

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

Pursuant to the Presiding Officer's Prehearing Order of June 15, 2010, the Complainant, by her undersigned attorney, submits the following Initial Prehearing Exchange. The categories of information below follow the sequence set forth in the Presiding Officer's Order.

I. COMPLAINANT'S WITNESSES AND EXHIBITS FOR CASE IN CHIEF

A. Mr. Todd Brown
Environmental Scientist
RCRA Compliance Section 1
RCRA Branch
Land and Chemicals Division
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Mr. Brown will testify that he is employed as an Environmental Scientist in the RCRA Compliance Section 1, and is duly commissioned to conduct compliance inspections pursuant to Section 3007 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6927, on behalf of the U.S. Environmental Protection Agency ("U.S. EPA"). He will testify as to his educational background, his employment experience, and his familiarity with U.S. EPA's information databases, including RCRAinfo. Mr. Brown was the lead inspector in this matter, and prepared the Compliance Evaluation Inspection Report and reviewed Respondent's answers to written requests for information under RCRA Section 3007. He will also testify to the following factual allegations in the Complaint:

1. Representatives of U.S. EPA conducted a compliance evaluation inspection (“CEI”) under Section 3007 of RCRA, 42 U.S.C. § 6927, at a facility Respondent operated at 13605 S. Halsted Street in Riverdale, Illinois (the “Riverdale facility”) on October 30, 2007 (Complaint, paragraph 18).

2. During the CEI, cardboard boxes, drums, two roll-off containers and three semi-truck trailers containing waste lamps were present at or adjacent to the Riverdale facility (Complaint, paragraph 19).

3. At least thirty-three of the boxes of waste lamps referred to in paragraph 2, above, were open and unlabelled (Complaint, paragraph 20).

4. On November 5, 2007, May 20, 2008 and October 3, 2008, U.S. EPA issued to Respondent Requests for Information under Section 3007 of RCRA, 42 U.S.C. § 6927 (Complaint, paragraph 21).

5. Respondent submitted responses to U.S. EPA’s Requests for Information on or about November 26, 2007, June 3, 2008 and October 20, 2008 (Complaint, paragraph 22).

6. 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 (Complaint, paragraph 41) .

7. Complainant’s analysis of the sample waste lamps referred to in paragraph 41, above, confirmed that at least some of the waste lamps Respondent 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) (Complaint, paragraph 42).

8. Respondent has not applied for a permit to engage in hazardous waste treatment at the Riverdale facility (Complaint, paragraph 46).

9. Respondent does not have a permit to engage in hazardous waste treatment at the Riverdale facility (Complaint, paragraph 47).

10. Respondent has not applied for interim status to engage in hazardous waste treatment at the Riverdale facility (Complaint, paragraph 48).

Mr. Brown will also testify to the manner in which the proposed penalty has been calculated.

B. Mr. Bradley Grams
Environmental Scientist

TSCA/Toxics Section
Chemicals Management Branch
Land and Chemicals Division
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604

At the time of the CEI, Mr. Grams was employed as an Environmental Scientist in U.S. EPA Region 5's RCRA Branch, and accompanied Mr. Brown on the CEI. Complainant submits that Mr. Grams's anticipated testimony may be cumulative to Mr. Brown's, and so he is being identified here in the event Mr. Brown becomes unavailable.

- C. Mr. Francis A. Awanya (or a Central Regional Laboratory designee)
Group Leader
Central Regional Laboratory
Resources Management Division
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Mr. Awanya was a supervisor in the U.S. EPA's Central Regional Laboratory and participated in the analysis of the sample lamps taken from Respondent's facility in November 2007, and reviewed the work of other Central Regional Laboratory staff who participated in that analysis. He will testify to the contents of the Analytical Report, and as to the allegation that Complainant's analysis of the sample waste confirmed that at least some of the waste lamps Respondent 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) (Complaint, paragraph 42). If he is not available to testify, Complainant intends to produce a designee to testify in the same manner.

- D. Mr. Daniel Bakk
Environmental Protection Specialist
Internal Services Section
Program Services Branch
Land and Chemicals Division
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Mr. Bakk is expected to testify to the function and operation of U.S. EPA's electronic information system known as RCRAinfo and in particular, how it is maintained and how information is added to it. Complainant intends to establish that RCRAinfo is a

reliable resource for determining whether a person or entity managing hazardous waste has a permit or interim status under RCRA. His anticipated testimony will support Mr. Brown's testimony that Respondent did not seek or have a permit, or seek interim status, to treat hazardous waste (Complaint, paragraphs 46-48).

