UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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	)	

ORDER ON COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO THE APPLICABLE REGULATIONS AND LIABILITY
ORDER ON MOTION TO SUPPLEMENT RESPONDENTS' PRE-HEARING EXCHANGE

I. PROCEDURAL BACKGROUND

On April 23, 2010, the United States Environmental Protection Agency ("EPA" or "Agency"), Region 5 ("Complainant"), initiated this proceeding by filing a Complaint and Compliance Order ("Complaint") against Mercury Vapor Processing Technologies, Inc., a/k/a River Shannon Recycling ("Respondent MVPT" or "MVPT"). The Complaint alleges in one count that Respondent MVPT violated certain provisions of the Illinois Administrative Code ("IAC") promulgated pursuant to Section 3006(b) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928(a). Appearing *pro se*, Respondent MVPT, through its representative Laurence Kelly,[1/] filed an Answer in the form of a letter on May 20, 2010.[2/]

Pursuant to the Prehearing Order issued by the undersigned on June 15, 2010, Complainant and Respondent MVPT subsequently

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[1/] Throughout this proceeding, Laurence Kelly has also been referred to as Laurence C. Kelly and Larry Kelly.

[2/] Pursuant to 40 C.F.R. § 2.203(b), Respondent MVPT simultaneously filed a letter asserting a business confidentiality claim "covering all of the information in our response."

filed their initial prehearing exchanges[3/] and Complainant filed a rebuttal to Respondent MVPT's Initial Prehearing Exchange. On December 22, 2010, Complainant filed a Motion for Leave to Amend Complaint and Compliance Order ("Motion to Amend"), a memorandum in support thereof, and a Proposed Amended Complaint and Compliance Order ("Proposed Amended Complaint"). In the Motion to Amend, Complainant sought leave to amend the Complaint in order to revise a citation to a provision of the Illinois Administrative Code that appeared in numerous paragraphs of the Complaint and to add Mr. Kelly as a respondent in this matter. The Proposed Amended Complaint correspondingly contained additional paragraphs and an additional count to set forth allegations against Mr. Kelly. On January 10, 2011, the undersigned received Respondent MVPT's Memorandum in Support of Complainant's Motion for Leave to Amend the Complaint and Compliance Order, which contained, *inter alia*, responses to each of the numbered paragraphs of the Proposed Amended Complaint.

By Order dated January 19, 2011, the undersigned granted the Motion to Amend. Complainant subsequently filed an Amended Complaint and Compliance Order ("Amended Complaint") against Respondent MVPT and Mr. Kelly ("Respondent Kelly") on January 28, 2011, alleging in two counts that Respondents operated a hazardous waste storage and treatment facility in Riverdale, Illinois, without a RCRA permit in violation of 35 IAC § 703.121(a)(1).

More specifically, Complainant alleges that, between February 2005 and November 2007, Respondents received waste lamps, including spent fluorescent bulbs, from third parties; transported the waste lamps to their Riverdale property for storage and treatment; crushed the waste lamps using a "mobile treatment unit" at their Riverdale property in order to reduce the volume of the lamps, capture any mercury vapor released during the crushing process, and render the lamps non-hazardous; and disposed of the resulting materials at solid waste landfills. Complainant further alleges that at least some of the waste lamps stored and crushed by Respondents at their Riverdale property constituted hazardous waste under 35 IAC § 721.103(a) and that Respondents failed to obtain a permit for their activities as required by 35 IAC § 703.121(a)(1). For the alleged violations,

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[3/] On October 29, 2010, Respondent MVPT filed both its Initial Prehearing Exchange and a Motion for Amendment of Answer, which identified a number of proposed amendments to its Answer. On November 19, 2010, the undersigned granted the unopposed Motion and simultaneously scheduled a hearing in this matter to commence on March 1, 2011. By Order dated February 23, 2011, the hearing was rescheduled to begin on July 25, 2011, and continue if necessary through July 29, 2011.

Complainant proposes the assessment of a civil administrative penalty in the amount of $743,293 against Respondents.

Pursuant to the Order of January 19, 2011, Respondent MVPT's responses to the Proposed Amended Complaint were deemed to constitute Respondents' Answer to the Amended Complaint ("Amended Answer") and the filing date was designated to be the same as that of the Amended Complaint. In their Amended Answer, Respondents deny that they engaged in the storage and treatment of hazardous waste, arguing that the waste lamps handled at their Riverdale property constituted universal waste, which is not fully regulated as hazardous waste under federal and state regulations. Respondents also deny that Respondent Kelly stored waste lamps at the Riverdale property and that either Respondent crushed the waste lamps. Rather, Respondents contend that Respondent MVPT transported and accumulated the waste lamps at the Riverdale property and that Respondent Kelly, acting as the sole proprietor of a business known as SLR Technologies,[4/] operated "mobile volume reduction equipment" designed to reduce the volume of the lamps and capture any mercury vapor released during the volume reduction process. Respondents further contend that Respondent MVPT arranged for the resulting materials either to be sold for reuse or to be disposed of as non-hazardous waste. Finally, Respondents argue that they complied with federal and state regulations governing universal waste in conducting these activities.

