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	)	
	)	

INITIAL DECISION

Before: Susan L. Biro
Chief Administrative Law Judge

Issued: April 7, 2005

Appearances:

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I. Procedural Background

This proceeding was initiated by a Complaint filed on September 28, 2001 by the United States Environmental Protection Agency ("Complainant" or "EPA"), alleging that Strong Steel Products, LLC ("Respondent" or "Strong Steel") violated the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq.*, and the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"), as amended, 42 U.S.C. §§ 6901 *et seq.* The Complaint is based on EPA's multimedia inspection of Respondent's scrap metal processing facility in Detroit, Michigan on July 22, 1999.

Counts 1 and 2 of the Complaint, alleging violations of CAA regulations governing the evacuation of ozone depleting refrigerants prior to disposal, were dismissed by Order dated August 13, 2002. The remaining Counts 3 through 9 allege violations of RCRA, the EPA-authorized Hazardous Waste Management Regulations of the State of Michigan codified in the Michigan Administrative Code ("MAC") Part 299, and the Federal Hazardous Waste Management Regulations set forth in Title 40 of the Code of Federal Regulations ("C.F.R.") Parts 260-279.

On September 9, 2002, then-Presiding Judge Stephen J. McGuire issued an Order on the parties' cross motions for accelerated decision as to the alleged RCRA violations ("Order on Accelerated Decision"). Judge McGuire granted Complainant's motion for accelerated decision as to liability for Counts 7 and 8, denied Complainant's motion as to Counts 3, 4, 5, 6 and 9, granted in part and denied in part Respondent's motion for accelerated decision as to Count 5, and denied Respondent's motion for accelerated decision as to Counts 6 and 9.

By Order dated October 27, 2003, this Tribunal granted Complainant's Motion for Leave to Amend the Complaint ("Order to Amend"), allowing Complainant to amend the Complaint to include an alternative legal theory for Counts 3 and 4, add an additional basis for liability for Count 5, clarify Counts 6 and 7, increase the proposed penalty for Count 3, reduce the proposed penalty for Count 6, and "compress" the penalty for Count 4 into that for Count 7. The Order to Amend further deemed withdrawn Respondent's affirmative defenses nos. 1, 2, 10 and 13, and found to be moot Respondent's affirmative defense no. 3, as those defenses were set forth in Respondent's original Answer.

Complainant filed its Amended Complaint ("Complaint") on October 30, 2003. Respondent filed its Answer to the Amended Complaint ("Answer") and its Expanded Statement of Affirmative Defenses on November 12, 2003.[1] Complainant proposes the assessment of a

[1]For convenience, references herein to the "Complaint" and "Answer" shall refer to the "First Amended Complaint" and "First Amended Answer," respectively, unless otherwise indicated.

civil administrative penalty in the amount of $307,450 based upon the statutory criteria set forth in RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3), and calculated in accordance with EPA's 2003 "RCRA Civil Penalty Policy." Complainant also seeks a "Compliance Order" requiring Respondent to "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." Complaint at 40, ¶ 174.

An evidentiary hearing was held from November 18-21, 2003, and continued on December 9-10, 2003, in Detroit, Michigan. Both parties timely filed Post-Hearing Briefs, and Complainant timely filed a Post-Hearing Reply Brief.

On August 3, 2004, this Tribunal denied Respondent's Motion to disregard arguments regarding "RCRA closure," granted Respondent's alternative Motion for leave to file a "RCRA Closure Response Brief," and granted Complainant's Motion for leave to file a "Brief in Response to Respondent's RCRA Closure Response Brief." Respondent timely filed its "RCRA Closure Response Brief" on August 16, 2004, and Complainant timely filed its "Brief in Response to Respondent's RCRA Closure Response Brief" on August 24, 2004. Complainant filed a "Motion to File Copy of RCRA Closure Response Brief Instanter with the Presiding Officer" on September 15, 2004.[2] Finally, Respondent filed "Respondent's Notice of Pertinent Appellate Decision" on September 24, 2004, drawing this Tribunal's attention to the case of *Pyramid Chemical Company*, 11 E.A.D.__, EPA Docket No. RCRA-HQ-2003-0001 (EAB, Sept. 16, 2004).[3]

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits at 40 C.F.R. Part 22 (Rules of Practice).

