

Administrative Law Judge Rules that Illinois' Universal Waste Rule is not Enforceable by USEPA

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On May 5, 2011, Administrative Law Judge Barbara A. Gunning issued an order resolving EPA's Motion for Partial Accelerated Decision in the matter of [Mercury Vapor Processing Technologies, Inc.](#), Docket No. RCRA-05-2010-0015. This case dealt with a waste storage and treatment facility located in Riverdale, Illinois.

USEPA alleged that between February 2005 and November 2007, the defendant received waste lamps, including spent fluorescent bulbs, from third parties; transported the waste lamps to the Riverdale property for storage and treatment; crushed the waste lamps using a "mobile treatment unit" at the Riverdale property in order to reduce the volume of the lamps, captured any mercury vapor released during the crushing process, and rendered the lamps not hazardous; and disposed of the resulting materials in solid waste landfills. USEPA further alleged that at least some of the waste lamps stored and crushed by the defendant at the Riverdale property constitute hazardous waste under the Illinois Administrative Code and that the defendant failed to obtain a permit for these activities, as required. The defendant denied that it was engaged in the storage and treatment of hazardous waste and argued that the waste lamps handled at its property constituted universal waste, which is not fully regulated as hazardous waste under federal and state regulations. USEPA filed a Motion for Partial Accelerated Decision as to the applicability of regulations and liability. (A Motion for Partial Accelerated Decision is analogous to a Motion for Summary Judgment under the Federal Rules of Civil Procedure.)

One issue was whether the hazardous waste provisions of the Resource Conservation and Recovery Act, Subtitle C, applied in this case. This was an interesting issue, because back in 1986, USEPA 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. On May 11, 1995, USEPA published the final Federal Universal Waste Rule, and in 2000, hazardous waste lamps were added to that rule. In 1996, Illinois adopted its own version of the Federal Universal Waste Rule; however, USEPA has yet to authorize Illinois to administer its Universal Waste Rule as part of its approved Hazardous Waste Program. USEPA argued, and the Administrative Law Judge agreed, that Illinois' version of the Universal Waste Rule is not enforceable by USEPA until the agency authorizes Illinois to implement it as part of Illinois' approved Hazardous Waste Program. In the interim, USEPA argued that it can enforce only those state regulations that have already been approved, namely, Illinois' traditional hazardous waste regulations. Thus, the Administrative Law Judge held "that the full hazardous waste regulations adopted by Illinois and authorized by EPA apply in the present proceeding."

However, Judge Gunning denied USEPA's Motion for Partial Accelerated Decision as to liability. Part of her reasoning was that the defendant had a defense of fair notice, because there

was evidence in the record that demonstrated USEPA's implied authorization of the Universal Waste Rule adopted by Illinois. For example, USEPA's website provides links to Illinois Universal Waste Rule, and the Illinois EPA's website specifically states that, "In Illinois, you may follow the Universal Waste Rule described in the state regulations, or you may follow the RCRA requirements for hazardous waste handling, storage, treatment and disposal." Judge Gunning found that the affirmative defense of fair notice may absolve the defendant of liability or serve as a mitigating factor in calculating the appropriate penalty to assess if liability is established. Furthermore, the defendant had contested additional facts in the proceeding that would prevent the Court from granting USEPA's Motion for Partial Accelerated Decision as to liability.

This case obviously presents one way in which environmental laws can set traps for the unwary. Even though USEPA and IEPA websites clearly directed this company to comply with the Illinois version of the Universal Waste Rule, USEPA still began an enforcement action against this company. This case demonstrates how a competent environmental attorney and consultant can help manufacturers and other companies comply with the complex statutes and regulations that are currently in place.

Stay tuned to the Illinois Environmental Law Blog for more news and developments. To set up a free initial consultation to discuss your legal matter, please contact Dave Scriven-Young at (312) 239-9722 or dscriven-young@pecklaw.com.