Cc: ptomasi@foley.com[ptomasi@foley.com]; ABeggs@foley.com[ABeggs@foley.com]
To: lbenfield@foley.com[lbenfield@foley.com]; Cahn, Jeffrey[cahn.jeff@epa.gov]
From: Olson, Erik
Sent: Thur 12/21/2017 9:52:14 PM
Subject: Re: Container Life Cycle Management LLC
ICS Ohio ACO.pdf

Here is the document.

Regards,

Erik

Erik H. Olson

Associate Regional Counsel

U.S. Environmental Protection Agency Region 5

77 West Jackson Boulevard, Mailcode C-14J

Chicago, Illinois 60604

(312)886-6829

olson.erik@epa.gov

From: lbenfield@foley.com <lbenfield@foley.com>
Sent: Thursday, December 21, 2017 3:20 PM
To: Cahn, Jeffrey
Cc: Olson, Erik; ptomasi@foley.com; ABeggs@foley.com
Subject: RE: Container Life Cycle Management LLC

I believe it was related to a permanent total enclosure.

Thanks.

From: Cahn, Jeffrey [mailto:cahn.jeff@epa.gov]
Sent: Thursday, December 21, 2017 1:46 PM
To: Benfield, Linda E.
Cc: Olson, Erik; Tomasi, Pete; Beggs, Amanda K.
Subject: RE: Container Life Cycle Management LLC

I have all of the materials I referenced out on my desk, and I cannot find anything with a citation like this: EPA 517113A (Ohio EPA). I also don't see it in my electronic files.

Do you know in what contest I referenced this?

Regards,

Jeffrey A. Cahn, Associate Regional Counsel
Office of Regional Counsel (Mail Code C-14J)
U.S. Environmental Protection Agency
77 West Jackson Blvd.
Chicago, Illinois 60604
PH: 312-886-6670
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From: lbenfield@foley.com [mailto:lbenfield@foley.com]
Sent: Thursday, December 21, 2017 1:33 PM
To: Cahn, Jeffrey <cahn.jeff@epa.gov>
Cc: Olson, Erik <olson.erik@epa.gov>; ptomasi@foley.com; ABeggs@foley.com
Subject: Container Life Cycle Management LLC

Jeff,

During our December 18, 2017 meeting, you provided several citations to materials

related to RCRA. We have reviewed those materials and believe they support the RCRA application that CLCM and the Reusable Industrial Packaging Association have presented, as it applies to container reconditioners, including the CLCM facilities. We reviewed:

1. Letter from John H. Skinner, Office of Solid Waste to Karl J. Klepitsch, Jr., Waste Management Branch, dated November 28, 1984 (RCRA Online 11048 (from 1984)).

2. Military Munitions Rule: Hazardous Waste Identification and Management; Explosives Emergencies; Manifest Exemption for Transport of Hazardous Waste on Right-of-Ways on Contiguous Properties, 62 Fed. Reg. 6622, 6626 (Wednesday, February 12, 1997).

3. *In the Matter of Mercury Vapor Processing Technologies, a/k/a River Shannon Recycling, and Laurence C. Kelly*, EPA Docket No. RCRA 05-2010-0015, U.S. EPA, dated December 14, 2012 at p. 44, fn 31 and p. 64.

4. *In the Matter of Industrial Container Services—OH, LLC,* Director's Final Findings and Orders, Ohio Environmental Protection Agency, dated September 28, 2015.

5. *In the Matter of Industrial Container Services— SCII, LLC(ICS)*, Consent Agreement, EPA Docket No. RCRA 04-2008-4019B, dated December 18, 2008.

6. *K.P. McNamara Nw., Inc. v. Dep't of Ecology*, 173 Wn. App. 104 (Wash. Ct. App. 2013).

7. Revision of Wastewater Treatment Exemptions or Hazardous Waste Mixtures ("Headworks Exemptions") 70 Fed. Reg. 57769, 57779 (Tuesday, October 4, 2005); Letter from Marcia Williams, Director of Solid Waste to Daniel R. Cookey, Mobile Tank Care Services, dated December 12, 1985 (RCRA Online 125122); Letter from Sylvia K. Lowrance, Director, Office of Solid Waste to. Richard G. Stoll, Freedman, Levy, Kroll, and Simonds, dated April 10, 1990 (RCRA Online 11504); Letter from Sylvia K. Lowrance, Director, Office of Solid Waste to Cynthia V. Bailey Executive Director Department of Waste Management, dated June 5, 1989 (RCRA Online 11431); and Letter to Casey Coles from Robert Springer, EPA Director Office of Solid Waste, dated April 12, 2004 (RCRA Online 14708).

