UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	**Docket Nos. RCRA-5-2001-0016**
STRONG STEEL PRODUCTS, LLC,	)	**CAA-5-2001-0020**
Detroit, Michigan	)	**MM-5-2001-0006**
	)	
Respondent.	)	
	)	

ORDER ON CROSS-MOTIONS REGARDING "RCRA CLOSURE"

On July 8, 2004, Respondent filed a Motion and Memorandum in Support thereof to Disregard Arguments in Region 5's Post-Hearing Reply Brief Regarding RCRA Closure; or, Alternatively, for Leave to File a Response to Such Arguments ("Respondent's Motion" and "Respondent's Memorandum"). Complainant filed its Response on July 23, 2004, which further "requests the opportunity to file a response to any brief the Presiding Officer allows the Respondent [to] file on this issue." Complainant's Response at 12, n.9. Respondent filed its Reply Memorandum on August 3, 2004. As explained below, Respondent's Motion to disregard arguments regarding "RCRA closure" is **DENIED**, Respondent's alternative Motion for leave to file a RCRA Closure Response Brief is **GRANTED**, and Complainant's Motion for leave to file a Brief in Response to Respondent's RCRA Closure Response Brief is **GRANTED**. Respondent shall file its RCRA Closure Response Brief within ten (10) days of the date upon which this Order is issued, and Complainant shall file its Brief in Response to Respondent's RCRA Closure Response Brief within ten (10) days of Respondent's filing of its RCRA Closure Response Brief.

The briefing allowed by this Order shall be strictly limited to the issue of whether this Tribunal should issue a compliance order requiring Respondent to submit a "RCRA closure plan" to the Michigan Department of Environmental Quality ("MDEQ"), to the extent that issue is addressed on pages 19, 51-55, and 99-100 of Complainant's Post-Hearing Reply Brief. Complainant's Brief in Response to Respondent's RCRA Closure Response Brief shall be limited to the scope of Respondent's RCRA Closure Response Brief, and, in the interest of judicial economy, no further briefing by any party shall be permitted.

I. Respondent's Motion to Disregard Arguments in Region 5's Post-Hearing Reply

Brief Regarding RCRA Closure

The final sentence of Complainant's Post-Hearing Reply Brief ("CPHRB") states: "Finally, a compliance order is required to ensure that the Respondent either submits to MDEQ a hazardous waste permit application or a closure plan as required by the regulations." CPHRB at 99-100. Respondent objects to the "RCRA closure" aspect[1] of this compliance order request and the accompanying argument set forth in CPHRB's at pages 19 and 51-55, arguing that Respondent had no notice that Complainant sought a "RCRA closure compliance order" and that the Complainant improperly raised the issue for the first time in the CPHRB. Complainant counters that Respondent had notice of the "RCRA closure compliance order" issue in that it was implicit in the Amended Complaint and was specifically addressed in testimony adduced at hearing and in Respondent's Post-Hearing Reply Brief[2] ("RPHRB"). Complainant further argues that "[t]here is no specific limitation that the reply must only address issues raised in the movant's *initial* motion. . . . It is the response which dictates the scope of the reply." Complainant's Response at 5 (emphasis in original).[3]

A. Notice of the Issue

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[1] Regarding the "hazardous waste permit application" aspect of this compliance order request, Respondent in its Reply Memorandum at footnote 3 argues that: "It is obvious that neither EPA nor MDEQ is at all interested in issuing a RCRA permit to Strong Steel, and Strong Steel certainly has no desire to become a permitted TSD [('treatment, storage or disposal facility')]. . . . The only true issue is whether, assuming that Region 5 has persuasively shown that Strong Steel is a 'disposal facility,' Strong Steel should be required to undergo RCRA closure. Thus, the Court should construe Strong Steel's Motion as requesting that the Court disregard Region 5's argument that the Court should issue a compliance order compelling Strong Steel to either obtain a RCRA permit or to undergo RCRA closure." Respondent's Reply at 3, n.3. As discussed *infra*, whether the Strong Steel facility is a "disposal facility" as defined by 40 C.F.R. § 260.10 is an issue in this case. That definition explicitly includes the concept of "closure," which, in turn, is specifically regulated. Therefore, *if* the Strong Steel facility is found to be a "disposal facility," then the injunctive relief requested in the Amended Complaint would include RCRA compliance with *either* the continued operation of the facility *or* the "closure" of the facility. Under such circumstances, this Tribunal does not speculate as to which course Respondent would choose or whether MDEQ would issue a hazardous waste permit for continued operation. Therefore, this Tribunal denies Respondent's request "that the Court disregard Region 5's argument that the Court should issue a compliance order compelling Strong Steel to either obtain a RCRA permit or to undergo RCRA closure."

