

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of: )  
)  
Mercury Vapor Processing )  
Technologies, Inc. a/k/a River Shannon )  
Recycling )  
13605 S. Halsted )  
Riverdale, IL 60827 )  
EPA ID No: ILD005234141, and )  
)  
Laurence Kelly )  
)  
Respondents )

Docket No. RCRA-05-2010-0015

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PROTECTION AGENCY

**RESPONDENTS' RESPONSE TO USEPA OPPOSITION TO RESPONDENTS' MOTION TO DISMISS WITH PREJUDICE FOR LACK OF FAIR NOTICE AND CONVOLUTED REGULATIONS**

Respondents are seeking protection for Lack of Fair Notice based on the conflicting information and guidance provided by the USEPA regarding Illinois' Universal Waste Rule, which has set a regulatory trap into which the Respondents have fallen.

Respondents relied on USEPA guidance documents specifically directing the regulated community to the adopted Universal Waste Rule in Illinois as well as statements such as "states can modify the Universal Waste Rule and add additional Universal Wastes in individual state regulations so check with your state for the *exact* regulations that apply" (emphasis added) (Attachment A)

I. Respondents' Motion to Dismiss

Complainant indicates that Respondents are "confused about whether the Illinois Universal Waste Rules or the U.S. EPA-authorized Illinois general hazardous waste regulations applied to their crushing of waste mercury vapor lamps at the Riverdale, Illinois facility." River Shannon Recycling again emphatically denies and states that it at no point ever "crushed", "treated", "processed" or "volume reduced" any material at the Riverdale facility. River Shannon Recycling identified and received a USEPA Generator ID number (RX5), and acted as a large quantity generator and handler of Universal Waste at the Riverdale property. River Shannon employed and outsourced with a separate and distinct company authorized by the State of Illinois EPA to perform volume reduction of materials that River Shannon Recycling and other

generators handlers, in accordance with Illinois Universal Waste Rule found at 35 IAC 733. The Illinois rules allow for their vendor to perform volume reduction of Universal Waste lamps at their warehouse (RX9).

## II. Legal Standard

### A. Motion to Dismiss under 40 CFR part 22.20(a)

Respondents request this Motion to Dismiss for Failure to state claim upon which relief can be granted based on the affirmative defense of lack of fair notice created by the conflicting statements made by the US EPA.

### B. Elements of a Fair Notice Defense

Respondent argues that it did rely on published rules in Illinois found at 733 as well as exemptions for Universal Waste from RCRA found at 35 IAC 703.121 and 35 IAC 721.109, located within the context of Illinois authorized RCRA program, but also it relied heavily on published guidance by the US EPA (RX2 and Attachment A) which lead Respondent to believe that USEPA had granted apparent authority to Illinois' published Universal Waste Rules and the regulated community in Illinois was bound to abide by those rules since the effective date of August 1, 1996.

Respondents relied on USEPA guidance documents specifically directing the regulated community "states can modify the Universal Waste Rule and add additional Universal Wastes in individual state regulations so check with your state for the *exact* regulations that apply" (emphasis added) (Attachment A). Additionally, Respondents relied on USEPA guidance on their "Where you live" webpage (RX2) that directs citizens in Illinois to 35 IAC 733, constituting apparent authority for Illinois Universal Waste Rule.

The complainant contends their actions or in actions over the last 14 years has been de minimus. Respondents argue that their actions or inactions have brought about significant ramifications for the Respondents and the regulated community in Illinois in general.

1. The USEPA posts conflicting guidance on their website by stating that the Illinois Universal Waste Rule is adopted, not authorized and provides a link directly to Illinois Universal Waste Rule (RX2), constituting apparent authority to manage these wastes under that rule in the State of Illinois.

2. The USEPA's overall failure to pro-actively stop Illinois from doing just that over the past 14 years.

## III. Argument

A. Motion to Dismiss calls for the Dismissal of this Complaint for Failure to state claim upon which relief can be granted based on the affirmative defense of lack of fair notice created by the conflicting statements made by the US EPA.