On February 8, 2011, Complainant filed a Motion for Partial Accelerated Decision as to Applicable Regulations and Liability ("Motion for Accelerated Decision"), a Memorandum in support thereof ("C's Memo"), and Attachments A-C ("C's Attachments").[5/]

[4/] Throughout this proceeding, the parties also refer to SLR Technologies as SLR and Shannon Lamp Recycling.

[5/] To date, a number of documents filed in this proceeding have received confidential treatment due to Respondent MVPT's earlier assertion of a business confidentiality claim. Complainant relates in its Motion for Accelerated Decision that, by letter dated December 21, 2010, EPA notified Respondent MVPT of its determination that Respondent MVPT "had waived the claim of business confidentiality that it had asserted for responses to requests for information under Section 3007 [of RCRA], 42 U.S.C. § 6907, for failing to substantiate its claim of confidentiality." Motion for Accelerated Decision at 2. Complainant further represents that, because its records reflect that a period exceeding the ten business days provided by 40 C.F.R. § 2.205(f)(2) has passed since Respondent MVPT received that letter, Complainant was filing its Memorandum in unredacted form.

(continued...)

On March 4, 2011, through Respondent Kelly, Respondents filed an Objection to the Complainant's Motion for Partial Accelerated Decision as to the Applicable Regulations and Liability ("Objection"), a Memorandum in support thereof ("Rs' Memo"), and Attachments A-K (R's Attachments"). Complainant filed a Reply Memorandum in Support of its Motion for Partial Accelerated Decision as to the Applicable Regulations and Liability ("C's Reply") on March 14, 2011. Upon consideration, for the reasons set forth below, Complainant's Motion for Accelerated Decision is hereby **GRANTED IN PART** and **DENIED IN PART.**

On March 28, 2011, Respondents filed a Motion to Supplement Respondents' Pre-Hearing Exchange ("Motion to Supplement"). On April 1, 2011, Complainant filed a Response indicating that it does not oppose Respondents' Motion. Upon consideration, the unopposed Motion to Supplement is hereby **GRANTED.**

II. STANDARD FOR ADJUDICATING A MOTION FOR ACCELERATED DECISION

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), set forth at 40 C.F.R. part 22. Section 22.20(a) of the Rules of Practice authorizes Administrative Law Judges to:

> render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as

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[5/] (...continued)
Pursuant to 40 C.F.R. § 2.205(f)(2), a notice of EPA's denial of a business confidentiality claim shall state that:

> EPA will make the information [at issue] available to the public on the tenth working day after the date of the business's receipt of the written notice . . ., unless the EPA legal office has first been notified of the business's commencement of an action in a Federal court to obtain judicial review of the determination [that the information is not entitled to confidential treatment], and to obtain preliminary injunctive relief against disclosure.

Nothing in the record suggests that Respondent MVPT is seeking judicial review of EPA's determination that Respondent MVPT waived its business confidentiality claim and that Respondent MVPT has obtained a preliminary injunction against disclosure. Accordingly, the office of the undersigned will no longer treat any documents filed in this proceeding in a confidential manner.

> affidavits, as he may require, if 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).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, at *8 (ALJ, Sept. 11, 2002). Pursuant to Rule 56(a) of the FRCP, a tribunal "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).[6/] Therefore, federal court rulings on motions for summary judgment provide guidance for adjudicating motions for accelerated decision. *See, e.g., Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

In assessing materiality for summary judgment purposes, the United States Supreme Court has held that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). In turn, a factual dispute is genuine if a finder of fact could reasonably find in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 252.

The Supreme Court has held that the party moving for summary judgment bears the burden of showing that no genuine issue of material fact exists. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party.

[6/] The standard for granting summary judgment was previously set forth in subsection (c) of Rule 56 and read as follows: summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Rule 56 was amended effective on December 1, 2010 (after the motion presently before the undersigned was filed), and among other modifications, the standard for granting summary judgment was moved from subsection (c) to subsection (a). However, the substantive standard "remains unchanged," and the amendments do not affect earlier case law construing and applying the standard. Fed. R. Civ. P. 56 Notes of Advisory Committee on 2010 amendments.

See Anderson, 477 U.S. at 255; *Adickes*, 398 U.S. at 158-59. Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In support of or in opposition to a motion for summary judgment, a party must "cit[e] to particular parts of materials in the record," such as documents, affidavits or declarations, and admissions, or "show[] that the materials cited do not establish the absence or presence of a genuine dispute." Fed. R. Civ. P. 56(c)(1). The Supreme Court has found that, once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, the non-moving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

More specifically, the Supreme Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist. *Strong Steel Products*, EPA Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57, at *22 (ALJ, Sept. 9, 2002). Rather, a party opposing a motion for accelerated decision must produce some evidence that places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; see *Bickford, Inc.*, EPA Docket No. TSCA-V-C-052-92, 1994 EPA ALJ LEXIS 16, *8 (ALJ, Nov. 28, 1994).

The Supreme Court has noted, however, that there is no requirement that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex*, 477 U.S. at 323-324. Of course, if the moving party fails to meet its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes*, 398 U.S. at 156.

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether a genuine factual dispute exists, I must consider as the finder of fact whether I could reasonably find for the non-moving party under the "preponderance of the evidence" standard.

