-day matrix, $3,869, in order to be consistent with the selection for the gravity-based component of the penalty. *Id.* at 346. Based upon this figure and the duration of the violation, Complainant calculated the multi-day component of the proposed penalty to be $692,551. Amd. Compl. at Attachment A; CEX 62, Bates 04092; C's Post-Hearing Brief at 60.

**iii. Economic benefit component**

Complainant calculated the economic benefit component of the proposed penalty to be $21,596. Amd. Compl. at Attachment A; CEX 62, Bates 04093; Tr. at 379; C's Post-Hearing Brief at 61. To support this assessment, Complainant contends that Respondents' failure to comply with 35 IAC § 703.121(a)(1) resulted in an economic benefit "equal to *at least* the cost associated with

filing the Part A and Part B permit applications."[42/] CEX 62, Bates 04095 (emphasis in original). Mr. Brown testified that in order to determine the costs associated with filing those applications, he relied upon a manual entitled "Estimating the Costs for the Economic Benefit of RCRA Noncompliance" and dated September of 1997, which estimates the costs of certain obligations under RCRA. Tr. at 379; *see also* CEX 62, Bates 04095; CEX 16, Bates 02347-02524. Mr. Brown explained that he then entered the resulting figure into the BEN model to calculate the total economic benefit of the violations as $21,596. Tr. at 380; *see also* CEX 62, Bates 04097.

The RCRA Penalty Policy instructs enforcement personnel to add an economic benefit component to the sum of the gravity-based and multi-day components when the sum totals $50,000 or more and the economic benefit component totals $5,000 or more. CEX 15, Bates 02273. Pursuant to this guidance, Complainant included its calculation of economic benefit component in the penalty proposed in this proceeding. CEX 62, Bates 04097.

**iv. Adjustment factors**

Complainant considered a number of adjustment factors in its Post-Hearing Brief but determined that only Respondents' ability to pay a penalty warranted an adjustment of the sum of the gravity-based and multi-day components and the economic benefit resulting from the violations. C's Post-Hearing Brief at 63-80. The Penalty Policy advises enforcement personnel to conduct a preliminary inquiry into the financial status of an alleged violator in the event that the alleged violator raises its ability to pay a penalty during the course of a proceeding.[43/] CEX 15, Bates 02283-84. When enforcement personnel determine that the alleged violator cannot afford the penalty prescribed by the Policy or payment of all or a portion of the penalty would preclude the alleged violator from achieving compliance or from

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[42/] Complainant maintains that Respondents likely received additional economic benefit as a result of operating in violation of 35 IAC § 703.121(a)(1), such as the avoidance of increased operating costs that would have resulted from conditions imposed on Respondents' operations by a RCRA permit. CEX 62, Bates 04095; C's Post-Hearing Brief at 61-63. As evidence of these costs and other expenses associated with the operation of a permitted facility, Complainant presented the testimony of Leonard S. Worth, the President of Fluorecycle, Inc., a business enterprise engaged in the storage and treatment of spent lamps pursuant to a RCRA permit. Tr. at 499-527. Complainant does not pursue any other forms of economic benefit as part of the proposed penalty, however.

[43/] As discussed in greater detail below, the alleged violator bears the burden of demonstrating its inability to pay a penalty.

completing remedial measures deemed to be more important than deterrence effect of the penalty, the Policy directs the enforcement personnel to consider a number of options, including a reduction of the penalty. CEX 15, Bates 02284-85.

Complainant explains in the penalty narrative that Respondents submitted certain financial documents to the Agency in connection with their claim that they lacked the ability to pay the penalty proposed in the Amended Complaint and that the Agency, in turn, provided the documents to Industrial Economics, Inc. ("Industrial Economics"), a consulting firm serving as the Agency's financial expert in this proceeding. CEX 62, Bates 04098. Complainant further explains:

> As of June 30, 2011, EPA's financial expert was unable to identify material sources of funds available to MVPT (a dissolved corporation) for payment of a penalty. As of the same date, the financial expert finds that Mr. Kelly has limited resources for penalty payment; though identified potential future cash flows up to $62,000. At the same time EPA's financial expert advises that questions remain as to whether Mr. Kelly has provided EPA with a complete picture of his business holdings and financial circumstances.
>
> In this case, the EPA is electing to reduce the penalty by $623,293 to arrive at a final penalty amount of $120,000, or roughly double the potential cash flow identified by EPA's financial expert. The EPA is making this adjustment to account for the apparent limited funds available to the respondents, while at the same time weighing the uncertainty over Mr. Kelly's financial condition and the seriousness of the violation.

CEX 62, Bates 04098.

Mr. Brown reiterated this assessment at the hearing, testifying that the Agency "received financial documents from the Respondents. We had concerns regarding their completeness and their accuracy, but we gave them the benefit of the doubt, and we reduced the penalty . . . ." Tr. at 291.

**b. Respondents' Arguments**

**i. Challenges to Complainant's penalty calculation**

Respondents object to Complainant's application of the RCRA Penalty Policy in their Reply Briefs. Rs' Reply Briefs at 16-25. Among other challenges, Respondents dispute that their operations at the Riverdale property created a risk of human or environmental exposure to hazardous waste. *Id.* at 16-18. While

Respondents acknowledge the highly toxic nature of mercury and the harmful effects that result at certain levels, they contend that no dwellings or businesses existed in the vicinity of the Riverdale property at the time of their operations. *Id.* at 16-17. Therefore, Respondents argue, "even if every lamp broke at once the mercury that would be emitted would disseminate causing no potential harm to Human Health and Safety." *Id.* at 16.

Respondents also dispute Complainant's claim that solid mercury could have entered cracks in the floor of the building and been absorbed by the underlying soil. Rs' Reply Briefs at 16-17. First, Respondents challenge the evidence presented by Mr. Brown of cracks in the floor, arguing that no such cracks existed at the time they vacated the property. *Id.* Respondents further argue that spent lamps contain mercury vapor, rather than solid mercury, and that the claim that solid mercury was present at the Riverdale property is unsubstantiated and "pure hyperbole." *Id.* at 17.

Finally, Respondents cite news releases issued by EPA and dated November 1, 2007, and November 6, 2007, as evidence that Respondents' operations created no risk of exposure to hazardous waste. Rs' Reply Briefs at 16 (citing REX 16). The news release dated November 1, 2007, relates that EPA inspectors determined during the CEI that "there [were] not elevated levels of mercury in the air beyond the facility." REX 16. Additionally, both news releases advise that the EPA inspectors found no evidence that River Shannon posed a public health threat from mercury emissions. *Id.*

**ii. Inability to pay claim**

Respondent MVPT raised an "inability to pay" claim early in this proceeding, arguing in its initial prehearing exchange that it "does not have the ability to pay a penalty of [ **CBI** ] Respondents produced a number of financial documents to support this claim and their position that Respondent Kelly similarly lacked the ability to pay the penalty sought by Complainant. CEX 13, 58, 59, 61, 84. In addition, Respondent Kelly testified at the hearing that while his wife works, [ **CBI**

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In their Reply Briefs, Respondents contend that they have submitted all of the financial information available to them with regard to their ability to pay a penalty and that this information adequately supports their claims. Rs' Reply Briefs at 29-32.

