UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
STRONG STEEL PRODUCTS, LLC,	)	**Docket Nos. CAA-05-2001-0020**
	)	**RCRA-05-2001-0016**
Respondent	)	**MM-05-2001-0006**

ORDER DENYING MOTION TO CONSOLIDATE RELATED ACTIONS

I. Background

On June 23, 2003, Complainant filed a Motion to Consolidate Related Actions (Motion), requesting that a Complaint filed on June 20, 2003, assigned Docket Number CAA-05-2003-009 ("CAA Complaint") be consolidated with the multi-media Complaint assigned Docket Numbers CAA-05-2001-0020, RCRA-05-2001-0016, and MM-05-2001-0006 ("Multi-Media Complaint"). The time period for filing a response has elapsed, and no response has been filed by Respondent.

These proceedings were commenced with the filing by the United States Environmental Protection Agency, Region 5 (Complainant), of the Multi-Media Complaint against the Respondent on September 28, 2001, pursuant to Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. § 7413, and Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA). On October 26, 2001, Respondent filed its Answer to the Multi-Media Complaint, denying the alleged violations, asserting affirmative defenses, and requesting a hearing.

The Multi-Media Complaint alleged two counts of violating the CAA (Counts 1 and 2) by violating Federal regulations governing the proper evacuation of ozone-depleting refrigerants prior to disposal, and seven counts of violating RCRA (Counts 3 through 9). On August 13, 2002, Administrative Law Judge Stephen J. McGuire issued an Order Granting Respondent's Motion to Dismiss Counts 1 and 2 (Dismissal Order). Counts 1 and 2 were dismissed for lack of jurisdiction, on grounds that the joint "waiver" by EPA and the Attorney General of the jurisdictional limitations set forth in Section 113(d)(1) of the CAA was not effective until after the Multi-Media Complaint was filed.

On September 9, 2002, Judge McGuire issued an Order granting Complainant's Motion for Accelerated Decision on Counts 7 and 8, granting in part and denying in part Respondent's Motion for Accelerated Decision on Count 5, and Denying Complainant's Motion for Accelerated Decision on Counts 3, 4, 5, 6, and 9 and Respondent's Motion for Accelerated

Decision on Counts 6 and 9 (Accelerated Decision Order).

On February 13, 2003, upon Judge McGuire's departure from EPA's Office of Administrative Law Judges, this matter was redesignated to the undersigned. By Order dated April 11, 2003, a hearing in this matter was scheduled to commence on November 18, 2003.

The Consolidated Rules of Practice, 40 C.F.R. §22.1 et seq., provide as follows at 40 C.F.R. § 22.12(a), in pertinent part:

> The Presiding Officer ... may consolidate any or all matters at issue in two or more proceedings subject to these Consolidated Rules of Practice where: there exist common parties or common issues of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.

There is a commonality of parties in the Multi-Media Complaint and CAA Complaint. The questions presented by the Motion are whether consolidation will expedite and simplify consideration of common issues of law and fact, and whether consolidation would adversely affect the rights of Respondent.

II. Complainant's arguments supporting consolidation

Complainant points out that the Dismissal Order did not address the merits of the allegations in Counts 1 and 2, but dismissed them on jurisdictional grounds. Complainant asserts that the Dismissal Order dismissed Counts 1 and 2 without prejudice to the filing of a subsequent action in a court of competent jurisdiction. Motion at 4. Complainant states that the CAA Complaint alleges similar violations to those that were alleged in Counts 1 and 2 of the Multi-Media Complaint.

Indeed, Count 1 of the Multi-Media Complaint alleged that Respondent disposed of at least 49 small appliances, one motor vehicle, and one shipment of small appliances, without any, or with deficient, verification statements or contracts as to prior removal of ozone depleting refrigerants, which constitutes "at least 51 separate violations of 40 C.F.R. § 82.156(f) and Section 113(a) of the CAA." Count 2 of the Multi-Media Complaint alleged that Respondent did not maintain or retain records of disposal or such verification statements, constituting at least 146 violations of 40 C.F.R. § 82.166(i) and (m). Complainant asserts that the CAA Complaint alleges at least 70 violations of 40 C.F.R. § 82.156(f) and 137 violations of 40 C.F.R. § 82.166(i) and (m). Motion at 5, n. 5.