Having fully considered the record of the case and the arguments of counsel, this Tribunal finds Respondent to be in violation of RCRA and federal and state implementing regulations as discussed below, and holds that Respondent shall pay a civil administrative penalty in the amount of $269,527. Further, Respondent shall comply with this Tribunal's Compliance Order, set forth below, within sixty (60) days of the effective date of this Initial Decision.

II. Factual Background

[2]For good cause shown therein, Complainant's "Motion to File Copy of RCRA Closure Response Brief Instanter with the Presiding Officer" is **Granted**.

[3]The parties' voluminous *post*-hearing briefing in this case totals some 340 pages.

Strong Steel Products, LLC, is a Michigan corporation[4] owning a 9.1 acre site in Detroit, Michigan which, having begun operations in March 1997, purchases scrap metal products from industrial companies, municipalities, peddlers and private individuals, and shreds the scrap metal in order to recover its ferrous[5] metallic content for re-sale to steel mills. Complaint ¶¶ 14-17; Answer ¶¶ 14-17; Tr. 11/19/03, p. 296. Strong Steel processes approximately 2,000 tons of scrap metal per day. Tr. 11/21/03, p. 66. The vast majority of scrap metal purchased by Strong Steel consists of "junked" automobiles. Between March 1997 and July 2003, Strong Steel processed approximately 756,572 vehicles, averaging 9,826 vehicles per month. Respondent's Exhibit ("RX") 27, p. 1. Steven Benacquisto[6] estimated that Strong Steel received 400-500 automobiles per day in 1999. Tr. 11/19/03, p. 327.[7] At times, there are "over a thousand cars stacked up on the site." Tr. 12/9/03, p. 50. Some of the automobiles received by Strong Steel have already been crushed before entering the Strong Steel site, while others are "whole" or "uncrushed" automobiles.[8] Between March 1997 and July 2004, Strong Steel received approximately 643,096 crushed vehicles and 113,476 uncrushed vehicles. RX-27 at 1. During this time period, therefore, 15% of the vehicles received by Strong Steel were uncrushed. Steven Benacquisto similarly testified that approximately 75-80% of the cars are crushed, so that Strong Steel receives approximately 100 uncrushed cars per day. Tr. 11/19/03, pp. 326-327. Strong

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[4]Strong Steel Products, LLC, is wholly owned by Ferrous Processing & Trading Company, Inc. ("Ferrous"), which is owned by Soave Enterprises ("Soave") (75% of Ferrous capital stock is owned by Anthony Soave, and 25% of Ferrous capital stock is owned by the Ferrous officers). Complainant's Exhibit ("CX") 91, Bates 1275, 1292; Transcript ("Tr."), 11/21/03, p. 128.

[5]"Ferrous" materials include steel and iron, recovered pieces of which are commonly referred to in the scrap metal industry as "frag." Tr. 11/19/03, p. 296.

[6]Steven Benacquisto was the Strong Steel "Site Manager" from approximately June 1998 until June 1999, "Operations Manager" from approximately June 1999 until an unknown date, and is currently "Vice President in Charge of Transportation for Ferrous Processing." Tr. 11/19/03, pp. 292, 343.

[7]Michael Beaudoin (Strong Steel's "Director of Engineering," responsible for environmental compliance and remediation until July 2001 (Tr. 12/9/03, pp. 88, 100-101)), similarly estimated that Strong Steel processes 300-500 automobiles per day. Tr. 12/9/03, pp. 49-50.

[8]In RX-27, Respondent explains that: "[It is] using the term 'uncrushed' as opposed to 'whole cars' as that is the best we could do; that is, cars typically come in with batteries, gas tanks and other pieces already removed and are not 'whole.'" RX-27, p. 1. Steven Benacquisto further explained that approximately 90% of the "uncrushed" cars accepted by Strong Steel came from "dismantlers" who "strip them out." Tr. 11/19/03, p. 327-328. Therefore, it appears that 10% of the "uncrushed" cars were "whole cars."