### c. Complainant's Challenge to Respondents' Inability to Pay Claim

Complainant argues that Respondents have not met their burden of demonstrating that they lack the ability to pay the revised proposed penalty amount of $120,000. C's Post-Hearing Brief at 91. As support for this contention, Complainant relies upon the financial documents submitted by Respondents to EPA, the testimony of Respondent Kelly, and the testimony of Mark Ewen, a principal and managing director of Industrial Economics. *Id.* at 91-100.

As pointed out by Complainant in its Post-Hearing Brief, Mr. Ewen analyzed the financial documents submitted by Respondents and, assuming their veracity, calculated that Respondent Kelly had a total annual cash flow of [ **CBI** ] C's Post-Hearing Brief at 99 (citing Tr. at 749-50). Complainant asserts that "[i]n accordance with EPA's ability to pay guidance,[44/] which provides for the consideration that Mr. Kelly will generate that cash flow over time, that amount for three years is [ **CBI** ] *Id.* (citing Tr. at 750-51).

Notwithstanding this assessment, Complainant argues that Respondents have failed to establish that they lack the ability to pay a penalty in the amount of $120,000. C's Post-Hearing Brief at 100. In particular, Complainant claims that the information produced by Respondents is "unsubstantiated and contains inconsistencies which, taken together, cast substantial doubt on the accuracy and truthfulness of their overall financial picture." *Id.* Complainant identifies numerous examples of these uncertainties in its Post-Hearing Brief. *Id.* at 91-99. Complainant then cites the observation of Mr. Ewen that given these uncertainties, Respondents may be able to afford a penalty greater than $62,000. *Id.* at 99-100. Complainant concludes, "Despite [the uncertainties], EPA has taken into consideration Respondents' ability to pay claims and reduced the penalty by $623,293 . . . . Respondents should be assessed a penalty of at least $120,000." *Id.* at 100.

### d. Discussion

#### i. Gravity-based, multi-day, and economic benefit components

Upon consideration of the analyses described in the penalty narrative prepared by Mr. Brown and Complainant's Post-Hearing Brief, I find that Complainant fairly and reasonably applied the RCRA Penalty Policy's methodology in calculating the gravity-

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44/ The precise source of this guidance was not identified in the record.

based, multi-day, and economic benefit components of the revised proposed penalty. I see no reason to disturb these determinations based upon the objections raised by Respondents. As noted above, Respondents dispute that their operations at the Riverdale property created any risk of human or environmental exposure to hazardous waste. Rs' Reply Briefs at 16-18. In particular, Respondents appear to challenge Complainant's determination concerning the degree of harm that would result in the event of a release, first arguing that no dwellings or businesses existed in the vicinity of the Riverdale property at the time they occupied the property. *Id.* at 16-17. Therefore, Respondents contend, "even if every lamp broke at once the mercury that would be emitted would disseminate causing no potential harm to Human Health and Safety." *Id.* at 16.

This argument fails for two reasons. First, the preamble to the final rule adding waste lamps to the federal universal waste rule advises, "Mercury is easily volatized; it can be dispersed widely through air and transported thousands of miles." 64 Fed. Reg. at 36,470. Thus, dwellings and businesses need not be in the immediate vicinity of a broken lamp in order to be impacted by the mercury emitted. Second, while some evidence in the record supports Respondents' claim that the residences observed by Mr. Brown in the vicinity of the Riverdale property on May 26, 2011, were under construction at the time Respondents occupied the property, CEX 42, Bates 03072, 03076; REX 33, Respondents overlook that the remnants of spent lamps observed at the Riverdale property on that day demonstrate that releases of hazardous waste may be ongoing and inflicting harm on the occupants of the now-existing residences.

Respondents also dispute Complainant's claim that solid mercury could have entered cracks in the floor of the building and been absorbed by the underlying soil, arguing that no cracks existed at the time they vacated the property and that spent lamps contain mercury vapor rather than solid mercury. Rs' Reply Briefs at 16-17. This argument also fails. Just as the question of whether residences existed in the vicinity of the Riverdale property at the time Respondents occupied the property is immaterial, so too is the question of whether cracks existed at that time. Further, Respondents offer no evidence to rebut Mr. Brown's testimony concerning the potential for solid mercury to enter the underlying soil.

Finally, Respondents point to news releases issued by EPA and dated November 1, 2007, and November 6, 2007. Rs' Reply Briefs at 16 (citing REX 16). These advisories relate that EPA inspectors found no evidence that River Shannon posed a public health threat from mercury emissions. Rs' Reply Briefs at 16 (citing REX 16). In addition, the news release dated November 1, 2007, relates that EPA inspectors determined during the CEI that elevated levels of mercury were not present in the air beyond the

Riverdale property. *Id.* While the news releases reflect that Respondents' activities had not caused actual harm, this consideration is not dispositive of whether a given violation poses a risk of exposure to hazardous waste. As the Penalty Policy advises:

> In considering the risk of exposure, the emphasis is placed on the potential for harm posed by a violation rather than on whether harm actually occurred. Violators rarely have any control over whether their pollution actually causes harm. Therefore, such violators should not be rewarded with lower penalties simply because the violations did not result in the actual harm.

CEX 15, Bates 02259. Accordingly, Respondents' argument is rejected.

The other arguments raised by Respondents in opposition to Complainant's application of the Penalty Policy's methodology in calculating the gravity-based component of the revised proposed penalty relate to their position that they were not required to obtain a permit for their activities because they were operating in accordance with Illinois's universal waste rule. *See* Rs' Reply Briefs at 18-19. These arguments similarly lack merit, as discussed above, and do not warrant further discussion.

Respondents do not object to Complainant's application of the Penalty Policy in calculating the multi-day component of the revised proposed penalty. They challenge Complainant's calculation of an economic-benefit component, however, arguing that "MVP/RSR was operating at a loss, and Mr. Kelly was not compensated for the services he offered to MVP/RSR." Rs' Reply Briefs at 19. Because neither Respondent earned any money from the operations conducted at the Riverdale property, Respondents argue that they realized no economic benefit. This argument is inconsistent with the Penalty Policy, which advises that an economic benefit component will be added to the proposed penalty "[w]here a company has derived significant savings or profits by its failure to comply with RCRA requirements." CEX 15, Bates 02248. Thus, an alleged violator need not conduct a profitable business in order to derive an economic benefit.

