mercury vapor has been associated with systemic toxicity in humans and animals" and that the major affected organs are the kidneys and the central nervous system. CEX-49-03218; Tr. 304. At higher levels of exposure respiratory, cardiovascular, and gastrointestinal effects can also occur. *Id.*; Tr. 305. Additionally, respiratory symptoms are a prominent effect of high-level exposure to mercury vapors, with the most commonly reported symptoms including cough, dyspnea, and tightness or burning pains in the chest (citations omitted). CEX-49-03228; Tr. 305. Cardiovascular effects resulting from exposure to mercury include increased blood pressure and heart/rate palpitations. CEX-49-03230; Tr. 305. Gastrointestinal effects resulting from mercury exposure include stomatitis (inflammation of the oral mucosa). Case studies show that teenage girls exhibited anorexia, intermittent abdominal cramps, mild diarrhea, painful mouth, and bleeding gingival 2 weeks after a spill of metallic mercury in their home resulted in the release of mercury vapor. CEX-49-03232; Tr. 305-306. Musculoskeletal effects include increases in tremors, muscle fasciculations, myoclonus, and muscle pains after exposure to mercury vapor. CEX-49-03234; Tr. 306. The "central nervous system is probably the most sensitive target organ for metallic mercury vapor exposure." CEX-49-03243; Tr. 306-307. A wide variety of cognitive, personality, sensory, and motor disturbances have been reported after exposure to mercury vapor. *Id.*

Because mercury is highly toxic, because Respondents stored and treated a large amount of waste lamps at the Riverdale facility, because Respondents did not properly containerize waste lamps, and because broken lamps were observed at the facility, the evidence supports concluding that the risk of exposure presented by Respondents' violation is major.

b. Harm to the RCRA regulatory program

In determining the "gravity" component of RCRA penalty, the evidence supports the conclusion that the "harm to the RCRA program" sub-component is major. "All regulatory requirements are fundamental to the continued integrity of the RCRA program." CEX-15-02259. Violations of RCRA regulations "may have serious implications and merit substantial penalties where the violation undermines the statutory or regulatory purposes or procedures for implementing the RCRA program." *Id.* The Policy specifically lists "operating without a permit" as an example of harm to the regulatory program. *Id*; Tr. 318. As Mr. Brown testified, and explained in EPA's penalty narrative:

> Respondents operated a commercial hazardous waste treatment facility for nearly three years without applying for and obtaining the required RCRA Permit. In doing so, Respondents avoided a critical regulatory procedure which prevented regulatory authorities from evaluating their operations and ensuring that basic and important requirements applicable to treatment, storage and disposal facilities (TSDFs) would be in place, and sufficient to protect human health and the environment.

CEX-62-04089; Tr. 318-319. A RCRA permit application would contain important information including, but not limited to, a description of the processes to be used for treating, storing and disposing of hazardous waste, facility inspection schedules, a contingency plan, etc. *See* CEX-62-04089. The RCRA permit would contain specific requirements that the Permittee is required to follow, based on the information contained in the permit application. *Id.* Mr. Brown testified as to some of the requirements of a RCRA permit:

> A: [F]or instance, the requirement to have a written closure plan. To ensure that when the business stops operating at a location, that there is an approved procedure that the agency had had [sic] a chance to review, that will explain how the facility will be checked for decontamination, and any contamination that might exist will be removed and handled. The permit would have required that, in this case, Respondents had obtained financial assurance, which would be an amount of money equal to what has been estimated it will cost to conduct those closure activities, and that money had been set aside. Either as a trust fund, or it's

> an insurance policy, or a letter of credit, for instance; that ensures that when a business stops operating, there is money available to conduct those closure activities. And the permit process would have ensured that the permittee would had to have demonstrated that they had that at the time they were getting their permit, and the permit would have required them to maintain it.

Tr. 320; CEX-62-04091. Additional requirements in a RCRA permit include:

- Security provisions to ensure unauthorized persons do not gain access to the facility;
- Inspection requirements;
- Training for facility personnel relative to their hazardous waste management duties;
- Maintenance of emergency equipment to respond in the event of a release of hazardous waste;
- A hazardous waste contingency plan;
- Designation of a person (or persons) to be on call at all times to respond in the event of an emergency; and
- Maintenance of an operating record.

CEX-62-04091. By not obtaining an RCRA permit for the Riverdale facility, the RCRA program had no way of knowing that Respondents were operating a hazardous waste storage and treatment facility, and there was no mechanism in place to ensure these important requirements were met. Thus, the harm to the regulatory program is major because the violations had a substantial adverse effect on the statutory and regulatory procedures for implementing the RCRA program.

ii. Extent of deviation

In considering the gravity based component of a RCRA penalty, the "extent of deviation" consideration relates to the degree to which the violation renders inoperative the requirement violated. CEX-15-02261. For the major category under extent of deviation, the Policy states that "the violator deviates from requirements of the regulation or statute to such an extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance." CEX-15-02262. Respondents never applied for a permit and never received

one. Thus, Respondents never complied with any of the permit requirements. Accordingly, the appropriate category for extent of deviation is major. Tr. 321.

iii. Placement in matrix and adjustment within cell for a total gravity based penalty

In selecting an appropriate penalty amount from a cell in the gravity based matrix, there is discretion to consider the seriousness of the violation in relation to other violations which would fall within the same cell; the efforts at remediation or the degree of cooperation evidenced by the facility, to the extent that they are not considered elsewhere in the penalty amount calculation; the size and sophistication of the violator; the number of days of violation; and other relevant matters. CEX-15-02264; Tr. 323.

As discussed above, the potential for harm and extent of deviation for Respondents' violations are both major, which puts the violations in the major/major category of the gravity matrix. Tr. 322; CEX-62-04088. For violations occurring after 2004, the gravity matrix category major/major range is $25,791 to $32,500. CEX-33-02659; Tr. 322-323. Mr. Brown testified that he chose $29,146 within the category and explained his reasoning:

A: I selected an amount that was in the middle of those two. And the exact amount was $29,146.

Q: Could you please explain why you selected that amount?

A: The policy gives discretion to the enforcement officers, or to the agency, I should say, in selecting an exact amount from a matrix cell. It asks us to consider the seriousness of the violation, efforts at remediation or degree of cooperation, size and sophistication of the violator, environmental sensitivity, duration of the violation if not already accounted for, and any other relevant matters that may be specific to this case. And as a general practice, I start in the middle of a cell range, so as not to be biased one way or the other, to be too conservative, or too harsh, and I consider those factors and decide whether or not it needs to be increased or decreased, i.e., a larger amount or a lower amount needs to be selected, as opposed to just the middle.

Tr. 323-324.

Mr. Brown also discussed the discretion factors relevant in deciding appropriate placement within the cell. In considering the sophistication of Respondents, Mr. Brown pointed out that Mr. Kelly has "been involved in the waste business for some time" and that MVPT appeared to be a small business with few employees. Tr. 324, 333. Mr. Brown highlighted a Security and Exchange Commission filing dated February 12, 2002, for a company called VX Technologies, Inc ("VX"). Tr. 324-325; CEX-37. VX appeared to be in the waste lamp recycling business. CEX-37-02907. Mr. Kelly filed a prospectus with the SEC to sell stock in the company, and was VX's President. CEX-37-02903, 02961. The prospectus contained a description of Mr. Kelly's relevant background experience:

> Laurence C. Kelly, prior to founding Spent Lamps Recycling Technologies in April, 1997, was the president and managing partner of a nationwide manpower and consulting company, EEMI Consulting, Inc., which specialized in due diligence, quantification and remediation projects across the United States. He has been in the environmental business since 1978. During that time he founded an operated a hazardous waste hauling company, which he sold in 1983. He was a partner in a "*Waste to Energy*" facility in western Illinois until he sold his interest in 1989 when he formed EEMI Consulting, Inc. In January of 1997 he sold his interest in EEMI Consulting, Inc. to pursue researching, developing and the patenting of what is today known as Spent Lamp Recycling Technologies. He has over 20 years of waste hauling, site remediation and environmental consulting experience. Through the course of his experience in the environmental business he has compiled a working knowledge of regulatory guidelines. Because he was in the business of waste hauling on or about the time the Resource Conservation Recovery Act became law, he has been in a position to track and maintain an ongoing understanding of all aspects of business operations under that and all other relevant regulations. He also has the ability to apply that understanding to the spirit of the new "*Universal Waste Rule*" pertaining to spent mercury-containing lamps. Mr. Kelly has been President and a Director of VX Technologies, Inc. since our merger with DFR Associates I, Inc. Mr. Kelly formed our predecessor Spent Lamps Recycling Technologies in 1997 and was its president and a director until it merged into us.