Steel crushes the uncrushed automobiles at the Strong Steel site.[9] All of the crushed automobiles are then processed through a "shredder," which processes "the entire vehicle body into fist-size pieces." Respondent's Post-Hearing Brief ("RPHB") at 9.[10]

The City of Detroit and the State of Michigan have conducted numerous inspections of the Strong Steel site for various purposes. Fred James, an Inspector with the City of Detroit Buildings and Safety Engineering Department, inspected the site on May 17, 1999, in response to complaints from people living in the residential neighborhood surrounding the site about explosions caused by gasoline tanks in the shredder. Tr. 11/19/03, pp. 146-148; CX 91, Bates 1312-1317. George Zagresky, a Safety Officer with the Michigan Department of Consumer & Industry Services, Bureau of Safety and Regulation, inspected the site on July 12, 1999. CX 91, Bates 1498-1504; Tr. 11/19/03, pp. 134-137. Ann Vogen, an Environmental Quality Analyst with the Michigan Department of Environmental Quality ("MDEQ"), inspected the site for purposes of Michigan's scrap tire regulations on February 16 and July 21, 1999, March 13, 2001, and July 30, 2002. Tr. 11/19/03, pp. 83-84; CX 79; CX 80; CX 82; CX 84.[11]

On July 22, 1999, EPA conducted a "multimedia inspection"[12] at the Strong Steel site. Complaint ¶ 32; Answer ¶ 32; CX 1; CX-73, Bates 898-910; CX 86; CX 87; CX 111, Att. 2; Tr. 11/18/03, pp. 138-140, 171 ln. 25. The EPA inspectors present were George Opek, Ross Powers, and Kenneth Zolnierczyk. CX-73, Bates 898, 903; Tr. 11/18/03, p. 140. Mr. Opek's inspection pertained to RCRA compliance, Mr. Powers' inspection pertained to Spill Prevention

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[9]Michael Beaudoin testified that: "Some cars ... have not been flattened, so a forklift truck will smash the roof down so that that car can be stacked along with some others and moved over to the shredder infeed for processing... I would say that ... it was a routine, somewhat routine way of processing inbound cars." Tr. 12/9/03, pp. 75-76.

[10]Anthony Benacquisto ("Executive Vice President of Operations for all of Ferrous Processing" (Tr. 11/20/03, p. 96)) described the "shredder" as a "mega-shredder" (Tr. 11/20/03, p. 99), which "is the largest shredding capacity made. It's 120 inches in diameter ... [and] the rotor that turns inside of it ... weighs in excess of 120 tons." Tr. 11/21/03, p. 34. Steven Benacquisto further explained that the shredder has "a 6,000 horsepower motor that's spinning a rotor inside of it that has ... 800 pound hammers on it, and it's shredding the material, just chewing itself up." Tr. 11/19/03, pp. 296-97.

[11]Ms. Vogen also visited the site on November 18, 1998 for a tour at the invitation of Strong Steel. Tr. 11/19/03, pp. 81-82.

[12]The Declaration of Ross Powers explains: "Multi-media compliance inspections are inspections where EPA evaluates a company's compliance with more than one environmental law or regulation." CX 86, Bates 1199-1200, ¶ 10.

Control and Countermeasure ("SPCC") Plan requirements,[13] and Mr. Zolnierczyk's inspection pertained to the Toxic Substances Control Act ("TSCA"). CX-73, Bates 898-910; Tr. 11/18/03, pp. 138-140. Strong Steel representatives present during the July 22, 1999 inspection were Steven Benacquisto, attorney Susan Johnson (Strong Steel's Environmental Counsel), Michael Beaudoin, and Lisa Carroll.[14] CX-73, Bates 898, 903; Tr. 11/21/03, pp. 120-21. The group took a walking tour of the site, and Mr. Powers took a number of photographs. CX-1; CX-73, Bates 898-901; CX-87; Tr. 11/18/03, p. 141.

On August 2, 1999, Mr. Powers returned to the Strong Steel site with Cheryl Elliott, who was an Assistant START ("Superfund Technical Assessment and Response Team") Program Manager with Ecology & Environment, Inc. ("E&E"), an EPA contractor, to collect samples from some of the areas that he and Mr. Opek had observed during the July 22, 1999 inspection. CX-16; Tr. 11/18/03, pp. 174-76, 181-184. Ms. Elliott collected samples from three separate areas in the southern portion of the property and photographed the three locations where the samples were collected. The samples consisted of two soil samples ("SS1" and "SS3") and one liquid sample ("SS2"). CX-16; CX-28; Tr. 11/18/03, pp. 178-181. All three samples having been collected in the southern-most "pie wedge" area of the site, the soil samples (SS1 and SS3) were collected from an area of "deteriorated asphalt" and the liquid sample (SS2) was collected from the "temporary compaction area,"[15] where "there was a car ... that had fluid leaking out underneath it." Tr. 11/18/03, p. 180; RX-10, Figure 2.[16]