**ii. Adjustment factors**

Turning to the adjustment factors, Complainant considered the factors of good faith efforts to comply/lack of good faith, degree of willfulness and/or negligence, history of noncompliance, ability to pay, and environmentally beneficial

projects to be performed.[45/] C's Post-Hearing Brief at 63-71. Complainant determined that only Respondents' ability to pay a penalty warranted an adjustment of the sum of the gravity-based and multi-day components and the economic benefit resulting from the violations. *Id.* Respondents object in their Reply Briefs, arguing, in essence, that they sought guidance from EPA guidance documents and Illinois regulators concerning their role and compliance as a large quantity handler and co-generator under Illinois's universal waste rule. Rs' Reply Briefs at 20-21.

I agree with Complainant's determination. As discussed on pages 58 through 63 of this Initial Decision, the evidentiary record supports a finding that Respondent Kelly was informed by Illinois regulators that the full Illinois hazardous waste regulations governed activities such as those performed at the Riverdale property and that EPA provided adequate notice to the regulated community that Illinois's universal waste rule was not authorized by EPA and that the full hazardous waste regulations would be enforced in the absence of such authorization. Further, I observe the testimony of Leonard Worth, who described the steps he took to ensure that he handled spent lamps during his business operations in the State of Illinois in accordance with the applicable RCRA requirements. These considerations weigh against any adjustment of the penalty for the factors of good faith efforts to comply/lack of good faith and degree of willfulness and/or negligence. In addition, the record does not contain sufficient evidence that Respondents have a history of noncompliance beyond the violations at issue in this proceeding or that Respondents intend to perform any environmentally beneficial projects. Thus, I find that an adjustment of the penalty is not warranted on those grounds.

On the other hand, I find that a reduction in the revised proposed penalty is appropriate on the basis that Respondents lack an ability to pay the amount sought by Complainant. Because the statutory penalty criteria set forth at Section 3008(a)(3) of RCRA are restricted to "the seriousness of the violation" and "good faith efforts to comply with the applicable requirements," a respondent's ability to pay is not a factor that a complainant must consider as part of its prima facie burden of establishing

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[45/] Complainant also considered "other unique factors," including the issues of enforcement discretion, Respondents' compliance with the federal and state versions of the universal waste rule, and Respondent MVPT's claim that it acted as a co-generator of the spent lamps. Consistent with my rejection of Respondents' arguments with respect to these issues in the subsection of this Initial Decision entitled "Respondents' Defenses to Liability," I find that any consideration of the issues as "unique factors" for purposes of determining the appropriate penalty to assess in this proceeding is unwarranted.

the appropriateness of its proposed penalty. *Carroll Oil*, 10 E.A.D. at 662. Accordingly, in order to be considered by the complainant, a claim of an "inability to pay" the proposed penalty must be raised and substantiated as an "affirmative defense" by the respondent.[46/] *Id.* at 663. As noted above, the Rules of Practice provide that the respondent bears the burdens of presentation and persuasion for any affirmative defenses. 40 C.F.R. § 22.24(a).

According to the RCRA Penalty Policy:

> The Agency generally will not assess penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability of a violator to pay a penalty. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially-troubled business. EPA reserves the option, in appropriate circumstances, to seek penalties that might put a company out of business.

CEX 15, Bates 02283. The Policy further provides, "The burden to demonstrate inability to pay rests on the respondent, as it does with any mitigating circumstances . . . If the respondent fails to fully provide sufficient information, then enforcement personnel should disregard this factor in adjusting the penalty." CEX 15, Bates 02284.

As noted above, Respondents produced a number of financial documents in this proceeding to support their claims that they lacked the ability to pay the penalty sought by Complainant. CEX 13, 58, 59, 61, 84. In addition, Respondent Kelly testified at the hearing that while his wife works, [ **CBI**

]

Mr. Ewen conducted an extensive analysis of this documentary and testimonial evidence. Qualified as an expert in the area of financial analysis for the purpose of testifying as to his evaluation and opinion of Respondents' claim that they lacked the ability to pay [ **CBI** ], Mr. Ewen explained that the first step

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[46/] While the Board treated the respondent's inability to pay claim in *Carroll Oil* as an affirmative defense, it recognized that such a claim is not an affirmative defense "in the traditional sense that financial hardship, if demonstrated, would completely bar the imposition of a penalty." *Carroll Oil*, 10 E.A.D. at 663 n.25. Rather, the Board viewed the claim as a potential mitigating factor to consider when assessing a civil penalty. *Id.*

of any ability to pay analysis is to gather three to five years of financial information from the regulated party. Tr. at 689, 692. The next step, Mr. Ewen testified, is to evaluate that information for four components of the regulated party's financial standing: income, expenses, assets, and liabilities. Tr. at 692. Mr. Ewen explained that the purpose of this evaluation is to "identify some potential sources of funds that might be available for whatever their environmental obligation might be." Tr. at 692-93.

Mr. Ewen first testified as to Respondent Kelly's ability to pay a penalty in this proceeding. He explained that in analyzing an individual's ability to pay a penalty, he looks for two sources of funds: 1) immediately available cash, or assets that can quickly be converted to cash, that are not necessary to fund the individual's livelihood or household expenses; and 2) any household or individual cash flow that can be generated over time. Tr. at 693-94. Mr. Ewen testified that an individual's tax returns serve as a source of information about the individual's income but that the individual is required to supplement the tax returns with information about his or her expenses, assets, and liabilities, which are not disclosed on those documents. Tr. at 694. EPA requests such information by way of a document entitled "Individual Ability to Pay Claim Financial Date Request Form" ("Financial Disclosure Form"). Tr. at 699-700. Mr. Ewen further explained that in the absence of specific information about an individual's assets, he looks to publicly available information, such as county property assessment records, corporate filings, license or registration records, and Dunn and Bradstreet reports. Tr. at 700-02.

With respect to Respondent Kelly's financial standing specifically, Mr. Ewen testified that he commenced his analysis in May of 2011 based upon Respondent Kelly's individual tax returns from the years 2007 through 2009, Respondent Kelly's completed Financial Disclosure Form, dated December 17, 2010, responses to EPA's Information Requests, and a variety of publicly available information. Tr. at 707-09. Mr. Ewen explained that he was unable to form an opinion of Respondent Kelly's ability to pay a penalty at that time, however:

> A: I didn't have the 2010 tax returns, and since I was getting all this in May, I figured that it was likely that a 2010 return had been prepared, and it was particularly important in this instance, because in the public records review, it appeared that Mr. Kelly had been involved in the incorporation of a couple new business entities during 2010, and I in particular wanted to scope out what was going on with that. And there were a few other uncertainties and issues I wanted to follow up on, as well.