Accordingly, a party moving for accelerated decision must establish by citing to particular parts of materials in the

record that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law by the preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the presence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. Even if the finder of fact believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

III. FACTUAL BACKGROUND

Until its involuntary dissolution on or about March 10, 2010, Respondent MVPT was a corporation doing business in the State of Illinois, and Respondent Kelly served as its vice president, health and safety officer, and chief operating officer. Amended Complaint ("AC") ¶¶ 5, 28, 64; Amended Answer ("AA") ¶¶ 5, 28, 64. Respondent MVPT began operating at 13605 S. Halsted Street in Riverdale, Illinois ("Riverdale property"), in February 2005. AC ¶ 17, 27; AA ¶ 17, 27. Respondents did not hold or apply for a permit or interim status to engage in the storage and treatment of hazardous waste at the Riverdale property. AC ¶¶ 52-63; AA ¶¶ 52-63.

On October 30, 2007, representatives of EPA conducted an inspection of the Riverdale property pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927. AC ¶ 21; AA ¶ 21. During the inspection, EPA representatives observed cardboard boxes, drums, roll-off containers, and semi-truck trailers containing waste lamps at or adjacent to the Riverdale property. AC ¶¶ 22; AA ¶¶ 22. Complainant collected samples of these waste lamps on November 14, 2007, and subjected the samples to the Toxicity Characteristic Leaching Procedure ("TCLP") described at 35 IAC § 721.124 and 40 C.F.R. § 261.24. AC ¶ 50; AA ¶ 50. The analysis conducted by Complainant revealed that at least some of the waste lamps exhibited the characteristic of toxicity, as defined by 35 IAC § 721.124 and 40 C.F.R. § 261.24, due to the level of mercury the lamps contained. AC ¶¶ 48, 49, 51; AA ¶¶ 48, 49, 51.

IV. STATUTORY AND REGULATORY BACKGROUND

A. Subtitle C of RCRA and the Implementing Regulations

Designed to regulate hazardous waste from "cradle to grave," Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939e, directs EPA to promulgate standards governing the generation, transportation, treatment, storage, and disposal of hazardous waste. The

standards established by EPA to regulate these activities are found at 40 C.F.R. parts 260 through 279. Of particular relevance here, Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and the implementing regulations promulgated by EPA 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 obtain a permit for its operation. Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), authorizes EPA to assess a civil penalty and issue orders requiring compliance immediately or within a specified time period for violations of any requirement of Subtitle C of RCRA, including federal regulations promulgated thereunder.

Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, EPA may authorize states to administer and enforce their own hazardous waste programs in lieu of the federal Subtitle C program. Section 3006(b) requires EPA to approve state programs found to 1) be the equivalent of the federal Subtitle C program; 2) be consistent with the federal Subtitle C program and the programs of other approved states; and 3) provide adequate enforcement. The requirements for authorization are set forth at 40 C.F.R. part 271, and EPA codifies its authorization of state hazardous waste programs at 40 C.F.R. part 272.

B. <u>Federal Universal Waste Rule</u>

Set forth at 40 C.F.R. part 273, the federal universal waste rule governs the collection and management of certain widely generated hazardous wastes known as universal wastes.[7/] 60 Fed. Reg. at 25,492. The federal universal waste rule imposes less stringent standards than those governing other types of hazardous waste under the full Subtitle C regulations and applies only to transporters and handlers of universal waste. 64 Fed. Reg. at 36,468.

A universal waste transporter is defined as a person engaged in the off-site transportation of universal waste by air, rail, highway, or water. 40 C.F.R. § 273.9. A universal waste handler is defined as:

(1) A generator . . . of universal waste; or

[7/] When first promulgated in 1995, the rule designated three categories of waste as universal wastes: hazardous waste batteries, certain hazardous waste pesticides, and hazardous waste thermostats. 60 Fed. Reg. 25,492, 25,503 (May 11, 1995). Effective on January 6, 2000, hazardous waste lamps were added to the federal universal waste rule. 64 Fed. Reg. 36,466 (July 6, 1999). Effective on August 5, 2005, the category of universal wastes consisting of hazardous waste thermostats was expanded to include other types of spent mercury-containing equipment. 70 Fed. Reg. 45,508 (Aug. 5, 2005).

> (2) The owner or operator of a facility, including all contiguous property, that receives universal waste from other universal waste handlers, accumulates universal waste, and sends universal waste to another universal waste handler, to a destination facility, or to a foreign destination.

Id. The definition further states, in pertinent part, that a universal waste handler is not "[a] person who treats . . ., disposes of, or recycles universal waste . . . ."[8/] *Id.*

In turn, a generator is defined as any person, by site, whose act or process produces hazardous waste listed in 40 C.F.R. part 261 or whose act first causes a hazardous waste to become subject to regulation. 40 C.F.R. § 273.9. Subject to certain exceptions, a destination facility is defined as a facility that treats, disposes of, or recycles a particular category of universal waste. *Id.* The definition further states that "[a] facility at which a particular category of universal waste is only accumulated, is not a destination facility for purposes of managing that category of universal waste." *Id.* Destination facilities are subject to the full requirements applicable to hazardous waste storage, treatment, and disposal facilities under

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[8/] While the federal universal waste rule does not define the terms "treat," "dispose," or "recycle," the full Subtitle C regulations define "treatment" as the following:

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

40 C.F.R. § 260.10. The federal regulations implementing Subtitle C also define "disposal" as the following:

> Disposal means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or waste so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Id.

Subtitle C of RCRA and must obtain a permit for such activities. 40 C.F.R. § 273.60.