E&E sent the samples to EIS Analytical Services, Inc. ("ASI") for analyses. CX-16, Bates 104. E&E then prepared a "Letter Report" to the EPA summarizing ASI's chemical analyses. CX-16. That E&E Letter Report sets forth the sample results for ASI Samples SS1, SS2, and SS3 for BTU, Ignitability, Oil and Grease, Bottom Sediment, Extractable Organic Halides, Water, Total Metals (Arsenic, Barium, Cadmium, Chromium, Lead, Mercury, Selenium, Silver), Polychlorinated Biphenyls (PCBs), Semi-volatile Organics (Bis (2-ethyylhexyl phthalate, Butyl benzyl phthalate, Methylnaphthalene (2), Naphthalene, Phenanthrene, Pyrene), toxicity characteristic leaching procedure (TCLP) Metals (Arsenic,

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[13]The Declaration of Ross Powers explains: "The CWA SPCC Plan requirements address the proper handling of oil, both virgin and used." CX 86, Bates 1197-98, ¶ 3.

[14]Ms. Carroll was a Strong Steel "Scalemaster" from May, 1997 until July, 1999; a Strong Steel "General Manager / Site Manager" from July 1999 until April 2003; and a Ferrous Processing "Corporate Safety Officer" at the time of the hearing. Tr. 11/21/03, pp. 70, 74-75. At the time of the July 22, 1999 inspection, Steven Benacquisto was training Ms. Carroll to take over his position as the Strong Steel "Site Manager." Tr. 11/19/03, p. 343.

[15]The "temporary compaction area" has also been referred to in these proceedings as the "battery storage area." *See, e.g.*, Tr. 12/10/03, p. 19; CX-101, Bates 170.

[16]Mr. Beaudoin explained that the "temporary compaction area" was where "a forklift truck will smash the roof down" on uncrushed cars. Tr. 12/9/03, p. 75.

Barium, Cadmium, Chromium, Lead, Mercury), and Volatile Organics (Benzene, Ethylbenzene, Heptane (normal), Naphthalene, Propylbenzene (normal), Toluene, TPH (DRO/GRO), Trichlorofluoromethane, Trimethylbenzene (1,2,4), Trimethylbenzene (1,3,5), Xylene (ortho), Xylenes (meta+para)). CX-16, Bates 114-115; see also, CX 99 (ASI raw data).

The E&E/ASI sample analysis shows that sample SS2 was above the RCRA TCLP limit specified in MAC §§ 299.9212(4) and 299.9217 (Table 201a), and 40 C.F.R. § 261.24, for lead (RCRA waste code D008) and Benzene (RCRA waste code D018). Specifically, SS2 contained 43.5 mg/l of Lead (as a "TCLP Metal," as opposed to a "Total Metal"), while the regulatory limit is 5.0 mg/l; and SS2 contained 6,230 ppm of Benzene, while the regulatory limit is 0.5 mg/l.[17] CX-16, Bates 115. In addition, sample SS2 was ignitable at 81 degrees Fahrenheit[18] and was therefore a "characteristic hazardous waste" for "ignitability," being below the regulatory limit of 140 degrees Fahrenheit set forth in MAC § 299.9212(1)(a) and 40 C.F.R. § 261(a)(1). CX-16, Bates 114.[19]

Mr. Beaudoin was present during the August 2, 1999 sampling, and at the same time that Ms. Elliott collected the three samples to be analyzed by ASI, Ms. Elliot provided Mr. Beaudoin with samples from the same locations.[20] Tr. 12/9/03, pp. 51-52, 98. Mr. Beaudoin delivered his

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[17]"Parts per million" (ppm) equates with "milligrams per liter" (mg/l) for a liquid sample. Tr. 11/19/03 p. 19, ln. 8, 22-23; Tr. 11/18/03, p. 261, ln. 21-23. *See also*, *Hoosier Spline Broach Corporation*, 7 E.A.D. 665, 671, n.13 (EAB 1998).