> Q: Generally -- what questions or uncertainties did you have based on your review?
>
> A: Well, I think I mentioned a couple. A., that I didn't have a fully up-to-date record. And B., it didn't capture, or didn't reference a handful of these other things that I thought appeared relevant; like the new businesses that I mentioned, and also some inconsistencies between income reported in the financial disclosure and in the tax returns.

Tr. at 709-10.

Based upon Mr. Ewen's recommendation, EPA requested additional information from Respondent Kelly regarding his financial standing on May 27, 2011, to which Respondents submitted a written response on June 15, 2011. Tr. at 710-12; CEX 60, 61R. This written response included Respondent Kelly's individual tax return from the year 2010, information supplementing the previously submitted Financial Disclosure Form, and information related to Respondent Kelly's active business affiliations. Tr. at 712-13; CEX 61R. In particular, the written response explained that Respondent Kelly is affiliated with three business entities, MercPak, Inc. ("MercPak"), S.L.R. Technologies, Inc. ("SLRT"), and Citywide Elevator Inspection Services, Inc. ("Citywide"). CEX 61R, Bates 04061; Tr. at 713. The written response included unaudited internal financial statements for those entities for the year 2010 and the first quarter of year 2011. CEX 61R, Bates 04061, 04072-83; Tr. at 713-15. As explained in the written response, corporate tax returns for the year 2010 were not available, however, because requests for extensions of the filing deadline had been filed with the IRS. CEX 61R, Bates 04061; Tr. at 714.

Mr. Ewen testified that he subsequently assessed the financial standing of each of these business entities, evaluating the information contained in the written response submitted by Respondent Kelly and publicly available sources of information, such as corporate filings. Tr. at 715-16. Relying upon this information, Mr. Ewen explained that MercPak is engaged in the business of recycling spent lamps and ballasts, that Respondent Kelly is the sole owner and president, that MercPak had a **[ CBI**

**]** With respect to SLRT, Mr. Ewen explained that it is engaged in the business of recycling spent lamps, that Respondent Kelly is the sole owner and president, that SLRT had a **[ CBI**

**]** Finally, with respect to Citywide, Mr. Ewen explained that it performs elevator safety inspection services, that Respondent Kelly is part owner and

secretary, that Citywide generated a positive net income of approximately [ **CBI**

]

When questioned about the significance of the loans between these business entities and Respondent Kelly, Mr. Ewen testified:

> A: I -- to me it just says, you've got to look at these three entities as a whole, and think about their operations kind of together.
>
> Q: And how did these companies fit into your analysis of Mr. Kelly's overall financial picture?
>
> A: They simply represent an asset-holding of Mr. Kelly, and obviously a potential income source for Mr. Kelly as well. So it's just one piece of his financial portfolio.

Tr. at 726-27. Mr. Ewen noted, however, that he was unable to determine the source of the funds that Respondent Kelly lent to MercPak, SLRT, and Citywide. Tr. at 726.

Turning to the Financial Disclosure Form submitted by Respondent Kelly, Mr. Ewen observed that Respondent Kelly reported that his spouse earns approximately [ **CBI**

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Mr. Ewen next evaluated Respondent Kelly's tax returns from the years 2007, 2008, and 2009, noting that Respondent Kelly reported [ **CBI**

] On the tax return for year 2009, Mr. Ewen observed that Respondent Kelly reported the [ **CBI**

] Mr. Ewen testified that these amounts were consistent with Respondent Kelly's tax return from the year 2010, with the exception of the oil and gas royalties, which rose to approximately [ **CBI**

]

Mr. Ewen noted a number of inconsistencies, however. First, Mr. Ewen observed that Respondent Kelly failed to include on the Financial Disclosure Form any of the oil and gas royalties reported on his individual tax returns. Tr. at 729-30. In addition, Mr. Ewen noted, Respondent Kelly never reported income from the business enterprises with which he was affiliated on any of the tax returns, which appeared to conflict with Respondent Kelly's testimony of Respondent MVPT's success in 2007. Tr. at

730-32. Specifically, Respondent Kelly testified, "In 2007, we were doing pretty well. We had acquired a lot of companies, including [ **CBI**

]

Finally, Mr. Ewen expressed concern about the date that on which the tax returns were prepared and submitted. Tr. at 733-35. As Mr. Ewen observed, each tax return was dated by the paid preparer on February 7, 2011, and by Respondent Kelly on February 8, 2011, and the Agency was unable to obtain copies directly from the IRS. Tr. at 733-35; CEX 59R, Bates 04031, 04034, 04038; CEX 60, Bates 04055. Given these issues, Mr. Ewen testified:

> So, I just -- I just don't know. I have a gut sense here that these were all -- you know, there's some potential these were all prepared right around early February of this year and submitted in a batch to EPA. I'm not certain that they were previously submitted to the IRS. It's just a point of some uncertainty.

Tr. at 734.

With respect to the public records he reviewed, Mr. Ewen explained that they reflect that Respondent Kelly sold his home in 2005 to a Mr. Molidor[47/] for $1,000,000 but that Respondent Kelly continues to live there. Tr. at 735-36. As noted by Mr. Ewen, Respondent Kelly also reported in the Financial Disclosure Form that he pays no rent. CEX 58, Bates 04028. When questioned by the Agency about the sale of the home, Respondent Kelly answered in the supplement to the Financial Disclosure Form that records of the sale had been destroyed in a flood. Tr. at 736-37; CEX 61R, Bates 04062.

Finally, Mr. Ewen testified that the materials submitted by Respondent Kelly reflect that he had approximately [ **CBI**

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Based upon the foregoing evidence, Mr. Ewen testified that he calculated a total annual cash flow for Respondent Kelly at [ **CBI** ] Mr. Ewen further testified that that amount over three years is [ **CBI** ] According to Mr. Ewen, these figures incorporate a number of assumptions, such as that "the status quo of 2010 kind of continues out into the future." Tr. at 751. When questioned about the reliability of the information upon which he relied to perform the calculation, Mr. Ewen explained:

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47/ In its Second Response, Respondent MVPT identifies Mr. James Molidor as its president.

Q: Does the information that you were presented with provide a clear and definite picture of the Respondent's financial information?

A: No, this was really a tough one. I mean, there's a mix of information here. And some inconsistencies in the data, some concerns about the reporting, obviously this kind of swirl of a lot of business enterprises, assumed names, doing business as names, kind of a flow of creating new corporations, dissolving them, creating new ones; all in a relatively consistent line of business gives some concern. So that -- that sort of -- I'm balancing the reality of the data I have to look at against some of these concerns about the underlying quality of the data that I'm looking at.

* * *

Q: And in your opinion, how important are all of those uncertainties in determining an accurate, overall picture of the Respondent's financial situation?