Pursuant to 40 C.F.R. §§ 273.11 and 273.31, any handlers of universal waste are prohibited from 1) disposing of universal waste and 2) diluting or treating universal waste.

C. Applicability of Federal Regulations in Authorized States

The preamble to the final universal waste rule instructs that, prior to the enactment of the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), a state that had received final authorization of its hazardous waste program (an "authorized state") administered its program entirely in lieu of the federal Subtitle C program. 60 Fed. Reg. at 25,536. Federal requirements no longer applied in the authorized state, and any new, more stringent federal requirements promulgated by EPA did not take effect in the authorized state until it adopted equivalent requirements as state law. *Id.*

Since the enactment of HSWA, any new requirements and prohibitions promulgated pursuant to HSWA take effect in authorized states on the same date they take effect in unauthorized states. 60 Fed. Reg. at 25,536 (citing 42 U.S.C. § 6926(g)). Authorized states are required to adopt any such requirements and prohibitions as state law and obtain final authorization to administer and enforce them. *Id.* In the interim, however, the provisions are administered and enforced by EPA. *Id.*

In contrast, any new requirements and prohibitions not promulgated pursuant to HSWA do not apply in authorized states until those states revise their hazardous waste programs to adopt equivalent requirements and prohibitions as state law and receive final authorization from EPA for the revisions. *See* 60 Fed. Reg. at 25,536. Authorized states are required to modify their programs only when the new requirements and prohibitions promulgated by EPA are more stringent or broader in scope than existing federal standards. *Id.*

In the preamble to the final universal waste rule, EPA noted that the rule was not promulgated pursuant to HSWA and, therefore, it would not take effect in an authorized state until the state revises its hazardous waste program to adopt equivalent requirements under state law and is authorized by EPA to administer the rule. 60 Fed. Reg. at 25,536. EPA also noted that, because the universal waste rule is less stringent than existing requirements for the management of hazardous waste, authorized states are not required to modify their hazardous waste programs to adopt requirements equivalent to the provisions contained in the rule. *Id.*

D. Illinois's Hazardous Waste Program

Effective on January 31, 1986, EPA granted final authorization to the State of Illinois to administer and enforce a hazardous waste program in lieu of the federal Subtitle C program pursuant to Section 3006(b) of RCRA. 40 C.F.R. § 272.700; 51 Fed. Reg. 3778 (January 31, 1986). EPA approved revisions to Illinois's program effective on March 5, 1988, 53 Fed. Reg. 126 (January 5, 1988); April 30, 1990, 55 Fed. Reg. 7320 (March 1, 1990); June 3, 1991, 56 Fed. Reg. 13,595 (April 3, 1991); August 15, 1994, 59 Fed. Reg. 30,525 (June 14, 1994); May 14, 1996, 61 Fed. Reg. 10,684 (March 15, 1996); and October 4, 1996, 61 Fed. Reg. 40,520 (Aug. 5, 1996). EPA has identified the state statutes and regulations that Illinois is authorized to administer and enforce as part of its hazardous waste program at 40 C.F.R. § 272.701(a).[9/]

Similar to the federal Subtitle C program, the EPA-approved Illinois hazardous waste program provides, in pertinent part, that "[n]o person may conduct any hazardous waste storage, hazardous waste treatment, or hazardous waste disposal operation . . . [w]ithout a RCRA permit for the HWM (hazardous waste management) facility . . . ." 35 IAC 703.121(a)(1). Illinois has also adopted its own universal waste rule, codified at 35 IAC part 733. However, EPA has yet to authorize Illinois to administer and enforce its universal waste rule as part of its approved hazardous waste program. *See* 40 C.F.R. part 272, subpart O.

Following final authorization of its program and any revisions thereto, Illinois has primary responsibility for enforcing the program. 40 C.F.R. § 272.700(c). Pursuant to Section 3008(a) of RCRA and 40 C.F.R. § 272.700(c), EPA also retains its enforcement authority to prosecute violations of Subtitle C, including the particular provisions of the Illinois Administrative Code that Illinois is authorized to implement, which EPA "incorporate[s] by reference . . . as part of the hazardous waste management program under Subtitle C of RCRA." 40 C.F.R. § 272.701(a)(1).

V. DISCUSSION

In its Motion for Accelerated Decision, Complainant requests that the undersigned render an accelerated decision ruling that 1) the RCRA Subtitle C requirements adopted by the State of Illinois and authorized by EPA apply to Respondents; and 2) Respondents are liable for conducting a hazardous waste storage

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[9/] EPA has not yet amended 40 C.F.R. § 272.701(a) to list the authorized revisions to Illinois's program effective on August 15, 1994, May 14, 1996, and October 4, 1996.

and treatment operation without a RCRA permit in violation of 35 IAC § 703.121(a)(1). Respondents oppose the Motion for Accelerated Decision. In support of their respective positions, the parties largely rely upon information provided in their prehearing exchanges. Exhibits attached to the parties' prehearing exchanges will be referred to as "CPX" and "RPX."

A. Applicability of the RCRA Subtitle C Requirements Adopted by the State of Illinois and Authorized by EPA to Respondents

Complainant first seeks an entry of accelerated decision regarding the set of regulations that apply to Respondents' activities at the Riverdale property. The parties' respective positions on this issue are summarized below.

