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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
Mercury Vapor Processing) DOCKET NO. RCRA-05-2010-0015
Technologies Inc., a/k/a/ River Shannon)
Recycling)
13605 S. Halsted)
Riverdale, Illinois 60827)
U.S. EPA ID No.: ILD005234141,)
)
Respondent)
_____)

**MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION
FOR LEAVE TO AMEND THE COMPLAINT AND COMPLIANCE ORDER**

BUSINESS CONFIDENTIALITY ASSERTED

**Information claimed confidential has been deleted. A complete copy of this document,
containing the information claimed confidential, has been filed with the
Regional Hearing Clerk**

Complainant, the Director of the Land and Chemicals Division, United States
Environmental Protection Agency, Region 5 (Complainant or U.S. EPA), pursuant to 40 C.F.R.
§§ 22.16 and 22.14(c) of the *Consolidated Rules of Practice Governing the Administrative
Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*
(Consolidated Rules or Rules), offers this Memorandum in Support of its Motion for Leave to
Amend its Complaint and Compliance Order in order to: (1) add Laurence C. Kelly (also known
as Larry Kelly) as a Respondent in this matter; and (2) change the regulatory definitions that cite
to 35 IAC § 720.110, which are found at paragraphs 10, 15, 16, 17, 18, 20, 70, 71, 72, 87, 89,

105, and 107 of the proposed Amended Complaint, to cite the regulatory definitions found at 35 IAC § 702.110.

I. BACKGROUND

On April 23, 2010, Complainant issued a Complaint and Compliance Order (Complaint) in the above-referenced matter to Mercury Vapor Processing Technologies, Inc. d/b/a River Shannon Recycling (MVPT/RSR) for alleged violations of the U.S. EPA-authorized Illinois RCRA program. Specifically, Complainant alleges that MVPT/RSR stored and treated spent mercury-containing lamps (waste lamps), which are hazardous wastes, without a permit in violation of 35 IAC § 703.121(a)(1). Complainant's allegations are based on information gathered during an October 30, 2007 inspection of a facility that MVPT/RSR operated (the Riverdale facility), subsequent sampling and analysis of wastes held at the facility, and MVPT/RSR's responses to three information requests sent by Complainant pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927.

Respondent submitted its prehearing exchange as required by 40 C.F.R. § 22.19 and the Presiding Officer's June 15, 2010 Order on October 19, 2010. In its "Statement Regarding Compliance and Penalty" and its "Responses to Administrative Complaint and Compliance Order," Respondent asserts that MVPT/RSR would pick up waste lamps from third-party locations, transport the waste lamps to the Riverdale facility, and then contact a different company known as Shannon Lamp Recycling or SLR. SLR, purportedly a sole proprietorship owned and operated by Mr. Laurence Kelly, would then come to the facility and crush the waste lamps. MVPT/RSR would attempt to resell the crushed waste lamps or send them to a non-hazardous waste landfill. Respondent's "Statement Regarding Compliance and Penalty" states that "... acting as *sole proprietor* of SLR, Mr. Kelly would safely conduct the volume reduction

activities for MVP/RSR.” (Emphasis added). Additionally, paragraph 66 of Respondent’s “Responses to Administrative Complaint and Compliance Order” states “SLR is and was *solely owned* by one of MVP/RSR’s principals known as Larry Kelly.” (Emphasis added).

Additional information MVPT/RSR has provided supports the inclusion of Mr. Kelly as a Respondent. For example, Respondent admits in its June 3, 2008 response that Mr. Laurence Kelly **[information relating to individual responsibilities redacted]**. Mr. Kelly was the Vice President and **[information relating to individual responsibilities redacted]** of MVPT/RSR, the Health and Safety Officer for MVPT/RSR, and **[information relating to individual responsibilities redacted]**. Mr. Kelly **[information relating to individual responsibilities redacted]**. See Response to Question 3, CX 5.

With respect to the proposed amendment to regulatory citations, the original Complaint filed in this matter cites to certain regulatory definitions found at 35 IAC § 720.110. However, these definitions apply, in part, to 35 IAC § 733, the Illinois Standards for Universal Waste Management, which have not been authorized by U.S. EPA. Complainant respectfully asks for leave to amend in order to change the definitions cited in paragraphs 14, 15, 17, 55, 56, 57, 72, and 74 to 35 IAC § 702.110, which contains the definitions applicable to this action because it was brought under 35 IAC § 703.121(a)(1).

