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

REPLY TO THE ATTENTION OF:

C-14J

January 24, 2011

BY UNITED PARCEL SERVICE
FOR OVERNIGHT DELIVERY
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. d/b/a River Shannon Recycling
Docket No. RCRA-05-2010-015

Dear Judge Gunning:

Enclosed please find a file-stamped copy of the following Complainant's Motion for Partial Accelerated Decision as to Applicable Regulations, with a supporting Memorandum and a Certificate of Filing and Service. By copy of this letter, the Respondent is being served today by overnight delivery service.

Sincerely,

Thomas M. Williams
Associate Regional Counsel

Enclosure

cc (w/ enclosure): Mr. Laurence Kelly

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO THE APPLICABLE REGULATIONS AND LIABILITY

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 22.20 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"), hereby respectfully requests that the Presiding Officer enter an order granting an accelerated decision (1) ruling that the EPA-authorized Illinois RCRA Subtitle C requirements apply to the Respondent;[1] and (2) finding that the Respondent is liable for operating a hazardous waste storage and treatment facility without a permit in violation of 35 IAC § 703(a)(1) (Count 1 of the Complaint).

In support of this Motion for Accelerated Decision as to the applicable regulations and liability, Complainant relies on the Consolidated Rules, the pleadings and documents in the record, and the facts and law set forth in the attached Memorandum in Support of this Motion

[1] Complainant submitted a Motion for Leave to Amend the Complaint and Compliance Order on December 22, 2010, to add Mr. Laurence Kelly as a Respondent in this action. Respondent did not object to Complainant's Motion. If the Presiding Officer grants the Motion for Leave to Amend, Complainant plans to file a Motion for Partial Accelerated Decision as to Mr. Kelly's liability as well.

with the attached affidavits.

Additionally, Complainant wishes to notify the Presiding Officer and the Regional Hearing Clerk that, by letter dated December 21, 2010, the United States Environmental Protection Agency, Region 5's Regional Counsel notified Respondent of his determination that by failing to substantiate the claim of business confidentiality it had asserted for responses to requests for information under Section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6907, it had waived that claim. Complainant's records show that a period exceeding the ten business days provided in 40 CFR § 2.205(f)(2) has passed since Respondent received that determination letter. Accordingly, the accompanying Memorandum in Support of the Motion for Partial Accelerated Decision as to the Applicable Regulations and Liability is being filed in unredacted form.

Complainant wishes to clarify that a final determination on the claim of business confidentiality that Respondent had asserted for certain financial information that was included in Complainant's Prehearing Exchange 12-A through 12-E, and 13-A through 13-H is pending. While they are not discussed in this motion, those exhibits should continue to be maintained as confidential pending that final determination.

Respectfully submitted this 24th day of January 2011,

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

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COMPLAINANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL ACCELERATED DECISION AS TO THE APPLICABLE REGULATIONS AND LIABILITY

Complainant, pursuant to 40 C.F.R. §§ 22.16 and 22.20 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 Partial Accelerated Decision respectfully requesting that the Presiding Officer enter an order: (1) ruling that the EPA-authorized Illinois RCRA Subtitle C requirements apply to the Respondent; and (2) finding that the Respondent is liable for operating a hazardous waste storage and treatment facility without a permit in violation of 35 IAC § 703(a)(1) (Count 1 of the Complaint).

I. RELEVANT STATUTORY, REGULATORY AND POLICY BACKGROUND

A. EPA Authorization of the Illinois Subtitle C RCRA Program.

The Resource and Conservation Recovery Act (RCRA) is a comprehensive environmental statute that authorizes EPA to regulate hazardous wastes from cradle to grave, in accordance with the safeguards and waste management procedures of Subtitle C, 42 U.S.C. §§ 6921-6939. *See, e.g., Chicago v. Envtl. Defense Fund*, 511 U.S. 328, 331 (1994). Section

3005(a) of RCRA, 42 U.S.C. § 6925(a), and its implementing regulations at 40 C.F.R. Part 270, require each person owning or operating a facility for the treatment, storage or disposal of hazardous waste to have a hazardous waste management permit.