(italics in original). CEX-37-02920; Tr. 327-330. In this prospectus, Mr. Kelly held himself out as having extensive experience with RCRA. Mr. Kelly's ability to file a prospectus with the SEC is a further indication of his level of sophistication. Tr. 330-331. Mr. Brown also noted the

fact that Mr. Kelly testified before the Illinois Pollution Control Board during a hearing related to amending Illinois's universal waste rule to include mercury-containing lamps in December 1997. Tr. 332; CEX-35-02704. Mr. Kelly testified about his current business, Spent Lamp Recycling Technologies, and its process for crushing universal waste lamps. CEX-35-02776-02794. In summary, Mr. Kelly has been involved in various environmental businesses for over twenty-five years, and started up several businesses involving the management of waste lamps, which indicating a significant level of sophistication.

In evaluating the seriousness of the violation, Mr. Brown testified:

> A: The same facts relative to the gravity that is to why we consider it be a major potential for harm, that I discussed previously. That --- the requirement to obtain a permit is important, that it would have posed important protective standards on the facility that will not otherwise be in place if a permit is not obtained.

Tr. 334.

In evaluating the efforts at remediation and degree of cooperation criteria under the Policy, Mr. Brown testified:

> A: Well, I would highlight in terms of cooperation, it can be looked at and two basic things I'd like to highlight. First, the Respondent was cooperative in allowing for inspections, collection of samples, responding to information requests, et cetera. However, I would point out at the same time, and this goes to efforts at remediation, there's no evidence that the Respondents have conducted RCRA closure activities according to the regulations, and according to the requirements that a permit would have imposed upon the facility. . . .

Tr. 335. Additionally, Mr. Brown highlighted the fact that Mr. Kelly is still operating lamp recycling businesses that are engaged in exactly the same operations that EPA alleges Respondents conducted in this matter. Tr. 335-336. EPA sent Mr. Kelly, as the representative of a company known as "Shannon Lamp Recycling" an information request pursuant to Section

3007 of RCRA, 42 U.S.C. § 6927, on July 6, 2010.[33] CEX-38. In the response, Mr. Kelly, as Shannon Lamp Recycling's representative, provided information indicating that Shannon Lamp Recycling was sending crushed glass and aluminum ends from a location at 2107 W. Hubbard St. in Chicago to one of the solid waste landfills that MVPT sent crushed waste lamps. Tr. 337-338; CEX-39-02980-03006. EPA sent Shannon Lamp Recycling a second information request on November 24, 2010. Tr. 338; CEX-40. In the response, Mr. Kelly listed two locations where Shannon Lamp Recycling has crushed universal waste lamps using its "mobile volume reduction equipment": 2107 W. Hubbard St. Chicago, Illinois, and 1750 W. 75th Place, Chicago, Illinois. Mr. Brown testified that he recognized the second address:

> A: [A]nd I believe I've stated earlier that that second address is recognizable from previous information requests responses from River Shannon, in that that is where the inventory of lamp material that had been at the Riverdale Facility at the time of my inspection, that is where we were told that it was taken to be crushed after they stopped operating at Riverdale.

Tr. 340; CEX-8-02061-02062. The response also stated that Mr. Kelly is the owner of the mobile volume reduction equipment, and that Mr. Kelly is the owner of S.L.R. Technologies, Inc., which is the company operating as Shannon Lamp Recycling.[34] Tr. 341; CEX-41-03015. Shannon Lamp Recycling reported that a company called "MercPak, Inc." transported intact waste lamps to the Hubbard Street address, and that "MercPak, Inc. is responsible for the universal waste lamps while awaiting volume reduction at the Hubbard St. address."[35] CEX-41-03016. The response also stated that "S.L.R. Technologies, Inc. (Shannon Lamp Recycling) conducts volume reduction of MercPak's universal waste utilizing the methods delineated in the

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[33] This information request was sent before EPA was made aware of Respondents' assertion that Mr. Kelly operated a sole proprietorship referred to at various times as Shannon Lamp Recycling in this matter. Tr. 335-336.

[34] S.L.R. Technologies, Inc. is also one of the names of Mr. Kelly's alleged sole proprietorship in this matter.

[35] "MercPak" has also been identified as one of MVPT's assumed business names. CEX-6-02050.

Illinois Regulations found at 35 IAC 733.133(d)(3)." CEX-41-03016; Tr. 341. MercPak, Inc. is identified as a tenant of the property at 2107 W Hubbard Street. *Id.* Based on this information, Mr. Brown concluded that:

> A: Well, it can be pointed out that I think, relevant to today, that after the complaint was filed, after River Shannon had been informed of its noncompliance by the EPA, the Respondents, operating now under two new corporations, of which [Mr. Kelly] is the sole owner, conducted the same activities at a different location in Chicago.

Tr. 342. Thus, Respondents continue to conduct a hazardous waste storage and treatment operation without a permit under different (but similar or using previously assumed business names) corporate entities, after EPA notified Respondents that they are operating an illegal hazardous waste storage and treatment facility. In consideration of the above, $29,146 is an appropriate amount within the major-major cell for Respondents' violations.

iv. Multi-day penalties

Under the Policy, multi-day penalties are mandatory for the second through the 180th day of a continuing violation designated major-major or major-moderate, subject to being waived in "highly unusual cases" with prior EPA Headquarters' consultation. CEX-15-02270-02271. Mr. Brown testified that multi-day penalties are appropriate for Respondents' violations

> A: Because this was – we viewed this as a continuing violation that – the facility operated beginning at some point in February, 2005, until at least the time of my inspection, October 30th, 2007 . . . .
>
> Q: [H]ow many days of violation did you use in your calculation?
>
> A: 179 days added on to the day one, which gets the initial gravity-based penalty. So there's 179 days worth of additional multi-day penalties added.
>
> Q: Why did you cap at 179 days?
>
> A: The penalty policy instructs us that for a continuing violation that falls within the major potential for harm, major extent of deviation, that multi-day penalties are mandatory for days two through 180 of the violation, therefore 179 days, and

from that point forward, they are discretionary. I used my discretion to stop calculating multi-day penalties after that point.

Tr. 344-345.

The appropriate cell in the multi-day penalty matrix for the violations in this matter is major/major, and the ranges in that cell are $1,100 through $5,500. Mr. Brown explained why choosing $3,869 within that cell is appropriate:

A: I kept it at the mid-point to remain consistent with what had been decided for the initial gravity-based penalty. I saw no reason, any change in conditions, to go up or down in that cell, so I just kept it consistent.

Tr. 346. Mr. Brown, when calculating the appropriate gravity based penalty, multiplied $3,869 by 179 days, which equals $692,551. Tr. 345; CEX-15-02271. Thus, by adding the gravity component of $29,146 to the multi-day component, $692,551, the total, unadjusted, gravity based penalty is $721,697. CEX-62-04088.

v. Economic benefit

The trial record supports assigning a significant value to the economic benefit component of the penalty in this case. The Policy states that "the Agency's 1984 Policy on Civil Penalties mandates the recapture of any significant economic benefit of noncompliance (EBN) that accrues to a violator from noncompliance with the law." CEX-15-02273; CEX-34. Specific violations identified for which "significant economic benefits" may accrue to a violator include the failure to meet "closure/post-closure" requirements. CEX-15-02273. There are two types of economic benefit from noncompliance to consider when determining the economic benefit component: benefit from delayed costs and benefit from avoided costs. *Id.* at 02274-02275.

Mr. Brown testified that he calculated the economic benefit in this case by using the EPA's "Estimating the Costs For the Economic Benefits of RCRA Noncompliance" manual. Tr. 379; CEX-16. Mr. Brown testified as to his calculation of the economic benefit:

A: Yes. The EPA has a manual entitled "Estimating the Cost of Economic Benefit." It dates from 1997. It was developed by contractors for EPA and assist the EPA in coming up with dollar amounts for specific compliance activities. There is a – Chapter 9 that deals with permit applications. I selected – it has tables that give specific amounts, estimated amounts. It has low, middle-of-the-road, and high-end estimates. For specific parts, to complete specific parts of the permit application, I selected from that table those I believe would apply to any facility seeking a permit, because they were in the general permitting, permit application requirements. It's items like photos of the facility, topographic maps, descriptions of waste managed, description of – descriptions of precautions taken, inspection schedules, training programs, that – those types of things that would apply to all permitted facilities . . . .

Tr. 379-380. Included in EPA's penalty calculation is a detailed table for estimated costs associated with a RCRA permit application. CEX-62-04096. Mr. Brown testified that he entered in the amounts associated with RCRA permit costs into an economic benefit calculation program that EPA uses for estimating economic benefits, and it produced a total economic benefit for the violations in this case of $21,596. CEX-62-04097; Tr. 380. The economic benefit of $21,596 was added to the gravity based penalty of $721,697, for a total, unadjusted, penalty of $743,293. CEX-62-04088; Tr. 381-382. Although Mr. Brown's economic benefit calculation was prepared relying on (and consistent with) EPA guidance, policy, and procedure, his calculation does not represent the actual, real world economic benefit that Respondents gained from their non-compliance with RCRA.

