UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

C-14J

November 21, 2011

VIA U.S. EPA POUCH MAIL

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

Re: Mercury Vapor Processing Technologies, Inc. a/k/a River Shannon Recycling and Laurence C. Kelly
Docket No. RCRA-05-2010-015

Dear Judge Gunning:

Enclosed please find a copy of Complainant's "Reply Brief" that was filed today in the above-referenced matter.

Sincerely,

Jeffrey A. Cahn
Associate Regional Counsel

Enclosure

cc: Mr. Laurence Kelly (w/ enclosure)

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, and	)	
LAURENCE C. KELLY	)	
	)	
Respondents.	)	

POST-HEARING
REPLY BRIEF
OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

The United States Environmental Protection Agency ("EPA" or "Complainant") submits this post-hearing reply brief ("Reply Brief") pursuant to the Presiding Officer's orders setting the briefing schedule dated August 18 and September 29, 2011, and in accordance with 40 C.F.R. § 22.26 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* ("Consolidated Rules" or "CROP").

I. INTRODUCTION

Respondents' post-trial brief ("Respondents' Brief") contains the following three themes: Respondents' alleged attempt to comply with Illinois law preempts federal enforcement; the violations are based on insufficient evidence, and Respondents were not afforded "fair notice" of the applicable regulations.[1] First, Respondents argue that they were in compliance with Illinois'

[1] Respondents' Brief was not timely filed. The Presiding Officer ordered the parties to file their initial briefs on, or before, November 7, 2011. The Consolidated Rules of Practice state that "[a] document is filed when it is received by the appropriate Clerk." 40 C.F.R. § 22.5(a). Respondents' Brief was sent to the Regional Hearing clerk via Registered Mail on November 7, 2011, and served on Complainant by facsimile and Registered mail on that same day. *See* the Certificate of Service attached to Respondents' Brief. The Regional Hearing Clerk's docket shows that the Respondents' Brief was filed stamped "received" on November 8, 2011 (the Presiding Officer can take judicial notice of this readily verifiable fact). For purposes of preserving the issue for appeal, Complainant

unauthorized universal waste rule and that such compliance leads to the conclusion that they are not liable for violation of Illinois' authorized RCRA program and that they are not obligated to conduct RCRA closure of the Riverdale facility ("Riverdale" or "Riverdale facility"). Respondents' Brief at 3, 7-15, 17, 18, 20, 21-22. Respondents argue at length that they were in compliance with Illinois's unauthorized universal waste rule, because MVPT was a "co-generator" that collected waste lamps from third-parties and then stored those lamps at Riverdale, and because Mr. Kelly (as sole proprietor of Shannon Lamp Recycling) acted as a "handler" of universal waste when he "volume reduced" the waste lamps at Riverdale.[2] Respondents' Brief at 7-15. Respondents' arguments are irrelevant to determining their liability, because the Presiding Officer has already ruled as a matter of law that for purposes of determining liability the applicable law is Illinois's authorized RCRA Subtitle C hazardous waste program as authorized by EPA. The storage and treatment of waste lamps, as admitted by Respondents, at the Riverdale facility without a RCRA permit is a violation of 35 IAC § 703.121(a)(1).

Second, Respondents argue that there was insufficient evidence (in the form of sample results) to establish that the intact waste lamps at the facility were hazardous, and no samples establishing that the crushed waste lamps were hazardous. Further, Respondents argue that EPA did not call as witnesses the EPA emergency response personnel that conducted air sampling

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hereby moves that the Presiding Officer strike the Respondents' Brief from the record on the ground that it was not timely filed.

[2] Respondents play word games in an attempt to avoid liability. For example, Respondents argue that the Riverdale facility was not a treatment, storage, or disposal facility, because "MVP/RSR has never treated spent lamps. It did hire outside services authorized in the state of Illinois to volume reduce their lamps" (Respondents' Brief at 15) and that "Respondents have never used the word treatment, which outside the context of RCRA means action, management, or handling. Respondents' do use the word process, which means procedure, method, or course of action." Respondents' Brief at 17. Saying something "is so" doesn't make it true. The fact is that, regardless of what Respondents call it, the activities performed at Riverdale by Respondents constituted treatment of the hazardous waste within the meaning of Illinois' authorized program. EPA's initial post-hearing brief ("Initial Brief") at 21-31.

outside and inside the facility after it had ceased operating and who determined that at the time of sampling the facility did not pose threat to human health or the environment based on air emissions of mercury. It is unclear why Respondents raise these issues, but they may be attempting to claim that: their waste lamps were not hazardous wastes and thus were not subject to regulation; or that any penalty should be small because there was no actual harm to the environment; or that closure of the Riverdale facility is unnecessary. None of these claims has merit. First, the record contains exhibits and testimony establishing that many of the waste lamps at Riverdale were hazardous wastes. Indeed, Respondents stipulated to EPA's sample results, which showed that four of the twelve waste lamps collected from the Riverdale facility contained mercury in their Toxicity Characteristic Leaching Procedure (TCLP) extracts at or above the regulatory level of 0.2 mg/L, and were, thus, hazardous waste under 35 IAC §§ 721.103(a) and 721.124(b). Second, Respondents' argument of "no harm, no foul" to the environment does not serve as a basis for mitigating penalty. Finally, because the record establishes that many of the lamps were hazardous wastes and Respondents treated those waste lamps on-site, the Riverdale facility is subject to RCRA closure, part of which entails sampling to determine the scope of any residual contamination. Further, issuance of a compliance order directing that Respondents not operate a hazardous waste storage and treatment operation without a RCRA permit for the hazardous waste management facility is appropriate, especially in light of the fact that Mr. Kelly continues to engage in the exact same illegal off-site storage and treatment operations that are at issue in this matter.