Section 3006 of RCRA, 42 U.S.C. § 6926, provides that EPA may authorize states to administer and enforce their own hazardous waste programs in lieu of the federal RCRA Subtitle C (hereinafter Subtitle C) program. EPA will approve a state's request for authorization if it determines, among other things, that the state's program is equivalent to and consistent with the federal one. 42 U.S.C. § 6926(b). Following its authorization of a state's regulatory program, EPA enforces the authorized state regulations in lieu of the federal regulations within that state. A violation of any state provision authorized pursuant to Section 3006 of RCRA constitutes a violation of RCRA subject to the assessment of a civil penalty and issuance of a compliance order as provided in Section 3008 of RCRA, 42 U.S.C. § 6928. 42 U.S.C. § 6926(d).

EPA codifies its approval of state programs in 40 C.F.R. Part 272, and incorporates by reference therein the state statutes and regulations that EPA will enforce under Section 3008 of RCRA in order to provide clear notice to the public of the scope of the authorized program in every state. *See, e.g.,* 54 Fed. Reg. 45575 (Oct. 2, 1992). EPA granted Illinois final authorization to administer a Subtitle C program effective January 31, 1986. 40 C.F.R. § 272.700; 51 Fed. Reg. 3778 (Jan. 31, 1986). EPA authorized revisions to the originally approved program effective March 5, 1988, April 30, 1990 and June 3, 1991. 40 C.F.R. § 272.700. The Illinois statutes and regulations that have been authorized as part of the Subtitle C hazardous waste management program are listed at 40 C.F.R. § 272.701.

B. Applicability of federally promulgated RCRA rules in authorized states.

The Hazardous and Solid Waste Amendments of 1984 (HSWA) made significant

changes to the management of hazardous wastes, and to the applicability of certain federally promulgated rules in authorized states. *See* Hazardous Waste Management System; Final Codification Rule, 50 Fed. Reg. 28702, 28729 (July 15, 1985). The preamble to the universal waste rule, 60 Fed. Reg. 25492 (May 11, 1995), compares the differences in applicability of federal requirements promulgated pursuant to HSWA to those promulgated under pre-HSWA RCRA statutory authorities.[1] *See* 60 Fed. Reg. 25492, 25536 (May 11, 1995).

Prior to the enactment of HSWA, a state with final RCRA authorization administered its hazardous waste program in lieu of the federal program in that state. EPA retained authority to enforce the authorized state regulations under RCRA Section 3008. New federal RCRA requirements did not take effect in an authorized state, *i.e.*, were not enforceable by EPA within the state, until the State adopted the equivalent requirements under state law and was authorized by EPA for the new requirements. In contrast, under RCRA Section 3006(g), 42 U.S.C. 6926(g), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect as part of the RCRA program in authorized states, and are enforceable by EPA, as soon they become federal law. While the states must still adopt HSWA related provisions as state law to retain final authorization, EPA implements the HSWA provisions in authorized states until the states do so. Federal RCRA rules that are promulgated after HSWA's passage, but which are promulgated pursuant to pre-HSWA RCRA authorities, do not become applicable in authorized states until the state adopts and becomes authorized for the state counterpart to such rules. 60 Fed. Reg. 25492 at 25536.

C. The Universal Waste Regulations.

1. Background.

[1] As discussed in I.C.2. *infra,* the federal universal waste rule was promulgated pursuant to pre-HSWA RCRA statutory authority.

The universal waste rule became effective on May 11, 1995. 60 Fed. Reg. 25492 (codified at 40 C.F.R. Part 273).[2] This rule created streamlined hazardous waste management requirements for collecting and managing certain widely generated hazardous wastes[3] in order to encourage resource conservation, improve implementation of the Subtitle C regulatory program, and to provide incentives for the collection of common universal wastes and remove them from non-hazardous waste management systems. 60 Fed. Reg. 25492 at 25501.

The universal waste regulations create categories of large and small quantity universal waste "handlers," which include "generators" of universal waste and collection facilities. *See* 40 C.F.R. § 273.9. Universal waste handlers who generate or temporarily hold items designated as universal waste are exempt from RCRA permitting and certain other requirements that would otherwise apply to hazardous waste management, and instead are subject to the requirements of 40 C.F.R. Part 273, which include, among other things, streamlined standards for storing universal waste, labeling and marking waste or containers, preparing and sending shipments of universal wastes off-site, employee training, and response to releases. 64 Fed. Reg. 36466, 36468 (July 6, 1999).