[2] Respondent's brief is captioned "Respondent's Post Hearing Brief." However, because the brief was filed after Complainant's Post-Hearing Brief and was responsive thereto, this Order refers to Respondent's Post-Hearing Brief as "Respondent's Post-Hearing Reply Brief."

[3] The quoted passage is footnoted with a number 5, but the document does not contain a footnote number 5.

The Amended Complaint alleges that "Strong was the owner or operator of a hazardous waste <u>disposal facility</u>..." Amended Complaint at 19 (emphasis added). Under the heading "Compliance Order RCRA Counts III-IX," the Amended Complaint further states:

> ...Respondent is hereby ordered ... to comply with the following requirements immediately upon the effective date of this Order:
>
> A. Respondent shall achieve and maintain compliance with all applicable requirements and prohibitions governing the generation, treatment, storage or disposal of used oil and hazardous waste as codified at or incorporated by MAC § 299 [40 C.F.R. Parts 260-268 and 279] at the Strong facility.

Amended Complaint at 40, ¶ 174.

The RCRA regulations at 40 C.F.R. § 260.10 define "disposal facility" as "a facility ... at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain <u>after closure</u>." (Emphasis added). Those regulations further define "closed portion" as "that portion of a facility which an owner or operator has closed in accordance with the approved facility closure plan and all applicable closure requirements." 40 C.F.R. § 260.10. Thus, although the Amended Complaint does not explicitly identify "RCRA Closure" as a possible component of the requested compliance order, it does allege that Respondent owns or operates a "disposal facility" and seeks an order to comply with "all applicable regulations." If, therefore, Respondent does in fact own or operate a "disposal facility" which has been closed, such "applicable regulations" include those cited in the CPHRB concerning "RCRA closure."

Further, at the hearing in this case, Complainant's counsel cross-examined Respondent's witness Mr. Frank Ring regarding the specific issue of "RCRA closure" (Tr., 12/10/03, 43-50). Respondent's counsel also specifically addressed that same issue on re-direct examination of Mr. Ring. Tr., 12/10/03, 98 (ln. 16) - 99 (ln. 21).

In addition, Complainant's Post-Hearing Brief ("CPHB"), while not specifically stating to which "applicable regulations" it referred, requested that this Tribunal "order the Respondent to comply with the applicable regulations" (CPHB at 1), and "[o]rder the injunctive relief that [Complainant] requested in the Complaint." CPHB at 85.

Finally, it is clear that the question of whether the Strong Steel facility is a "disposal facility" as defined by 40 C.F.R. § 260.10 is an issue in this case. Respondent in its RPHRB states:

> ALJ McGuire correctly noted in his discussion of Count VI [in his September 9, 2002 Order on Cross Motions for Accelerated Decision] that Strong Steel would not be required to notify of hazardous waste disposal activity unless Region 5 could plead and prove that it satisfied that definition of "disposal facility."

RPHRB at 50. The Amended Complaint, filed October 30, 2003, does in fact allege that "Strong

was the owner or operator of a hazardous waste disposal facility..." Amended Complaint at 19 (emphasis added).[4] As noted above, that definition explicitly includes the concept of "closure," which, in turn, is specifically regulated. Therefore, Respondent should have known that if it were found to be a disposal facility, the injunctive relief requested in the Amended Complaint would include RCRA compliance with either the continued operation of the facility or the "closure" of the facility. This is precisely what the CPHRB requests in stating: "Finally, a compliance order is required to ensure that the Respondent either submits to MDEQ a hazardous waste permit application or a closure plan as required by the regulations." CPHRB at 99-100.

For the forgoing reasons, Respondent was given adequate notice of the "RCRA closure compliance order" issue. Further, to the extent that Respondent did not, in fact, anticipate that issue, any harm to Respondent is ameliorated by the fact that this Order grants Respondent's Motion for leave to file a RCRA Closure Response Brief.

B. "New Argument" Raised in a Reply Brief

Respondent further argues that "a party may not make a new argument in its reply brief," and that Complainant has done so here. RPHRB at 2. Although this argument is essentially mooted by the finding, *supra*, that the "RCRA closure" issue *was* raised prior to Complainant's filing of its CPHRB, to the extent that some portion of Complainant's argument may have been initially articulated in its CPHRB, the undersigned finds that any such argument was responsive to issues raised in Respondent's RPHRB.