Third, Respondents raise the affirmative defense of "fair notice" by claiming that they did not know what regulations they were subject to, woven together with an argument that EPA should have used its enforcement discretion and not brought this action, because (again)

Respondents claim to have complied with Illinois' unauthorized universal waste rule. As discussed in EPA's Initial Brief and herein, the "fair notice" defense is not available to Respondents based on the facts in this case. Moreover, given Respondents actual knowledge that they were out of compliance with Illinois' unauthorized universal waste rule, not only is bringing this action an appropriate exercise of EPA's enforcement discretion, but adjusting the penalty upward to account for their willfulness is warranted.

In support of their three broad themes described above, Respondents cite to alleged facts that are not contained in the trial record[3]; misquote witness testimony[4] ; and inject numerous red

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[3] There are too many instances where Respondents' Brief asserts facts that are not contained in the trial record to list them all. However, some noteworthy examples include the second full paragraph on page 5, discussing the effect of the universal waste rule on the regulated community; much of the discussion on pages 7-9, dealing with facts allegedly establishing MVPT as a "co-generator;" and the sampling discussion on pages 22-23.

[4] For example, Respondents' Brief purports to directly quote Mr. Brown as testifying at page 213, line 7 through page 214, line 10, as follows: "to encourage the purchasing of mercury containing lamps and improve implantation [sic] of the Hazardous waste program by encouraging CESQG and SQG to volunteer their waste in the RCRA scheme." Respondents' Brief at 5. In fact, at Respondents' citations, the transcript reads as follows:

> Q Okay. We're going to be adding CEX 50 and request that the Court take judicial notice of CEX 50, and judicial notice of CEX 51. Mr. Brown, could you turn to CEX 50? With respect to your understanding of the purpose of the Federal Universal Waste Rule, is there anything in this document that you would like to highlight?
>
> A Yes. On page 3847, it begins -- it provides a summary of the purposes behind Universal Waste Rule, the Federal Universal Waste Rule.
>
> Q And what are some of the purposes identified in the -- for the Federal Universal Waste Rule?
>
> A The Agency wanted to create a streamline set of regulations in facilities that generate and collect universal waste. And specifically, it was to encourage resource conservation so to make -- for lamps. For instance, to encourage people to want to buy mercury-containing lamps because they are more energy efficient than incandescent lamps.
>
> Another goal is described as improving implementation of the Hazardous Waste Program. What is discussed there is trying to encourage non-regulated entities such as households were conditionally exempt, small quantity generators to volunteer their waste into the RCRA regulatory scheme. And to keep these kinds of common wastes from entering municipal waste landfills.

It is one thing to paraphrase a witness's testimony in a brief (without placing it in quotes), and wholly another thing to put quotations marks around made-up language and passing it off as someone's testimony.

herring arguments[5] that have no bearing on liability, penalty, or the issuance of a compliance order.

In this Reply Brief, EPA addresses each of the three broad themes raised by Respondents. As explained in EPA's Initial Brief, the trial record establishes that Respondents' storage and treatment of the waste lamps at Riverdale without a RCRA permit is a violation of 35 IAC § 703.121(a)(1), which provides that no person may conduct any hazardous waste storage, treatment, or disposal operation without a RCRA permit for the hazard waste management facility. Respondents' Brief provides no basis for concluding otherwise.

II. ARGUMENT

A. Respondents' Argument That They Complied With Illinois' Unauthorized Universal Waste Rule And Therefore Are Not Liable Must Fail, Because This Court Has Already Ruled That The Applicable Regulatory Scheme Is Illinois' Authorized RCRA Subtitle C Program

Respondents devote roughly 22 of the 27 pages of their post hearing brief attempting to avoid liability by constructing an alternate universe where their waste lamp storage and treatment activities were in compliance with Illinois' unauthorized universal waste rule, thereby obviating the need for a RCRA permit for the Riverdale facility. According to Respondents, MVPT is a "co-generator" of waste lamps that it picked up from other generators and accumulated at Riverdale, and Mr. Kelly, doing business as a sole proprietorship, which operated under many different names, is an "ally" or "handler" that would periodically come to the Riverdale facility to crush the accumulated waste lamps.[6] The crushed waste lamps were then sent to landfills. Unfortunately for Respondents, their creativity is a wasted effort, because the Presiding Officer

[5] For example, Respondents make much of the fact that EPA did not call any Illinois EPA employees as witnesses in support of the conclusion that Respondents were out of compliance with Illinois' unauthorized universal waste rule. Of course the flip side is also true -- Respondents did not call any Illinois EPA witnesses to testify that Respondents were in compliance with Illinois' unauthorized version of the universal waste rule.