II. LEGAL STANDARD

The Consolidated Rules provide that a complaint may be amended after the answer has been filed upon motion granted by the Presiding Officer. 40 C.F.R. § 22.14(c). “While no standard is provided in the Rules for determining whether to grant an amendment, the general rule is that administrative pleadings are ‘liberally construed and easily amended.’” *In re Scranton Prods., Inc., et al.*, Docket No. CAA-03-2008-0004, 2008 EPA ALJ LEXIS 16, at *2, (Chief

ALJ, April 3, 2006) (quoting *In re Port of Oakland and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 205 (EAB 1992)). “The FRCP [Federal Rules of Civil Procedure] adopts a liberal stance toward amending pleadings, stating that leave to amend ‘shall be freely given when justice so requires.’” *In re FRM Chem, Inc., et al.*, Docket No. FIFRA-07-2008-0035, 2010 EPA ALJ LEXIS 12, at *5-6 (EPA ALJ, May 27, 2010), citing Fed. R. Civ. P. 15(a). In considering a motion to amend under FRCP Rule 15(a), the Supreme Court has held that absent a showing that the proposed amendment is brought in bad faith or for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile, leave to amend should be granted. *Id.* at *7 (citing *Foman v. Davis*, 371 U.S. 178, 181-182 (1962)). Similarly, the Environmental Appeals Board (EAB) has found that a complainant should be given leave to freely amend a complaint in EPA proceedings in accordance with the liberal policy of FRCP 15(a), as it promotes accurate decisions on the merits of each case. *Id.* (citing *In re Abestos Specialists, Inc.*, 4 E.A.D. 819, 830 (EAB 1993); *In re Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. at 205).

III. DISCUSSION

Justice requires that Complainant’s Motion for Leave to Amend be granted in order to facilitate an accurate decision on the merits of this case. The prehearing exchange submitted in this matter contains information that establishes Mr. Laurence Kelly’s personal liability for storing and treating hazardous waste without a permit as: (1) a sole proprietor; and (2) the operator of a facility.

- A. Complainant’s Motion will not cause the opposing party undue prejudice and will not result in undue delay of this proceeding.

As stated in the ALJ’s opinion in *In re FRM Chem, Inc.*, the EAB has observed that a court’s primary concern in reviewing a claim of undue delay is whether the delay in amending

the complaint would unduly prejudice the opposing party. 2010 EPA ALJ LEXIS 12 at *10 (referencing *In re Carroll Oil Co.*, 10 EAD 635, 650 (EAB 2002); *In re Zaclon, Inc., et al.*, Docket No. RCRA-05-2004-0019 2006 EPA ALJ LEXIS 19, *10 (Chief ALJ, April 21, 2006)). “The EAB has observed that ‘[p]rejudice is usually manifested by a lack of opportunity to respond or need for additional pre-hearing fact-finding and preparation that cannot be readily accommodated.’” *Id.*

The proposed additional party to this action will not suffer undue delay or undue prejudice if Complainant’s Motion for Leave to Amend the Complaint to add Mr. Laurence Kelly as a Respondent in this matter is granted. Mr. Kelly will not suffer undue prejudice because the proposed allegations against Mr. Kelly are the same violations that Complainant alleged against MVPT/RSR and are based on the same underlying facts. Mr. Kelly is the principal of MVPT/RSR and is representing MVPT/RSR, and therefore he is intimately familiar with the facts constituting the violations alleged in this matter. In fact, it is Mr. Kelly who now argues that he crushed waste lamps as the sole proprietor of a purportedly different company called SLR. Complainant notified Mr. Kelly of its intention to file a motion to amend the Complaint to add him personally on December 7, 2010.

The deadlines in the Prehearing Order have been met as of November 12, 2010 and the hearing in this matter is over two months in the future. The information supporting the proposed amendment was supplied in part by the Respondent in its prehearing exchange. The proceedings have not progressed to such an advanced stage where inclusion of an additional Respondent might work a hardship on either the present opposing party or the proposed additional party.

Additionally, amending the Complaint to add Mr. Laurence Kelly will serve the interests of judicial economy because the alternative is for Complainant to file a separate complaint

against him and adjudicate two separate cases that involve the same facts and allegations as the present matter.

Amending the Complaint to change the definitions from 35 IAC § 720.110 to 35 IAC § 702.110 does not cause any undue prejudice to the Respondent. Changing the citations of the definitions does not make substantive changes to the Complaint. The definitions of the regulatory terms at 35 IAC § 720.110 are either exactly the same as, or reflect no substantive changes from, the definitions found at 35 IAC § 702.110. Changing the citations to the applicable definitions does not change any elements of Complainant's prima facie case, and the underlying alleged violations remain the same.

Granting Complainant's Motion for Leave to Amend the Complaint to include Mr. Laurence Kelly will not result in undue delay or prejudice because the allegations against MVPT/RSR and Mr. Laurence Kelly all arise from a common nucleus of operative facts and involve exactly the same allegedly unlawful actions, which are the storing and crushing of waste lamps without a permit.

- B. Complainant's Motion was made in good faith, will serve to promote justice, and is not futile.

If there is a colorable basis for the proposed amendment, it is not futile. *Zaclon, Inc.* 2006 EPA ALJ at *17. Complainant's Motion for Leave to Amend is made based on information submitted as part of Respondent's prehearing exchange taken together with responses to information requests.