At hearing, EPA called Mr. Leonard Worth to testify. Mr. Worth is the President of Fluorecycle, Inc. (Fluorecycle), a company that collects and recycles universal waste lamps in Illinois. Tr. 499-500. Fluorecycle operates as a regulated "destination facility" under Illinois's unauthorized universal waste rule and has a RCRA Subtitle C permit for its storage operation. [36] Tr. 506-508, 511. Mr. Worth testified as to the costs he incurred in obtaining a RCRA permit for

[36] While Fluorecycle, Inc. operates as a "destination facility" that collects and recycles universal waste lamps in Illinois, Mr. Worth's testimony is relevant because his facility is subject to the RCRA Subtitle C permit requirements as a waste lamp storage and recycling facility.

a facility, in maintaining the permit, and the cost of maintaining a closure plan for the facility. Mr. Worth's testimony is relevant as to determining the economic benefit that Respondents derived from non-compliance with RCRA permit requirements. Tr. 12-13.

Mr. Worth first explained his understanding of what it means for his company to be a destination facility under Illinois's universal waste rule and what it means to be a handler:

> A: Yes, well, as – from what I know, this location would be called a generator site. Whoever removed that lamp becomes the first handler in line, and the handler remains the guy – the people responsible, until such time as it arrives at a destination facility. At the time it arrives at a destination facility, which is we – that's what they call us, what the EPA calls us. When it arrives at a destination facility, then it's our responsibility to do something with that lamp, but that the owner of the lamp, the generator site, remains, as I understand it, continues to be responsible for that lamp until it's properly destroyed. At which time, in our case, we issue a certification saying that the lamp has been destroyed. That's pretty much the extent of the paperwork for the outside.

Tr. 511-512.

Mr. Worth then presented testimony regarding the costs Fluorecycle incurred in obtaining, and the costs it incurs in maintaining, its RCRA permit from Illinois. Mr. Worth testified that he paid his consultants and lawyers a total of $103,086 for assisting in the RCRA permit application process, and $8,000 for fees and communication with the village of Lakemore, Illinois for initial site approval, and an initial fee of $1300 to IEPA. Tr. 516, 518, 521. For Fluorecycle's closure plan and financial assurance, Mr. Worth initially paid $86,000, and now has paid $95,0000, for a closure bond, also known as financial assurance, that names IEPA as the beneficiary of the bond, so that if Fluorecycle shuts down there will be money available to properly close down the facility. Tr. 517, 524. Fluorecycle spends $54,920 in annual costs associated with maintaining its RCRA permit. Tr. 525. These annual costs include pollution insurance, closure plan fees, inspections, recordkeeping requirements, disposal fees, consultant fees, employee training, and equipment fees. Tr. 525-526.

Accordingly, a real-world calculation of the total economic benefit that Respondents achieved by avoiding the costs associated with obtaining a RCRA permit and maintaining RCRA compliance is at least $372,146.[37]

Thus, the record supports assigning a significant value to the economic benefit component of the penalty in this case.

vi. Adjustment factors

a. Good faith efforts to comply

The Policy provides for a presumption that there should be no downward adjustment to an otherwise appropriate penalty amount "for respondent's efforts to comply or otherwise correct violations after the Agency's detection of violations . . . since the amount set in the gravity-based penalty component matrix assumes good faith efforts by a respondent to comply after EPA['s] discovery of a violation." CEX-15-02280-02281. The Policy also states that "no downward adjustment should be made because respondent lacked knowledge concerning either applicable requirements or violations committed by respondent." *Id.*

No downward adjustment was made for good faith efforts to comply in this case because Respondents made no attempt to obtain a RCRA permit, despite the fact that Mr. Kelly was clearly informed in writing by IEPA in October 2000, that a "facility that was collecting and crushing lamps from off-site generators would be fully regulated..." CEX-72-04216. IEPA's letter describes the exact activities that Respondents engaged in. Additionally, after IEPA notified Respondents that they were in violation of RCRA, Respondents did not conduct RCRA

[37] To calculate this amount, one should add the total cost of RCRA maintenance fees for each year of non-compliance, here three years, plus the consultant fees, municipal planning fees, initial site fee to the IEPA, and closure bond to arrive at the total economic benefit of Respondents. The equation is represented as: ($54,920 x 3 years) + $103,086 + $8,000 + $1,300 + $95,000 = $372,146.

closure at the Riverdale facility. In fact, they continue to conduct hazardous waste storage and treatment operations without a RCRA permit under different corporate entities, as discussed above. Therefore, no adjustment was made to the penalty for good faith efforts to comply.

b. Degree of willfulness/negligence

The Policy provides that a penalty amount found appropriate for RCRA violations "may be adjusted upward for willfulness and/or negligence." CEX-15-02281. Mr. Brown testified to the fact that Respondents knew they were in violation of the law and continued to operate. As part of Respondents' prehearing exchange, they submitted a letter from IEPA dated October 16, 2000, addressed to Mr. Kelly, as President of a company called Spent Lamp Recycling Technologies, Inc. Tr. 347-348; CEX-72-04216. The letter was IEPA's response to a letter from Mr. Kelly and followed a meeting between IEPA and the company's representatives, including Mr. Kelly. *Id.* The letter set out IEPA's understanding of the company's process and operation of a "mobile lamp-crushing unit" and stated, in part, the following:

> 1. Lamps are placed into a rectangular chamber in the mobile crushing unit.
>
> ***
>
> 3. When crushing is complete, the chamber is opened and material in the chamber, consisting of glass, aluminum and brass, and phosphor power, is scooped out into container.
> 4. This container is shipped to SLRT's facility for storage.
> 5. When sufficient quantities are accumulated at SLRT's facility, the material is sent to a destination facility, where components are separated.
> 6. After component separation, components are sent to a recycler as follows:
>
> a. Aluminum and brass are sent to a metal recycler.
> b. Glass and phosphor powder are sent to a fiberglass manufacturer, where they are used as feed stock in the fiberglass manufacturing process.

CEX-72-04216-02417; Tr. 349-352. The letter states that, based on this understanding, "SLRT may operate its mobile treatment device as a large quantity handler of universal waste."[38] *Id.* The letter goes on to explain:

> As a handler of universal waste, SLRT may receive lamps at its facility for accumulation without a permit provided the lamps are only accepted for accumulation and subsequent shipment to the destination facility. Please note that *the Universal Waste Rule requires that lamps must be crushed at the site of generation. Therefore, a facility that was collecting and crushing lamps from off-site generators would be fully regulated as indicated in the April 18, 2000 letter.* Also note that the destination facility, where component separation occurs, is also fully regulated.

Id. (emphasis added).

As explained above, Respondents' operations in this matter were not in compliance with what was described as allowed in IEPA's letter. Mr. Kelly was told by IEPA that he and his company could accumulate waste lamps at their facility and then ship the waste lamps to a destination facility without a RCRA permit. But that is not what the Respondents were doing in this matter. Mr. Kelly was also told by IEPA that he and his company could "volume reduce" waste lamps at the site of generation of the waste lamps. But Respondents were not doing that, either. Instead, Respondents were taking waste lamps to the Riverdale facility and treating them there without a RCRA permit, contrary to what is described in IEPA's letters. Mr. Brown explained how he considered this letter in connection with degree of willfulness under the Policy:

> A: Well, I think it could be considered that the Respondent – it could be said that the Respondent understood and was informed by the state of Illinois that if lamps were taken from offsite sources to the Riverdale facility and crushed there, that

[38] An explanation of the federal universal waste rule, which provides exceptions to the need for a RCRA permit for "transporters" and "handlers" of universal waste, is provided in footnote 6, *supra*. An explanation of Illinois's version of the universal waste rule, which is not part of Illinois's federally authorized program, and provides exceptions under Illinois law relating to the need for a RCRA permit for "transporters" and "handlers" of universal waste, is provided in footnote 10, *supra*.

that was a fully regulated facility that needed to obtain a permit. And so a regulatory agency had advised the Respondent on that requirement.

Tr. 352.

At hearing, Mr. William Graham provided testimony relating to Respondents' degree of willfulness and knowledge of the regulations. Mr. Graham is currently a principal engineer employed with Bureau Veritas, a consulting firm, and has had over twenty years of experience as an environmental consultant. Tr. 446-449. Mr. Graham is a certified engineer, a certified professional environmental auditor, and environmental consultant. Tr. 455-457. In 2002, Mr. Kelly, while operating as President of Spent Lamp Recycling Technologies, hired Mr. Graham to assist him with some environmental issues. Tr. 462; CEX-47-03118. He worked for Mr. Kelly for three months. Tr. 463. Mr. Graham testified to his initial understanding of Mr. Kelly's company:

A: Well, my understanding was initially, that a mobile unit would go to a generator location, and crush the lamps. And the materials that were produced at that site, at that location, the crushed material as well as the residue that was in a filter, that would be then removed from that location and handled elsewhere.