[6] Mr. Kelly has called his alleged sole proprietorship "Shannon Lamp Recycling," "Spent Lamp Recycling Technologies, Inc." and "SLR." *See* EPA's Initial Brief, pages 25-27, 29.

has ruled that for purposes of determining Respondents' liability the applicable law is Illinois's RCRA Subtitle C hazardous waste program as authorized by EPA.[7] As explained in EPA's Initial Brief at pages 17-43, the trial record confirms the following facts establishing Respondents' liability: Respondents collected waste lamps from third parties and transported the waste lamps to the Riverdale facility; Respondents then stored and crushed the waste lamps at Riverdale without a RCRA permit; finally, Respondents arranged for the disposal of the crushed glass and metal as solid waste to landfills. Respondents' storage and treatment of the waste lamps at Riverdale without a RCRA permit is a violation of 35 IAC § 703.121(a)(1), which provides that no person may conduct any hazardous waste storage, treatment, or disposal operation without a RCRA permit for the hazard waste management facility. Respondents' claims, which are not supported by the evidence, have no bearing on their liability. Respondents are liable whether or not they were in compliance with Illinois' unauthorized universal waste rule, because as a matter of law Respondents needed to be in compliance with Illinois's authorized RCRA program.

With respect to Respondents' argument that MVPT was a "co-generator," as explained in EPA's Initial Brief at pages 71-80, the co-generator concept has no application to this case. In support of their argument that MVPT was a co-generator, Respondents argue the following:

> [B]ased on Kelly's knowledge and hands on experience dating back to the early 1980's when he was cleaning, removing and disposing of Underground Storage Tanks and its hazardous contents it was common for companies such as his to establish the complete care, custody and control for these UST's and its contents for identifying a method to manage the removal. When managing the contents of the tanks and tracking the proper disposal of the contents of the tank there was a

[7] On May 5, 2011, this Court issued an "Order on Complainant's Motion for Partial Accelerated Decision as to the Applicable Regulations and Liability" holding that, as a matter of law, Respondents' handling of waste lamps at the Riverdale facility is governed by the general hazardous waste regulations adopted by Illinois and approved by EPA, "namely the full Subtitle C regulations," and not Illinois's universal waste rule, which Illinois has not yet been authorized to administer and enforce as part of its hazardous waste program. *In re Mercury Vapor Processing Technologies, Inc. et al.*, Docket No. RCRA-05-2010-0015, 2011 ALJ LEXIS 4, 18 (May 5, 2011).

> need to create a clear Potential Responsible Party (PRP) relating to ownership of not only the building owner but also the owner of the tank and the materials inside the tank. When conducting a removal for the purpose of tracking these inventories the company actually performing the work would in fact become the co-generator, taking on the responsibility for the cradle to grave management and tracking of any hazardous waste generated from the removal process. That entity was deemed to be the co-generator because that entity had agreed to carry out and fulfill the generators duties for all.

Respondents' Brief at 7.[8] These assertions clearly lay out the flaws in Respondents' reasoning that MVPT is a co-generator. MVPT was not "managing the contents of tanks" or "conducting a removal" for underground storage tanks. The on-site cleaning and removal of hazardous materials from a tank is an affirmative action that brings the materials into RCRA's cradle to grave management system, and requires that those hazardous materials then be disposed of properly. Here, MVPT picked up waste lamps that had already been discarded and accumulated for pick-up, and then transported, stored, treated and arranged for disposal of those lamps at the Riverdale facility. Even if MVPT "contracted out" its crushing activities to Mr. Kelly, MVPT still remained the operator of the Riverdale facility and made the decision to store and treat those waste lamps at Riverdale.[9] The very fact that Respondents were engaged in an alleged "lamp recycling" business that solicited customers to place discarded lamps into boxes for Respondents to transport to an off-site location for storage and treatment negates the idea that MVPT is a co-generator.

Even assuming MVPT was a co-generator, both MVPT and Mr. Kelly engaged in transporting those wastes to an off-site location for storage and treatment, and then arranged for those wastes' disposal. Therefore, the permit exemption for generators does not apply to them,

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[8] As found throughout Respondents' Brief, this paragraph makes assertions without any record support, except for a citation at the end of the paragraph to a Federal Register notice.

[9] The evidence does not support Respondents' assertions that Mr. Kelly operated a sole proprietorship. *See* Complainant's Initial Brief at 97-99.

because they were engaged in off-site storage and treatment activities, which clearly requires a permit under any scenario.