B. USEPA claims alleged violations in the Complaint are the Operation of a Hazardous Waste Treatment, Storage and Disposal Facility.

Complainant now claims that Respondent is in violation of the Illinois Universal Waste Rule in addition to violations of the Authorized Hazardous Waste Regulations, which is not a count within their original complaint. The fact remains that RSR has never “processed”, “crushed”, “treated”, or “volume reduced” any materials, and Complainant again attempts to intermingle the Respondent with their outsourced ally. RSR performed a singular operation acting as a co-generator that transported and consolidated spent lamps at the Riverdale property. (Attachment B)

Further, RSR does not claim to be ignorant of requirements. RSR claims the USEPA directs the Illinois regulated community to follow IUWR, even though unauthorized, constituting apparent authority for Illinois Universal Waste Rule.

RSR did not volume reduce Universal Waste, did not have the wherewithal to volume reduce and did not have the authority to volume reduce from the state. The Riverdale warehouse was not a destination facility; it was a consolidation point for Universal Waste.

RSR, acting as a large quantity generator, supplied containers to various small quantity generators, and once notified, RSR would transport volumes of spent lamps from small quantity generators to its USEPA identified generator location in Riverdale, IL, ILD005234141. Acting as a large quantity co-generator, RSR from time to time would then request that its’ Illinois authorized volume reduction ally would perform its authorized service in a safe manner at the Riverdale facility. At all times during the course of this process RSR maintained title to these spent materials staged at its’ warehouse. During the course of the volume reduction of the materials, the materials were staged in a lined and covered container pending further disposition. Subsequent to the safe staging of the volume reduced materials, the mobile equipment was demobilized and exited the Riverdale property. RSR did not perform any component separation. RSR then shopped known markets at permitted facilities that had the ability and proper permitting to separate this material and could utilize this material for reuse. If the markets were not present, for the purpose of eliminating potential speculative accumulation, RSR would move the non-hazardous mixed glass and metals to a special waste landfill that accepted RSR’s profiled non-hazardous waste (RX11). Throughout the entire course of this operation, RSR acted as a large quantity co-generator and maintained title throughout the various stages as described above.

“Respondents’ argument boils down to being ignorant of the fact that the US EPA can enforce an authorized state RCRA Program...” Respondents are not ignorant of the fact that the U.S. EPA

can enforce an authorized state RCRA program where a party violates provisions of that program. Respondents are ignorant of the fact that the USEPA can and would create a regulatory trap by directing citizens to one set of regulations, constituting apparent authority for said regulations, and then bring enforcement action for following the regulations to which they direct.

Respondents disagree with “questions about how U.S. EPA might exercise its enforcement discretion regarding handlers of hazardous waste lamps in Illinois need not be answered or addressed here”. RSR, acting as the generator / handler of spent lamps at this location had a responsibility to safely manage these lamps through the course of the acquiring, taking title to, transporting and consolidating the Universal Waste lamps in question. Respondents relied on a document issued by the IEPA to their ally allowing that company to volume reduce materials at various generator locations. RSR never “treated”, “processed”, “crushed” or “volume reduced” any Universal Waste lamps. To define the RSR warehouse as a destination facility is inaccurate and distorted. The USEPA again intertwines the Respondent with their ally to create the illusion of a destination facility.

C. The Evidence Offered by the Respondent is Sufficient to Establish a Fair Notice Defense.

The guidance offered by the USEPA is contradictory to their regulatory position.

1. The USEPA offers guidance that contradicts their Regulatory Interpretation.

a. US EPA website demonstrates a contradiction to the US EPA’s legal position in this complaint.

When seeking guidance at a federal level, citizens in Illinois are referred to the Illinois Universal Waste Rule, constituting apparent authority for the Illinois Universal regardless of its adopted or authorized status, which is clearly in contradiction to the USEPA’s position in this Complaint (RX2).