E. Mr. Steven Nightingale, P.E. (or his designee)
Permit Section Manager
Bureau of Land
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Mr. Nightingale or his designee is expected to have knowledge of Illinois EPA's permitting process and recordkeeping systems, and would testify whether a particular hazardous waste management facility in Illinois has applied for or received a permit or interim status. The witness is expected to testify that Illinois EPA has no record of Respondent having applied for a RCRA permit or interim status. Complainant submits that this witness is being named in the exercise of caution, since Mr. Bakk is expected to testify as to the operation of U.S. EPA's RCRAinfo database, and Mr. Brown is expected to testify that U.S. EPA's own informational database shows that Respondent has not applied for a RCRA permit or interim status.

F. Mr. Gary Westefer (or a Land and Chemicals Division designee)
Environmental Protection Specialist
RCRA Program Section
RCRA Branch
Land and Chemicals Division
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Mr. Westefer works in the RCRA Program Section, RCRA Branch of the Region 5 Land and Chemicals Division, and has knowledge of the state authorization process under RCRA and the authorized status of state hazardous waste programs in Region 5. He or a designee is expected to testify that at the time of the activities alleged in this action, Illinois was not authorized to implement the Universal Waste Rule. Complainant submits that he is being named in the interest of thoroughness, because Respondent has denied the relevant allegation. The non-authorized status of the Universal Waste Rule in Illinois is a matter of record, and Complainant may address this issue on prehearing motion.

G. Complainant reserves the right to call Respondent's individual principal or other employees adversely.

- H. Complainant reserves the right to call an expert witness to testify to the issue of ability to pay a civil penalty should subsequent proceedings raise that issue. In this respect, Complainant has alleged that the State of Illinois has involuntarily dissolved the Respondent, and so Complainant seeks compliance as part of the wind-up of Respondent's corporate affairs.

However, following the filing of the Complaint, Complainant has learned that Respondent's individual principal has organized at least two other corporations through which he may continue to engage in, or solicit customers for, the business of managing spent lamps, including crushing them and arranging for their transport and disposal. In light of this information, the Presiding Officer is respectfully notified that Complainant may move for leave to amend the Complaint to name additional parties respondent, or to file a separate action and move that it be consolidated with the present action in the interest of judicial economy. If an expert witness is subsequently named, Complainant will notify the Presiding Officer and Respondent of his or her *curriculum vitae*.

Because Respondent has not substantiated a business confidentiality claim covering the responses to requests for information under RCRA Section 3007, Complainant also intends to seek leave to amend in order to allege the amounts of spent lamps Respondent treated, so that the record reflects the magnitude of Respondent's operations and hence the gravity of the violation.

For the Presiding Officer's convenience, the following is a list of the documents or other items that Complainant presently intends to offer as exhibits.

- A. Compliance Evaluation Inspection Report with photographs (Complainant's Exhibit 1, with color photographs as Complainant's Exhibits 1-P1 – 1-P47)
- B. Sampling Inspection Report dated February 26, 2008, with Appendices (Complainant's Exhibit 2, with color photographs as Complainant's Exhibits 2 A-P1- through 2 A- P-22)
- C. Request for Information under RCRA Section 3007 dated November 5, 2007 (Complainant's Exhibit 3)
- D. Respondent's Response to Request for Information under RCRA Section 3007, dated November 26, 2007 (Complainant's Exhibit 4)
- E. Request for Information under RCRA Section 3007 dated May 20, 2008 (Complainant's Exhibit 5)

- F. Respondent's Response to Request for Information under RCRA 3007, dated June 3, 2008 (Complainant's Exhibit 6)
- G. Request for Information under RCRA Section 3007 dated October 3, 2008 (Complainant's Exhibit 7)
- H. Respondent's Response to Request for Information under RCRA 3007, dated October 20, 2008 (Complainant's Exhibit 8)
- I. Material Data Safety Sheets for lamps of variety found at Respondent's facility during Compliance Evaluation Inspection (Complainant's Exhibit 9-A through 9-I)
- J. Copy of printed pages comprising Respondent's former internet site at www.rsrecycling.com (Complainant's Exhibit 10) (Complainant notes that the Presiding Officer may prefer that color copies be provided. Because the internet site pages were printed while this matter was under investigation, and the internet site has since been removed, Complainant has only the attached black-and-white copies included here)
- K. IRS Form 4506 for release of U.S. income tax returns for years 2004-2008 (Complainant's Exhibit 11)
- L. U.S. Internal Revenue Service Memorandum with enclosed Respondent's U.S. income tax returns (redacted)(Complainant's Exhibits 12, 12-A through 12-E)
- M. Respondent's April 4, 2010 cover letter with enclosed balance sheets and profit and loss statements (Complainant's Exhibits 13, 13-A through 13-H)
- N. Penalty calculation narrative and worksheet (Complainant's Exhibit 14)
- O. RCRA Civil Penalty Policy (Complainant's Exhibit 15) (to conserve resources, Complainant submits a two-sided copy)
- P. U.S. EPA Manual, *Estimating the Costs for the Economic Benefit of RCRA Noncompliance, September 1997*. (Complainant's Exhibit 16) (to conserve resources, Complainant submits a two-sided copy)