Co-generation, as it is described in the preamble to the universal waste rule, is limited to the specific removal of lamps from service (i.e., literally unscrewing the lamps from fixtures).[10] Here, neither MVPT nor Mr. Kelly was hired as a contractor to remove waste lamps from service at third party locations by taking the waste lamps out of their fixtures. Rather, Respondents collected lamps that had already been removed from service and placed into containers for pick-up. By storing and treating the waste lamps, through volume reduction, at Riverdale, the Riverdale facility became a fully regulated "destination facility" that required a RCRA permit. Respondents then arranged for the disposal of the crushed bulbs to solid waste landfills. In Respondents' alternate universe, they are co-generators of the already-discarded waste lamps (freeing them of the real-world obligations of RCRA, the federal universal waste rule, and Illinois' unauthorized version of the universal waste rule), Riverdale is somehow transmogrified into the point of generation, and SLR conveniently becomes a handler that can "volume reduce" the waste lamps at the fictionally created, Riverdale "point of generation." *See* page 3 of Respondents' Brief. By shifting the characterization of their activities over by one degree (where the "destination facility" becomes the "point of generation" and where a "handler" becomes a "co-generator"), Respondents' activities morph into activities that don't require a RCRA permit. Of course, accepting Respondents' alternate universe as "reality" completely undermines the regulations that prohibit handlers from treating wastes. Respondents' actual

[10] The federal universal waste rule and Illinois' version of the universal waste rule are similar in almost all material aspects, with the notable exception being that Illinois's unauthorized regulations allow handlers and transporters of waste lamps to perform volume reduction of those lamps *at the site where they are generated* under certain controlled conditions, such as conducting the crushing in a closed system, meeting certain emission limits and providing notice to the state. 35 IAC §§ 733.133(d)(3) and 733.151(b); Tr. 241-243 (emphasis added).

activities cannot simply morph into activities that do not require a RCRA permit by a simple use of semantics. Indeed, their circumnavigation of the regulations would render the requirement that off-site storage and treatment operations obtain RCRA permits pointless, because virtually any party managing universal waste would claim to be a co-generator to avoid the costs of associated with obtaining a RCRA permit.[11] Simply, the concept of "co-generators" mentioned in the EPA guidance documents and the federal register notice cannot be analogized to Respondents' storage and treatment operations.

To the extent that Respondents' version of reality could have any bearing in this matter, it is with respect to arguing for a lower penalty premised on a "good faith efforts to comply" argument or based on an "enforcement discretion" argument.[12] The record establishes that Respondents' interpretation of Illinois's universal waste rule is incorrect.[13] Applying the facts

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[11] Respondents make a policy argument in support of their interpretation of Illinois' unauthorized version of the universal waste rule, as well as in support of continuing to argue that the unauthorized program should trump the authorized subtitle C program in this matter. Respondents argue that rejection of their interpretation and application of the Subtitle C requirements will "impair the natural progression of a very good rule and retroactively tell the regulated community in Illinois that they have been mismanaging their spent lamps for over 10 years [and] will not only set off a litany of potential litigation but force a good part of the regulated community in Illinois back underground. . . ." This Court should not be influenced by Respondents' scare tactics, which are falsely premised on the proposition that there are numerous facilities operating in the same manner as Respondents did. First, there is no trial record evidence that anyone, other than Respondents, interprets Illinois' unauthorized version of the universal waste rule to allow crushing of waste lamps at a location other than the point of generation. Further, there is no trial record evidence that anyone other than Respondents operated or operates a waste lamp storage and treatment facility in Illinois without a RCRA permit. As EPA has explained, had Respondents been in compliance with Illinois' unauthorized version of the universal waste rule (which they were not), then it would have exercised its enforcement discretion and not pursued this matter. Second, accepting Respondents proposition that federal enforcement of the authorized RCRA program will have an adverse effect on businesses would render the idea federal primacy and the idea of authorization meaningless.

[12] Respondents' post-trial brief does not address the question of an appropriate penalty.

[13] Respondents are alone in their interpretation of the regulatory scheme. Indeed, Mr. Kelly was expressly told by Illinois EPA that off-site storage and treatment of waste lamps required a RCRA permit. On October 16, 2000, Illinois EPA wrote to Mr. Kelly, as President of a company called Spent Lamp Recycling Technologies, Inc. The letter states that, based on Illinois' EPA's understanding of SLRT's activities, "SLRT may operate its mobile treatment device as a large quantity handler of universal waste." CEX-72-04216-02417; Tr. 349-352. The letter unequivocally states:

> As a handler of universal waste, SLRT may receive lamps at its facility for accumulation without a permit provided the lamps are only accepted for accumulation and subsequent shipment to the

established at hearing in this case to the only logical interpretation of the rules shows that Respondents were out of compliance with both the federal universal waste rule, as well as Illinois's unauthorized version of the universal waste rule. If the purpose of Respondents' claims about their compliance with their interpretation of Illinois' unauthorized universal waste rule was to influence penalty size, then those claims must be rejected.