We were not able to review one additional document (EPA 517113A (Ohio EPA)) because we have not been able to locate it. If you can provide a copy to us, we will also review that.

As detailed below, all of the materials we reviewed support CLCM's positions with respect to the allegations in the U.S. EPA's RCRA NOV dated November 27, 2017.

1. Letter from John H. Skinner, Office of Solid Waste to Karl J. Klepitsch, Jr., Waste Management Branch, dated November 28, 1984 (RCRA Online 11048 (from 1984))

This 1984 U.S. EPA guidance document indicates that tank cars must be emptied using commonly employed methods by the applicable industry and that simply meeting the 1 inch rule for RCRA-empty purposes is not sufficient for the tank cars to be classified as RCRA-empty under 40 C.F.R. § 261.7 if additional material can be removed from the tank car. The tank car should be emptied as completely as possible, and the agency focused on the fact that although the tank cars were pumped out by the users, the cars themselves had a valve at the bottom of the tank, and that should have been employed to further empty the tank cars. CLCM does not dispute the U.S. EPA's position included within this guidance letter, and agrees that in order for containers to be considered RCRA-empty they must be emptied using commonly employed practices in the industries of its vendors. I recall that U.S. EPA discussed this letter in the context of the Oak Creek facility where the company uses a "can opener" to remove lids from the tight-head drums. However, there is no valve at the bottom of the tight-head drums, and the users do not utilize a "can opener" to remove the lids. Therefore, the containers are RCRA-empty when they are received by CLCM because they have been emptied using commonly employed practices, and the fact that CLCM uses the can opener to recondition the empty drum does not change the status of the container under RCRA.

2. Military Munitions Rule: Hazardous Waste Identification and Management; Explosives Emergencies; Manifest Exemption for Transport of Hazardous Waste on Right-of-Ways on Contiguous Properties, 62 Fed. Reg. 6622, 6626 (February 12, 1997)

This reference is to the preamble to the Military Munitions Rule which addresses when military munitions become hazardous waste. The preamble expressly indicates that the rule addresses this issue in the "unique context of military munitions." 62 Fed. Reg. at 6626. The preamble indicates that a military munition becomes a solid waste for regulatory purposes when it is "removed from storage for the purposes of disposal, burning, incineration, or other treatment prior to disposal." *Id.* U.S. EPA specifically indicated that unused military munitions are unused "products" that do not become waste until they are discarded material. *Id.* The preamble explains that the U.S. EPA considers a product discarded when an intent to discard the material is demonstrated. *Id.* U.S. EPA acknowledged that intent is often difficult to discern and for this reason U.S. EPA promulgated this Military Munitions Rule to clearly delineate a test to determine the military's intent in the context of unused munitions. *Id.* U.S. EPA recognized that "even usable munitions scheduled for disposal may be called back into service" therefore simply determining that a stored munition is "unusable" is not enough to classify the munition as a solid or hazardous waste. *Id.* The decision to treat or dispose of the munition must be clear. *Id.* A munition that is sent for evaluation as to whether it can be sold for use, reconditioned for use, recycled for use, or whether it should be disposed is not shipped for purposes of disposal and therefore is not a hazardous waste. *Id.* This discussion regarding "intent to discard" a munition is clearly consistent with CLCM's position that the third party manufacturers that supply CLCM with containers do not intend to discard or abandon the non-empty containers they erroneously ship to CLCM. CLCM's vendors have an express, contractual, enforced expectation that any non-empty container will be recovered by the generator, and in every instance, they retrieve that precise container. The vendors do not intend to discard the non-empty containers and expressly agree not to do so.

3. *In the Matter of Mercury Vapor Processing Technologies, a/k/a River Shannon Recycling, and Laurence C. Kelly*, EPA Docket No. RCRA 05-2010-0015, U.S. EPA, dated December 14, 2012 at p. 44, fn 31 and p. 64.

This administrative decision, which applied Illinois law, analyzes the application of universal waste laws and the treatment of spent lamps. However, it is not analogous to the facts and circumstances applicable to the CLCM facilities. The Administrative Law Judge determined in this decision that the spent lamps at issue were "generated as a 'solid waste' at the time they were removed from service by third parties", but the third parties in that case clearly determined that the lamps were no longer useable, took the lamps out of service and discarded them. The lamps themselves were removed because they were demonstrably "spent" and there is no assertion that some of the lamps were working fine or were in new packaging and were erroneously removed from the facilities and then retrieved. As noted above, the third party manufacturers that supply CLCM with containers do not intend to discard or abandon the non-empty containers they erroneously ship to CLCM. CLCM's vendors have an express, contractual, enforced expectation that any non-empty container will be recovered by the generator. In every instance, the vendors retrieve that precise container. The vendors do not intend to discard the non-empty containers and expressly agree not to discard such containers.