1. Arguments of the Parties

a. Complainant's Motion for Accelerated Decision

Complainant contends that, "[a]s a matter of law, the only Subtitle C regulations applicable to the management of hazardous waste lamps in Illinois are those in effect and authorized by EPA." C's Memo at 13. Complainant points out that EPA authorized Illinois to implement its own hazardous waste program on January 31, 1986, prior to the promulgation of the federal universal waste rule, and that the rule was not enacted pursuant to HSWA. *Id.* at 5. As such, Complainant argues, the rule does not take effect in Illinois, and EPA enforces only the authorized Illinois hazardous waste regulations with respect to the management of hazardous waste lamps, until Illinois adopts and receives authorization from EPA to implement a state universal waste rule as part of its approved hazardous waste program. *Id.* at 5, 13.

To demonstrate that EPA has not yet authorized Illinois to implement a state universal waste rule as part of its approved hazardous waste program, Complainant relies upon an affidavit attached to its Motion for Accelerated Decision from Gary Westefer, the Illinois Regulatory Specialist in the RCRA Programs Section of Region 5 ("Westefer Aff."). C's Memo at 6 (citing C's Attachment B). Mr. Westefer attests that, effective on August 1, 1996, Illinois adopted a version of the federal universal waste rule and that Illinois's universal waste rule has been enforceable under state law in Illinois since that date. Westefer Aff. ¶¶ 8-9. Mr. Westefer further declares that Illinois submitted an application to EPA for authorization of its universal waste rule on October 30, 1996, but that, as of the date of his affidavit, EPA has yet to authorize Illinois's version of the rule. *Id.* ¶¶ 11-12. Complainant also points out that EPA provides notice, through publication in the Federal Register and at 40 C.F.R. part 272 subpart O, of the Illinois regulations that EPA has authorized as part of Illinois's

approved hazardous waste program and that EPA has yet to provide such notice for the universal waste rule adopted by Illinois. C's Memo at 6.

Complainant claims that Agency policy supports its position that only Illinois's authorized hazardous waste regulations apply to Respondents. Specifically, Complainant cites an April 10, 1996 memorandum addressed to the Regional Administrators from Steve Herman, Assistant Administrator of the Office of Enforcement and Compliance Assurance, and Elliot Laws, Assistant Administrator of the Office of Solid Waste and Emergency Response ("Herman Memo"). C's Memo at 6 (citing RPX 4a). The Herman Memo instructs:

> [W]here [authorized] States are implementing the Part 273 standards but have not yet received authorization [to do so as part of their approved hazardous waste programs], Regions should take enforcement actions involving universal wastes only where handlers of such wastes are not in full compliance with the Part 273 standards.

RPX 4a.

Complainant argues that, "to the extent Respondents rely on the Herman Memo as an equitable defense to [an] enforcement action, they do not meet the criteria under which the [Herman] Memo directs EPA to forgo enforcement of the authorized Subtitle C regulations." *Id.* at 13. Complainant contends that no genuine issue of material fact exists that Respondents failed to comply with the federal regulations governing handlers of universal waste set forth at 40 C.F.R. part 273. *Id.* Specifically, Complainant argues that Respondents treated hazardous waste lamps at their Riverdale property and that, accordingly, they operated a destination facility as defined by 40 C.F.R. § 237.9, for which they failed to obtain a permit as required by 40 C.F.R. § 273.60(a). *Id.* at 19.

To support its position that Respondents treated waste lamps at the Riverdale property,[10/] Complainant cites Respondent MVPT's descriptions of its activities in the responses it submitted to three information requests sent by EPA pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927,[11/] and information provided by

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[10/] Complainant refers to the definition of "treatment" set forth at 35 IAC § 702.110. This definition closely mirrors the definition of "treatment" set forth at 40 C.F.R. § 260.10.

[11/] Submitted as part of Complainant's Initial Prehearing Exchange, the information requests were sent by EPA to Respondent MVPT on November 5, 2007 (CPX 3); May 20, 2008 (CPX 5); and October

(continued...)

Respondent MVPT in its Initial Prehearing Exchange. C's Memo at 8-11, 16-17. Complainant also cites the website maintained by Respondent MVPT during its operation, which advertised that "it would come to its customers' facility and rid them of their generator liability for managing hazardous wastes by 'recycling' and taking title to the wastes." *Id.* at 8 (citing CPX 10). Complainant points out that Respondent MVPT's descriptions of its activities varied between its responses, Initial Prehearing Exchange, and website. *Id.* at 17. However, Complainant contends that all of the descriptions fall within the definition of "treatment" set forth in the applicable regulations. *Id.* at 17.

Complainant further contends that, "[b]y his own admission, Respondent Kelly 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 . . . ." C's Memo at 17. Complainant argues that, assuming that Respondent Kelly acted as a sole proprietor of a business that crushed spent lamps for Respondent MVPT, as Respondents claim in their Amended Answer, Respondent Kelly is individually liable because a sole proprietorship has no legal identity apart from the person who owns it. *Id.* Thus, Complainant contends, "[r]egardless of whether Respondent Kelly was treating waste lamps as a sole proprietor of a different company or as the operator of MVPT, Respondent Kelly is liable for treating hazardous waste." *Id.* at 18.

b. Respondents' Objection

Respondents maintain that the Subtitle C regulations adopted by Illinois and authorized by EPA do not apply to the activities they conducted at the Riverdale property. R's Memo at 14-15. While they acknowledge that "Illinois currently maintains an adopted status regarding Universal Waste," Respondents argue that a number of considerations demonstrates EPA's implied authorization of the universal waste rule promulgated by Illinois. Rs' Memo at 3-5.