Tr. 464. Mr. Graham testified that he was hired "to understand what the nature of the business activity was, and the regulations that applied to it . . .and . . . to look at helping put together more of an environmental program for the whole company." Tr. 463-464. Mr. Graham further explained why he was hired:

A: [W]ell, there were some letters that Spent Lamp had received from the state of – it was from Illinois EPA. And the letters were sent in response to questions and submissions that had been made by Spent Lamp. And the letters created some dilemmas for the operation.

Tr. 465. The April 2000 letter from IEPA to Mr. Kelly as President of Spent Lamp Recycling Technologies, Inc. was given to Mr. Graham, and he was hired partly because of the issues addressed in the letter. Tr. 469. Mr. Graham explained:

A: [I]t was a letter, again, that was given to me, and I think the narrative in the letter was one of the reasons that I was asked to help out. And that is that the last paragraph indicates that the material, after being volume reduced, remains a Universal Waste, and has to be handled at a authorized destination facility. Or a regulated destination facility. And in that, I thought, was a problem. Once I started to look at the operation, I wasn't sure we were conforming to that requirement.

Tr. 473. Mr. Graham testified that he discussed with Mr. Kelly the requirements of Illinois's universal waste rule:

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

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

Q: What's the generator location?

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

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

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

Q: And you discussed this with Mr. Kelly?

A: Yes.

Tr. 474-475. Mr. Graham further testified that he quit working for Mr. Kelly due to the following: his concerns about Mr. Kelly and Spent Lamp Recycling Technologies, Inc.'s noncompliance with the regulations; Mr. Kelly's failure to produce analytical results showing that the crushed spent lamps were non-hazardous; and Mr. Kelly's failure to pay Mr. Graham's fees. Tr. 472, 475-480. With respect to Mr. Kelly's business practices, Mr. Graham testified that he was worried about "volume reduction occurring away from generator locations." Tr. 475. He further explained:

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

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

Tr. 477.[39]

Mr. Graham's testimony is undisputed. In fact, Mr. Kelly declined to even cross-examine Mr. Graham. Mr. Kelly explained:

> Your Honor, at this time, I've racked my brain trying to remember exactly what Mr. Graham did for us. I do remember his face, I see some -- the documents here, but he worked apparently for our company for three months, nine years ago. I can't remember or recall how that -- why he left or whatever, but bottom line is, I don't have any questions.
>
> ***
>
> . . . I know back then, in 2000, we started to look at the rule real closely, and we were going back and forth with the U.S. EPA, but I don't recall exactly who was involved and who wasn't. Obviously Mr. Graham was involved for a while, but I just don't have any questions for him that would be relevant to this case here.

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[39] Mr. Graham also testified that he visited a location in Melrose Park where Mr. Kelly and Spent Lamp Recycling Technologies, Inc. were accumulating materials that had been crushed and that were stored outside awaiting separation. Tr. 479. Mr. Graham explained Mr. Kelly's operations there:

> A: [B]ut I also got concerned when I went to Melrose Park and observed activities at that location which, to me, were at a minimum, poor management practice, and potentially a violation of RCRA regulations. But at least, they were poor management practice, because crushed glass and metal were being held outdoors. You know, not really contained other than they were on concrete. And then periodically, the material would be put in a piece of equipment that would separate the glass and the metal. This was done in open air. There's no training, no protective gear.

Tr. 477-478. Mr. Graham also had concerns because he never saw a chain of custody report for the sampling results that he received from Mr. Kelly and Spent Lamp Recycling Technologies, Inc., even after he asked for it, and that seeing such results was "normal protocol for environmental testing." Tr. 480. On summing up why he stopped working with Mr. Kelly, Mr. Graham said:

> A: You know, my – my job is to help my customers come into compliance. This – this situation appeared to be a very high mountain.

Tr. 481.

Tr. 482.

Mr. Graham's testimony establishes that Mr. Kelly (and thus Respondents) knew that he needed a RCRA permit to treat waste lamps at the Riverdale facility. Mr. Graham's testimony demonstrates that Mr. Kelly had knowledge of the requirements of the Illinois universal waste regulations and Mr. Kelly understood the contents of April 18, 2000 letter – the exact same letter Respondents now rely on as their "authorization" to operate from IEPA. Thus, Respondents had knowledge that they were not operating in accordance with either the authorized Illinois hazardous waste program or the Illinois universal waste requirements and that they needed to have a RCRA permit for their activities.

c. History of noncompliance

The Policy provides only for an upward adjustment to the gravity based penalty in consideration of this factor if there is evidence that a respondent has a history of noncompliance. CEX-15-02282. No upward adjustment was made for this factor.

d. Ability to pay

The Policy instructs EPA to "consider the ability to pay of a violator to pay a penalty." CEX-15-02283. The Policy instructs enforcement personnel to conduct a preliminary inquiry into the financial status of a Respondent, which may include publicly available information, and in some circumstances, to "review the financial viability of related entities as those related entities could provide financial support to the respondent." CEX-15-02283. When authorized staff are preparing and issuing an administrative complaint for civil penalties, they can "presume" that a respondent has the ability to pay the amount of the proposed civil penalty until the respondent's ability to pay "is put in issue by a respondent." *In re New Waterbury*, 5 E.A.D. 529 at 15 (1994). Moreover, in RCRA penalty actions, "ability to pay" is not a designated

penalty criterion which the statute requires that the Administrator consider in determining a penalty amount. Thus, the Respondents have the burden of presentation and persuasion on that issue.[40] *In re Carroll Oil Co.*, 10 E.A.D. 635 at 662-668 (EAB 2002).

Mr. Brown testified that the penalty was reduced by $623,293 in consideration of Respondents' ability to pay. He explained:

> A: [W]e received certain financial documents from the Respondents. We had concerns regarding their completeness and their accuracy, but we gave them the benefit of the doubt, and we reduced the penalty . . . .

Tr. 291.[41] The penalty was reduced by $623,293 in consideration of Respondents' claimed inability to pay. As explained further in EPA's penalty narrative:

> As of June 30, 2011, EPA's financial expert was unable to identify material sources of funds available to MVPT (a dissolved corporation) for payment of a penalty. As of the same date, the financial expert finds that Mr. Kelly has limited resources for penalty payment; though identified potential future cash flows up to $62,000. At the same time, EPA's financial expert advises that questions remain as to whether Mr. Kelly has provided EPA with a complete picture of his business holdings and financial circumstances. In this case, EPA is electing to reduce the penalty by $623,293 to arrive at a final penalty amount of $120,000, or roughly double the potential cash flow identified by EPA's financial expert. The EPA is making this adjustment to account for the apparent limited funds available to the respondents, while at the same time weighing the uncertainty over Mr. Kelly's financial condition and the seriousness of the violation.

CEX-62-04098. Thus, at a minimum, a penalty of $120,000 is appropriate based on consideration of Respondents' ability to pay, due to the inconsistencies and inaccuracies in Respondents' submitted financial information. This is discussed further below in the context of Respondents' failure to establish their inability to pay as an affirmative defense.

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[40] In fact, Respondents have not met their burden to prove inability to pay the proposed penalty, which is discussed below.

[41] Mr. Brown considered the fact that Mr. Kelly appeared to be involved in multiple related lamp recycling companies and an elevator inspection company, when considering ability to pay. Tr. 359-360; CEX-22-26, 61-R.

e. Environmental projects

No supplemental environmentally beneficial projects are contemplated in this matter and there is no evidence in the record pertaining to this factor. Accordingly, no adjustment should be made for "environmental projects." CEX-15-02285.

f. Other unique factors

This Court should not consider Respondents' claim that they "acted as a large quantity generator in accordance with both state and federal published rules relating to the handling and accumulation of Universal Waste exceeding 5000 kg in any given month" (CEX-63-04107) as a fact relevant to reducing or mitigating the penalty under the "other unique factors" criteria of the penalty policy.[42] First, as this Court has previously ruled, and as discussed above, Illinois's authorized hazardous waste program applied to Respondents, and not Illinois's unauthorized universal waste regulations. Second, Respondents were not in compliance with either the federal or the unauthorized Illinois version of the universal waste rule. Accordingly, bringing this action was an appropriate exercise of EPA's enforcement discretion.

i. Enforcement discretion

On April 10, 1996, EPA stated its policy regarding enforcement against universal waste 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*" (Herman Memo). CEX 45-03111-03112; Tr. 117. The Herman Memo directs EPA, under specified circumstances, to

[42] This Court should also reject considering Respondents' arguments in this regard as an equitable defense to liability. The bottom line is that the facts establish that Respondents were out of compliance with Illinois's unauthorized version of the universal waste rule, as well as the federal universal waste rule.

exercise discretion not to enforce the authorized Subtitle C regulations against handlers and transporters of universal wastes in states that have adopted (but have not been authorized to implement) the universal waste rule. *Id.* In recognition of EPA's position that managing wastes in compliance with the universal waste regulations at 40 C.F.R. Part 273 is environmentally protective, the Herman Memo provides that "where States are implementing the Part 273 standards but have not yet received authorization, *Regions should take enforcement actions involving universal wastes only where handlers of such wastes are not in full compliance with the Part 273 standards." Id.* (emphasis added); Tr. 117.