4. *In the Matter of Industrial Container Services—OH, LLC,* Director's Final Findings and Orders, Ohio Environmental Protection Agency, dated September 28, 2015.

This document relates to the Industrial Container Services ("ICS") container reconditioning facility in Blacklick, Ohio. The Ohio EPA relied on a unique provision of Ohio law to exempt the facility from the requirement to obtain a hazardous waste facility installation and operation permit under Ohio law. Although this was resolved using a unique provision in Ohio state law, the ICS reconditioning facility was not required to obtain a RCRA Treatment, Storage, and Disposal ("TSD") permit. Because of that, none of the agencies or ICS had to directly address the interpretation of the applicable RCRA regulations to container reconditioning facilities, as CLCM and the Reusable Industrial Packaging Association have detailed.

5. *In the Matter of Industrial Container Services— SCII, LLC(ICS)*, Consent Agreement, EPA Docket No. RCRA 04-2008-4019B, dated December 18, 2008.

While this settlement appears to address certain items at an ICS container reconditioning facility in South Carolina, the facts surrounding the settlement are unclear and it appears that this facility may have been processing non-empty containers. CLCM does not process non-empty containers.

6. *K.P. McNamara Nw., Inc. v. Dep't of Ecology*, 173 Wn. App. 104 (Wash. Ct. App. 2013)

The court in this case addressed a tote reconditioning facility where they alleged that

materials from non-empty containers "leak[ed] and drain[ed] to the tote below or to the gravel." *K.P. McNamara Nw.*, 173 Wn. App. at 135. The CLCM facilities do not process non-empty containers and the U.S. EPA has made no allegation that any non-empty containers were processed by the CLCM facilities or that any containers at the CLCM facilities were "leaking or draining."

Additionally, to the extent that the *K.P. McNamara* case also determined that the rinse water from the washing of the RCRA-empty containers must be appropriately characterized and managed, this determination is consistent with CLCM's position. CLCM appropriately characterizes and disposes the rinse/wash water and ash generated from washing or pyrolizing the RCRA-empty containers it receives.

7. Revision of Wastewater Treatment Exemptions or Hazardous Waste Mixtures ("Headworks Exemptions") 70 Fed. Reg. 57769, 57779 (Tuesday, October 4, 2005); Letter from Marcia Williams, Director of Solid Waste to Daniel R. Cookey, Mobile Tank Care Services, dated December 12, 1985 (RCRA Online 125122); Letter from Sylvia K. Lowrance, Director, Office of Solid Waste to. Richard G. Stoll, Freedman, Levy, Kroll, and Simonds, Dated April 10, 1990 (RCRA Online 11504); Letter from Sylvia K. Lowrance, Director, Office of Solid Waste to Cynthia V. Bailey Executive Director Department of Waste Management, dated June 5, 1989 (RCRA Online 11431); and Letter to Casey Coles from Robert Springer, EPA Director Office of Solid Waste, dated April 12, 2004 (RCRA Online 14708)

Each of these U.S. EPA documents address the treatment of rinse water used to wash RCRA-empty containers. These documents confirm that if the removal or subsequent management of residue removed from a RCRA-empty container generates a new hazardous waste, then that new waste is subject to regulation under RCRA. CLCM agrees, and properly characterizes and disposes of the rinse/wash water and ash generated from washing or pyrolizing the RCRA-empty containers it receives. However, nothing in any of these documents supports the position that the waste determination must be made at the instant residue from an empty container is removed from the container and before it contacts the washwater or is burned. In fact, the 2004 letter from Robert Springer to Casey Coles indicates that where a rinsing agent includes a solvent that would be hazardous waste when discarded (which is not the case for the CLCM facilities), the resulting rinsate may be hazardous not because of the material that was removed from the container, but because of the nature of the rinsing agent.

Please let me know if you would like to discuss. I will be traveling through January 8 so please copy Pete Tomasi and Amanda Beggs on correspondence to me so that we can be responsive on our side.

Thanks.

Linda

Linda E. Benfield

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Milwaukee, WI 53202

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