The final rule adding mercury-containing hazardous waste lamps ("waste lamps" or "spent lamps") to the universal waste rule became effective on January 6, 2000. 64 Fed. Reg. 36466 (July 6, 1999). In the preamble to the rule, EPA stated that universal waste handlers should not treat universal waste because handlers are not subject to the full Subtitle C management standards. 64 Fed. Reg. 36466, 36477 (July 6, 1999). EPA emphasized its concern with the treatment, by crushing, of mercury-containing lamps, stating that:

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[2] A copy of the final universal waste rule is attached to this Memorandum for the Presiding Officer's convenience.
[3] The following were initially designated as universal wastes under the new rule: hazardous waste batteries, hazardous waste pesticides that are either recalled or collected in waste pesticide collection programs and hazardous waste thermostats. On July 6, 1999, EPA added hazardous waste lamps to the federal universal waste rule. 64 Fed. Reg. 36466.

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

Id. EPA stated that it would consider authorization of state programs that include provisions for controlling treatment or crushing of universal waste lamps where the state program application includes a demonstration of equivalency to the federal prohibition. *Id.*

2. Applicability of the universal waste rule in Illinois.

The federal universal waste rule was not promulgated pursuant to HSWA. 60 Fed. Reg. 25492 at 25536. Therefore, the federal universal waste regulations for spent lamps became applicable and federally enforceable only in states that did *not* have final RCRA authorization for the base Subtitle C program as of January 6, 2000, when the rule went into effect.

Illinois's authorized Subtitle C program became effective on January 31, 1986. Because the federal universal waste regulations did not become effective in Illinois at the time they were promulgated, 40 C.F.R. Part 273 is not federally enforceable in Illinois. Until Illinois obtains authorization to implement a state-adopted universal waste program which EPA determines is at least as stringent as the federal universal waste rule, EPA enforces the authorized Illinois Subtitle C regulations with regard to the management of hazardous waste lamps.[4]

D. EPA Policy on enforcing the Part 273 universal waste regulations in States that are not authorized to implement the universal waste rule.

On April 10, 1996, EPA stated its policy regarding enforcement against universal waste

[4]Respondent argues that universal wastes are listed as exempt from Subtitle C under 35 IAC § 721.109, which is mirrored in 40 C.F.R. § 261.9. However, 40 C.F.R. § 261.9 and the universal waste rule were promulgated concurrently on May 11, 1995 (60 Fed. Reg. 25541), nine years after the Subtitle C program was authorized in Illinois, and three years after the last EPA-authorized amendments to the Illinois Subtitle C program became effective on June 3, 1991. 55 Fed. Reg. 7320 (March 1, 1990). Neither 40 C.F.R. § 261.9 nor 35 IAC § 721.109 are part of the authorized Subtitle C program in Illinois.

handlers and transporters in states that are authorized for the Subtitle C program, but are not yet authorized to implement the universal waste regulations. 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* (April 10, 1996)(Herman Memo) (Respondent' Prehearing Exchange Exhibit (RPX) 4a). The policy directs EPA, under specified circumstances, to exercise discretion not to enforce the authorized Subtitle C regulations against handlers and transporters of universal wastes in such states. In recognition of EPA's position that managing wastes in compliance with the universal waste rule at 40 C.F.R. Part 273 is environmentally protective, the Herman Memo provides that EPA "*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).

II. RELEVANT FACTUAL BACKGROUND

A. Illinois is not authorized to implement the universal waste regulations.

Illinois initially submitted a package for authorization of its version of the universal waste rule on October 30, 1996. (Westefer Aff., Attach. B). EPA has not yet authorized the Illinois version of the universal waste rule. EPA provides notice at 40 C.F.R. Subpart O of the Illinois regulations that have been approved as the authorized Subtitle C program. They do not include Illinois's universal waste regulations. Therefore, consistent with the Herman Memo, EPA uses the federal universal waste regulations at 40 C.F.R. Part 273 in evaluating the regulated community in Illinois that manages universal waste. As explained in V.C. *infra*, Respondent is not in compliance with the requirements of 40 C.F.R. Part 273, and therefore is subject to the EPA-authorized Illinois Subtitle C regulations for facilities that store and treat

hazardous waste.