RSR argues that the printed statements made at the USEPA web site are consistent with other matter of fact statements that lead anyone looking for guidance at the USEPA web site to believe that whether a state has adopted or been authorized, published state rule should be adhered to. The lack of contradiction to Illinois Universal Waste Rule lends credibility to apparent authority the USEPA has given to Illinois’ Universal Waste Rule. The lack of public contradiction to managing Universal Waste as such in Illinois is exactly why this compliance issue has surfaced in front of the courts today. The continuous use of the words Authorized and Adopted throughout published USEPA documents without defining the difference or the ramifications has lead not just the Respondents but most of the regulated community in the State of Illinois to believe that these two words are synonymous with one another with only one important and very clear and distinct difference and that is according to the USEPA, states that have Adopted the UW rule may have added additional waste materials to the UW rule (Attachment A). There is

absolutely no mention anywhere that the State of Illinois has duly promulgated a UW rule but must be federally authorized before the rule can be implemented.

“The federal universal waste regulations are set forth in [40 CFR part 273](#). States can modify the universal waste rule and add additional universal waste(s) in individual state regulations so [check with your state](#) for the *exact regulations* that apply.” (emphasis added) (Attachment A)

The above statement is contradictory to this Complaint, because according to the USEPA’s Compliant, if the state is not fully authorized but simply has adopted the Universal Waste Rule, the Universal Waste Rule as published in that state is not applicable and the regulated community must follow the more stringent and authorized Subtle “C” RCRA rule that the state is in fact authorized to manage. To direct citizens to check with their state implies the state has the authority to manage these wastes under their program.

Respondents argue to the contrary that the web sites provided as guidance only adds to the apparent authorization of the State of Illinois by not definitively defining the absolute 180 degree difference between Adopted and Authorized as the USEPA has attempted to state in this opposing motion but in fact lends credence to the regulated community belief that Illinois not only had the authority to manage their published rule but has been managing their rule for well of ten years now with the full knowledge of the USEPA.

Respondents argue that not only has the US EPA not made any attempt to clarify the confusing guidance one receives when looking for direction on the US EPA’s websites it is reasonable to assume that the US EPA has knowingly allowed Illinois to manage their published UW rule since August 1, 1996 pending the resolution of some other legislative glitch having nothing to do with their application for authorization (Westifer Affidavit). To use the phrase a “minor potential ambiguity” not only acknowledges that they agree their guidance is flawed but it has caused the regulated community in Illinois to apparently mismanage their Universal Waste, what appears now to be Hazardous Waste, creating significant potential sudden and non-sudden generator liability that may take years to quantify.

The message that has been sent or the lack thereof to the regulated community in Illinois and the IEPA simply lends itself to what is termed as Apparent Authority by reason of the lack of a clear and distinct definition found nowhere on any guidance documents offered up by the USEPA as to the subtle but very significant difference between a state that has Adopted a rule or has been fully Authorized. Their reference to the attached Chart (RX2) further confuses the issue because although certain states are authorized on that chart there are also certain states that have adopted the rule. But there are also states on that chart that the USEPA states as a matter of fact that they must adhere to the USEPA published rules and in fact are managed by the USEPA. However the only definitive statement made pertaining to states that have adopted the rule is these states may have added additional waste streams to their rule so check with your individual state for further guidance (Attachment A). Although these states appear on the chart as Adopted this statement

made on the USEPA's published chart clearly implies adopted states have received some sort of Apparent Authority. That combined with the fact that Illinois has specific personnel that the regulated community must report to on a quarterly basis when managing UW in Illinois has sent a very distorted and confusing message to the regulated community of the State of Illinois.

b. Respondents relied on guidance from their state at the direction of the USEPA to do so.

The USEPA contends that RSR argues that for the purpose of federal compliance Respondents are quoting State published guidelines. In fact, Respondents contend that they followed published state guidelines at the behest and direction of the USEPA to do so, and the inaction of the USEPA for over 10 years to step in and stop the state from managing this rule sent a message of Apparent Authority to the regulated community in Illinois. The USEPA's presumption that RSR is attempting to use the IEPA UW rule as a shield is wrong. RSR followed USEPA guidance and direction to follow the IEPA UW rule.