Complainant asserts that consolidation would involve efficient use of the parties' resources. Although conceding that the legal issues in the two cases are not common - that the Multi-Media Complaint now concerns only RCRA violations, and that those in the CAA Complaint concern only CAA violations, Complainant asserts that the Complaints involve some common factual issues, as to Respondent's corporate status, its operation, its receipt and

handling of automobiles and the observations related to an EPA inspection. Complainant further asserts that the cases would both involve testimony from at least two common witnesses, as to observations during the inspections, selection of the site as a multi-media inspection candidate or its environmental impact on the community. Complainant states that Respondent also may call at least some of the same witnesses, as the description of testimony in Respondent's Prehearing Exchange was not distinguished as relevant only to CAA or RCRA violations.

Complainant also asserts that consolidation would restore this matter to the multi-media position it was prior to the Dismissal Order. Further, that consolidation would result in only one hearing, and one schedule for briefing and related activities. Complainant believes that the prehearing exchange for the CAA Complaint may be "shortened" because Complainant has already submitted in its Prehearing Exchange for the Multi-Media Complaint many of the documents it will rely on for the CAA Complaint. Motion at 8. Complainant states that it will not request or accept a mediator under Alternative Dispute Resolution (ADR).

III. Discussion and Conclusion

The fact that in regard to the CAA Complaint the parties may rely on some of the testimony and documents presented in the prehearing exchanges in the Multi-Media matter suggests that consolidation might simplify and expedite consideration of the issues pertaining to the CAA Complaint, but the essential question is whether consolidation would expedite or at least maintain the time frame for consideration of issues in the Multi-Media proceeding. The question would be answered in the negative if the hearing scheduled for the latter proceeding would need to be postponed to allow time for prehearing preparation as to the CAA Complaint. The Order Scheduling Hearing requires the parties to file stipulations by August 29, 2003, prehearing motions by September 5, 2003, and any prehearing briefs by October 31, 2003, in preparation for the hearing set to commence on November 18, 2003. Postponement of the hearing is not favored here where the Multi-Media Complaint has been pending for almost two years, and it is the goal of the Office of Administrative Law Judges to complete cases within 18 months. Indeed, Complainant does not suggest that the hearing be postponed to allow for prehearing submissions as to the CAA Complaint. Thus, Complainant appears to presume that the entire prehearing process as to the CAA Complaint would be completed in sufficient time before the hearing on November 18.

This presumption does not appear to be well supported. Complainant did not submit a copy of the CAA Complaint with the Motion, so the undersigned cannot determine how similar the two Complaints are. The CAA Complaint was filed on June 20, 2003, and an answer is not due until 30 days after the Complaint was served on Respondent. It is unknown at this point in time what factual and legal issues may be raised by the pleadings. Even assuming service on Respondent occurs within a reasonable time and that Respondent files an answer to the Complaint timely, without requesting an extension of time or filing a preliminary motion, and (per Complainant's intent not to participate in ADR) that ADR letters are not issued from the Office of Administrative Law Judges, much tighter deadlines would be required for the

prehearing schedule as to the CAA Complaint than the undersigned generally allows. The undersigned is reluctant to impose such an expedited schedule in the CAA case, particularly given these circumstances.

The Consolidated Rules of Practice provide that, by its failure to file any opposition to the Motion, Respondent waives any objection to the granting of the Motion under 40 C.F.R. § 22.16(b). However, a decision as to consolidation must consider whether the rights of Respondent may be adversely affected by consolidation of the proceedings. At this point in time, such a determination cannot be made.

Accordingly, the Motion to Consolidate Related Actions is **DENIED.** Complainant may renew its Motion, if appropriate, when additional facts relevant to determination on the criteria under 40 C.F.R. § 22.12(a) are developed.

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Susan L. Biro
Chief Administrative Law Judge

Dated: July 16, 2003
Washington, D.C.

In the Matter of Strong Steel Products, LLC, Respondent
Docket Nos. CAA-05-2001-0020; RCRA-05-2001-0016 & MM-05-2001-0006

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Motion To Consolidate Related Actions**, dated July 16, 2003, was sent this day in the following manner to the addressees listed below:

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: July 16, 2003

Original and One Copy by Pouch Mail to:

Sonja Brooks-Woodard
Regional Hearing Clerk
U.S. EPA
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590

Copy by Pouch Mail to:

Richard Clarizio, Esquire
Associate Regional Counsel
U.S. EPA
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590

Copy by Regular Mail to:

Susan L. Johnson, Esquire
Strong Steel Products, Inc.
3400 E. Lafayette
Detroit, MI 48207

Christopher J. Dunsky, Esquire
Honigman Miller Schwartz & Cohn, LLP
2290 First National Building
660 Woodward Avenue
Detroit, MI 48226-3583