[18]Sue Rodenbeck Brauer, Complainant's expert in "used oil and geology" (Tr., 11/18/03, p. 63), explained: "...the 81 degrees is due to the device – that's the lowest that the device used to determine the flash point can go." Tr. 11/18/03, pp. 81-82.

[19] Complainant does not appear to allege that any parameters of Complainant's (E&E/ASI at CX-19, Bates 114-115) samples SS1 or SS3 exhibit TCLP or characteristic levels above regulatory limits. (*See* Amended Complaint ¶¶ 57-58).

[20]The record does not definitively indicate whether the samples provided to Mr. Beaudoin were "split samples" or "simultaneous samples." Complainant's expert John Fowler explained: "A split sample would be where you ... collect a sample, put it in a container, mix it, and then ... divide it ... into two different bottles so that you can give one bottle to one lab and another bottle to another lab... [Simultaneous sampling] would be where one sample is collected from a site and put aside, then immediately another sample is collected from the same site area and put aside." Tr. 11/19/03, pp. 70-71. Mr. Beaudoin testified: "Q: You were present when [Mr. Powers and Ms. Elliott collected the samples on August 2, 1999]? A: ... Yes, I was. ... Q: ... Did you take any samples yourself at the site on that day? A: No, I did not. I just – I did receive jars from the EPA sampler, and sent those to an independent laboratory. Q: Okay. So you passively received the jars that she had filled? A: Correct." Tr. 12/9/03, pp. 51-52. Mr. Beaudoin further explained that he accompanied Mr. Powers and Ms. Elliott and "coordinated with the sampler that she would provide duplicate samples for us to have analyzed

samples to Respondent's contracted laboratory, Novi Analytical Laboratories, Inc. ("Novi" or "Novi Labs"), on August 3, 1999, which prepared an "Analytical Report" for each of the three samples analyzed. Tr. 12/9/03, p. 52; RX-10, Att. A and B; CX-18, Bates 173-180; CX-100; CX-101, Bates 1725-1732. The Novi results were summarized in a report prepared by Conestoga-Rovers & Associates ("CRA"), which Respondent had hired to prepare a summary of the environmental data and activities associated with the site, including the soil sampling, site excavation and remediation activities, and off-site shipment and storage of hazardous waste. RX-10; CX-18, Bates 179 *et seq*.

The CRA Report summarized the Novi results for sample SS2 (the liquid sample from the "temporary compaction / battery storage area") as follows:

> Analytical results ... [for sample SS2] identified elevated concentrations of regulated parameters, including benzene, chlorobenzene, 1,4-dichlorobenzene, 1,2-dichlorobenzene, tetrachloroethylene, trichloroethylene, and lead. Additionally, the sample was identified as ignitable.

RX-10, p. 2; CX-101, Bates 1710. Indeed, the Novi data show that sample SS2 was above the RCRA TCLP limits specified in MAC §§ 299.9212(4) and 299.9217 (Table 201a), and 40 C.F.R. § 261.24, as follows:

Chemical	TCLP Limit	Sample Results	RCRA Waste Code
Benzene	0.5 mg/l	559 mg/l	D018
Chlorobenzene	100 mg/l	2,969 mg/l	D021
1,4-Dichlorobenzene	7.5 mg/l	967 mg/l	D027
1,2-Dichloroethane	0.5 mg/l	36 mg/l	D028
Tetrachloroethylene	0.7 mg/l	6.2 mg/l	D039
Trichloroethylene	0.5 mg/l	3.6 mg/l	D040
Lead	5.0 mg/l	27 mg/l	D008

RX-10, Att. A, pp. 1-2; CX-18, Bates 174-175; CX-101, Bates 1726-1727. The CRA/Novi analysis further shows that SS2 was ignitable at 70 degrees Fahrenheit and was therefore a "characteristic hazardous waste" for "ignitability," being below the regulatory limit of 140

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independently." Tr. 12/9/03, p. 98. Respondent's expert Constance Boris testified: "It's my understanding that there was a split sample that ... Strong Steel sent to Novi Labs." Tr. 12/9/03, p. 142. For convenience, hereinafter, Respondent's samples SS1, SS2, and SS3 may be hereinafter referred to as "split samples."

degrees Fahrenheit set forth in MAC § 299.9212(1)(a) and 40 C.F.R. § 261(a)(1). RX-10, Att. A, p. 2; CX-18, Bates 175; CX-101, Bates 1727.