B. EPA's Inspection of the Riverdale Facility.

On October 30, 2007, EPA conducted an inspection of the premises where Mercury Vapor Processing Technologies, Inc. (MVPT) conducted its operations, located at 13605 S. Halsted Street, in Riverdale, Illinois (the Riverdale facility or facility). (Complainant's Prehearing Exchange Exhibit (CPX) 1). Inside the building at the facility, EPA observed at least 33 open containers of spent fluorescent lamps. *Id.* Some of the containers were unlabeled, and some were marked: "Regulated Universal Waste Destined for Recycling." (CPX 1, Attach. A, Photographs 20-21). There were containers of intact fluorescent lamps, and containers with broken fluorescent lamps inside the facility. (CPX 1, Attach. A, Photographs 1-4,7-19). There were also three semi-trailers containing intact waste lamps parked in the yard of the facility (CPX 1, Attachment A, Photo 4-4, 42-42, 38-41, 45). Two uncovered roll-off boxes containing crushed glass were also present (CPX 1, Attach A Photographs 1-4, 35-37). The MVPT representative present, Mr. Laurence Kelly, informed EPA that it used a "mobile treatment unit" to crush the waste lamps it picked up from its customers. (CPX 1). Mr. Kelly further explained that some waste lamps were held at the Riverdale facility prior to being treated at the facility. *Id.*

C. EPA's Sampling and Analysis of Waste Lamps at the Riverdale Facility.

Illinois and the federal regulations define "hazardous wastes," in part, as "solid wastes" that exhibit certain characteristics, including the characteristic of toxicity. 35 IAC §§ 721.103(a), 721.124; 40 C.F.R. § 261.24. The maximum toxicity concentration for mercury is 0.2 mg/L. 35 IAC § 721.124(b); 40 C.F.R. § 261.24. On November 14, 2007, EPA collected twelve samples of 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. (Brown

Aff. Attach. C; CPX 2). Using the Toxicity Characteristic Leaching Procedure, four of the twelve waste lamp samples yielded mercury concentrations at or above the regulatory limit for mercury (0.2 mg/ml). *Id.* Therefore, at least some of the lamps stored at the Riverdale facility were hazardous wastes.

D. Respondent's Website.

During its operation, MVPT, using the assumed name River Shannon Recycling, maintained a website at http://www.rsrecycling.com. (CPX 10). MVPT's website offered recycling services to customers for various universal and electronic wastes, including different types of fluorescent lamps. *Id.* The website described the process for recycling universal wastes as follows:

> I represent a company that owns significant patented technology that has the ability to come to your back door and eliminate your companies' and your clients' *generator* liability immediately, by recycling your consolidated material and creating raw fresh product that we own and take title to subsequent to our recycling process.

Id. (emphasis added). The website also refers to the hazards associated with improper handling of wastes such as spent lamps. *Id.*

E. Respondent's Responses to EPA's Information Requests.

EPA sent MVPT three information requests pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927 on the following dates: November 5, 2007 (CPX 3), May 20, 2008 (CPX 5), and October 3, 2008 (CPX 7). Respondent delivered its responses to the information requests on or about the following dates: November 26, 2007 (First Response) (CPX 4), June 3, 2008 (Second Response) (CPX 6), and October 20, 2008 (Third Response) (CPX 8). A summary of MVPT's Responses is provided below in order to show that, although MVPT has modified its description of operations in an apparent attempt to demonstrate compliance with the federal and state

universal waste regulations, there is no genuine issue of material fact that MVPT conducted a hazardous waste storage and treatment operation without a permit.

1. Respondent's First Response.

In MVPT's First Response, it stated that it leased the Riverdale facility from a Mr. Anthony Gerardi by unwritten agreement. (CPX 4, No. 18). It also described in detail its process for "processing" spent mercury containing lamps as follows: MVPT loads spent lamps into the processing unit, and the "mercury vapor processing unit is fed by hydraulic elevators that introduces [sic] and *crushes* spent lamps" and a series of active carbon filters capture the mercury vapor in the form of mercuric sulfide. (CPX 4, No. 2) (emphasis added). Once the process has taken place and "the extraction of mercury vapor has been completed," crushed glass and aluminum by-products are stored for reuse or disposal "depending on the markets." *Id.* MVPT provided bills of lading showing that during the months it operated at the Riverdale facility, Respondent sent tons of the crushed glass and aluminum from the Riverdale facility to solid waste landfills, and also showed that Mr. Kelly arranged for the disposal of the wastes. *Id.* MVPT stated that it owned the "mobile processing unit" that it used to crush waste lamps. (CPX 4, No. 2(e)). MVPT also stated that "consolidated spent lamps collected from generators are staged inside the Riverdale facility . . .and processed periodically depending on volumes." (CPX 4, No. 2(g)). Regarding the intact waste lamps EPA observed during its inspection of the Riverdale facility, MVPT stated that it planned to "immediately process" the lamps. (CPX 4, No. 4(c)).