B. Respondents' Arguments That There Is Insufficient Information To Conclude That The Waste Lamps Were Hazardous Is Meritless

Respondents argue that there was insufficient evidence (in the form of sample results) to establish that the intact waste lamps at the facility were hazardous, and no samples establishing that the crushed waste lamps were hazardous. They also make much of the fact that EPA did not call as witnesses the EPA emergency response personnel that conducted air sampling outside and inside the facility after it had ceased operating and who determined that at the time of sampling the facility did not pose threat to human health or the environment based on air emissions of mercury. Respondents do not clearly explain why they are raising these issues. Perhaps Respondents are arguing that their waste lamps were not hazardous wastes and, thus, were not subject to regulation. Or, perhaps Respondents are arguing that any penalty should be small because there was no "harm." Or, maybe Respondents are arguing that closure of the Riverdale facility is unnecessary, because there is no proof of contamination by hazardous substances.

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

Id. (emphasis added). Thus, Mr. Kelly was told by IEPA that he and his company could accumulate waste lamps at their facility and then ship the waste lamps to a destination facility without a RCRA permit. Mr. Kelly was also told by IEPA that he and his company could "volume reduce" waste lamps at the site of generation of the waste lamps. Finally, Mr. Kelly was expressly told by Illinois EPA that a facility, like Riverdale, that was collecting and crushing lamps collected from off-site generators needed a RCRA permit. Accordingly, Mr. Kelly was on notice of the applicable requirements.

Mr. Brown (Tr. at 222-251; 260-273; 349-352; 658-660), Mr. Worth (Tr. at 511-512), and Mr. Graham (Tr. at 464; 474-475; 477) all testified consistent with this interpretation of Illinois EPA's letter.

Regardless of what point Respondents desire to make, all points fail. The trial record establishes that some of the waste lamps at the facility tested at or above the regulatory limit for mercury when subjected to the TCLP, and, thus, were a hazardous waste; further, substantial penalties in RCRA cases are warranted even where there is no evidence of actual "harm." Finally, the absence of proof of contamination does not determine the need for conducting RCRA closure. Indeed, one of the first steps of closure is conducting sampling to determine if there have been releases of hazardous substances requiring additional closure activities.

Regarding Respondents first claim that there is insufficient proof that the waste lamps at Riverdale were a hazardous waste, as explained at pages 33-39 of EPA's initial Brief, the waste lamps stored and treated by the Respondents at Riverdale meet the definitions of "solid waste" and "hazardous waste." Under 35 IAC § 702.110, "hazardous waste" means "a hazardous waste as defined in 35 Ill. Adm. Code 721.103." 35 IAC § 721.103(a) provides, in part, that a "solid waste," as defined in 35 IAC § 721.102, is a "hazardous waste" "if [i]t exhibits any of the characteristics of hazardous waste as identified in Subpart C of this Part. . . ." Thus, to be a "hazardous waste" under the Illinois hazardous waste program, a material must first be a "solid waste." *Id.* Tr. 171.

35 IAC § 721.102(a)(1) defines "solid waste", in part, as any discarded material that is not excluded by regulation. 35 IAC § 721.102(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. . . ." 35 IAC § 721.102(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.

Tr. 174-75.

The waste lamps at the Riverdale facility were solid wastes, because they were "accumulated, stored, or treated" before they were "abandoned by being disposed of" at solid waste landfills.[14] CEX-4-00285; Tr. 174; CEX-3-00272; CEX-4-00286; Tr. 177; CEX-4-00286; Tr. 177-78; CEX-3-00273; Tr. 178; CEX-4-00286; CEX-4-00319-00327; Tr. 179; Tr. 185; CEX-3-00273; Tr. 182; CEX-4-00287; Tr. 179-180; Tr. 185.

The record also establishes that the waste lamps at Riverdale are hazardous wastes. 35 IAC § 721.103(a) provides, in part, that a solid waste, as defined in 35 IAC § 721.102, is a hazardous waste "if [i]t exhibits any of the characteristics of hazardous waste identified in Subpart C of this Part . . ." 35 IAC § 721.124 provides in part that a solid waste exhibits the characteristic of toxicity:

> [I]f, 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)], 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 . . . .

The table in 35 IAC § 721.124(b) establishes a maximum concentration of mercury, for purposes of the toxicity characteristic, of 0.2 mg/L.

On November 14, 2007, EPA collected twelve samples of intact waste lamps that MVPT was storing at the Riverdale facility in order to determine whether any of the lamps possessed the toxicity characteristic for mercury. CEX-2-00056-00057; Tr. 188. Using the Toxicity Characteristic Leaching Procedure (TCLP), four of the twelve waste lamp samples yielded

[14] The lamps were generated as solid wastes when they were taken out of service by third parties, which was the "point of generation" for the waste lamps. A detailed discussion of this issue follows below.

mercury concentrations in their TCLP extracts at or above the regulatory limit for mercury (0.2 mg/L). CEX-2-00058; Tr. 189. The TCLP results are undisputed. Tr. 190-191.

Material Safety Data Sheets (MSDS) of different companies that manufacture fluorescent lamps, such as General Electric (GE), Phillips Lighting Company, and Osram Sylvania Products, Inc., also establish that lamps at the Riverdale facility were, more likely than not, hazardous waste. CEX-9-02094-02119; Tr. 192-193; CEX-9-02095; Tr. 194; CEX-9-02099; Tr. 196; CEX-9-02098; Tr. 195; CEX-1-000117-00019, 00023, 00070-000071, 00074-00075, 00077-00080, 00085-00086.