Again, the USEPA attempts to combine two separate and distinct companies to create the illusion of a destination facility. The respondents have never admitted to acts that in anyway violate published UW rules in the State of Illinois.

RSR takes exception to the USEPA's misleading use of the word **Promulgated**, again another attempt to minimize where the Illinois rule has been and is today. The Illinois rule is in fact beyond a stage of making a public declaration nor was it in stage of making it known. Illinois published, Adopted with a specific assigned number to its rule and applied for final authorization with the USEPA 14 years ago. By reason of Region 5's own Liaison Mr. Westifer, the initial application was apparently rejected for reasons to do with other legislative glitches not the UW aspect of the application. (Westifer Affidavit)

Respondents do not claim that Illinois has misinterpreted federal regulations. Respondents contend that the USEPA has knowingly allowed Illinois to manage this type of waste as Universal Waste since 2000, directs citizens in Illinois to follow the Illinois Universal Waste Regulations and their inaction in stopping these wastes from being managed as such in addition to guiding constituents in Illinois to the Illinois Universal Waste rule constitutes apparent authority for the Illinois Universal Waste rule.

Respondents in their motion to dismiss make no claim that the USEPA has no jurisdiction to pursue this case. Rather, Respondents claim that they operated within the published regulations in their state, regulations which the USEPA was fully aware of and regulations which the USEPA directs citizens in Illinois to follow, despite the adopted but not yet authorized status.

c. Respondents present communications with the US EPA as further demonstration to their significant efforts to clarify applicable regulations.

Through ongoing efforts to receive clarification to the applicable regulations, Respondents at many times contacted appropriate representatives from the US EPA to receive clarification on applicable regulations, only to receive conflicting opinions, consistent with the conflicting guidance documents available.

2. The USEPA offers ambiguous guidance regarding the status of Illinois' Universal Waste Rule.

The use of the term adopted without defining the abilities of an adopted regulation is ambiguous.

“The map shows the states that have universal waste regulations and which of those states have added different waste categories (in green).” The map key denotes the green colored states as adopted. (RX2)

“Note, states do not have to include all of the federal universal wastes when the states adopt the rule (For example Maine and Washington did not include pesticides and North Dakota did not include thermostats).” (RX2)

“Like in most federal environmental legislation, EPA encourages states to develop and run their own hazardous waste programs as an alternative to direct EPA management.

- State adoption of the 1995 universal waste rule is optional because the rule is less stringent than the previous requirements under RCRA
- States can create different standards (except for batteries due to the [Battery Act \(PDF\)](#) (9 pp, 134 KB) , but they have to be equivalent to the federal regulations (i.e., they must provide equivalent protection, cannot regulate fewer handlers, etc.)
- States may adopt the entire rule or certain provisions, which are:
  - General provisions
  - Provisions for batteries, pesticides, mercury-containing equipment, and lamps (states do not have to include all of them)
  - Provisions allowing the addition of new universal wastes in states

The universal waste rule went into effect immediately in states and territories that are not RCRA-authorized including Iowa, Alaska, and Puerto Rico. State adoption of the 1995 universal wastes rule as well as subsequent federal universal wastes (e.g., lamps, mercury-containing equipment) are strongly encouraged.” (RX2)

The utilization of these types of statements creates significant ambiguity in the meaning of adopted and the allowances for a state that maintains an adopted status.

#### IV. Conclusion

In conclusion based on the above stated facts and the historical conflicting guidance offered by the USEPA, there is sufficient evidence to demonstrate that by the USEPA's actions or inactions

they have given the IEPA Apparent Authority and the created lack of Fair Notice which has set a regulatory trap into which the Respondents and the regulatory community in Illinois has fallen.