Included in MVPT's First Response was a detailed list of its protocols regarding managing universal waste. Under the section entitled "Spent Lamps," it listed MVPT's procedures regarding picking up lamps from customers and "downloading" and "staging" lamps

at a facility. *Id.* Throughout MVPT's protocols, it referred to a "crusher/recovery unit." *Id.*

2. Respondent's Second Response.

Throughout MVPT's Second Response, it referred to "processing" and "mobile recycling" of waste lamps. (CPX 6, Nos. 7, 8). Respondent stated that it was given permission by the Illinois Environmental Protection Agency (IEPA) to receive lamps at its facility for accumulation without a permit, provided the lamps are only accepted for accumulation and then shipped to a fully regulated "destination facility."[5] (CPX 6, No. 12). Respondent also stated that one of its assumed names is "Shannon Lamp Recycling" and that "the destination facility is our mobile processing unit." (CPX 6, Nos. 7, 13).

3. Respondent's Third Response.

In MVPT's third response, it made a reference to itself, for the first time, as a "generator/handler" (CPX 8, No. 3b). Respondent continued to admit that what it now calls a "mobile recycling unit" processed spent lamps. *Id.* It also stated that it "commissioned Shannon Lamp Recycling," which it had earlier identified as one of its own assumed names, to "perform recycling services using the SLR mobile recycling unit ...." *Id.* Specifically, MVPT stated that the spent lamps present during EPA's inspection were transported to a different location and processed using "SLR's personnel and mobile unit to process the Universal Waste," with the glass and metal then being sent to a solid waste landfill. *Id.* at 3b.

F. Respondent's Amended Answer and Prehearing Exchange.

MVPT included with its prehearing exchange a "Statement Regarding Compliance and

[5] This statement presumably refers to a letter that MVPT has submitted as part of its prehearing exchange from the IEPA to a predecessor company dated October 16, 2000. (RPX 9). The letter states that the predecessor corporation may receive lamps at its facility without a permit "provided the lamps are only accepted for accumulation and subsequent shipment to the destination facility." The letter notes that the Illinois universal waste rule requires that lamps be crushed at the site of generation only, and expressly states that "the destination facility, where component separation occurs, is also fully regulated." Even if this letter applied to the Respondent, which it does not, Respondent ignored the letter's express limitations by crushing waste lamps at the Riverdale facility.

Penalty" (Statement). (RPX Attachment). In MVPT's Statement, it stated again that it is a "generator." However, MVPT asserted the new argument that it was only responsible for picking up waste lamps and transporting them to the Riverdale facility. *Id.* MVPT asserted here that Shannon Lamp Recycling or "SLR," which it had identified earlier as one of its assumed names (CPX 6 No. 7), was a sole proprietorship operated by Laurence Kelly, who is also the Chief Operating Officer of MVPT and who established the protocols and managed day-to-day activities relating to the purported "recycling" of universal waste. (CPX 5). MVPT asserted that it would transport waste lamps to the Riverdale facility, arrange for Mr. Kelly to process lamps in the mobile treatment unit, and then MVPT would seek "known end users" to take the glass and metal, and if there were none, send the glass and metal to a landfill. (Statement, para. 1).[6] MVPT used yet another term to describe its operations, stating that Laurence Kelly "*volume reduced*[7]" lamps using his "*volume reduction*" equipment. *Id.* (emphasis added).

III. STANDARD OF REVIEW

Accelerated decision is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a). Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (FRCP). *See, e.g., In re BWX Techs., Inc.,* 9 E.A.D. 61, 74-77 (EAB 2000); *Belmont Plating Works,* Docket No. RCRA-5-2001-0013, 2002

[6] Based on MVPT's Responses to EPA's information requests and the information submitted in its prehearing exchange, Complainant submitted a Motion for Leave to Amend the Complaint and Compliance Order to include Laurence Kelly as a party to this action on December 22, 2010. MVPT did not object to Complainant's Motion, stating that Laurence Kelly acted as a sole proprietor operating on a "verbal contract to volume reduce" MVPT's universal waste. (Respondent's Memorandum in Support of Complainant's Motion For Leave to Amend the Complaint and Compliance Order).

[7] Use of the term "volume reduce" may be an attempt by the Respondent to claim that it is in compliance with the unauthorized Illinois universal waste regulations at 35 IAC § 733.133(d)(3), which allows large quantity handlers of universal waste lamps to volume reduce lamps *at the site of generation only*, with certain procedures and controls in place. However, Respondent has admittedly brought waste lamps to the Riverdale facility and "volume reduced" them at that location, and therefore is not in compliance with the unauthorized Illinois rule.