Complainant prefers that the hearing be held in Chicago, Illinois, as provided by sections 22.21(d) and 22.19(d) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("the Consolidated Rules"), 40 C.F.R. §§ 22.21(d) and 22.19(d). However, Complainant

does not object to conducting the hearing at a suitable location elsewhere in Cook County, as for example, Morton Grove, where the Respondent does or has done business.

Complainant requests approximately three (3) hours to complete its direct examination of its witnesses for its case-in-chief.

II. CALCULATION OF PENALTY

The detailed summary of the manner in which the proposed penalty was calculated, with references to the provisions of the applicable penalty policy, appears in Complainant's Exhibit 14 identified at item I.N. above, to which the Presiding Officer's attention is respectfully directed. Complainant intends to have Mr. Brown testify to the calculation of the penalty at hearing.

III. STATEMENT REGARDING PAPERWORK REDUCTION ACT

The Paperwork Reduction Act does not apply to this action since the requirement of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq., ("RCRA"), at issue to wit, the requirement of a permit for the storage and treatment of hazardous waste, is imposed by the U.S. Congress, not U.S. EPA rulemaking or information gathering authority.

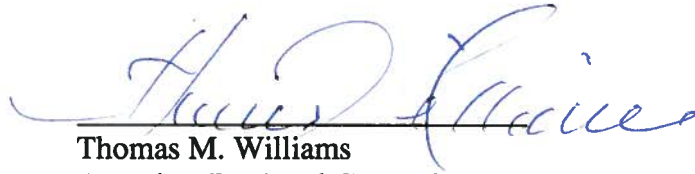
Congress enacted the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501-3520, to reduce the regulatory reporting burden on the public. In general, if an agency requires the public to collect and report information, the PRA requires the agency to: 1) first obtain review of the requirement by the Office of Management of Budget, evidenced by an eight digit control number, and, 2) display the control number upon any document associated with the request. The Public Protection provision of the PRA, 44 U.S.C. § 3512, insulates the public from penalties resulting from a failure to respond to a federal collection of information which does not bear a valid OMB control number.

The Public Protection provision of the PRA does not apply to the facts of this action. The PRA, at 44 U.S.C. § 3502(3), defines "collection of information" to mean ". . . the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency . . ." 44 U.S.C. § 3502(3). The definition specifically excludes collections of information during the conduct of an administrative action or investigation involving an agency against specific individuals or entities. 44 U.S.C. § 3518(c)(1)(B)(ii).

Complainant alleges Respondent violated the RCRA's requirement of a permit for the storage and treatment of hazardous waste at 42 U.S.C. § 6925. This is a substantive requirement imposed by the U.S. Congress in the enactment of RCRA and implemented by

U.S. EPA through rulemaking authority, and is not a requirement imposed by U.S. EPA through its information gathering authority. Further, while much of the evidence of the violation consists of admissions Respondent made in its answers to requests for information under RCRA Section 3007, those requests were made in the course of an investigation against a specific entity. They were outside the scope of the PRA, and so stated. Therefore, the PRA does not apply to this action because it does not allege a failure to respond to a "collection of information" as that term is defined, and the agency's investigative activities did not in any event involve "collection[s] of information." The PRA's Public Protection provision, 42 U.S.C. § 3512, does not apply, and does not bar the collection of penalties in this action.

Respectfully submitted this 20th of September 2010,

A handwritten signature in blue ink, appearing to read "Thomas M. Williams", written over a horizontal line.

Thomas M. Williams
Associate Regional Counsel

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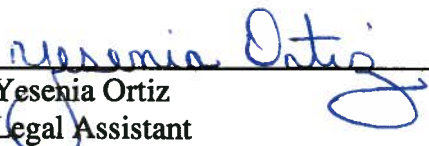
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Riverdale, Illinois 60827)
U.S. EPA ID No.: ILD005234141,)
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Respondent)
)

CERTIFICATE OF SERVICE

I hereby certify that today I filed personally with LaDawn Whitehead, Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, 77 West Jackson Boulevard (E-19J), Chicago, Illinois, 60604-3590, the original document entitled **COMPLAINANT PREHEARING EXCHANGE** for this civil administrative action and that I issued to the Court and Respondent by first class mail a copy of the original document:

Judge Barbara Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

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



Yesenia Ortiz
Legal Assistant



Dated