A: They're pretty important. I mean, I -- you know, I -- I've stretched a little bit to generate -- to try to help folks get understanding of what a reasonable range might be, but there's considerable certainty related to this financial disclosure here.

Q: In your opinion, do all of these uncertainties make it possible that the Respondents could afford a penalty higher than the range you gave earlier?

A: Yes.

Tr. at 751-53.

Turning to the financial standing of a corporate respondent such as Respondent MVPT, Mr. Ewen testified that he relies upon a corporations's tax returns and audited financial statements to analyze the corporation's ability to pay a penalty. Tr. at 703. He further testified that he looks for two sources of funds in his analysis: 1) internally-generated cash flow; and 2) external sources, such loans from third-party lenders and contributions of equity from stockholders. Tr. at 705-06.

Mr. Ewen explained that during the course of his analysis in this proceeding, he considered Respondent MVPT's corporate tax returns for the years 2004 through 2008, internally-generated financial statements from those same years, Respondent MVPT's responses to the Information Requests, and public records. Tr. at 737. Mr. Ewen testified that according to these documents, Respondent MVPT generated revenues between [ **CBI** ]

during its years of operation and that its [ **CBI** ] Therefore, Mr. Ewen testified, it did [ **CBI** ] Mr. Ewen further testified that at the time Respondent MVPT ceased operations, it retained a small amount of [ **CBI** ] In the supplement to the Financial Disclosure Form, Respondent Kelly explained that "MVC" is "Molidor Venture Capital," that "said debts were not resolved and are still outstanding," and that the remaining capital assets, such as several trucks and a trailer, have been vandalized, stolen, or otherwise rendered inoperable. CEX 61R, Bates 04060-61; Tr. at 741-42.

With respect to the corporate tax returns, the record contains copies of Respondent MVPT's tax returns obtained from the Internal Revenue Service ("IRS") by EPA. CEX 12; Tr. at 742. The tax returns for each year reflect that they were signed by the paid preparer and Respondent Kelly on May 5, 2009, and that the IRS stamped them as received on various days in the month of May in 2009. CEX 12, Bates 02137, 02146, 02156, 02166, 02176; Tr. at 742-43. Thus, as Complainant points out, "MVPT's tax returns for 2004 through 2009 were all stamped, signed, and submitted in May of 2009." C's Post-Hearing Brief at 97 (citing Tr. at 743). As Mr. Ewen testified:

> A: So, you know, we have the IRS returns, it's just that it's pretty clear, these were all developed, signed, and submitted in May of 2009.
>
> Q: And how does that affect the credibility or reliability of the information contained in those tax returns?
>
> A: Well, I don't know. I've never -- I don't know that I've really seen this before. But it -- it just -- to me, it sort of gets back to my earlier point of you're -- you're trying to build some confidence in the financial information, and you know, to me this is pretty clear evidence that the firm had some problems getting its tax return reporting done on time, and in to the IRS. So it's -- it is one item of concern.

Tr. at 743.

Mr. Ewen also testified concerning Respondent MVPT's purported relationship with SLRT, as depicted by the financial documents:

Q: Is there any information in here [the internal financial statements for Respondent MVPT] that indicates SLR or SLRT's relationship to MVPT?

A: Only one piece, and it's by inference.

Q: Okay.

A: There's no explicit reference to a business relationship between River Shannon and SLRT explicitly, or the extent to which MVPT was using the services of SLRT, but the one little piece that shows up here is on page 02199.

Q: And what shows up there?

A: Well, the inference here is -- if you look at this, this is profit and loss statement. And you see two columns, essentially in the reporting. There's a column of numbers underneath the title, RS Recycling, which is presumably River Shannon. Then there is a right-hand column, you'll see an expense item related to lamp processing that is allocated to the SLRT column in the amount of [ **CBI** ]

So, you know, this shows up as a kind of a -- I can't quite tell whether this is accounting for the interaction, or -- between the two, or separate lamp processing income earned by SLRT, that's being rolled up in the summation there.

Q: And what year are you looking at? What profit and loss statement for what year?

A: 2007.

Q: Is that the only time you found a reference to SLR or SLRT in MVPT's financial information?

A: Correct.

Q: And do you believe that the -- that reported lamp processing fee to SLRT is -- is Mr. Kelly's sole proprietorship?

A: I would guess that that's the -- the SLRT that he's referencing.

Q: Did Mr. Kelly report any income from that sole proprietorship on his 2007 tax return?

A: [ **CBI**
]

Q: In your opinion, are you seeing the full picture of MVPT's operations?

A: Well, I'm certainly seeing some of the picture, and I think the -- the concern I have is this uncertainty around tax return reporting, the kind of swirl of business enterprises around MVPT, and then its dissolution and the apparent continuation of similar business enterprises under newly incorporated entities. So I do worry a little bit that I'm seeing just a few trees of a broader forest.

Tr. at 746-48.

Notwithstanding this uncertainty, when asked his opinion about Respondent MPVT's ability to pay the proposed penalty, Mr. Ewen testified that he does not "**[ CBI**

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As pointed out by Complainant, Respondent Kelly opted not to question Mr. Ewen at the hearing, explaining, "I'm not going to conduct a cross-examination, Your Honor, this -- this -- the reports and the financial statements were something that I did not have day-to-day input on, so I'm going to pass on any kind of cross." Tr. at 756. Respondents argue in their Reply Briefs, however, that they submitted all of the financial information available to them with regard to their ability to pay a penalty and that this information adequately supports their claims. Rs' Reply Briefs at 29-32.

Based upon Mr. Ewen's credentials, I attribute considerable weight to his testimony and opinion concerning Respondents' ability to pay the penalty proposed in this proceeding. Undoubtedly, the deficiencies that he identified in the financial documents submitted by Respondents cast substantial doubt on the picture they paint of Respondents' financial circumstances, as argued by Complainant.[48/] Nevertheless, I find that this uncertainty may be accounted for by assessing a penalty at the top of the range that Mr. Ewen calculated for Respondent Kelly's **[ CBI** ] This amount also reasonably reflects Mr. Ewen's conclusions regarding the limited resources available to Respondents for the payment of a penalty and the

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[48/] Respondent Kelly's convictions for such criminal offenses as mail fraud and racketeering cast further doubt on the veracity and completeness of the financial information provided by Respondents.

seriousness of the established violation. An assessment of $62,000, rather than the $120,000 proposed by Complainant, is particularly appropriate given the conclusion set forth below that Complainant has met its burden of demonstrating that issuance of a compliance order is necessary, the cost of which may be significant for Respondents. For the foregoing reasons, Respondents are hereby assessed a civil penalty of $62,000 for the violations found in this proceeding.