EPA ALJ LEXIS 65 at *8 (ALJ Sept. 11, 2002). The movant has the initial burden of showing "no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). Once the movant meets its burden, the non-movant must come forward with specific facts showing there is a genuine issue for hearing. *See BWX Techs., Inc.*, 9 E.A.D. at 75. All of the evidence must be viewed in a light most favorable to the non-movant. *SMS Demag Aktiengesellschaft v. Material Scis. Corp.*, 565 F.3d 365, 368 (7th Cir. 2009) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)). However, in order to raise a genuine issue of material fact, the non-movant must present significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. *BWS Techs., Inc.*, 9 E.A.D. at 75; *In re FRM Chem, Inc., et al.* Docket No. FIFRA-07-2008-0035, 2010 EPA ALJ LEXIS 18 at *8 (ALJ Sept. 13, 2010).

IV. ARGUMENT

A. The EPA-authorized Illinois Subtitle C regulations apply to the Respondent.

The crux of Respondent's argument is simple: it is not required to have a RCRA operating permit because it is in compliance with the Illinois universal waste rule at 35 IAC Part 733 and the federal universal waste rule at 40 C.F.R. Part 273. In fact, Respondent's denials of the allegations in the Complaint are entirely based on its assertions that it was in compliance with the universal waste regulations. However, Respondent's assertions are incorrect both legally and factually. The applicable Subtitle C regulations prohibited it from storing and treating hazardous wastes without obtaining a RCRA permit.

As discussed in II.A. *supra*, Illinois' universal waste regulations have not been authorized as part of the Subtitle C program in Illinois. Because the federal universal waste rule at 40 C.F.R. Part 273 was not promulgated pursuant to HSWA, it is not federally enforceable in

Illinois until Illinois receives final authorization from EPA. *Id.*

To the extent Respondent relies on the Herman Memo as an equitable defense to EPA's enforcement action, it does not meet the criteria under which the Memo directs EPA to forego enforcement of the authorized Subtitle C regulations. Respondent is not in compliance with 40 C.F.R. Part 273. Part IV.C, *infra*, discusses Respondent's compliance status with Part 273 and demonstrates beyond any factual dispute that Respondent's operations are out of compliance with the federal universal waste rule. Thus, because Respondent is not in compliance with the federal universal waste rule, the authorized Illinois Subtitle C regulations apply to Respondent, which required it to have a permit for its hazardous waste management operation.

B. Respondent is liable for conducting a hazardous waste storage and treatment operation without a permit.

By its own admissions, Respondent held and crushed spent lamps at the Riverdale facility and then arranged for the disposal of the resulting glass and metal as solid waste. Thus, this case is not about universal waste recycling. Throughout EPA's investigation of this matter and in the presentation on the now-defunct website, Respondent attempted to create the impression that its activities constituted an effort to return the components of spent lamps to productive use. However, the undisputed facts establish that crushed glass from the bulbs and their metal ends have been sent to solid waste landfills and so-called "spent carbon filters" are stockpiled pending disposal at a solid waste landfill. (CPX 4,6). Respondent has produced no evidence documenting that any portion of the spent lamps has ever been recycled.

Pursuant to 35 IAC § 703.121(a)(1), no person may conduct any hazardous waste storage, treatment or disposal operation without a RCRA permit for the hazard waste management facility. The following shows there is no genuine issue of material fact that Respondent operated a hazardous waste storage and treatment facility without a RCRA permit.

1. Respondent is a "person" under the EPA-authorized Illinois Subtitle C program.

Under 35 IAC § 702.110, "person" means "any individual, partnership . . . firm, company, corporation . . . or any other legal entity." As a corporation organized under the laws of Illinois, MVPT clearly falls within this definition.

2. The Riverdale property is a "facility" under the EPA-authorized Illinois Subtitle C program.

Under 35 IAC § 702.110, facility means "all contiguous land and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste." Based on EPA's inspection, the Riverdale property comprised a building and a paved outdoor area. (CPX 1). Intact waste lamps and crushed waste lamps were stored in cartons, roll-off boxes and in semi-trailer trucks at the facility. *Id.* In MVPT's Responses to information requests, it identified the Riverdale property as a location to which it brought waste lamps and as the location where either it or Laurence Kelly used equipment to crush or "volume reduce" waste lamps. Therefore, the Riverdale property is clearly a "facility" under 35 IAC 702.110.