Respectfully Submitted,



Laurence C. Kelly

7/4/11

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CERTIFICATE OF SERVICE

I certify that the foregoing Respondents' Response to USEPA Opposition to Respondents' Motion to Dismiss with Prejudice for Lack of Fair Notice and Convoluted Regulations, dated July 4, 2011, was sent by fax this day in the following manner to the addressees listed below:

Original by Certified Mail to: Regional Hearing Clerk  
U.S. EPA - Region 5  
77 W. Jackson Blvd.  
Mail Code: E-19J  
Chicago, IL 60604

Copy by Fax and Certified Mail to: Jeffery Cahn  
Associate Regional Counsel  
US Environmental Protection Agency - Region 5  
77 W. Jackson Blvd.  
Mail Code: C-14J  
Chicago, IL 60604

The Honorable Judge Gunning  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Mail Code 1900L  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

  
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Suite 303  
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# **Attachment # A**

<http://www.epa.gov/osw/hazard/wastetypes/universal/index.htm>

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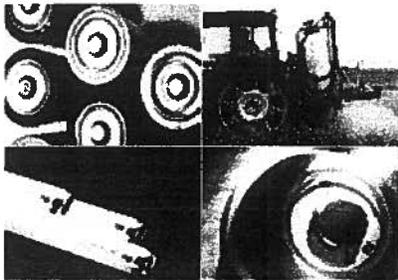
Wastes - Hazardous Waste - Universal Wastes

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- [Waste Types](#)
- [Universal Wastes](#)

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## Universal Wastes



### Kinds of Universal Waste

- [Batteries](#)
- [Pesticides](#)
- [Mercury-Containing Equipment](#)
- [Bulbs \(Lamps\)](#)

### Proposed Addition to Universal Waste Rule

EPA has [proposed adding hazardous pharmaceutical waste](#) to the Universal Waste rule.

## Related Link

### Frequent Questions

EPA's universal waste regulations streamline hazardous waste management standards for federally designated "universal wastes," which include:

- batteries
- pesticides
- mercury-containing equipment and
- bulbs (lamps)

The regulations govern the collection and management of these widely generated wastes, thus facilitating environmentally sound collection and proper recycling or treatment.

These regulations also ease the regulatory burden on retail stores and others that wish to collect these wastes and encourage the development of municipal and commercial programs to reduce the quantity of these wastes going to municipal solid waste landfills or combustors. In addition, the regulations also ensure that the wastes subject to this system will go to appropriate treatment or recycling facilities pursuant to the full hazardous waste regulatory controls.

The federal universal waste regulations are set forth in 40 CFR part 273. **States can modify the universal waste rule and add additional universal waste(s) in individual state regulations so check with your state for the exact regulations that apply.**

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Last updated on Friday, October 01, 2010

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# **Attachment # B**

## CALL CENTER QUESTIONS & ANSWERS

### RCRA

#### 1. Contractors as Cogenerators of Universal Waste Lamps

*An elementary school is in the process of remodeling and is replacing its light fixtures with more energy-efficient lamps. This process will generate more than 5,000 kg of spent hazardous waste lamps that will be subject to the universal waste management standards in 40 CFR Part 273. If the school hires a contractor to remove the spent hazardous lamps, who is required to comply with the universal waste standards in Part 273?*

Both the school and the contractor will be subject to the universal waste handler standards in Part 273 because they would both be considered universal waste handlers. A universal waste handler is defined as a generator of universal waste or the owner or operator of a facility that receives universal waste from other universal waste handlers (§273.9). A generator is any person, by site, whose act or process produces hazardous waste or whose act first causes a hazardous waste to become subject to regulation (§273.9). In this case, the school used the lamps and made the determination to discard them and is thus a generator. The contractor that actually removes the universal waste lamps from service is considered a handler and generator of the waste making the school and the contractor cogenerators (64 FR 36466, 36474; July 6, 1999). As cogenerators, both the school and the contractor will be jointly and severally liable as universal waste handlers. 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 (45 FR 72024, 72026;

October 30, 1980). The generator duties in this case are those required of a large quantity handler of universal waste in Part 273, Subpart C, which apply to universal waste handlers accumulating 5,000 kilograms or more universal waste at any time (§273.9).