**B. COMPLIANCE ORDER**

Section 3008(a)(1) of RCRA, provides that "whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subtitle . . . , the Administrator may issue an order . . . requiring compliance immediately or within a specified time period . . . ." 42 U.S.C. § 6928(a)(1). The EAB has observed that "[RCRA] confers *broad discretion* on the Administrator (and derivatively to his delegatees) to fashion appropriate compliance orders for RCRA violations." *Pyramid Chemical Co.*, 11 E.A.D. 657, 686 n.40 (EAB 2004)(emphasis in original)(quoting *A.Y. McDonald Indus.*, 2 E.A.D. 402, 428 (CJO 1987)(emphasis added) and citing *Arrcom, Inc.*, 2 E.A.D. 203, 210-14 (CJO 1986)).

In the present proceeding, Complainant requests the issuance of a compliance order that requires, in summary:

1) Respondents shall cease any storage and treatment of hazardous waste, including spent lamps, at the Riverdale property immediately upon the effective date of the compliance order;

2) Respondents shall arrange for the proper treatment, recycling, and/or disposal of any hazardous wastes, including spent lamps, presently at the Riverdale property at an off-site facility within 90 days of the effective date of the compliance order, and provide records demonstrating compliance to EPA within 10 days of the last shipment of hazardous waste to the off-site facility;

3) Respondents shall submit to IEPA a closure plan for the Riverdale property, in accordance with 35 IAC § 724.212, and a detailed written estimate of the cost of closure, in accordance with 35 IAC § 724.242, within 90 days of the effective date of the compliance order;

4) Respondents shall execute the closure plan upon approval by IEPA, in accordance with 35 IAC part 724, subpart G;

5) Respondents shall obtain financial assurance for the cost of closure, in accordance with 35 IAC § 724.243; submit proof of this financial assurance with the closure plan and cost

estimate for closure; and maintain the financial assurance until closure activities are deemed complete by IEPA;

6) Respondents shall obtain liability coverage for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations at the Riverdale property in amounts designated by EPA, in accordance with 35 IAC § 724.247, within 30 days of the issuance of the compliance order; submit proof of this liability coverage to IEPA within 10 days of its establishment; and maintain the coverage until closure activities are deemed complete by IEPA;

7) Respondents shall comply with the security provisions of 35 IAC § 724.114 immediately upon the effective date of the compliance order and continue to comply until closure activities are complete;

8) Respondents shall develop and follow a written schedule for inspecting equipment related to preventing, detecting, or responding to environmental or human health hazards, in accordance with 35 IAC § 724.115(b), within 30 days of the issuance of the compliance order, and continue to adhere to this schedule until closure activities are complete;

9) Respondents shall develop and implement a training program for facility personnel, in accordance with 35 IAC § 724.116, within 30 days of the issuance of the compliance order, and continue to implement the program until closure activities are complete;

10) Respondents shall develop a written contingency plan, in accordance with 35 IAC § 724.152, within 30 days of the issuance of the compliance order;

11) With respect to the Riverdale property, Respondents shall comply with all other applicable requirements set forth at 35 IAC part 722; 35 IAC part 724, subparts C, D, G, and H; and 35 IAC § 724.115;

12) Respondents shall maintain copies of any documents required by the compliance order until closure activities are complete, and submit copies of those documents to EPA within the amount of time designated by EPA; and

13) Respondents and their successors, doing business under their own or any assumed names, shall not own or operate a hazardous waste treatment, storage, or disposal facility without first obtaining a permit to do so.

Amd. Compl. ¶¶ 114-42.

Complainant presented the testimony of Mr. Brown in support of this request. Tr. at 383-99. With respect to paragraphs 115 through 118 of the proposed compliance order, which direct Respondents to cease any operations at the Riverdale property, arrange for the proper treatment and disposal of all hazardous wastes at the Riverdale property, and provide shipping records for those wastes, Mr. Brown explained that EPA believes an order prohibiting the storage and treatment of hazardous wastes at the Riverdale property is necessary because of Respondents' history of violative conduct. Tr. at 384-85. He further testified that an order requiring the proper management of any wastes remaining at the Riverdale property is necessary because of his observation of spent lamp materials in and around the property during his inspection on May 26, 2011. Tr. at 385.

Paragraphs 119 through 121 of the proposed compliance order direct Respondents to develop and implement a closure plan for the Riverdale property. Amd. Compl. ¶¶ 119-121. When questioned about the importance of these requirements, Mr. Brown explained:

> It's important to ensure that no hazardous constituents, or wastes, remain at the facility, to check to make sure that none are there. And to comply with the method that RCRA uses, to ensure that human health and the environment is not going to be impacted at a -- because a facility used to have hazardous wastes treated and stored there.

Tr. at 386. In turn, paragraphs 122 through 140 of the proposed compliance order direct Respondents to comply with standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities while Respondents implement the closure plan, including the requirements to obtain and maintain financial assurance for closure of the Riverdale property, to obtain and maintain liability coverage for sudden accidental occurrences at the Riverdale property, and to implement security measures at the Riverdale property. Amd. Compl. ¶¶ 121-140. Mr. Brown testified as to the importance of each of these requirements as well, explaining, in essence, that they are necessary to ensure the proper management and closure of the Riverdale property. Tr. at 387-96.

Finally, paragraph 142 of the proposed compliance order prohibits Respondents and their successors from owning or operating a hazardous waste treatment, storage, or disposal facility without first obtaining a permit to do so. Amd. Compl. ¶ 142. Mr. Brown testified that EPA believes that such a prohibition is necessary based upon Respondents' violations at the Riverdale property. Tr. at 396-97. He further testified that a prohibition against "operating at different locations" is necessary. Tr. at 398. While Mr. Brown did not elaborate on that statement at that point in his testimony, Complainant points

out in its Post-Hearing Brief that Respondent Kelly is currently operating a hazardous waste storage and treatment operation without a RCRA permit. C's Post-Hearing Brief at 83 (citing Tr. at 396-97). Complainant concluded, "Respondents are out of compliance with RCRA and have demonstrated not only an unwillingness to come into compliance, but also a willful intention to continue to operate out of compliance. Accordingly, a compliance order is appropriate and necessary." *Id.*

Respondents counter that they should not be required to perform closure activities at the Riverdale property because they vacated the property 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." Rs' Reply Briefs at 25 (emphasis omitted). Respondents contend that they do not own the waste allegedly remaining at the Riverdale property and that the conditions observed by Mr. Brown on May 26, 2011, are "obviously the remnants of a building completely left unattended," for which they cannot be held accountable. *Id.* at 25-26. Finally, Respondents contend that "RCRA closure is inappropriate" because Complainant's request is premised on the testimony of Mr. Brown that solid mercury could enter cracks in the floor of the building on the Riverdale property and reach the underlying soil. *Id.* at 26 (citing C's Post-Hearing Brief at 49). Respondents maintain that "[t]his line of thinking is flawed, in that the hazardous constituent in spent fluorescent lamps is mercury vapor, not solid mercury." *Id.*