In addition, the CRA Report summarized the Novi results for samples SS1 and SS3 (the soil samples from the "deteriorated asphalt areas") as follows: "Analytical results from ... [SS1 and SS3] identified elevated concentrations of lead." RX-10, p. 2; CX-101, Bates 1710. Indeed, the Novi data show that samples SS1 and SS3 were above the RCRA TCLP limit for lead (5.0 mg/l) specified in MAC §§ 299.9212(4) and 299.9217 (Table 201a), and 40 C.F.R. § 261.24, in that SS1 contained 6.7 mg/l of lead and SS3 contained 22 mg/l of lead. RX-10, Att. B, pp. 2, 4; CX-18, Bates 178, 180; CX-101, Bates 1730, 1732.[21]

Strong Steel employed Inland Waters Pollution Control, Inc., ("Inland Waters") to excavate contaminated soil on the property in the three areas where Ms. Carroll and Mr. Powers had collected samples. CX-18, Bates 170; RX-10, p. 3; Tr. 12/9/03, p. 61. Inland Waters performed the excavation on April 11, 2000 at the direction of CRA, which provided "documentation, reporting and preparation of closure reports" and directed Inland Waters regarding "how deep to excavate." Tr. 12/9/03, p. 62; Tr. 12/10/03, p. 18. Frank Ring (Environmental Engineer and then-Project Manager for CRA) was the supervisor of the project. Tr. 12/9/03, p. 62. Inland Waters also took some direction from Mr. Beaudoin regarding "where to excavate." Tr. 12/10/03, p. 18. Inland Waters excavated approximately one cubic yard of soil from the "battery storage / temporary compaction area" and placed it into two[22] 55-gallon drums,

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[21]Based on Respondent's CRA/Novi analyses of the "split samples" taken by Mr. Beaudoin on August 2, 1999, Judge McGuire correctly found: "Based solely upon Respondent's sample results from August 2, 1999, Complainant can establish that soil at Respondent's site was contaminated with substances identified by the waste codes D001 (ignitable), D008 (Lead), D018 (Benzene), D021 (Chlorobenzene), D027 (1,4-Dichlorobenzene), D028 (1,2-Dichloroethane), D039 (Tetrachloroethylene) and D040 (Trichloroethylene) above the regulatory toxicity level." Order on Accelerated Decision at 24 (citations omitted). The remainder of that paragraph of Judge McGuire's Order, based upon "Respondent's 'verification sample' results from *April 11, 2000*" (emphasis added), was called into question at hearing because Respondent's April 11, 2000 sample results were based upon a "totals analysis" rather than a "TCLP analysis." *See* Tr. 11/18/03, pp. 21-22; Complainant's Post-Hearing Brief ("CPHB") at 67. This issue will be addressed, *infra*, regarding Count VIII of the Amended Complaint. However, the first part of the quoted paragraph of Judge McGuire's Order regarding "Respondent's sample results from *August 2, 1999*" (emphasis added) has not been called into question.

[22]The evidence in the record indicates that there has been some confusion regarding whether the approximately one cubic yard of material excavated by Inland Waters from the "battery storage / temporary compaction area" on April 11, 2000 was placed into *two* or *three* 55-gallon drums. For example, Mr. Ring (on behalf of CRA) sent a letter, dated May 5, 2000, to Susan Johnson of Strong Steel summarizing the April 11, 2000 Inland Waters excavation. That

which were not promptly disposed of but were rather "stored on [Strong Steel] property." RX-10, p.3. Inland Waters also excavated soil from the "two areas of significantly deteriorated asphalt immediately south of the Temporary Compaction Area" and placed it into two 20-cubic yard "roll-off boxes."[23] *Id.* The material in these roll-off boxes was disposed of on April 20, 2000. RX-10, Att. F; CX-101, Bates 1785-86; CX-18, Bates 219-20. All of the excavation was done to a depth of less than one foot. RX-10, p. 3.