3. The waste lamps stored and treated at the Riverdale facility were hazardous wastes.

Respondent admits that universal waste meets the definition of hazardous waste. (RPX, Answer, 58). Four of the twelve waste lamp samples EPA analyzed from the Riverdale facility contained mercury concentrations at or above the RCRA toxicity level of 0.2 mg/L. (Brown Aff. Attach. C). Respondent denies that the waste lamps from the Riverdale facility that EPA sampled and tested are hazardous. However, Respondent does not point to any failure with EPA's testing methods. Respondent seems instead to argue that the "volume reduced" glass and metal are not hazardous. Yet the hazardous character of the wastes following the crushing

process is irrelevant to the issue of whether MVPT needed a permit to store the wastes and subject them to that process. Here, there is no question at least some of the waste stored at the Riverdale facility was hazardous. Respondent even acknowledges this, basing its internet advertising on the risks that spent lamps can pose, and warning that lamp users should avoid "generator liability." (II.D. *supra*). Respondent admits arranging for processing waste lamps that it collected from customers and held at the Riverdale facility. (CPX 4). Therefore, Respondent managed waste lamps that were hazardous when they arrived at the Riverdale facility.

4. Respondent conducted a hazardous waste storage operation.

35 IAC § 702.100 defines "storage" as "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere." EPA's inspection revealed a large quantity of lamps stored at the facility, both intact and crushed. (II.B. *supra*). Respondent admitted at the time of inspection, in its Responses, and in its prehearing exchange that it took waste lamps from its customers and stored them at the Riverdale facility before the waste lamps were processed. (II. *supra*). Since waste lamps were being temporarily held pending treatment, they were being stored within the regulatory definition's meaning.

5. Respondent conducted a hazardous waste treatment operation.

Under 35 IAC § 702.110, "treatment" means:

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

Respondent clearly used processes designed to change the physical and chemical character of the

hazardous waste lamps. Respondent admits that the so-called mobile unit "crushed, "processed," and "volume reduced" waste lamps, all of which are clearly "treatment" under 35 IAC § 702.110. That the lamp crushing process purportedly rendered the waste lamps nonhazardous or safe to dispose of, as Respondent suggested on its website, would also bring it within the regulatory definition of "treatment." MVPT stated that it had a "mobile processing unit" that "crushed" waste lamps. (II.E.1 *supra*). Then, MVPT "processed" waste lamps at a "destination facility," which was the "mobile processing unit." (Part II.E.2 *supra*). Apparently realizing that this description subjected it the RCRA operating permit requirement, MVPT then stated that it was a "generator" and operated a "mobile volume reduction unit" and only "volume reduced" waste lamps. (II.E.3, F, *supra).* Then MVPT changed its story yet again, claiming that Laurence Kelly, using one of MVPT's assumed names, operated a sole proprietorship that crushed waste lamps, and that MVPT only picked up waste lamps, accumulated them at the Riverdale facility and sought unsuccessfully for purchasers before arranging for disposal. (II.F, *supra).* However, no matter what slant on the story Respondent attempts to make, it remains liable because its various descriptions of spent lamp processing at the Riverdale facility are all considered "treatment" under 35 IAC § 702.110.

Respondent now seems to contend that it escapes liability because Mr. Kelly, who was at times the vice president, president, and the Chief Operating Officer (COO) of MVPT, and who made all of the decisions regarding the handling, transporting, storage, treatment and disposal of the hazardous waste lamps taken to and crushed at the Riverdale facility, would occasionally run the crushing operation as a sole proprietor using one of the corporation's assumed names. Yet MVPT's First Response states that it was the lessee of the Riverdale facility, and was at that time the owner of the mobile treatment unit. As such, it had authority to control hazardous waste

management activities. Therefore, even if one believes Mr. Kelly's more recent statement that MVPT would, upon accumulation of a sufficient number of spent lamps, contact him in his individual capacity to crush lamps at the Riverdale facility with MVPT resuming custody of the crushed glass and metal, this scenario is merely a contractual employment arrangement whereby the facility operator engaged an individual to enter the premises and perform part of the operator's work. MVPT still had control of the premises as lessee, control of the treatment being performed, and authority to decide whether and when to contact Mr. Kelly to perform the crushing activities.

6. Respondent did not have a RCRA Subtitle C permit.

MVPT agrees that it did not have a permit to store hazardous waste. (Amended Answer, Paras. 43-44). EPA has requested that MVPT provide any RCRA permits that it has received, and MVPT has provided none. (CPX 4,8). Additionally, EPA reviewed the informational database RCRAinfo and found no information indicating MVPT under any of the assumed names Respondent used throughout EPA's investigation, has ever received a RCRA hazardous waste management permit for the facility. (Brown Aff. Attach. C). [8]

C. Respondent was not in compliance with the federal universal waste rule and is not eligible for enforcement discretion under the Herman Memo.