This Tribunal's December 15, 2003 Order Regarding Post-Hearing Briefs ordered that Complainant's Brief was due first, followed by Respondent's Brief, followed by Complainant's Reply Brief. The filing of Post-Hearing Briefs in this proceeding is governed by 40 C.F.R. § 22.26, which does not speak to the question at hand. However, the filing of the Post-Hearing Briefs contemplated by the December 15, 2003 Order followed the pattern of motion filings set forth in 40 C.F.R. § 22.16, which states in part:

> (a) ... Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer..." ...
> (b) ... The movant's reply to any written response ... shall be limited to issues raised in the response.

(Emphasis added). The Environmental Protection Agency's ("EPA's") interpretation of this rule similarly explains:

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[4] This Tribunal therefore rejects Respondent's request in footnote 5 of its Reply Memorandum that "[t]he Court should also disregard Region 5's arguments concerning whether Strong Steel's plant constituted a 'disposal facility'..." Respondent's Reply at 6, n.5.

> EPA believes that a motion-response-reply structure is both necessary and sufficient to present the issues fully for the Presiding Officer. The proposed rule specifically provides the movant an opportunity for a reply because responses to motions often raise issues not addressed in the motion itself. The proposed rule then limits the scope of the reply to those issues raised in the response, in order to avoid giving an unfair advantage to the movant. For those instances where this motion-response-reply format may not be appropriate, the Presiding Officer may order an alternative approach.

63 Fed. Reg. 9464, 9470 (Feb. 25, 1998) (emphasis added). Thus, the scope of the Complainant's post hearing reply brief in this case is determined by the issues raised in Respondent's post hearing reply brief, not by Complainant's initial post hearing brief.

Here, the RPHRB addresses both the "closure" issue and Complainant's request for a "compliance order." Respondent argues:

> Region 5 makes no effort whatsoever to show that Strong Steel's plant was a "disposal facility;" that is, that hazardous waste was intentionally placed into or on any land or water there, and that waste will remain after closure. Instead, the evidence shows that ... Strong Steel ... has properly remediated the spill areas to levels that are safe for residential use. The MDEQ has accepted Strong Steel's report of its remediation...

RPHRB at 13-14 (emphasis in original) (citations omitted). Further, under the heading "There is No Need to Issue a Compliance Order Because Region 5 has Not Shown Any Ongoing Violation," Respondent argues: "Strong Steel has remediated the spill area on its property to levels that are safe for generic residential use, to the satisfaction of MDEQ..." RPHRB at 83-84.

Thus, Respondent specifically argues in its RPHRB that a "compliance order" is not necessary because the Strong Steel facility is not a "disposal facility" as defined by the RCRA regulations, and therefore its "remediation" is adequate and it need not comply with the RCRA "closure" requirements. Complainant's argument regarding its request for a "RCRA closure compliance order" set forth on pages 19, 51-55, and 99-100 of Complainant's CPHRB is responsive to those arguments presented in Respondents RPHRB, and are therefore within the permissible scope of a reply brief under the Consolidated Rules of Practice ("CROP"), 40 C.F.R. Part 22, governing this proceeding.

Finally, as Respondent observes, "the rationale for limiting the scope of reply briefs is that it is unfair for a party to withhold an argument from its initial brief and then present it in its reply brief, thereby depriving its opponent of an opportunity to respond to the argument." Respondent's Memorandum at 3 (citations omitted). *See also*, Respondent's Reply at 2. Here, to the extent that any argument in the CPHRB was not fully articulated in its initial CPHB (although responsive to arguments in Respondent's RPHRB), any "deprivation of an opportunity to respond" is fully cured by the fact that this Order grants Respondent's Motion for leave to file

a RCRA Closure Response Brief.

For all of the forgoing reasons, Respondent's Motion to Disregard Arguments in Region 5's Post-Hearing Reply Brief Regarding RCRA Closure is denied.

II. Respondent's Motion for Leave to File a RCRA Closure Response Brief

Alternatively, Respondent moves for leave to file a RCRA Closure Response Brief. Respondent simply argues that "it would be unfair to Respondent to deprive it of an opportunity to express its argument on the issue" (Respondent's Motion at 1), and that this Tribunal "should at least allow Strong Steel a fair opportunity to present its arguments on this issue by filing a reply brief of its own." Respondent's Memorandum at 5. Complainant counters that this Tribunal's Order of December 15, 2003 established the briefing schedule and Respondent has failed to show good cause for it's request to deviate from that Order by filing an additional brief, that such additional briefing is not authorized by the CROP, that Respondent has already had ample opportunity to argue this issue, and that permitting Respondent to file an additional brief would allow Respondent to introduce new issues.