In particular, Respondents rely upon a page located at EPA's website entitled "Where You Live," which displays a color-coded map of the United States indicating the status of each state's universal waste rule and provides links to individual states' rules, including that of Illinois. Rs' Memo at 3-4 (citing RPX 2). Respondents point out that "[t]here is no mention [on this page] of Illinois or any other adopted but unauthorized state

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[11/] (...continued)
3, 2008 (CPX 7). Also submitted as part of Complainant's Initial Prehearing Exchange, Respondent MVPT's responses to the information requests are dated November 26, 2007 (CPX 4); June 3, 2008 (CPX 6); and October 20, 2008 (CPX 8).

being mandated to handle Universal Waste lamps as Subtitle C RCRA waste." Rs' Memo at 4. Respondents then argue that EPA:

> clearly had knowledge that Illinois was managing these wastes under their Universal Waste Rule and not as RCRA wastes since August 1, 1996, when the Universal Waste Rule became effective and enforceable under Illinois State law. If it is improper for Illinois to have allowed these wastes to be managed as Universal Wastes instead of RCRA wastes for the past 14 years, [EPA] certainly had an obligation and responsibility to intercede. Instead, [EPA] directly refers denizens of Illinois who request information on how to manage spent lamps in Illinois to the Illinois Universal Waste Rule, and not Illinois RCRA regulations.

Rs' Memo at 14-15.

Additionally, Respondents rely upon a page located at the website of the Illinois Environmental Protection Agency ("IEPA"). Rs' Memo at 4 (citing Rs' Attachment H). Entitled "How to Manage Used Fluorescent and High-Intensity-Discharge Lamps as Universal Wastes," this page notifies the public of two options for managing hazardous waste lamps: "In Illinois, you may follow the Universal Waste Rule described in [state regulations] or you may follow RCRA requirements for hazardous-waste handling, storage, treatment and disposal. You must choose one of these options." Rs' Attachment H.

Respondents also contend that hazardous waste lamps are exempt from regulation under Subtitle C of RCRA by 40 C.F.R. § 261.9 and from the obligation to obtain a permit by 40 C.F.R. § 270.1(c)(2)(vii).[12/] Pursuant to 40 C.F.R. § 261.9, universal wastes, including lamps as described by 40 C.F.R. § 273.5, "are exempt from regulation under [40 C.F.R.] parts 262 through 270 . . . except as specified in [40 C.F.R.] part 273 . . . and, therefore[,] are not fully regulated as hazardous waste." In turn, 40 C.F.R. § 270.1(c)(2)(vii) provides that universal waste handlers and universal waste transporters are among those persons who are not required to obtain a RCRA permit.

Finally, Respondents claim that they are entitled to enforcement discretion under the Herman Memo on the grounds that they complied with federal and state regulations governing universal waste. Rs' Memo 6, 18-19. In support, Respondents contend that Respondents operated as "two separate and distinct entities, who performed separate and distinct services . . . ." R's Memo at 18-19. Respondents then recite the standards

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[12/] The Illinois Administrative Code closely mirrors these provisions at 35 IAC §§ 721.109 and 703.123(h), respectively.

applicable to handlers of universal waste under 40 C.F.R. part 273 and identify evidence in the record that, according to Respondents, demonstrates Respondent MVPT's compliance with those standards. Rs' Memo at 6-10. Respondents also reiterate their denial that Respondent MVPT processed, treated, crushed, or volume-reduced any waste lamps at the Riverdale property. Rs' Memo at 16, 17. Respondents next argue that the universal waste rule adopted by Illinois allows handlers of universal waste to reduce the volume of hazardous waste lamps under specified conditions and that, as evidenced by a letter dated October 16, 2000, IEPA found that the technology Respondent Kelly operated met those conditions. Rs' Memo at 10, 17 (citing RPX 9).

Finally, Respondents cite the following statement in the Herman Memo: "Regions should continue to address the universal waste management practices that may present an imminent and substantial endangerment to human health and the environment under the authority provided in section 7003 of RCRA." Rs' Memo at 6 (quoting RPX 4a). Respondents argue that they never presented any endangerment to human health or the environment and, as support, cite press releases dated November 1, 2007, and November 6, 2007, in which EPA stated that it found no evidence that River Shannon Recycling posed a public health threat due to mercury emissions at the Riverdale property. Rs' Memo at 6 and 12 (quoting RPX 16a and 16b).

c. Complainant's Reply

In its Reply, Complainant argues that Respondents have not contradicted its position that Respondents' activities are subject to the Subtitle C regulations adopted by Illinois and authorized by EPA, rather than Illinois's version of the universal waste rule. C's Reply at 10-11. In particular, Complainant contends that no genuine dispute exists that Respondents failed to comply with the federal universal waste rule and, consequently, that the enforcement discretion articulated by the Herman Memo is of no avail to Respondents. *Id.* In support, Complainant identifies a number of statements made by Respondents in their Memorandum and other materials in the record that, according to Complainant, constitute admissions that Respondents engaged in the treatment of waste lamps in violation of the rule. *Id.* at 7-11. Complainant also contends that the arguments and evidence upon which Respondents rely to oppose Complainant's Motion for Accelerated Decision fail to demonstrate the presence of a genuine issue of material fact as to Respondents' compliance. *See, e.g.* C's Reply at 3-5 (disputing Respondents' claim that Respondent MVPT and Shannon Lamp Recycling operated as distinct entities).