1. Liability of Laurence Kelly as a sole proprietor operating a hazardous waste treatment facility without a permit.

Liability under RCRA extends to any "person" in violation of its provisions and implementing regulations. 42 U.S.C. § 6902(b). 35 IAC § 703.121(a)(1) provides that no person

may conduct any hazardous waste storage, hazardous waste treatment or hazardous waste disposal operation without a RCRA permit. Under 35 IAC § 702.110, “person” means “any individual, partnership . . . firm, company, corporation . . . or any other legal entity.” A sole proprietorship has no legal identity apart from the person who owns it. *Moriarty v. Svec*, 164 F.3d 323, 335 (7th Cir. 1998). An individual operating a sole proprietorship is personally responsible for the debts of the proprietorship. *Packard Bell Elec. Corp. v. Ets-Hokin*, 509 F.2d 634, 637 (7th Cir. 1975). As Mr. Kelly now argues, he acted as a sole proprietor doing business under the alias “SLR” and he crushed waste lamps for MVPT/RSR at the Riverdale facility. Therefore, Laurence Kelly is personally liable for conducting hazardous waste treatment without a permit.

2. Liability of Laurence Kelly for treating and storing hazardous waste without a permit as an operator of MVPT/RSR.

35 IAC § 703.121(a)(1) applies to any individual that conducts a hazardous waste storage, treatment, or disposal operation without a RCRA permit. See Part B.1. An individual cannot shield himself from liability for operating a hazardous waste facility merely by being an officer or shareholder of a corporation that also operates the facility. *Browning-Ferris Indus., Inc., et al. v. Richard Ter Maat et al.*, 195 F.3d 953, 955 (7th Cir. 1999). “The EAB has affirmed an ALJ’s holding that “a corporate officer may be held liable in civil as well as criminal actions, for wrongful acts of the corporation in which he participated.” *In re Roger Antikiewicz & Pest Elimination Prods. Of Am.*, 8 E.A.D. 218, 230 (EAB 1999); *see also U.S. v. NE Pharma. & Chem. Co., Inc.* 810 F.2d 726 (8th Cir. 1986) (holding that a corporate officer can be individually liable if they were “personally involved in or directly responsible for corporate acts in violation of RCRA”).

Mr. Kelly is liable as an operator of an unpermitted hazardous waste storage and treatment facility. Mr. Laurence Kelly is the Vice President **[information relating to individual responsibilities redacted]** of MVPT/RSR. By his own admission, Mr. Kelly **[information relating to individual responsibilities redacted]**. Regardless of whether Mr. Kelly was operating as a sole proprietor of a different company or as the Vice President/**[information relating to individual responsibilities redacted]** of MVPT/RSR, Mr. Kelly received waste lamps, crushed waste lamps, **[information relating to individual responsibilities redacted]**. Mr. Kelly, therefore, is directly liable for those actions.

3. Asking for leave to Amend to change some of the cited definitions is made in good faith.

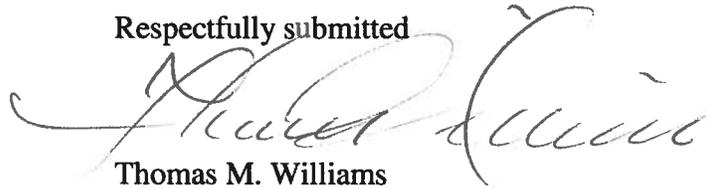
Complainant's definitions cited in the Complaint apply to regulations that have not been authorized by EPA . No substantive changes will result if the Presiding Officer grants the proposed changes to the definition citations.

III. CONCLUSION

Based on the foregoing, Complainant's Motion for Leave to Amend should be granted. The allegations against Mr. Laurence Kelly and MVPT/RSR all arise from his illegal hazardous waste treatment and storage of hazardous waste. Adding Mr. Laurence Kelly as a respondent in this matter will allow for proper and quick judicial resolution on the merits of this case.

A copy of the proposed Amended Complaint is attached to this Memorandum.

Respectfully submitted

A handwritten signature in cursive script, appearing to read "Thomas M. Williams".

Thomas M. Williams
Associate Regional Counsel
Kasey Barton
Assistant Regional Counsel
U. S. Environmental Protection Agency,
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

ATTACHMENT

PROPOSED AMENDED COMPLAINT

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)
) **DOCKET NO. RCRA-05-2010-0015**
Mercury Vapor Processing)
Technologies Inc., a/k/a/ River Shannon)
Recycling, and Laurence C. Kelly)
13605 S. Halsted)
Riverdale, Illinois 60827)
U.S. EPA ID No.: ILD005234141,)
)
Respondents)
_____)

Proposed Amended Complaint and Compliance Order

Preliminary Statement and Jurisdiction

BUSINESS CONFIDENTIALITY ASSERTED

Information claimed confidential has been deleted. A complete copy of this document, containing the information claimed confidential, has been filed with the

Regional Hearing Clerk

1. This is a civil administrative action instituted under Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. § 6928(a). RCRA was amended in 1984 by the Hazardous and Solid Waste Amendments of 1984 (HSWA).

2. The Complainant is, by lawful delegation, the Director, Land and Chemicals Division, Region 5, United States Environmental Protection Agency (U.S. EPA).

3. U.S. EPA has provided notice of commencement of this action to the State of Illinois pursuant to Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2).