Complainant's arguments in favor of issuance of a compliance order are persuasive. Mr. Brown's well-documented observations of remnants of spent lamps at the Riverdale property on May 26, 2011, demonstrate the need for an order requiring the proper disposal of these materials. In addition, as the operators of a hazardous waste storage, treatment, and disposal facility, Respondents were subject to certain requirements related to the management and closure of the Riverdale property. The purpose of RCRA would be thwarted if Respondents were able to evade their responsibility to conduct these activities merely because they vacated the Riverdale property before this enforcement action was initiated, as argued by Respondents. While Respondents may have "cleaned [the Riverdale property] 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" at the time they left the property, these activities do not necessarily discharge Respondents' duties under RCRA. Further, Respondents' contention that solid mercury is not emitted by spent fluorescent lamps has no bearing on Respondents' obligation to ensure that hazardous constituents are not present at the Riverdale property. The Riverdale property may be entirely free of such materials, but Respondents are still obligated to perform closure activities in accordance with RCRA.

Finally, as noted above, the record establishes that Respondent Kelly continues to operate a hazardous waste storage, treatment, and disposal facility without a permit despite the enforcement action pending against him. Complainant persuasively contends that a compliance order is necessary to bar this activity.

In accordance with the foregoing discussion, I find that Complainant has demonstrated by a preponderance of the evidence that the compliance order sought in the Amended Complaint is appropriate.

## VIII. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) At all times relevant to the Amended Complaint, Respondent Kelly was a person residing in the State of Illinois. Accordingly, Respondent Kelly is a "person," as that term is defined by 35 IAC § 702.110.

2) At all times relevant to the Amended Complaint, Respondent MVPT was a corporation organized under the laws of Illinois. Accordingly, Respondent MVPT is a "person," as that term is defined by 35 IAC § 702.110.

3) Between at least February of 2005 and November 14, 2007, Respondents engaged in the holding of spent lamps for temporary periods at the Riverdale property, at the end of which the spent lamps were treated, disposed of, or stored elsewhere. Accordingly, Respondent MVPT and Respondent Kelly engaged in the "storage" of spent lamps, as that term is defined by 35 IAC § 702.110.

4) Between at least February of 2005 and September 13, 2007, Respondents conducted activities at the Riverdale property designed to change the physical, chemical, or biological character of spent lamps so as to render the lamps non-hazardous, safer to dispose of, and reduced in volume. Accordingly, Respondent MVPT and Respondent Kelly engaged in the "treatment" of spent lamps, as that term is defined by 35 IAC § 702.110.

5) Following treatment, constituents of the spent lamps were either disposed of in a solid waste landfill or incinerated. Accordingly, the spent lamps constituted "solid waste," as that term is defined by 35 IAC § 721.102.

6) At least some of the spent lamps present at the Riverdale property between February of 2005 and November 14, 2007, exhibited the characteristic of toxicity for mercury when subjected to the Toxicity Characteristic Leaching Procedure. Accordingly, some of the lamps constituted "hazardous waste," as that term is defined by 35 IAC §§ 702.110, 721.103(a)(2)(A).

7) Neither Respondent MVPT nor Respondent Kelly applied for or possessed a permit to engage in the storage or treatment of hazardous waste at the Riverdale property.

8) Respondents engaged in the treatment of hazardous waste at the Riverdale property between at least February of 2005 and September 13, 2007, and the storage of hazardous waste at the Riverdale property between at least February of 2005 and November 14, 2007. Accordingly, the Riverdale property constituted a "hazardous waste management facility" between February of 2005 and November 14, 2007, as that term is defined by 35 IAC § 702.110.

9) By engaging in the unpermitted storage and treatment of hazardous waste at the Riverdale property, Respondents violated 35 IAC § 703.121(a)(1).

10) The assessment of a civil penalty in the amount of $62,000 and the issuance of a compliance order are authorized by Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

## IX. ORDER

1) Respondents Mercury Vapor Processing Technologies, Inc., and Laurence Kelly are assessed a civil administrative penalty in the amount of $62,000.

2) Payment of the full amount of this civil penalty shall be made within 30 days of the date on which this Initial Decision becomes a final order pursuant to Section 22.27(c) of the Rules of Practice, 40 C.F.R. § 22.27(c), by submitting a cashier's check or a certified check in the amount of $62,000, payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Contacts: Craig Steffen (513-487-2091)[49/]

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[49/] Alternatively, Respondents may make payment of the civil penalty by one of the methods described at the following website: http://www.epa.gov/cfo/finservices/payment_instructions.htm. Those methods are summarized below:

**WIRE TRANSFERS:**

Wire transfers should be directed to the Federal Reserve Bank of

(continued...)

3) A transmittal letter identifying the subject case and EPA docket number (RCRA-05-2010-0015), as well as Respondents' names and addresses, must accompany the check.

4) If Respondents fail to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

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[49/] (...continued)
New York:

Federal Reserve Bank of New York
ABA = 021030004
Account No. = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
(Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency")

**OVERNIGHT MAIL:**

U.S. Bank
Government Lockbox 979077
US EPA Fines & Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

Contact: (314-418-1028)

**ACH (also known as REX or remittance express):**

Automated Clearinghouse (ACH) for receiving US currency:

U.S. Treasury REX/Cashlink ACH Receiver
ABA = 051036706
Account No. = 310006, Environmental Protection Agency
CTX Format Transaction Code 22 - checking

Contact: John Schmid (202-874-7026)

**ON LINE PAYMENT:**

This payment option can be accessed as described below:

Visit http://www.pay.gov/paygov/
Enter "sfo 1.1" in the search field.
Open form and complete required fields.

5) Respondents are hereby further ordered to comply with the following Compliance Order pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a):

COMPLIANCE ORDER

6) Based on the foregoing, Respondents are hereby ordered, pursuant to the authority granted in Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and 40 C.F.R. § 22.37(b) to comply with the following requirements immediately upon this Compliance Order's effective date:

7) Respondents shall immediately cease transporting hazardous wastes, including hazardous waste lamps, from off-site sources to the Riverdale facility.

8) Respondents shall immediately cease the on-site treatment of all hazardous waste currently in storage at the Riverdale facility, including waste lamps.

9) Within 90 days of the effective date of this Compliance Order, Respondents shall arrange for the proper treatment, recycling and/or disposal of any and all hazardous wastes currently on-site at the Riverdale facility, including waste lamps, at an off-site facility permitted for the treatment, recycling and/or disposal of these wastes, in accordance with all applicable RCRA regulations.

10) Copies of all shipping records demonstrating compliance with paragraph 9, above, must be submitted to the U.S. EPA within 10 days of the last shipment of hazardous waste currently on-site at the Riverdale facility.