The federal universal waste regulations were created in part to relieve universal waste "handlers" of certain Subtitle C requirements, so long as they either send the waste to another handler or to a fully regulated destination facility. The universal waste rule defines a "universal waste handler" as: "(1) a generator (as defined in this section) of universal waste; or (2) the owner or operator of a facility . . . that receives universal waste from other universal waste handlers, accumulates universal waste, and sends universal waste to another universal waste

[8] Similarly, there appears to be no record of a RCRA permit covering the other location at which Respondent admits to having processed lamps, 1750 West 75th , Chicago, Illinois. (Brown Aff., Attach. C)

handler, or to a destination facility, or to a foreign destination. 40 C.F.R. § 273.9. The definition further provides that a universal waste handler *does not mean a person who treats, disposes of, or recycles universal waste* (and lists exceptions not relevant here) (emphasis added). *Id.* All universal waste handlers are prohibited from treating universal waste. 40 C.F.R. §§ 273.11, 273.31. A "generator" means "any person, by site, whose act or process produces hazardous waste . . . or whose act first causes a hazardous waste to become subject to regulation." *Id.* A "destination facility" is "a facility that *treats*, disposes of, or recycles a particular category of universal waste." 40 C.F.R. § 273.9 (emphasis added). Universal waste destination facilities are subject to all requirements for hazardous waste treatment, storage, and disposal facilities and must receive a RCRA permit for such activities. 40 C.F.R. § 273.60; 64 Fed. Reg. 36466, 36469.

As discussed above, Respondent picked up universal waste lamps from customers, stored the lamps at the Riverdale facility, treated them at the facility, and then sent the crushed glass and aluminum to solid waste landfills. There is no evidence Respondent has ever sent waste lamps to another handler or to a facility with a permit to treat hazardous wastes, as the regulations require. By treating waste lamps at the Riverdale facility, Respondent operated a "destination facility" as defined in 40 C.F.R § 237.9 and therefore was required to have a permit. 40 C.F.R. § 273.60(a). Respondent has also expressly admitted to operating a destination facility. (CPX 6, No.12). Since MVPT had no permit to treat hazardous waste, it was out of compliance with the federal universal waste rule. One reason EPA promulgated the universal waste rule was to prevent exactly the type of operation Respondent wa engaging in, that is, the unpermitted, uncontrolled crushing of hazardous waste lamps. *See* I.C.1 *supra.*

V. CONCLUSION

There is no genuine issue of material fact as to the applicable regulations in this matter or

Respondent's liability because Respondent has admitted that it stored and treated hazardous wastes at the Riverdale facility without a permit. Illinois has not been authorized to implement its universal waste regulations, and since Respondent is not in compliance with the 40 C.F.R. Part 273 provision for universal waste handlers, the Illinois Subtitle C regulations apply to it. Based on EPA's inspection of the Riverdale facility, the results of sampling and Respondent's own admissions, it is more likely than not that Respondent stored and treated hazardous wastes without a permit in violation of 35 IAC § 703(a)(1). Complainant respectfully requests the Presiding Officer grant its Motion for Partial Accelerated Decision and enter an order finding that (1) the EPA-authorized Illinois Subtitle C regulations apply to the Respondent; and (2) Respondent is liable for operating a hazardous waste storage and treatment facility without a permit in violation of 35 IAC § 702(a)(1).

Respectfully submitted this 24th day of January,

Thomas M. Williams
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

CERTIFICATE OF FILING AND SERVICE

I hereby certify that today I filed personally with the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, 77 West Jackson Boulevard (E-19J), Chicago, Illinois, 60604-3590, the original and one copy of the document entitled **Complainant's Motion for Partial Accelerated Decision as to the Applicable Regulations and Liability** and the Memorandum in support thereof, and that I caused to be served, by overnight delivery service, copies of the original documents on the Presiding Officer and the Respondent:

Honorable 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

Mr. Larry Kelly
Mercury Vapor Processing Technologies, Inc.
7144 North Harlem Avenue
Suite 303
Chicago, Illinois 60631

Date: January 24, 2011

Nina Johnson
Administrative Program Assistant
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard, C-14J
Chicago, Illinois 60604