4. Jurisdiction for this action is conferred upon U.S. EPA by Sections 2002(a)(1), 3006(b) and 3008 of RCRA; 42 U.S.C. §§ 6912(a)(1), 6926(b) and 6928.

5. Mercury Vapor Processing Technologies, Incorporated, also known as River Shannon Recycling (MVPT/RSR), is a Respondent in this matter and is a business corporation doing, or that has done, business in the State of Illinois.

6. Laurence C. Kelly, also known as Larry Kelly, is a Respondent in this matter and is a person operating, or who has operated, a hazardous waste storage and treatment facility in the State of Illinois.

Statutory and Regulatory Background

7. Pursuant to Sections 3002, 3003, and 3004 of RCRA, 42 U.S.C. §§ 6922, 6923, and 6924, U.S. EPA has promulgated regulations, codified at 40 C.F.R. Parts 260 through 279, governing generators and transporters of hazardous waste and facilities that treat, store and dispose of hazardous waste.

8. Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, the Administrator of U.S. EPA may authorize a state to administer the RCRA hazardous waste program in lieu of the federal program when the Administrator finds that the state program meets certain conditions.

9. Any violation of regulations promulgated pursuant to Subtitle C (Sections 3001-3023 of RCRA, 42 U.S.C. §§ 6921-6939(e)) or of any state provision authorized pursuant to Section 3006 of RCRA, constitutes a violation of RCRA, subject to the

assessment of civil penalties and issuance of compliance orders as provided in Section 3008 of RCRA, 42 U.S.C. § 6928.

10. Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), the Administrator of U.S. EPA granted the State of Illinois final authorization to administer a state hazardous waste program in lieu of the federal government's base RCRA program effective January 31, 1986. 51 Fed. Reg. 3778 (January 31, 1986). The U.S. EPA-authorized Illinois RCRA permit regulations are codified at 35 Illinois Administrative Code (IAC) Part 702 *et seq.* See also 40 C.F.R. § 272.700 *et seq.*

11. At all times relevant to this Complaint and Compliance Order, the Administrator had not granted final authorization to Illinois to administer the Universal Waste regulations at 40 C.F.R. Part 273.

12. In the absence of state authorization for the Universal Waste program, the authorized Subtitle C requirements apply to the treatment, storage and disposal of hazardous waste batteries, mercury-containing equipment, pesticides and lamps in Illinois.

13. Under Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), U.S. EPA may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified period of time, or both.

14. The Administrator of U.S. EPA may assess a civil penalty of up to \$25,000 per day for each violation of Subtitle C of RCRA according to Section 3008 of RCRA, 42 U.S.C. § 6928. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, required U.S. EPA to adjust its penalties for inflation on a periodic basis. Pursuant to the Civil

Monetary Penalty Inflation Adjustment Rule, published at 40 C.F.R. Part 19, U.S. EPA may assess a civil penalty of up to \$32,500 per day for each violation of Subtitle C of RCRA that occurred after March 15, 2004 through January 12, 2009, and may assess a civil penalty of up to \$37,500 per day for each violation of Subtitle C of RCRA that occurred after January 12, 2009.

General Allegations

15. MVPT/RSR was at all times relevant to this Complaint and Compliance Order a “person” as defined by 35 IAC § 702.110 and Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

16. Mr. Larry Kelly was at all times relevant to this Complaint and Compliance Order a “person” as defined by 35 IAC § 702.110 and Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

17. MVPT/RSR was at all times relevant to this Complaint and Compliance Order an “operator,” as defined by 35 IAC § 702.110 and 40 C.F.R. § 260.10, of a facility located at 13605 S. Halsted Street in Riverdale, Illinois (the “Riverdale facility”).

18. Mr. Larry Kelly was at all times relevant to this Complaint and Compliance Order an “operator,” as defined by 35 IAC § 702.110 and 40 C.F.R. § 260.10 of the Riverdale facility.

19. The Riverdale facility consisted of land and structures, and other improvements on the land, used for treating and storing hazardous waste.

20. The Riverdale facility is a “facility” as that term is defined under 35 IAC § 702.110 and 40 C.F.R. § 260.10.

21. Representatives of U.S. EPA conducted a compliance evaluation inspection (“CEI”) under Section 3007 of RCRA, 42 U.S.C. § 6927, at the Riverdale facility on October 30, 2007.

22. During the CEI, U.S. EPA’s inspector observed cardboard boxes, drums, two roll-off containers and three semi-truck trailers containing waste lamps at or adjacent to the Riverdale facility.

23. At least thirty-three of the boxes of waste lamps referred to in paragraph 22, above, were open and unlabelled.

24. On November 5, 2007, May 20, 2008 and October 3, 2008, U.S. EPA issued to MVPT/RSR Requests for Information under Section 3007 of RCRA, 42 U.S.C. § 6927.

25. MVPT/RSR submitted responses to U.S. EPA’s Requests for Information on or about November 26, 2007, June 3, 2008 and October 20, 2008.