2. Analysis

The parties do not dispute the following:

1. Effective on January 31, 1986, EPA granted final authorization to the State of Illinois to administer and enforce its own hazardous waste program in lieu of the federal Subtitle C program.

2. Subsequently, on May 11, 1995, EPA published the final federal universal waste rule. Effective on January 6, 2000, hazardous waste lamps were added to the federal universal waste rule.

3. Effective on August 1, 1996, Illinois adopted its own version of the federal universal waste rule. Illinois's universal waste rule has been enforceable under state law in Illinois since that date.

4. EPA has yet to authorize Illinois to administer its universal waste rule as part of its approved hazardous waste program.

In dispute, however, is the appropriate set of regulations to apply to the management of universal waste in the absence of EPA's authorization. This question is not explicitly addressed by RCRA or the regulatory history of the federal universal waste rule.

In considering it, I first note that, while Illinois's version of the universal waste rule is enforceable by the State, it is not necessarily enforceable by EPA.[13/] Complainant contends, in essence, that it is *not* enforceable by EPA until the Agency authorizes Illinois to implement it as part of Illinois's approved hazardous waste program. In the interim, Complainant argues, EPA enforces only those state regulations that have already been approved, namely Illinois's traditional hazardous waste regulations, with respect to the management of universal wastes such as those handled by Respondents at the Riverdale property.

Complainant's position is persuasive. As the parties agree, the federal universal waste rule was promulgated subsequent to EPA's final authorization of the hazardous waste program adopted by the State of Illinois. The preamble to the rule clearly states that it was not promulgated pursuant to HSWA, and

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[13/] In their Memorandum, Respondents claim that Complainant has improperly "act[ed] as if the published, enforceable Illinois [universal waste] rules simply do not exist," which suggests that Respondents fail to recognize that distinction. Rs' Memo at 19.

therefore, it does not take effect in an authorized state until the state revises its hazardous waste program to adopt equivalent requirements under state law and the state is authorized by EPA to administer those requirements. 60 Fed. Reg. at 25,536. The Environmental Appeals Board ("EAB") has also instructed:

> *Once authorized by EPA*, a state's hazardous waste regulations operate as requirements of RCRA Subtitle C in lieu of the comparable federal requirements. The state regulations are enforceable by the state, *as well as by EPA independent of the state*, pursuant to RCRA § 3008(a), 42 U.S.C. § 6928(a).

General Motors Automotive - North America, RCRA (3008) Appeal No. 06-02, 2008 EPA App. LEXIS 30, *19 (EAB, June 20, 2008) (emphasis added). *See also Pyramid Chemical Company*, 11 E.A.D. 657, 669 (EAB 2004) ("EPA has the authority pursuant to RCRA § 3008(a), 42 U.S.C. § 6928(a), to enforce any requirement of the *authorized* State program . . . ."") (emphasis in original); *Dearborn Refining Co.*, RCRA (3008) Appeal No. 03-04, 2004 EPA App. LEXIS 33, *1 n.1 (EAB 2004) ("Upon approval of Michigan's [hazardous waste] program, the State's program became a requirement of RCRA, and, as such, is enforceable by both EPA and the State."). Thus, a prerequisite for EPA's authority to enforce state hazardous waste regulations is its approval of those regulations, at which time the regulations become the operative requirements of those aspects of RCRA for which the state program is authorized and EPA may enforce the state regulations as requirements of RCRA pursuant to Section 3008(a), 42 U.S.C. § 6928(a).

Here, because EPA has not yet authorized Illinois to administer its universal waste rule as part of its approved hazardous waste program, that rule is not yet enforceable by EPA. Rather, as Complainant has reasoned, the only regulations that EPA has the authority to enforce in Illinois pursuant to Section 3008(a) of RCRA are those that Illinois is already authorized to administer, namely the full Subtitle C regulations.

While Respondents do not directly respond to Complainant's position, they argue that federal and state regulations exempt universal wastes from regulation under the full Subtitle C requirements. However, as Complainant points out in its Memorandum, such exemptions were promulgated concurrently with the federal universal waste rule, and as already stated, this rule does not apply in Illinois in the context of a federal enforcement action until EPA approves the version adopted by the State. Respondents also contend that a number of considerations demonstrates EPA's implied authorization of Illinois's version of the universal waste rule. In essence, this contention raises the affirmative defense of fair notice and/or an equitable defense in considering the appropriate penalty. However, an absence of fair notice is a defense to liability, not to the determination of the

operative statutory and regulatory requirements in a proceeding. Accordingly, I find no merit in the objections Respondents raise to the applicability of Illinois's full Subtitle C regulations to their activities.