Thus, the only conclusion to be drawn is that hazardous waste lamps were among the waste lamps stored and treated at the Riverdale facility.[15] Tr. 198.

No evidence was submitted by the Respondents at trial suggesting a failure with EPA's testing methods or inaccuracies with the relevant MSDS for fluorescent lamps found at the Riverdale facility. Notwithstanding, two pages of Respondents' Brief is now devoted to explaining why EPA's sampling was inappropriate and should have been conducted differently. Respondents' Brief at 22-23. The narrative at pages 22-23 of Respondents' Brief is based on facts not in the record and unsupported by evidence, and should not be considered.

In support of their argument that no harm was caused by their operations, Respondents' make much of the fact that EPA did not call its emergency response personnel to testify. They also make much of EPA press releases announcing that air monitoring at the facility did not show then-current threats to public health based on air release of mercury beyond the facility.

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[15] Respondents argue that "intact lamps will not fail TCLP" Respondents'' Brief at 4. Respondents' argument is based on the misconception that subjecting a lamp to the TCLP is what makes it a hazardous waste. This argument is misplaced; the TCLP is a procedure that is used to determine if a waste possesses the toxicity characteristic, which is one method of determining whether the material is a hazardous waste. If a lamp "fails" the TCLP (meaning the TCLP extracts contain mercury at or above the regulatory limit for mercury of 0.2 mg/L), then the lamp possesses the toxicity characteristic for mercury and, therefore, the lamp is a hazardous waste.

Both points are red herrings, because they do not discuss the actual issues presented in this case. The testimony of EPA's emergency response personnel is not relevant to establishing whether Respondents were in compliance with RCRA, and is not needed to establish the appropriate penalty here. Indeed the probative value of their testimony would be questionable at best, because the air monitoring was conducted by these personnel well after the facility stopped operating. Tr. at 603. By Mr. Kelly's own admission, air releases of mercury would have been of concern during the crushing of the waste lamps. Tr. at 559.

Respondents' arguments of "no harm, no foul" have little or no relevance to determining an appropriate penalty in this case. As explained in EPA's Initial Brief, the initial gravity-based penalty amount, which is a measurement of the "seriousness of the violation," a statutory penalty criteria under Section 3008(a) of RCRA, is determined by reference to two factors identified on a matrix of the Policy:

(1) "Potential for Harm" (vertical axis); and

(2) "Extent of Deviation from a Statutory or Regulatory Requirement" (horizontal axis). CEX-15-02263-02264; Tr. 285-286. The "potential for harm" factor is made up of two sub-factors not shown on the matrix: the risk of exposure of humans or the environment to hazardous waste and the adverse effect of noncompliance on the RCRA program. CEX-15-02257-02261; Tr. 285-286. The matrix provides three levels on which to register the "potential for harm" of a violation: major, moderate and minor. CEX-15-02263; Tr. 286. The "extent of deviation from a statutory or regulatory requirement" factor accounts for the degree to which the violation renders inoperative the requirement violated. *Id.* The matrix provides three levels on which to register the "extent of deviation requirement" manifested by the violation: major, moderate at minor. *Id.*

EPA's Initial Brief contains an extensive discussion of the harm or potential for harm posed by the storage and treatment of hazardous waste lamps at Riverdale by Respondents. Initial Brief at 47-54. Contrary to Respondents belief, substantial penalties are appropriate in RCRA cases absent evidence of actual harm caused by releases of hazardous wastes. *In re Everwood Treatment Company, Inc. and Cary W. Thigpen,* RCRA (3008) Appeal No. 95-1 (EAB 1996), aff'd, *Everwood Treatment Co., Inc. v. EPA*, 1998 WL 1674543, *15 (S.D.Ala. 1998).

Finally, Respondents' unsupported assertions regarding sampling and the hazards posed by their waste lamps have no bearing on whether a compliance order should be issued in this matter requiring, among other things, RCRA closure of the Riverdale facility and that Mr. Kelly stop operating a storage and treatment facility without a RCRA permit. Regarding closure, as things stand, other than visually observed conditions at the Riverdale facility, the question of whether contamination remains at the facility is unanswered, because Respondents did not have a RCRA permit and, therefore, did not have (and could not implement) a RCRA closure plan. Mr. Brown explained the importance of conducting RCRA closure, including performing sampling to determine the presence or absence of contamination. Tr. 52-53. Mr. Brown emphasized that

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

Tr. 386.