26. Pursuant to 40 C.F.R. § 22.19 and the Presiding Officer’s Initial Order, Complainant and MVPT/RSR completed a prehearing exchange on November 10, 2010.

27. According to MVPT/RSR, it began operating at the Riverdale facility in February 2005.

28. According to MVPT/RSR, Mr. Larry Kelly was its vice president, health and safety officer, and **[information relating to individual responsibilities redacted]** at the Riverdale facility.

29. According to MVPT/RSR, it has operated what it has identified as a “mobile treatment unit.”

30. According to MVPT/RSR, Larry Kelly has operated the “mobile treatment unit.”

31. According to MVPT/RSR, the “mobile treatment unit” crushed waste lamps, and mercury vapor released from the crushing was captured by a series of activated carbon filters in the form of mercuric sulfide.

32. At various times, including the period between February 2005 and October 30, 2007, MVPT/RSR received waste lamps, including spent fluorescent lamps, from third parties.

33. During the period referred to in paragraph 32, above, MVPT/RSR transported waste lamps, including spent fluorescent bulbs, to the Riverdale facility for crushing.

34. During the period referred to in paragraph 32, above, MVPT/RSR held waste lamps for temporary periods at the Riverdale facility before crushing them.

35. During the period referred to in paragraph 32 above, MVPT/RSR crushed waste lamps at the Riverdale facility.

36. By crushing the waste lamps, MVPT/RSR reduced the waste lamps’ volume.

37. During the period referred to in paragraph 32, above, Larry Kelly crushed waste lamps at the Riverdale facility.

38. By crushing the waste lamps, Larry Kelly reduced the waste lamps’ volume.

39. According to MVPT/RSR, the crushing process removed mercury from the waste lamps.

40. According to MVPT/RSR, subsequent to its crushing of waste lamps, the waste glass and aluminum resulting from the crushing process were at some times disposed of at the CID landfill facility located at 138th and Calumet Expressway, in Calumet City, Illinois.

41. According to MVPT/RSR, subsequent to the crushing of waste lamps, the waste glass and aluminum resulting from the crushing process were at other times disposed of at the Land and Lakes Landfill located at 801 East 138th Street, in Dolton, Illinois.

42. According to MVPT/RSR, subsequent to the crushing of waste lamps, the spent carbon resulting from the crushing process was temporarily held at the Riverdale facility.

43. According to MVPT/RSR, the spent carbon referred to in paragraph 42, above, was temporarily held at the Riverdale facility pending disposal at the Land and Lakes Landfill located at 801 E. 138th Street, in Dolton, Illinois.

44. As part of its response to the November 5, 2007, Information Request, MVPT/RSR provided bills of lading purporting to document the number of waste lamps it received for crushing at the Riverdale facility.

45. MVPT/RSR has claimed that the bills of lading referred to in paragraph 44, above, and the information contained therein, should not be made public for reasons of business confidentiality.

46. Pursuant to 40 C.F.R. Part 2, Subpart B, Complainant has requested MVPT/RSR to substantiate its claim of confidentiality. To date, MVPT/RSR has not provided a response.

47. Respondents held for temporary periods and crushed very large quantities of waste lamps at the Riverdale facility.

48. A significant percentage of the types of waste lamps MVPT/RSR crushed at the Riverdale facility exhibit the characteristic of toxicity as defined at 35 IAC § 721.124 (40 C.F.R. § 261.24), due to their exceedance of the maximum concentration for mercury.

49. A significant percentage of the types of waste lamps Mr. Larry Kelly crushed at the Riverdale facility exhibit the characteristic of toxicity as defined at 35 IAC § 721.124 (40 C.F.R. § 261.24), due to their exceedance of the maximum concentration for mercury.

50. On November 14, 2007, Complainant collected samples of waste lamps accumulated for treatment at the Riverdale facility, and subjected the waste lamp samples to the Toxicity Characteristic Leaching Procedure (TCLP) described at 35 IAC § 721.124 and 40 C.F.R. § 261.24.

51. Complainant's analysis of the sample waste lamps referred to in paragraph 50, above, confirmed that at least some of the waste lamps MVPT/RSR temporarily held for crushing at the Riverdale facility exhibited the characteristic of toxicity as defined at 35 IAC § 721.124 (40 C.F.R. § 261.24).

52. MVPT/RSR has not applied for a permit to engage in hazardous waste storage at the Riverdale facility.

53. MVPT/RSR does not have a permit to engage in hazardous waste storage at the Riverdale facility.

54. MVPT/RSR has not applied for interim status to engage in hazardous waste storage at the Riverdale facility.
55. Mr. Larry Kelly has not applied for a permit to engage in hazardous waste storage at the Riverdale facility.
56. Mr. Larry Kelly does not have a permit to engage in hazardous waste storage at the Riverdale facility.
57. Mr. Larry Kelly has not applied for interim status to engage in hazardous waste storage at the Riverdale facility.
58. MPVT/RSR has not applied for a permit to engage in hazardous waste treatment at the Riverdale facility.
59. MPVT/RSR does not have a permit to engage in hazardous waste treatment at the Riverdale facility.
60. MVPT/RSR has not applied for interim status to engage in hazardous waste treatment at the Riverdale facility.
61. Mr. Larry Kelly has not applied for a permit to engage in hazardous waste treatment at the Riverdale facility.
62. Mr. Larry Kelly does not have a permit to engage in hazardous waste treatment at the Riverdale facility.
63. Mr. Larry Kelly has not applied for interim status to engage in hazardous waste treatment at the Riverdale facility.
64. On or about March 10, 2010, MVPT/RSR was involuntarily dissolved by the State of Illinois.
65. Illinois Revised Code provides at 805 ILCS § 12.80 that:

[t]he dissolution of a corporation either (1) by filing articles of dissolution in accordance with Section 12.20 of this Act, (2) by the issuance of a certificate of dissolution in accordance with Section 12.40 of this Act, (3) by a judgment of dissolution by a circuit court of this State, or (4) by expiration of its period of duration, shall not take away nor impair any civil remedy available to or against such corporation, its directors or shareholders, for any right of claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within five years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.

Count 1

MVPT/RSR's Operation of a Hazardous Waste Storage and Treatment Facility Without a RCRA Permit

66. Complainant incorporates paragraphs 1 through 65 of this Complaint as though set forth in this paragraph.

67. 35 IAC § 721.102(a)(1) [40 C.F.R. § 261.2(a)(1)] defines “solid waste” as “... any discarded material that is not excluded by Section 721.104(a) or that is not excluded pursuant to 35 Ill. Adm. Code 720.130 and 720.131.”

68. 35 IAC § 721.102 (a)(2) [40 C.F.R. § 261.2(a)(2)] provides, in part, that discarded material “is any material that is described as ... [a]bandoned, as explained in subsection b) of this Section ...”

69. 35 IAC § 721.102(b) [40 C.F.R. § 261.2(b)] provides that a material is a solid waste “if it is abandoned in one of the following ways:

- 1) It is disposed of;
- 2) It is burned or incinerated; or
- 3) It is accumulated, stored or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.”

70. “Treatment” is defined at 35 IAC § 702.110 (40 C.F.R. § 260.10) as “any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize the waste, recover energy or material resources from the waste, or render the waste non-hazardous or less hazardous; safer to transport, store, or dispose of; or amenable for recovery, amenable for storage, or reduced in volume.”

71. “Storage” is defined at 35 IAC § 702.110 (40 C.F.R. § 260.10) 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.”

72. “Disposal” is defined at 35 IAC § 702.110 (40 C.F.R. § 260.10) as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent of the waste may enter the environment or be emitted into the air or discharged into any waters, including groundwater.”

73. 35 IAC § 721.103(a) [40 C.F.R. § 261.3(a)] provides, in part, that a solid waste, as defined in 35 IAC § 721.102 (40 C.F.R. § 261.2), is a hazardous waste “... if [i]t exhibits any of the characteristics of hazardous waste identified in Subpart C of this Part”

74. 35 IAC § 721.124 (40 C.F.R. § 261.124) provides in part that a solid waste (except manufacturing gas plant waste) exhibits the characteristic of toxicity:

... if, using Method 1311 (Toxicity Characteristic Leaching Procedure (TCLP)), in ‘Test Methods for Evaluating Solid Waste, Physical /Chemical Methods,’ USEPA Publication EPA 530-SW 846, as incorporated by reference in [35 IAC § 720.111(a)](40 C.F.R. § 260.11), the extract from a representative sample of the waste contains any of the contaminants listed in the table in subsection (b) of this

Section at the concentration equal to or greater than the respective value given in that table. ...

75. The table in 35 IAC § 721.124(b) [40 C.F.R. § 261.124(b)] establishes a maximum concentration of mercury, for purposes of the toxicity characteristic, of 0.2 mg/L.

76. By holding the waste lamps at the Riverdale facility for temporary periods before crushing and disposing of them, MVPT/RSR stored waste lamps at the Riverdale facility.

77. By crushing the waste lamps at the Riverdale facility, MVPT/RSR changed the waste lamps' physical characteristics so as to reduce their volume.

78. According to MVPT/RSR, its crushing process rendered the waste lamps non-hazardous.

79. According to MVPT/RSR, its crushing process at the Riverdale facility rendered the waste lamps safer to dispose of.

80. MVPT/RSR treated waste lamps at the Riverdale facility.

81. The crushed glass and aluminum derived from MVPT's crushing process at the Riverdale facility were disposed of at two landfills.

82. According to MVPT/RSR, the mercury released from the waste lamps through its crushing process was captured by activated carbon filters, which in turn were stored at its facility for eventual disposal in a solid waste landfill.

83. Because the lamps were stored and crushed at the Riverdale facility, before their disposal in a solid waste landfill, the lamps were abandoned.

84. The waste lamps MVPT/RSR crushed at the Riverdale facility were "solid wastes" as defined at 35 IAC § 721.102 (40 C.F.R. § 261.2).