To the extent Respondents rely on the Herman Memo as an argument for mitigation of the penalty, they do not meet the criteria under which the memo directs EPA to forego enforcement of the authorized Illinois Subtitle C regulations. Respondents are not in compliance with 40 C.F.R. Part 273, as explained below. Additionally, Respondents are not in compliance with Illinois's unauthorized universal waste regulations at 35 IAC Part 733. Because Respondents are out of compliance with both state and federal universal waste regulations, this action was an appropriate exercise of EPA's enforcement discretion and no penalty mitigation on this ground is warranted.

ii. Respondents are out of compliance with the federal universal waste regulations

Respondents are out of compliance with the federal universal waste rule. Therefore, there is no basis for EPA to exercise enforcement discretion as outlined by the Herman Memo, and no basis for penalty mitigation.

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 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. Most critical to the issues before this Court, 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 before commencing operation. 40 C.F.R. § 273.60; 64 Fed. Reg. 36466, 36469.[43] The federal universal waste rule does not allow the crushing of waste lamps under *any* conditions. *See* footnote 6, *supra*.

The evidence presented at hearing overwhelmingly establishes that Respondents picked up waste lamps from customers, stored the lamps at the Riverdale facility, crushed them at the facility, and then sent the crushed glass and aluminum to solid waste landfills. Respondents are not handlers because they treated waste lamps at the Riverdale facility. By storing and then treating waste lamps at the Riverdale facility, Respondents operated a "destination facility" as

[43] Additionally, the preamble to the universal waste rule states "the universal waste rule includes only two specific requirements for destination facilities. In general, however, these facilities are subject to the same requirements that are applicable to treatment, storage and disposal facilities under the full hazardous waste regulations." 60 Fed. Reg. 25501, 25492 May 11, 1995; Tr. 237-238.

defined in 40 C.F.R § 237.9, and therefore were required to have a RCRA permit for their hazardous waste storage and treatment operation. 40 C.F.R. § 273.60(a); Tr. 271-272. Neither MVPT nor Mr. Kelly had such a permit.

iii. MVPT is not a co-generator or a handler under the universal waste regulations

Respondents attempt to confuse matters by asserting that MVPT acted as a co-generator under the federal universal waste rule, and was somehow thereby exempt from any permitting requirement. Under Respondents' version of the facts, MVPT "supplied containers to various small quantity generators," and "acting as a large quantity co-generator," would from time to time request its "Illinois authorized volume reduction ally" to perform "its authorized service in a safe manner at the Riverdale facility." [44]

In support of their characterization of MVPT as a "co-generator," Respondents cite to an EPA guidance document entitled "Call Center Question and Answers" located on EPA's website.[45] (Complainant's Rebuttal Exhibit CRX-1). This document discusses the concept of "contractors as cogenerators of universal waste lamps," and explains who would be required to comply with the federal universal waste regulations, if a school hires a contractor to remove spent hazardous waste lamps from service. *Id.* It explains that both the school and the contractor would be jointly and severally liable as universal waste handlers under the universal waste rule. *Id.* The school would be a generator, because it "made the determination to discard" a quantity of hazardous waste lamps, and so would the contractor "that actually removes the universal

[44] Respondents asserted this argument in their "Response to USEPA Opposition to Respondents' Motion to Dismiss with Prejudice for Lack of Fair Notice and Convoluted Regulations" filed on July 12, 2011.

[45] Respondents do not assert that Mr. Kelly's sole proprietorship acted as a "co-generator," as allegedly he was the person conducting the "volume reduction" activities at the Riverdale facility.

waste lamps from service." CRX-1; Tr. 658-660.[46] The examples of a "co-generator" provided in CRX-1 and the authorities it cites are entirely inapposite to the activities of MVPT. MVPT did not use the lamps, did not determine that the lamps were no longer usable, and did not remove the lamps from service. Rather, MVPT picked up the waste lamps from customers and transported them to the Riverdale facility for storage and treatment. Even if Mr. Kelly operated the mobile processing unit, MVPT admits to having owned the machine. Both MVPT and Mr. Kelly are liable for storing and treating waste lamps. *See* the liability discussion of this Brief, *supra*. In short, MVPT was neither a generator nor a co-generator.

The term "co-generator" is not discussed or defined in RCRA regulations. However, in the preamble to the rule adding waste lamps to the universal waste rule, EPA addressed who is a generator or co-generator of spent lamps:

> [T]here are two types of entities that are considered handlers of universal waste lamps. The first is a person who generates the lamps, i.e., the person who used the lamps, then determined that they are no longer usable and thus should be discarded. Contractors who remove the universal waste lamps from service are considered handlers and co-generators of the waste. The second type of handler is a person who receives universal waste lamps from generators or other handlers, consolidates the lamps, and then sends the lamps on to other universal waste handlers, recyclers, or treatment and disposal facilities. Facilities that accumulate universal waste lamps but do not treat, recycle, or dispose of them are handlers of the lamps.

64. Fed. Reg. 36474, 36466 (July 6, 1999); Tr. 245-246.

Similarly, the preamble to the universal waste rule explains:

> The generator regulations proposed today include specific language clarifying when each item or material becomes a solid waste. This language is crafted to identify the point at which a particular material becomes a waste, but not to amend or revise that determination as it is currently set forth in 40 C.F.R. § 261.2.

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[46] The guidance document cites two Federal Register notices: the preamble of the final rule adding hazardous waste lamps to the federal version of the universal waste rule, 64 Fed. Reg. 36466, 36474 (July 6, 1999); Tr. 239-240, and the preamble to an interim final amendment to a rule that, *inter alia,* amended the definition of "generator" under the federal Subtitle C program at 40 C.F.R. § 260.10. 45 Fed. Reg. 72024 (October 30, 1980).

> For batteries, a used battery generally becomes a solid waste when a generator permanently removes it from service (for example, by removing it from the appliance or equipment in which it has been used). An unused battery becomes a solid waste when the generator decides to throw it away (for example, by disposing of the batter on the land or incinerating it).

58 Fed. Reg. 8102, 8115 (February 11, 1993); Tr. 245-246. Clearly, a generator is the person who removes, or is responsible for the removal of, a lamp from its socket at the location and at the point in time the lamp is first removed from service. Additionally, the Federal Register notice amending the definition of generator under 40 C.F.R. § 260.10 to "clearly cover[] persons who remove hazardous waste from product or raw material storage tanks, transport vehicles or vessels, or manufacturing process units in which the hazardous waste is generated," shows that EPA broadened the definition of generator to include persons who were involved in the actual process of removing hazardous waste from a unit or tank. [47] 45 Fed. Reg. 72024, 72026 (October 30, 1980). In discussing the allowance of a 90-day accumulation period without a permit for generators under Subtitle C, EPA states:

> This allowance of 90-day accumulation without a permit is available to any of the persons who are generators, even though the party accumulating the waste on-site may not own or operate the site. *This allowance only applies where the accumulation occurs on the site where the removal of hazardous waste from the tank, vehicle, vessel or unit takes place;* all of the other conditions and requirements of § 262.34 must, of course, be met. The 90-day accumulation

[47] The preamble does not discuss the term "co-generator", but it does explain further why EPA amended the definition of generator to include those responsible for removal of hazardous waste on-site: "[T]he operator of a manufacturing process unit, or a product or raw material storage tank, transport vehicle or vessel, and the owner of the product or raw material act jointly to produce the hazardous waste generated therein, and the person who removes the hazardous waste from a tank, vehicle, vessel or manufacturing process unit subjects it to regulation. All three parties are involved and EPA believes that all three . . . have the responsibilities of a generator." 45 Fed. Reg. at 72026. EPA also explains that "in the case of storage or transportation, the act of holding the product or raw material enables settling of heavy fractions of material to create hazardous waste sludges or sediments to adhere to the tank." *Id.* "Because all three parties contribute to the generation of a hazardous waste and none of the parties stands out as the predominant contributor, the Agency has concluded that the three parties should be jointly and severally liable as generators." *Id.* This does not apply to Respondents because Respondents did not "contribute to the generation" of the waste lamps. The waste lamps were already generated when taken out of service by third parties, and accumulated on-site for Respondents to pick up. Respondents were operating a business that collected waste lamps taken out of service, and then stored and treated those lamps at on off-site location; therefore the accumulation without a permit exemption does not apply them.

> period starts when the hazardous waste is removed from the tank, vehicle, vessel or unit . . .

45 Fed. Reg. 72024 at 72026 (emphasis added). As explained in the preamble above, EPA expanded the definition of generator to ensure that all parties involved in the removal of hazardous waste on-site are subject to the generator requirements. This cannot be analogized to Respondents operations, because they were engaged in the off-site storage and treatment of hazardous waste. Mr. Brown testified at hearing on his understanding of who qualifies as a universal waste lamp generator:

> A: Well, if you're going to be a contractor who is co-generating universal waste lamps, you being the entity who is doing or what job it is, such as a janitor of an office building who actually takes the lamps out of service, looks at them, decides that they no longer work, they're blinking, what have you, takes them out and decides this material is waste.
>
> Q: Given all that, is there a relationship between who takes a lamp out of service and where the Point of Generation is located?
>
> A: Well, where the lamp is taken out of service regardless by whom, is the Point of Generation.