On May 26, 2011, Mr. Brown conducted a re-inspection of the Riverdale facility, in order to observe its current condition. CEX-42-03023; Tr. 312-313. Mr. Brown testified that he

observed and took pictures of cracks in the floor[16] of the facility, which potentially could allow solid mercury to enter and absorb into the underlying soil. Tr. 313; CEX-42-03030, 03031, 03032, 03036, 03037, 03040, 03041, 03042. Mr. Brown also observed two piles of broken fluorescent lamps inside the building, and broken lamp pieces outside of the building. Tr. 313; CEX-42-03043, 03044, 03048. Mr. Brown's observation of broken waste lamps still present during a re-inspection on May 26, 2011, indicates that releases of mercury occurred. Unknown is what mercury contamination remains in the facility and in the soils around and under the facility. The fact that Respondents claim to have left the facility in a "clean, broom swept" condition (Respondents' Brief at 18) does not mean that the facility was left uncontaminated – that question is open pending sampling conducted as part of RCRA closure. Accordingly issuance of a compliance order that requires, among other things, the performance of sampling as part of RCRA closure is warranted.

C. Respondents Had both "Fair Notice" And Actual Knowledge Of Their Regulatory Obligations And EPA Properly Exercised Its Discretion In Bringing This Enforcement Action

Respondents argue that a "fair notice" defense should apply here, because they did not know what regulations they were subject to. Respondents also argue that EPA should have used its enforcement discretion and not brought this action, because Respondents claim to have complied with Illinois' unauthorized universal waste rule. Both claims should be rejected.

Both the "Response of the United States Environmental Protection Agency In Opposition To Respondents' Motion to Dismiss For Lack of Fair Notice and Convoluted Regulations" filed

[16] Respondents argue that the pictures taken during EPA's 2011 re-inspection and introduced into evidence "served no purpose other than a thinly veiled attempt to depict MVP/RSR as somehow causing cracks to appear in the floor (cracks were not there when Respondents vacated the building) when Respondents had no care, custody or control of that building for over two and half years [sic] prior to the picture being taken." Respondents' Brief at 2. Clearly, Respondents miss EPA's point with respect to the significance of the cracked concrete floor. It must be pointed out, however, that Respondents introduced no evidence at hearing with respect to the condition of the floor when they left the facility, and this is another effort by Respondents to have the court consider a fact outside the record.

on June 16, 2011 ("Response to Motion"), and EPA's Initial Brief include detailed discussions of the authorization process generally, and the status of Illinois' unauthorized version of the universal waste rule. Response to Motion; Initial Brief at 7-15. The Response to Motion and Initial Brief also explain in detail why the "fair notice" defense does not apply to Respondents. Response to Motion; Initial Brief at 83-89. There is no genuine "fair notice" issue here because: (1) EPA provides notice to the regulated community as to its authorization of state program and revisions through the Federal Register; (2) the preamble to the universal waste rule states that it does not take effect in states until they are authorized by EPA for the rule; (3) EPA has set forth guidance as to how it will enforce the universal waste rule in states that are implementing but have not yet been authorized for the rule; (4) Respondents have pointed to no material confusion that is relevant to the actual allegations of the Complaint (treatment requires a permit under both Illinois's authorized program and under Illinois's unauthorized universal waste rule); and (5) Mr. Kelly was informed by IEPA that processing waste lamps off-site is fully regulated under Subtitle C.

Respondents' claim that EPA should have used its enforcement discretion and not brought this action, because Respondents claim they were in compliance with Illinois' unauthorized version of the universal waste rule. On April 10, 1996, EPA issued the "Memorandum from Steve Herman, Assistant Administrator of the Office of Enforcement and Compliance Assurance and Elliott Laws, Assistant Administrator of the Office of Solid Waste and Emergency Response, to the Regional Administrators, *Universal Waste Rule – Implementation*" (Herman Memo). CEX 45-03111-03112; Tr. 117. The Herman Memo directs EPA, under specified circumstances, to exercise discretion not to enforce the authorized Subtitle C regulations against handlers and transporters of universal wastes in states that have adopted

(but have not been authorized to implement) the universal waste rule. *Id.* In recognition of EPA's position that managing wastes in compliance with the universal waste regulations at 40 C.F.R. Part 273 is environmentally protective, the Herman Memo provides that "where States are implementing the Part 273 standards but have not yet received authorization, *Regions should take enforcement actions involving universal wastes only where handlers of such wastes are not in full compliance with the Part 273 standards." Id.* (emphasis added); Tr. 117. As explained in the Initial Brief, Respondents do not meet the criteria under which the memo directs EPA to forego enforcement of the authorized Illinois Subtitle C regulations. Respondents are not in compliance with 40 C.F.R. Part 273. Initial Brief at 72-79. Additionally, Respondents are not in compliance with Illinois's unauthorized universal waste regulations at 35 IAC Part 733. Initial Brief at 80. Because Respondents are out of compliance with both state and federal universal waste regulations, this action was an appropriate exercise of EPA's enforcement discretion and no penalty mitigation on this ground is warranted.