Finally, each of the parties argue that, based upon the facts of this case, the Agency is directed by the Herman Memo to exercise its enforcement discretion in that party's favor. I need not consider the merits of these arguments, however. While guidance documents may instruct representatives of the Agency as to whether they *should* enforce a particular requirement or prohibition, that discretion to enforce is not dispositive of whether they have the *authority* to enforce it. In other words, EPA's jurisdiction to bring enforcement actions in Illinois is distinct from its discretion to bring those actions.

For the forgoing reasons, I hold that the full hazardous waste regulations adopted by Illinois and authorized by EPA apply in the present proceeding. Accordingly, Complainant's Motion for Accelerated Decision as to the applicable regulations is **GRANTED**.

B. Respondents' Liability for Conducting a Hazardous Waste Storage and Treatment Operation without a RCRA Permit

Complainant also seeks an order rendering an accelerated decision as to Respondents' liability for the violations alleged in Counts 1 and 2 of the Amended Complaint. Specifically, Complainant contends that no genuine issue of material fact exists that Respondents conducted a hazardous waste storage and treatment operation without a RCRA permit in violation of 35 IAC § 703.121(a)(1). As noted above, 35 IAC 703.121(a)(1) provides, in pertinent part, that "[n]o person may conduct any hazardous waste storage, hazardous waste treatment, or hazardous waste disposal operation . . . [w]ithout a RCRA permit for the HWM (hazardous waste management) facility . . . ."

Having already summarized in the preceding section of this Order the parties' arguments concerning Respondents' alleged treatment of hazardous waste lamps, I need not repeat that discussion here. At this juncture, I find from that discussion alone that genuine disputes as to the facts presented and the inferences drawn therefrom exist in this proceeding and that these disputes can only be properly adjudicated following a full evidentiary hearing.

As already noted, Respondents, in essence, raise the affirmative defense of fair notice by identifying evidence in the record that, according to Respondents, demonstrates EPA's implied authorization of the universal waste rule adopted by Illinois. Such a defense may absolve Respondents of liability or serve as a mitigating factor in calculating the appropriate penalty to assess if liability is established. Thus, it is an issue that

Complainant must address at an evidentiary hearing or in post-hearing briefs.

Further, Respondents have contested additional facts in this proceeding.[14/] Complainant correctly observes that inconsistencies exist in the record concerning Respondents' descriptions of the activities they conducted at the Riverdale property and the relationship between Respondent MVPT, River Shannon Recycling, and SLR Technologies and that Respondents failed to adequately support some of the arguments they raised in their Memorandum. However, under the standard for adjudicating motions for accelerated decision discussed above, I must view the evidentiary material and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255; *Adickes*, 398 U.S. at 158-59. Furthermore, Respondents may demonstrate a genuine issue of material fact by proffering *some* material, relevant, and probative evidence that places the moving party's evidence in question and allows me to reasonably conclude by a preponderance of the evidence that a question of fact exists for an adjudicatory hearing. *See Strong Steel Products*, EPA Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57, at *22-23 (ALJ, Sept. 9, 2002); *Bickford, Inc.*, EPA Docket No. TSCA-V-C-052-92, 1994 EPA ALJ LEXIS 16, *8 (ALJ, Nov. 28, 1994). The arguments and evidence presented by Respondents are barely sufficient to satisfy this standard[15/]

Thus, I find that genuine issues of material fact exist in the instant proceeding and that fully developing the issues within the context of an evidentiary hearing is more appropriate than rendering an accelerated decision. In view of this determination, Complainant's Motion for Accelerated Decision is **DENIED** as to Respondents' liability for Counts 1 and 2 of the Amended Complaint. I emphasize that, in denying Complainant's Motion for Accelerated Decision as to Respondents' liability, I have not weighed the evidence and decided the ultimate truth of

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[14/] For example, Respondents contend that, during at least some of the period in question, waste lamps were not crushed or volume reduced at the Riverdale property. Rs' Memo at 13. Respondents also argue that River Shannon Recycling and SLR Technologies are two separate and distinct companies and that IEPA provided SLR Technologies with authorization to operate its volume reduction technology. *Id.* at 17 (citing RPX 9).

[15/] As noted above, even if I were to find that accelerated decision is technically proper upon review of the evidence in this case, sound judicial policy and the exercise of judicial discretion permit a denial of a motion for accelerated decision in order for the case to be developed fully at trial. *See Roberts*, 610 F.2d at 536.

the matter. Rather, I have simply determined that an evidentiary hearing is warranted in this case.

VI. CONCLUSION

To summarize, I rule as follows:

Respondents' Motion to Supplement Respondents' Pre-Hearing Exchange is GRANTED.

Complainant's Motion for Partial Accelerated Decision as to Applicable Regulations and Liability is GRANTED as to the applicable regulations.

Complainant's Motion for Partial Accelerated Decision as to Applicable Regulations and Liability is DENIED as to liability.

Barbara A. Gunning
Administrative Law Judge

Dated: May 5, 2011
Washington, DC

In the Matter of *Mercury Vapor Processing Technologies, Inc., a/k/a River Shannon Recycling, and Laurence C. Kelly,* Respondent.
Docket No. RCRA-05-2010-0015

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion for Partial Accelerated Decision as to the Applicable Regulations and Liability; Order on Motion to Supplement Respondent's Pre-Hearing Exchange**, dated May 5, 2011, was sent on this 6th day of May 2011, in the following manner to the addressees listed below.

Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

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Copy by Pouch Mail to:

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Dated: May 6, 2011
Washington, DC