Tr. 247. The federal universal waste regulations establish that waste lamps are generated as hazardous waste at the point in time that they are taken out of service. A used lamp "becomes a waste on the day it is discarded." 40 C.F.R. § 273(c)(1). Under the definition of solid waste, discarded material is, in part, "any material that is abandoned by being accumulated, stored or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated." 40 C.F.R. § 262.2. 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. 40 C.F.R. § 273.9 (emphasis added). When the waste lamps are first taken out of service and are accumulated before being picked up by Respondents, the waste lamps are hazardous wastes subject to regulation. Thus, the used lamps become wastes on the day that the

third parties take them out of service. Tr. 260-263. The universal waste rule intended that wastes be generated at specific point in time; otherwise, any person could claim s/he is a handler or "co-generator." As Mr. Brown further explained:

> Q: What would be some of the results if you could have multiple points of generation for a spent lamp?
>
> A: Well, then everyone who handles that lamp from the point it is taken out of service can just claim I'm the generator. I'm the generator of the waste. There's no point in having requirements for transporters at that point. There's no point in having requirements for people who are going to store the waste off-site. There's no point in having the distinction in the regulations for that. Everyone can just comply with generator requirements, and every other requirement for every other entity from that point forward can just be avoided. So it's – it would exempt the lamp from cradle-to-grave management system. You'd be stuck with just cradle.
>
> A: And cradle is exempt from permitting requirements?
>
> Q: Yes, generators are exempt from permitting requirements if they comply with certain standards.

Tr. 264-265.

The co-generator concept has no application to this case. Co-generation, as it is described in the preamble to the universal waste rule, is limited to the specific removal of lamps from service (i.e., literally unscrewing the lamps). In no way can the concept of "co-generators" mentioned in the EPA guidance documents and the Federal Register notice be analogized to Respondents' operations. Here, neither MVPT nor Mr. Kelly were hired as contractors to remove waste lamps from service at third party locations. Rather, Respondents collected lamps that had already been removed from service and placed in containers for pick-up. Then, Respondents transported the waste lamps to the Riverdale facility, where they stored and treated the waste lamps. Respondents then arranged for the disposal of the crushed bulbs to solid waste landfills. If this type of operation is considered "co-generation," it would undermine the regulations that prohibit handlers from treating wastes. Additionally, this of circumnavigation of

the regulations renders the requirement that destination facilities obtain RCRA permits pointless, because virtually any party managing universal waste would claim to be a co-generator to avoid the costs of associated with obtaining a RCRA permit. Therefore, the concept of "co-generators" mentioned in the EPA guidance documents and the federal register notice cannot be analogized to Respondents' operations.

EPA believes that MVPT may be attempting to argue that it is a universal waste handler who "receives universal waste lamps from generators or other handlers, consolidates the lamps, and then sends the lamps on to other universal waste handler, recyclers, or treatment and disposal facilities." 64 Fed. Reg. 36474, 36466 (July 6, 1999). These handlers (not co-generators) are exempt under federal law from the requirement to obtain a RCRA permit. MVPT appears to contend that it was such a consolidator, and that, as noted above, either SLR or the mobile treatment itself was the actual destination facility. [48]

The facts, however, belie MVPT's claim that it was merely consolidating lamps and sending them on to another waste handler. As explained above at length, even under MVPT's current version of its relationship with Mr. Kelly/SLR, MVPT admittedly leased and controlled the Riverdale premises, owned and controlled the equipment operating at the Riverdale premises, and controlled through contract with Mr. Kelly/SLR the treatment of spent universal waste lamps. The reason persons who merely consolidate waste lamps and take them to another location for disposal are exempt from the requirement to obtain a RCRA permit is because these parties are not engaged in activities that can cause the release of mercury to the environment. MVPT, though its own actions and through Mr. Kelly, did indeed engage in such activities.

[48] In its Second Response, MVPT stated that "the destination facility is our mobile processing unit." CEX-6-02049.

iv. Respondents are out of compliance with Illinois's unauthorized universal waste regulations

Illinois's unauthorized universal waste regulations are found at 35 IAC Part 733. Illinois's universal waste regulations are the same as the federal universal waste regulations, except that Illinois's unauthorized regulations allow handlers and transporters of waste lamps to perform volume reduction of those lamps *at the site where they are generated* under certain controlled conditions, such as conducting the crushing in a closed system, meeting certain emission limits and providing notice to the state. 35 IAC §§ 733.133(d)(3) and 733.151(b); Tr. 241-243 (emphasis added). However, as explained above, Respondents brought waste lamps to the Riverdale facility, stored and then "volume-reduced" them at Riverdale. The lamps were generated as hazardous waste when they were taken out of service by third parties. Thus, Respondents were not performing volume reduction at the site of generation and are out of compliance with Illinois's unauthorized universal waste regulations.

In sum, Respondents' management of hazardous waste failed to comply with both state and federal universal waste regulations. Therefore, this action was an appropriate exercise of EPA's enforcement discretion. Accordingly, no adjustment to the penalty should be made based on "other unique factors."

3. Penalty conclusion

For all the reason discussed above, assessment of at least a $120,000 penalty against Respondents for their violations of the Illinois's authorized hazardous waste program is fully supported by the record.

4. The Compliance Order is appropriate and should be issued to Respondents

Section 3008 of RCRA, 42 U.S.C. § 6928, gives EPA the authority to issue compliance orders. EPA is afforded broad discretion when issuing compliance orders for RCRA violations.

See In re Pyramid Chem. Co., 11 E.A.D. 657, 686 n. 40 (EAB 2004). EPA is requesting that the Presiding Officer issue a compliance order to Respondents, requiring them, *inter alia*, to conduct RCRA closure at the Riverdale facility, and to order that Respondents not operate a hazardous waste storage and treatment operation without a RCRA permit for the hazardous waste management facility. CEX-30-02609-02613. Mr. Brown testified as to the general requirements and importance of conducting RCRA closure:

> Q: Are there any RCRA requirements that provide for or come into play when a RCRA facility stops its RCRA related activities?
>
> A: Well, it's a treatment, storage, a disposal facility. It's required to conduct RCRA closure operations. This is aimed at insuring all equipment at a facility is cleaned and we can be sure that there are no hazardous constituents or hazardous waste that remain at the facility or, in environment around the facility. There are requirements to have financial assurance, to ensure that the cost of doing that clean-up is available to the facility at the time they close down.
>
> Q: Any other requirements?
>
> A: [W]ell, specifically with closure, the requirements are decontaminate your equipment, removing any waste that might still be on site. Perhaps collecting soil samples if there is any reason to believe that waste constituents could have gotten out of the facility.

Tr. 52-53; *See* 35 IAC Part 724, Subpart G.

Mr. Brown also testified at hearing as to the importance of each specific paragraph requested in the compliance order. Tr. 384-399. Paragraphs 114-119 of the Complaint order Respondents to cease operations at the Riverdale facility, to arrange for proper disposal of all hazardous wastes at the Riverdale facility, and to provide EPA with shipping records for all wastes disposed of at the facility. CEX-30-02609; Tr. 384. These requirements are important because there are still broken lamps at the Riverdale facility that need to be properly disposed of, and to ensure that Respondents cease operating at Riverdale without a permit. Tr. 385. Paragraphs 119-123 require Respondents to submit a written closure plan in accordance with 35

IAC Part 724, Subpart G to IEPA and EPA, and to execute the plan once it is approved at the Riverdale facility. Tr. 385-386. Mr. Brown explained the importance of RCRA closure:

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

Tr. 386. Paragraphs 124-126 require Respondents to obtain and maintain financial assurance in accordance with 35 IAC § 724.243, in order to ensure closure is completed. Tr. 388-389. Paragraphs 127-129 require Respondents to maintain liability coverage during closure of the Riverdale facility in accordance with 35 IAC § 724.247 and to provide proof to IEPA, in case a third party is impacted by the closure activities or any hazardous waste constituents on-site. Tr. 389-390. Paragraph 130 requires Respondents to comply with all other applicable financial requirements at 35 IAC Subpart H. Paragraph 131 requires Respondents to comply with the security provisions at 35 IAC § 724.114, to ensure that that no one can enter the facility unauthorized until closure has been completed. Tr. 391-392. Paragraphs 132-134 require Respondents to develop and follow a written schedule for inspecting monitoring, safety, and emergency equipment in accordance with 35 IAC § 724.115(b) and to submit a copy of this schedule to EPA, to ensure that all equipment is operating properly. Tr. 393. Paragraphs 135-140 require Respondents to develop and implement a training program for facility personnel during closure, to develop a written contingency plan for the Riverdale facility, and to submit a copies of those plans to EPA, to ensure that employees conducting closure can respond to emergencies and ensure that equipment is working properly. Tr. 394-395. Paragraph 142 states "Respondents and their successors, doing business under their own or any assumed names, shall not own or operate a hazardous waste treatment, storage or disposal facility without first

obtaining a permit to do from the [IEPA] and, if required, the U.S. EPA." CEX-30-02613; Tr. 396-397. This is important because Mr. Kelly is currently operating a hazardous waste storage and treatment operation without a RCRA permit. Tr. 396-397.