Additional briefing in this proceeding is permitted at the discretion of this Tribunal. As noted *supra*, 40 C.F.R. § 22.26 governs the filing of Post-Hearing Briefs in this proceeding. That rule states: "After the hearing, any party may file ... briefs... The Presiding Officer shall set a schedule for filing these documents and <u>any reply briefs</u>..." (Emphasis added). The rule does not limit the number of "reply briefs" which the Administrative Law Judge ("ALJ") may allow. This Tribunal's December 15, 2003 Order Regarding Post-Hearing Briefs stated that "additional briefs will not be considered *unless approved in advance by this Tribunal*." (Emphasis added and removed). Further, as noted *supra*, 40 C.F.R. § 22.16 governs the analogous "motion-response-reply" pattern of motion filing. That rule states in part:

> (a) ... Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. <u>Any additional responsive documents shall be permitted only by order of the Presiding Officer</u>..."

(Emphasis added). The EPA's interpretation of this rule similarly explains:

> EPA believes that a motion-response-reply structure is both necessary and sufficient to present the issues fully for the Presiding Officer... For those instances where this motion-response-reply format may not be appropriate, <u>the Presiding Officer may order an alternative approach</u>.

63 Fed. Reg. 9464, 9470 (Feb. 25, 1998) (emphasis added).

The CROP further mandate that "[t]he Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay" (40 C.F.R. § 22.4(c)), and to that end empower the ALJ to "[d]o all other acts and take all measures

necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these [CROP]." 40 C.F.R. § 22.4(c)(10).

Here, it is in the interest of fully and fairly adjudicating all issues arising in this proceeding to allow Respondent to file a RCRA Closure Response Brief. Therefore, Respondent's motion for leave to file a RCRA Closure Response Brief is granted. Respondent's RCRA Closure Response Brief may not, however, introduce any new issues, and is strictly limited to the issue of whether this Tribunal should issue a compliance order requiring Respondent to submit a "RCRA closure plan" to the MDEQ, to the extent that issue is addressed on pages 19, 51-55, and 99-100 of the CPHRB.

III. Complainant's Motion for leave to file a Brief in Response to Respondent's RCRA Closure Response Brief

Complainant's Response states:

> If the Presiding Officer ... allows the Respondent to file any further briefs on the issue of closure or the arguments related to closure the Complainant requests the opportunity to file a response brief, without leave of the Presiding Officer and to allow no further replies on the matter.

Complainant's Response at 12-13.

Here, as is the case regarding Respondent's RCRA Closure Response Brief discussed above, it is in the interest of fully and fairly adjudicating all issues arising in this proceeding to allow Complainant to file a Brief in Response to Respondent's RCRA Closure Response Brief. Therefore, Complainant's motion for leave to file a Brief in Response to Respondent's RCRA Closure Response Brief is granted. Complainant's Brief in Response to Respondent's RCRA Closure Response Brief may not introduce any new issues, and is strictly limited to the issue of whether this Tribunal should issue a compliance order requiring Respondent to submit a "RCRA closure plan" to the MDEQ, to the extent that issue is addressed in Respondent's RCRA Closure Response Brief.

Further, in the interest of judicial economy and efficiency, Complainant's Motion "to allow no further replies on the matter" is granted.

ORDER

1. Respondent's Motion to disregard arguments regarding "RCRA closure" is **DENIED**.

2. Respondent's Motion for leave to file a RCRA Closure Response Brief is **GRANTED**.

3. Respondent's RCRA Closure Response Brief may not introduce any new issues, and is strictly limited to the issue of whether this Tribunal should issue a compliance order

requiring Respondent to submit a "RCRA closure plan" to the MDEQ, to the extent that issue is addressed on pages 19, 51-55, and 99-100 of the CPHRB.

4. Complainant's Motion for leave to file a Brief in Response to Respondent's RCRA Closure Response Brief is **GRANTED**.

5. Complainant's Brief in Response to Respondent's RCRA Closure Response Brief may not introduce any new issues, and is strictly limited to the issue of whether this Tribunal should issue a compliance order requiring Respondent to submit a "RCRA closure plan" to the MDEQ, to the extent that issue is addressed in Respondent's RCRA Closure Response Brief.

6. No further Reply Briefs from any party on the issues addressed in the briefs allowed by this Order shall be permitted.

7. Respondent shall file its RCRA Closure Response Brief within ten (10) days of the date upon which this Order is issued.

8. Complainant shall file its Brief in Response to Respondent's RCRA Closure Response Brief within ten (10) days of Respondent's filing of its RCRA Closure Response Brief.

Susan L. Biro
Chief Administrative Law Judge

Dated: August 3, 2003
Washington, D.C.