85. At least some of the waste lamps MVPT/RSR crushed at the Riverdale facility were “hazardous wastes” within the meaning of 35 IAC § 721.103(a) [40 C.F.R. § 261.3(a)] because they exhibited the characteristic of toxicity.

86. By holding, for temporary periods before crushing them, waste lamps at the Riverdale facility, MVPT/RSR has stored waste lamps possessing the characteristic of toxicity, as defined at 35 IAC § 721.124 (40 C.F.R. § 261.24).

87. MVPT/RSR has engaged in the “storage” of hazardous waste at the Riverdale facility within the meaning of 35 IAC § 702.110 (40 C.F.R. § 260.10).

88. By crushing waste lamps at its Riverdale facility, MVPT/RSR has treated waste lamps possessing the characteristic of toxicity, as defined at 35 IAC § 721.124 (40 C.F.R. § 261.24).

89. MVPT/RSR has engaged in the “treatment” of hazardous waste at the Riverdale facility within the meaning of 35 IAC § 702.110 (40 C.F.R. § 260.10).

90. 35 IAC § 703.121(a)(1) provides that no person may conduct any hazardous waste storage, hazardous waste treatment or hazardous waste disposal operation without a RCRA permit for the hazardous waste management facility.

91. By engaging in the unpermitted storage and treatment of hazardous waste at the Riverdale facility, MVPT/RSR violated 35 IAC § 703.121(a)(1).

92. MVPT/RSR’s violation of 35 IAC § 703.121(a)(1) began at least as early as February 2005.

93. MVPT/RSR’s violation of 35 IAC § 703.121(a)(1) continued until at least November 14, 2007.

Count 2

**Larry Kelly's Operation of a Hazardous Waste Storage and Treatment Facility
Without a RCRA Permit**

94. Complainant incorporates paragraphs 1 through 75 of this Complaint as though set forth in this paragraph.

95. By holding the waste lamps at the Riverdale facility for temporary periods before crushing them and disposing of them, Mr. Larry Kelly stored waste lamps at the Riverdale facility.

96. By crushing waste lamps at the Riverdale facility, Mr. Larry Kelly changed the waste lamps' physical characteristics so as to reduce their volume.

97. According to MVPT/RSR, Mr. Larry Kelly's crushing process rendered the waste lamps non-hazardous.

98. According to MVPT/RSR, Mr. Larry Kelly's crushing process at the Riverdale facility rendered the waste lamps safer to dispose of.

99. Mr. Larry Kelly treated waste lamps at the Riverdale facility.

100. The crushed glass and aluminum derived from Larry Kelly's crushing process at the Riverdale facility were disposed of at two landfills.

101. Because the lamps were stored and crushed at the Riverdale facility, before their disposal in a solid waste landfill, the lamps were abandoned.

102. The waste lamps Mr. Larry Kelly crushed at the Riverdale facility were "solid wastes" as defined in 35 IAC § 721.102 (40 C.F.R. § 261.2).

103. At least some of the waste lamps Larry Kelly crushed at the Riverdale facility were "hazardous wastes" within the meaning of 35 IAC § 721.103(a) (40 C.F.R. § 261.3(a)) because they exhibited the characteristic of toxicity.

104. By holding, for temporary periods before crushing them, waste lamps at the Riverdale facility, Mr. Kelly has stored waste lamps possessing the characteristic of toxicity, as defined at 35 IAC § 721.124 (40 C.F.R. § 261.24).

105. Mr. Larry Kelly has engaged in the “storage” of hazardous waste at the Riverdale facility within the meaning of 35 IAC § 702.110 (40 C.F.R. § 260.10).

106. By crushing waste lamps at its Riverdale facility, Mr. Larry Kelly has treated waste lamps possessing the characteristic of toxicity, as defined at 35 IAC § 721.124 (40 C.F.R. § 261.24).

107. Larry Kelly has engaged in the “treatment” of hazardous waste at the Riverdale facility within the meaning of 35 IAC § 702.110 (40 C.F.R. § 260.10).

108. 35 IAC § 703.121(a)(1) provides that no person may conduct any hazardous waste storage, hazardous waste treatment or hazardous waste disposal operation without a RCRA permit for the hazardous waste management facility.

109. By engaging in the unpermitted treatment of hazardous waste at the Riverdale facility, Larry Kelly violated 35 IAC § 703.121(a)(1).

110. Larry Kelly’s violation of 35 IAC § 703.121(a)(1) began at least as early as February 2005.

Civil Penalty

111. Complainant proposes that the Administrator assess a civil penalty of \$743,293 against the Respondents for the violations alleged in this Complaint, as further explained in Attachment A, “Penalty Summary Sheet.”

112. Complainant determined the proposed civil penalty according to RCRA Section 3008, 42 U.S.C. § 6928. In assessing a civil penalty, the Administrator of U.S.

EPA must consider the seriousness of the violation and any good faith efforts to comply with applicable requirements.” See Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3). Complainant has considered the facts and circumstances of this case with specific reference to U.S. EPA’s 2003 RCRA Civil Penalty Policy. A copy of the penalty policy is available upon request. This policy provides a consistent method of applying the statutory penalty factors to this case.