Respondents are out of compliance with RCRA and have demonstrated not only an unwillingness to come into compliance, but also a willful intention to continue to operate out of compliance. Accordingly, a compliance order is appropriate and necessary.

III. AFFIRMATIVE DEFENSES

A. Respondents have not proved the affirmative defense of "fair notice"

This Court "held in abeyance until after the evidentiary hearing" a ruling as to whether EPA failed to provide fair notice that Illinois's authorized Subtitle C regulations, as opposed to Illinois's unauthorized universal waste regulations, apply to the management of lamps in Illinois. 2011 EPA ALJ LEXIS 15 at 14-15. As explained below, Respondents were provided fair notice that Illinois is not authorized for the universal waste rule. There is no contradiction or ambiguity with respect to the applicable regulations for hazardous waste storage and treatment facilities; they are required to have a RCRA permit. Additionally, Respondents had actual knowledge that their operations were outside the scope of Illinois's universal waste regulations and would be fully regulated under Subtitle C, therefore any issue of fair notice is *de minimis*.

Courts apply an "ascertainable certainty" standard in determining whether an agency provided fair notice of its regulatory interpretations:

> If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.

Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995). The EAB has described the "ascertainable certainty" standard in the following way: "[P]roviding fair notice does not mean that a regulation must be altogether free from ambiguity . . . . Thus, the question is not whether a regulation is susceptible to only one possible interpretation, but rather, whether the particular interpretation advanced by the regulator was ascertainable by the regulated community." *In re Coast Wood Preserving, Inc.*, EPCRA Appeal No. 02-01, slip op. at 30 (EAB, May 6, 2003) (quoting *In re Tenn. Valley Auth.*, 9 E.A.D. 357, 412 (EAB 2000), appeal dismissed for lack of jurisdiction, 336 F.3d 1236 (11th Cir. 2003), cert. denied 541 U.S. 1030 (2004)). Generally, a particular interpretation advanced by a regulator is ascertainable so long as there are (1) no contradictions and (2) no major ambiguities in the agency's communications. *Star Wireless, LLC v. FCC*, 522 F.3d 469, 474 (D.C. Cir. 2008) (holding that fair notice was provided when there were no agency materials that "contradicted" the agency's conclusion and the agency's materials contained only "minor potential ambiguities"). The ascertainable certainty standard is also satisfied if there is definitive guidance accompanying otherwise ambiguous rules and regulations. *See Howmet Corp. v. EPA*, 614 F.3d 544 (D.C. 2010) ("[E]ven assuming the EPA's 1985 Rule and its accompanying regulations lacked enough clarity, on their own, to provide Howmet fair notice of the EPA's interpretation of its spent material definition, the *Guidance Manual* . . .was sufficient to do so.").

The record establishes that EPA has provided fair notice that the universal waste regulations are unauthorized in Illinois and that the full Subtitle C requirements are enforced when a party is not in compliance with the federal universal waste regulations at 40 C.F.R. Part 273. Additionally, Respondents had actual knowledge that their operations were not in

conformity with Illinois's unauthorized universal waste regulations, so their argument is moot. Accordingly, Respondents'' "fair notice" defense must be rejected.

1. EPA provided notice that the universal waste regulations are not authorized in Illinois

As discussed in the regulatory background section of this Brief, *supra*, EPA provides notice of authorizations to state hazardous waste programs and program revisions, including Illinois, in the Federal Register and the C.F.R. according to the procedures outlined in 40 C.F.R. Part 271, Subpart A. Both the preamble to the universal waste rule and the final rule adding waste lamps to that rule, state that the universal waste rule was not promulgated pursuant to HSWA and therefore does not take effect in an authorized state until the state adopts equivalent requirements and is authorized by EPA for those requirements. 60 Fed. Reg. 25492 at 25536; Tr. 49-50. It further states that, because the universal waste rule is less stringent than the existing RCRA Subtitle C requirements, authorized states are not required to adopt the requirements of the universal waste rule. *Id.* Tr. 50. Thus, a "regulated party acting in good faith" would be able to readily discern that they need to determine whether a particular state has been authorized for the universal waste rule. After checking the Federal Register, C.F.R, and EPA's website, it is clear that EPA has never authorized Illinois for the universal waste rule. EPA has never contradicted its position that Illinois is not authorized for the universal waste rule. Additionally, EPA provided notice of how it would enforce RCRA in states that had not been authorized for the universal waste rule in the Herman Memo. CEX-45-03111. The Herman Memo cogently sets forth EPA's policy that it would not enforce the full Subtitle C requirements against regulated entities that were in compliance with the universal waste regulations at Part 273. The memo advises that EPA enforces the Subtitle C requirements against regulated entities that are not in full compliance with the universal waste rule. EPA's website also lists Illinois as a state

that has adopted universal waste regulations, but that is not authorized for them. CEX-65-04139; http://www.epa.gov/osw/hazard/wastetypes/universal/statespf.htm#il. Thus, EPA has provided the regulated community with fair notice that the universal waste regulations have not been authorized in Illinois. Additionally, EPA provided fair notice to the regulated community as to how EPA will enforce the federal universal waste regulations in states that are implementing, but have not yet been authorized for, the universal waste regulations at Part 273.

The federal and Illinois's universal waste regulations also provide clear notice to parties that storage, treatment, and disposal facilities are fully regulated under Subtitle C and need a permit for their operation. 40 C.F.R. § 273.60(a); 35 IAC § 733.160. Although these types of facilities are called "destination facilities" under the universal waste rule, they are regulated under the same RCRA regulations as treatment, storage and disposal facilities. *Id.* Thus, there are no contradictions or ambiguous interpretations relating to the types of activities that are fully regulated under Subtitle C. Both the federal and Illinois's universal waste regulations require a RCRA permit for the off-site storage and treatment of hazardous wastes, which is exactly the type of operations that Respondents engaged in.

2. Respondents had actual knowledge of the applicable regulations, and are out of compliance with the federal and Illinois's unauthorized universal waste regulations

The record shows that Mr. Kelly has clearly indicated that he is both capable of understanding the applicable regulatory requirements, and that he can be considered a resource for information on such requirements. Because the fair notice analysis is conducted from the perspective of whether the regulated party could be expected to ascertain the standards that the agency expects it to adhere to, *see Howmet Corp,* 614 F.3d at 553-554, Mr. Kelly's statements about his knowledge of regulatory requirements are relevant to this inquiry. As discussed in the

penalty section of this Brief, above, Mr. Kelly has held himself out to the public, with respect to RCRA, as a person who "has been in a position to track and maintain an ongoing understanding of all aspects of business operations under that and all other relevant regulations" and as a person who has "the ability to apply that understanding to the spirit of the new universal waste rule pertaining to spent mercury-containing lamps." CEX-37-02920; Tr. 327-330. In fact, Mr. Kelly's own description of his background and experience at hearing spans seven pages of the trial record in this case, and includes, in part, the following statements:

> A: (reading) I developed and patented the first mobile lamp volume reduction unit in Illinois, designed to address the Universal Waste Rule . . . I conducted over 700 environmental audits for OSHA and RCRA compliance, Phase I site assessments . . . I assisted in the construction and permitting of RCRA treatment storage disposal facilities throughout the state of Illinois . . . I acquired DOT Hazardous Waste permitting for transportation in hazardous waste, hazardous and non-hazardous liquids and solids, for various hazardous waste haulers. I developed and implemented a site-specific health and safety plan, and emergency response plans at various OSHA and U.S. EPA remedial action sites throughout the United States . . . I negotiated the first Tiered Approach to Clean-up Objectives, commonly known as TACO, in the state of Illinois, in 1996 with the Illinois EPA and the U.S. EPA . . I was invited to testify, in December of 1997, along with representatives of Commonwealth-Edison, before the Illinois Pollution Control Board at a hearing establishing the Universal Waste Rule in Illinois. My testimony, coupled with Commonwealth-Edison's, was one of the drivers behind the Universal Waste Rule in the state of Illinois . . . A brief summary of my experience; 33 years as a technical managerial experience in DOT, OSHA, RCRA and remedial action environmental affairs. . .I conducted hundreds of environmental assessments and audits for the Innocent Party Defense Act. . . .

Tr. 544-550. Yet, Mr. Kelly claims, that with all his experience with RCRA, and specifically with the universal waste rule, he did not know that the rule was unauthorized by EPA.