11) Within 90 days of the effective date of this Compliance Order, Respondents must submit a written Closure Plan for the Riverdale facility to the Administrator of the Illinois Environmental Protection Agency (IEPA), in accordance with 35 IAC § 724.212. A copy of this Compliance Order, and a letter explaining that Respondents are submitting this plan for compliance with this Compliance Order, shall accompany the Closure Plan. A copy of the Closure Plan, and all subsequent revisions, must also be submitted to the U.S. EPA, as provided in paragraph 33 below. Respondents must maintain a copy of this plan, and all subsequent revisions at the Riverdale facility until closure is completed.

12) Upon approval of the Closure Plan by IEPA, Respondents shall execute the approved Closure Plan in accordance with 35 IAC Part 724, Subpart G.

13) Respondents shall comply with all other applicable requirements at the 35 IAC Part 724, Subpart G, "Closure and Post Closure," with respect to the Riverdale facility.

14) Prior to submitting the Closure Plan, Respondents shall develop a detailed written estimate of the cost of closure, in accordance with 35 IAC § 724.242.

15) This detailed written cost estimate shall be submitted to the IEPA along with the Closure Plan required by paragraph 11 of this Compliance Order. Respondents will maintain a copy of this written cost estimate, and all subsequent revisions, at the Riverdale facility until closure is complete.

16) Respondents shall obtain financial assurance for the cost of closure in accordance with 35 IAC § 724.243, prior to submittal of the Closure Plan required by paragraph 11 of this Compliance Order.

17) Respondents shall maintain this financial assurance until the IEPA has determined that Respondents have completed the closure activities in accordance with the approved Closure Plan.

18) Proof of this financial assurance shall be submitted along with the Closure Plan and cost estimate for closure required by paragraphs 11 and 14 of this Compliance Order.

19) Within 30 days of the issuance of this Compliance Order, Respondents must obtain and maintain liability coverage for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the Riverdale facility in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs, in accordance with 35 IAC § 724.247.

20) Respondents shall maintain this liability coverage until the IEPA has determined Respondents have completed the closure activities in accordance with the approved Closure Plan.

21) Proof of this liability coverage must be submitted to the IEPA and the U.S. EPA within 10 days of its establishment.

22) Respondents shall comply with all other applicable requirements of 35 IAC Part 724, Subpart H, "Financial Requirements," with respect to the Riverdale facility.

23) Respondents shall immediately comply with the security provisions at 35 IAC § 724.114, and continue to comply with these provisions until closure of the Riverdale facility has been completed.

24) Within 30 days of the issuance of this Compliance Order, Respondents must develop and follow a written schedule for inspecting monitoring equipment, safety and emergency equipment, security devices, and operating and structural equipment that are important to preventing, detecting, or responding to environmental or human health hazards, that meets the requirements of 35 IAC § 724.115(b). Respondents shall perform inspections according to this schedule until closure of the facility is completed.

25) Within 10 days of its development, Respondents must submit a copy of this schedule to the U.S. EPA.

26) Respondents shall comply with all other applicable General Inspection Requirements at 35 IAC § 724.115.

27) Within 30 days of the issuance of this Compliance Order, Respondents shall develop and implement a training program for facility personnel that meets the requirements of 35 IAC § 724.116. Respondents will continue to implement this program until closure of the Riverdale facility is complete.

28) Respondents shall immediately comply with all applicable requirements of 35 IAC Part 724, Subpart C, "Preparedness and Prevention," including equipping the Riverdale facility with the emergency equipment required by 35 IAC § 724.132. Respondents will continue to comply with these requirements until closure of the Riverdale facility is complete.

29) Within 30 days of the issuance of this Compliance Order, Respondents shall develop a written Contingency Plan meeting the requirements of 35 IAC § 724.152. Respondents will maintain a copy of this Contingency Plan on site until closure of the facility is complete.

30) Within 10 days of its completion, Respondents shall submit a copy of the Contingency Plan to the U.S. EPA.

31) Respondents shall comply with all other applicable requirements of 35 IAC Part 724, Subpart D, "Contingency Plan and Emergency Procedures."

32) Respondents shall comply with all applicable requirements of 35 IAC Part 722, with respect to any hazardous wastes generated at, and/or shipped off-site from the Riverdale facility.

33) Respondents shall submit all reports, submissions, and notifications required by this Compliance Order to be submitted to the United States Environmental Protection Agency, Region 5, Land and Chemicals Division, RCRA Branch, Attention: Todd C.

Brown (LR-8J), 77 West Jackson Boulevard, Chicago, Illinois 60604-3590.

34) Respondents and their successors, doing business under their own or any assumed names, shall not own or operate a hazardous waste treatment, storage or disposal facility without first obtaining a permit to do so from the Illinois Environmental Protection Agency and, if required, the U.S. EPA.

## X. APPEAL RIGHTS

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 days after its service upon the parties, unless a party moves to reopen the hearing under 40 C.F.R. § 22.28, an appeal is taken to the Environmental Appeals Board within 30 days of service of this Initial Decision pursuant to 40 C.F.R. § 22.30(a), or the Board elects to review this Initial Decision, *sua sponte*, as provided by 40 C.F.R. § 22.30(b).

Barbara A. Gunning
Administrative Law Judge

Dated: December 14, 2012
Washington, D.C.

**In the Matter of *Mercury Vapor Processing Technologies, Inc., a/k/a River Shannon Recycling, and Laurence C. Kelly,* Respondent.**
**Docket No. RCRA-05-2010-0015**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **(Redacted) Initial Decision,** dated December 14, 2012, issued by Barbara A. Gunning, Administrative Law Judge, was sent on this 14th day of December 2012, in the following manner to the addressees listed below.

Mary Angeles
Legal Staff Assistant

Original and One Copy by Electronic and Pouch Mail to:

LaDawn Whitehead
Regional Hearing Clerk
U.S. EPA, Region V, MC-E-19J
77 West Jackson Blvd.,
Chicago, IL 60604-3590

Copy by Electronic and Pouch Mail to:

Jeffrey A. Cahn, Esq.
Kasey Barton, Esq.
Thomas M. Williams, Esq.
Associate Regional Counsel
ORC, U.S. EPA / Region V / C-14J
77 West Jackson Blvd.
Chicago, IL 60604-3590

Copy by Electronic, Certified Return Receipt, and Regular Mail to:

Laurence Kelly
MVP Technologies, Inc.
a/k/a River Shannon Recycling
7144 N. Harlem Ave., Ste. 303
Chicago, IL 60631

Copy by Interoffice Hand-Delivery to:

Eurika Durr
Clerk of the Board
U.S. EPA, Environmental Appeals Board
1201 Constitution Ave., NW
Mail Code 1103M
Washington, DC 20004

Dated: December 14, 2012
Washington, DC