Terms of Payment

113. Respondents may pay this penalty by sending a certified or cashier’s check, payable to “Treasurer, the United States of America,” to:

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

Respondents must include the case name, docket number and the billing document number on the check and in the letter transmitting the check. Respondents must simultaneously send copies of the check and transmittal letter to:

Todd C. Brown
Land and Chemicals Division (LR-8J)
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Thomas M. Williams
Office of Regional Counsel (C-14J)
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

and

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604-3590

A transmittal letter identifying this Complaint shall accompany the remittance and the copy of the check.

Compliance Order

114. 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:

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

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

117. 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.

118. Copies of all shipping records demonstrating compliance with paragraph 117, 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

119. 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

Respondent is 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 141 below.

Respondent must maintain a copy of this plan, and all subsequent revisions at the Riverdale facility until closure is completed.

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

121. 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.

122. 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.

123. This detailed written cost estimate shall be submitted to the IEPA along with the Closure Plan required by paragraph 119 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.

124. 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 119 of this Compliance Order.

125. 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.

126. Proof of this financial assurance shall be submitted along with the Closure Plan and cost estimate for closure required by paragraphs 119 and 122 of this Compliance Order.

127. 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.

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

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

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

131. 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.

132. 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.

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

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

135. 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. Respondent will continue to implement this program until closure of the Riverdale facility is complete.

136. 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.

137. 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.

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

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

140. 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.

141. 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.

142. 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.

Rules Governing this Proceeding

The *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (the Consolidated Rules), 40 C.F.R. Part 22, govern this proceeding to assess a civil penalty. Enclosed with the Complaint served on Respondent is a copy of the Consolidated Rules.

Filing and Service of Documents

Respondents must file with the U.S. EPA Regional Hearing Clerk the original and one copy of each document Respondent intends as part of the record in this proceeding. The Regional Hearing Clerk's address is:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

Respondents must serve a copy of each document filed in this proceeding on each party pursuant to Section 22.5 of the Consolidated Rules. Complainant has authorized Thomas M. Williams, Associate Regional Counsel, to receive any Answer and subsequent legal documents that Respondents serves in this proceeding. You may telephone Mr. Williams at (312) 886-0814. His address is:

Thomas M. Williams (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 W. Jackson Blvd. 60604

Answer and Opportunity to Request a Hearing

The prehearing exchange between Complainant and MVPT/RSR has been completed as of November 10, 2010, and the Presiding Officer has set this matter for hearing on March 1, 2011. If Mr. Kelly contests any material fact upon which the Amended Complaint is based or the appropriateness of any penalty amount, or contends that he is entitled to judgment as a matter of law, he must file a written Answer within 30 days of receiving this Complaint. In counting the 30-day period, the date of receipt is not counted, but Saturdays, Sundays, and federal legal holidays are counted. If the 30-day time period expires on a Saturday, Sunday, or federal legal holiday, the time period extends to the next business day.

To file an Answer, Mr. Kelly must file the original written Answer and one copy with the Regional Hearing Clerk at the address specified above.

The written Answer must clearly and directly admit, deny, or explain each of the factual allegations in the Complaint; or must state clearly that Mr. Kelly has no knowledge of a particular factual allegation. Where Mr. Kelly states that he has no knowledge of a particular factual allegation, the allegation is deemed denied. Failure to admit, deny, or explain any material factual allegation in the Complaint constitutes an admission of the allegation.

The Answer must also state:

- a. the circumstances or arguments which he alleges constitute grounds of defense;
- b. the facts that he disputes;
- c. the basis for opposing the proposed penalty; and
- d. whether he requests a hearing.

If Mr. Kelly does not file a written Answer within 30 calendar days after receiving this Complaint, the Presiding Officer may issue a default order, after motion, under Section 22.17 of the Consolidated Rules. Default by Mr. Kelly constitutes an admission of all factual allegations in the Complaint and a waiver of the right to contest the factual allegations. Mr. Kelly must pay any penalty assessed in a default order, without further proceedings, 30 days after the order becomes the final order of the Administrator of U.S. EPA under Section 22.27(c) of the Consolidated Rules.

Settlement Conference

Mr. Kelly may request an informal conference to discuss the facts alleged in the Complaint and to discuss settlement. To request an informal settlement conference, he may contact Mr. Todd C. Brown at (312) 886-6091, or his attorney may contact Mr. Thomas M. Williams at (312) 886-0814.

A request for an informal settlement conference will not extend the 30-day period for filing a written Answer to this Complaint. Mr. Kelly may simultaneously pursue both an informal settlement conference and the adjudicatory hearing process. Complainant encourages all parties against whom it proposes to assess a civil penalty to pursue settlement through an informal conference. Complainant, however, will not reduce the penalty simply because the parties hold an informal settlement conference.

Continuing Obligation to Comply

Payment of a civil penalty will not affect the Respondents' continuing obligation to comply with RCRA and any other applicable federal, state or local law.

Date

Bruce F. Sypniewski
Acting Director
Land and Chemicals Division