Mr. Kelly knew that his operations at the Riverdale facility were outside the scope of Illinois's universal waste rule, and he was previously told by IEPA what activities were subject

to RCRA permit requirements.[49] CEX-72-04216-02417. Mr. Kelly's claim of a lack of fair notice is specious. Mr. Graham's testimony further demonstrates Mr. Kelly's actual knowledge of his regulatory obligations. Mr. Kelly hired Mr. Graham to help him resolve the issue of letters Mr. Kelly received from IEPA, indicating that the crushing of waste lamps off-site from where the lamps are generated is subject to the RCRA Subtitle C permitting requirements. Tr. 465-480; CEX-47-03132-03134. Mr. Graham stopped working for Mr. Kelly for a number of reasons, one being that he realized that Mr. Kelly was violating Illinois's universal waste rule, and was crushing lamps at an off-site location. Evidence of contemporaneous actual knowledge of regulatory obligations vitiates later claims of a lack of "fair notice" of those obligations. *In re Advanced Electronics*, 10 E.A.B. 385, 403-411 (EAB 2002).

Finally, as discussed at length previously in this Brief, Respondents were out of compliance with both the federal universal waste regulations and Illinois' unauthorized version of the universal waste regulations. Under both sets of regulations, Respondents were operating a "destination facility" for the treatment of waste lamps that required a RCRA permit and which they did not have.

In conclusion, there is no genuine "fair notice" issue here because: (1) EPA provides notice to the regulated community as to its authorization of state program and revisions through the Federal Register; (2) the preamble to the universal waste rule states that it does not take effect in states until they are authorized by EPA for the rule; (3) EPA has set forth guidance as to how it will enforce the universal waste rule in states that are implementing but have not yet been authorized for the rule; (4) Respondents have pointed to no material confusion which is relevant to the actual allegations of the Complaint (treatment requires a permit under both Illinois's

[49] *See* the analysis of "good faith efforts to comply," "degree of willfulness/negligence," and "other unique factors" in the penalty adjustment factors analysis of this Brief for a detailed discussion of why Mr. Kelly clearly had notice that his operations were in violation of the law, *supra.*

authorized program and under Illinois's unauthorized universal waste rule); and (5) Mr. Kelly was informed by IEPA that processing waste lamps off-site is fully regulated under Subtitle C.

B. Respondents have not proved the affirmative defense of inability to pay the proposed penalty

EPA has the burden of proof in civil penalty cases on the factors which the statute mandates that it considers when assessing a penalty. *In re Central Paint and Body Shop, Inc.*, 2 E.A.D. 309, 313-14 (EAB 1987). Under RCRA, these factors are limited to the seriousness of the violation and any good faith attempts to comply with the requirements. 42 U.S.C. § 6928(a)(3); *In re Carroll Oil Co.*, 10 E.A.D. 635, 662 (EAB 2002). Since Congress included the elements of ability to pay and economic impact in other environmental statutes such as the CAA, CWA, FIFRA, and TSCA, but did not do so under RCRA, the "logical conclusion is that ability to pay is not an element of EPA's proof" under RCRA. *See Central Paint*, 2 E.A.D. at 313-14; *Carroll Oil*, 10 E.A.D. at 662 n. 24; *In re Dearborn Refining Co.*, 2004 EPA App. LEXIS 33, 4 n. 4 (EAB 2004). Since ability to pay is not part of EPA's prima facie case, it is treated as an affirmative defense for which Respondents have the burden of presentation and persuasion. *See* 40 C.F.R. § 22.24(a); *In re Euclid of Virginia*, 13 E.A.D. 616, 705 (EAB 2008). The fact that the Respondents control the information necessary to determine ability to pay is an additional reason why it is both appropriate and efficient to require Respondents to provide this information. *See Central Paint*, 2 E.A.D. at 314-15. Therefore, as an affirmative defense Respondents must both raise the issue of ability to pay and meet the burden of proof. *Euclid*, 13 E.A.D. at 705.

If Respondents fail to furnish documentation that provides a clear picture of their financial state, Respondents will not meet the required burden of proof on the issue. Unsupported, self-serving, and conclusory testimony by a respondent is usually given little

weight. *See Central Paint*, 2 E.A.D. at 315-16. Documents that are not prepared in connection with the proceeding or are prepared by independent auditors are given greater weight. *See In re CDT Landfill Corp.*, 2003 EPA App. LEXIS 5, 54 (EAB 2003). Documents prepared by independent parties that are based only on unverified information provided by management are given less weight. *See Central Paint,* 2 E.A.D. at 317. Both tax returns and financial statements prepared according to generally accepted accounting principles are considered good evidence of financial state, though they do provide different information. *See CDT Landfill*, 2003 EPA App. LEXIS at 55 n. 42. Financial statements are generally favored over tax returns, because although financial statements seek to provide an accurate representation of the financial state of the entity, tax returns are prepared with the purpose of minimizing income for reporting purposes. *See* Id. at 55; *In re Bil-Dry Corp.*, 2001 EPA App. LEXIS 1, 85 (EAB 2001).

To ensure that the information provided accurately represents ability to pay, it may be necessary under certain circumstances to obtain financial information of other corporations or individuals. *See In re New Waterbury, Ltd.*, 1994 EPA App. LEXIS 15, 53 (EAB 1994). In situations involving potentially closely entangled entities or parent/subsidiary relationships, it may be crucial to obtain the records of the other entity to determine whether there were any "less than arm's length" transactions such as the shuffling of assets or liabilities, loans, or dividend payments between the parties. *See Carroll Oil*, 10 E.A.D at 664-668.

Since the respondent has this burden, the EAB has often noted when the respondent has failed to provide or comment on certain important documents, especially when no explanation is given for the omission. *See Bil-Dry*, 2001 EPA App. LEXIS at 84; *Central Paint*, 1987 2 E.A.D. 309 at 315 ("This testimony is notable for what is not said."). If it appears that the respondent has "frustrated efforts to develop a more comprehensive understanding of its financial situation"

by employing such techniques as "salting the record selectively," the result is that there will be low confidence that the respondent "has painted an accurate or complete picture." *See Carroll Oil*, 10 E.A.D at 664-668. Because Respondents have the burden on this issue, an incomplete or insufficient picture will result in the failure to prove inability to pay. *See* id. at 74. If the burden is not met, Respondents are not entitled to any penalty reduction on these grounds and must pay the penalty as determined by the statutory factors. *See Carroll Oil*, 10 E.A.D. at 668; CEX-15-02284.

Respondents have not met their burden that they are unable to pay the proposed penalty of $120,000, and therefore are not entitled to any reduction in penalty.

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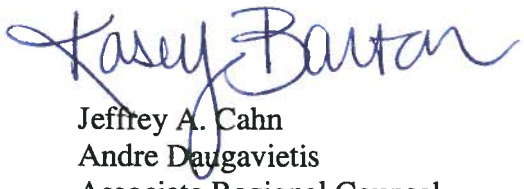
In summary, Respondents have not proved that they are unable to pay EPA's proposed penalty of $120,000. The financial information that Respondents have submitted is unsubstantiated and contains inconsistencies which, taken together, cast substantial doubt on the accuracy and truthfulness of their overall financial picture. Despite this, EPA has taken into consideration Respondents' ability to pay claims and reduced the penalty by $623,293. Considering all of the above information, Respondents should be assessed a penalty of at least $120,000.

VII. CONCLUSION

The evidence presented at hearing establishes that Respondents are liable for conducting a hazardous waste storage and treatment operation without a RCRA permit for the facility in violation of 35 IAC § 703.121(a)(1). Applying the established facts to the statutory penalty factors set forth at Section 3008(a) of RCRA, 42 U.S.C. § 6928, and the RCRA Penalty Policy, proves that the penalty proposed in the Complaint is appropriate. Additionally, issuance of the Compliance Order is appropriate to require Respondents to conduct RCRA closure at the Riverdale facility and to prevent them from operating without a RCRA permit in the future.

Complainant, therefore, respectfully asks this Court to find Respondents liable for the violations alleged in the Complaint, to issue the Compliance Order, and to assess the proposed penalty of $120,000.

Respectfully submitted,



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

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this day I filed with the Regional Hearing Clerk the original and one copy each of the accompanying Complainant's "Post-Hearing Brief" and "Proposed Findings of Fact, Conclusions of Law, and Order." I hereby further certify that on this day I filed with the Regional Hearing Clerk one copy each of the accompanying Complainant's "Post-Hearing Brief" and "Proposed Findings of Fact, Conclusions of Law, and Order" that have been redacted to remove confidential business information. I further certify that on this day I caused copies of Complainant's "Post-Hearing Brief" and "Proposed Findings of Fact, Conclusions of Law, and Order" and redacted copies of Complainant's "Post-Hearing Brief" and "Proposed Findings of Fact, Conclusions of Law, and Order" to be served on the following persons by the following means:

VIA POUCH MAIL:

Honorable Barbara Gunning
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