If anything, the facts in this case warrant increasing the penalty to account for the willfulness of Respondents' violation of RCRA. *See* Initial Brief 47, 64-69 for a discussion of the "degree of willfulness" RCRA penalty policy adjustment factor. Respondents' willfulness is established by the fact that Mr. Kelly knew from at least two sources that he was operating outside of Illinois' unauthorized version of the universal waste rule. First, Illinois EPA wrote to Mr. Kelly and told him what was permissible and what was not. Tr. 347-352; CEX-72-04216-02417. Illinois EPA expressly told Mr. Kelly that based on its understanding, "SLRT may operate its mobile treatment device as a large quantity handler of universal waste." *Id.* The letter goes on to explain:

> As a handler of universal waste, SLRT may receive lamps at its facility for accumulation without a permit provided the lamps are only accepted for

accumulation and subsequent shipment to the destination facility. Please note that *the Universal Waste Rule requires that lamps must be crushed at the site of generation. Therefore, a facility that was collecting and crushing lamps from off-site generators would be fully regulated as indicated in the April 18, 2000 letter.* Also note that the destination facility, where component separation occurs, is also fully regulated.

CEX-72-02417 (emphasis added).

As explained above, Respondents' operations in this matter were not in compliance with what was described as allowed in IEPA's letter. Mr. Kelly was told by IEPA that he and his company could accumulate waste lamps at their facility and then ship the waste lamps to a destination facility without a RCRA permit, and that he and his company could "volume reduce" waste lamps at the site of generation of the waste lamps. But Respondents chose to do neither. Instead, Respondents took waste lamps to the Riverdale facility, stored and then treated them there without a RCRA permit.

The second source who told Mr. Kelly what he could, and could not, legally do under Illinois' unauthorized version of the universal waste rule was his consultant, Mr. Graham. Mr. Graham testified that he discussed with Mr. Kelly the requirements of Illinois's universal waste rule:

Q: What did you discuss with Mr. Kelly regarding the topic of where volume reduction could take place?

A: Well, we – we discussed that it could be done at the generator location. The rule is very clear about that.

Q: What's the generator location?

A: On the property where the building was from which the lamps were removed.

Q: Could you expound a little on that? What do you mean by the – the facility where the lamps were removed?

A: Well, if the lamps were removed from a building or office tower, the lamps could be crushed at that property. Not down the road, or miles away. They could be crushed, essentially, by the generator at their location.

Q: And you discussed this with Mr. Kelly?

A: Yes.

Tr. 474-475. Mr. Graham further testified that he quit working for Mr. Kelly, because, among other reasons, his concerns about Mr. Kelly and Spent Lamp Recycling Technologies, Inc.'s noncompliance with the regulations. With respect to Mr. Kelly's business practices, Mr. Graham testified that he was worried about "volume reduction occurring away from generator locations." Tr. 475. He further explained:

Q: Could you describe again the activities that you thought were the mistake?

A: The mistake would have been that materials, Universal Waste, would be collected from locations, and transported to another location, and crushed at that location that was not the source where the material was generated. That was the thing that concerned me . . . .

Tr. 477. Mr. Graham's testimony is undisputed.

For the forgoing reasons, Respondents' argument that a "fair notice" defense should apply, because they did not know what regulations they were subject to, must be rejected based on the record. Respondents' argument that EPA should have used its enforcement discretion and not brought this action, because Respondents claim to have complied with Illinois' unauthorized universal waste rule, is similarly without merit.

III. CONCLUSION

The evidence presented at hearing establishes that Respondents are liable for conducting a hazardous waste storage and treatment operation without a RCRA permit for the facility in violation of 35 IAC § 703.121(a)(1). Applying the established facts to the statutory penalty factors set forth at Section 3008(a) of RCRA, 42 U.S.C. § 6928, and the RCRA Penalty Policy, proves that the penalty proposed in the Complaint is appropriate. Additionally, issuance of the Compliance Order is appropriate to require Respondents to conduct RCRA closure at the Riverdale facility and to prevent them from operating without a RCRA permit in the future. Nothing in Respondents' Brief changes that conclusion. Complainant, therefore, respectfully asks this Court to find Respondents liable for the violations alleged in the Complaint, to issue the Compliance Order requiring among other things closure of the Riverdale facility and that Mr. Kelly cease operating without a RCRA permit, and to assess the proposed penalty of $120,000.

Respectfully submitted,

Jeffrey A. Cahn
Andre Daugavietis
Associate Regional Counsel
Kasey Barton
Assistant Regional Counsel
U.S. EPA Region 5
Mail Code C-14J
77 West Jackson Boulevard
Chicago, Illinois 60604
(312) 886-6670

In the Matter of:	)	
	)	
MERCURY VAPOR PROCESSING TECHNOLOGIES, INC. a/k/a RIVER SHANNON RECYCLING, and LAURENCE C. KELLY	)	**Docket No. RCRA-05-2010-0015**
	)	
	)	
Respondents.	)	

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this day I filed with the Regional Hearing Clerk the original and one copy of Complainant's "Post-Hearing Reply Brief." I further certify that on this day I caused copies of Complainant's "Post-Hearing Reply Brief" to be served on the following persons by the following means:

VIA POUCH MAIL:

Honorable Barbara Gunning
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460-2001

VIA U.S. MAIL:

Laurence Kelly
7144 North Harlem Avenue
Suite 303
Chicago, Illinois 60631

Kasey Barton

Date: November 21, 2011

Kasey Barton
Assistant Regional Counsel
United States Environmental Protection Agency
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604