Six "verification samples" were collected from the excavated areas and sent to "Houston Laboratories" for analysis. RX-10, Table 1 and Att. C; Tr. 11/19/03, p. 45; CX-101, Bates 1733-66. Four of the samples were collected from the southern "significantly deteriorated asphalt area," none were collected from the northern "significantly deteriorated asphalt area," and two were collected from the "temporary compaction area." RX-10, Figures 2 and 3. All of the April 11, 2000 verification samples were collected from the "bottom" of the excavated sites, and no sidewall samples were collected from any of the excavated sites. RX-10, p. 3; Tr. 12/9/03, pp. 27, 270. The samples were analyzed for target compound list volatile organic compounds ("TCL VOC's"), methyl tert-butyl ether ("MTBE"), and RCRA metals (arsenic, barium, cadmium, chromium, lead, mercury, selenium, and silver), using a "totals analysis."[24]

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letter states: "Remediation activities included excavation and removal of approximately 1 cubic yard of soil from the batter storage area. The soils were placed in *three* 55-gallon drums." CX-18, Bates 170 (emphasis added). However, a June 19, 2001 letter from Mr. Ring to the MDEQ states: "On April 11, 2000 ... [r]emoval activities included excavation and removal of approximately 1 cubic yard of soil from the temporary compaction area. The soils were place in *two* 55-gallon drums and stored on [Strong Steel] property." RX-10, p. 3; CX-101, Bates 1711 (emphasis added). *See also,* RX-26 (Affidavit of Mark Lombardi). Mr. Ring testified: "... Jeff Lambert was ... the field engineer ... overseeing the work at the Strong Steel site in April of 2000. He ... arrived at the site and the contractor had already filled the drums with soil. He saw three drums there and thought there were three drums of soil... I talked with Jeff Lambert relatively recently ... and ... he told me that he had not seen them actually fill the drums, he just saw three drums there... [I]n 2001 when we did the second remediation ... I also spoke with the supervisor that was on-site for the contractor doing the work. His name is Mark Lombardi... [H]e told me there never were three drums, there were two drums that they had filled. The third one was never filled with soil." Tr. 12/9/03, pp. 273-274. However, the parties have stipulated that *two* 55-gallon drums of soil were excavated by Inland Waters from the "battery storage / temporary compaction area" on April 11, 2000. Tr. 12/9/03, pp. 5-6.

[23]The "roll-off boxes" are akin to enormous dumpsters. *See* photograph at RX-4, page 6.

[24]*See, e.g.*, Tr. 11/19/03, p. 46, ln. 7 (Mr. Fowler); Tr. 12/10/03, p. 28 (Mr. Ring). Section 261.24(a), 40 C.F.R. states: "A solid waste ... exhibits the characteristic of toxicity if, *using the Toxicity Characteristic Leaching Procedure [("TCLP")]*, ... the extract from a representative sample of the waste contains any of the contaminants listed in table 1 at the concentration equal to or greater than the respective value given in that table." (Emphasis added). *See also,* 45 Fed. Reg. 33084, 33110-33112 (May 19, 1980). Mr. Fowler explained the

RX-10, p. 2, Tables 1 and 2; Tr. 11/19/03, pp. 45-46; Tr. 12/10/03, pp. 27-28. The results of these analyses are set forth in RX-10, Tables 1 & 2, Att. C; CX-101, Bates 1722-1724, 1733-1766. Respondent summarizes these results, in part, by stating that: "[Sample] S-JL-003 was collected from the eastern edge of the [southern deteriorated asphalt area] from an approximate depth of 1 foot [below ground surface ("bgs")] and ... lead was detected at 4,040 mg/kg, above the Residential DCC [("Direct Contact Criteria")] of 400 mg/kg and the Industrial DCC of 900 mg/kg." RX-10, p. 4. *See also*, RX-10, Table 2, p. 1; CX-101, Bates 1723.

On March 1, 2001, Inland Waters returned to the Strong Steel site for a second excavation because verification sample S-JL-003, collected and analyzed in April 2000 from the southern "significantly deteriorated asphalt area," had shown significantly elevated levels of lead, as described above. RX-10, p. 4, Tr. 12/10/03, p. 29. Inland Waters, again under the supervision of Frank Ring, excavated an area approximately 25 feet long, 25 feet wide, and three feet deep in the southernmost "significantly deteriorated asphalt area," and placed the material into two 20-cubic yard roll-off boxes. Tr. 12/10/03, pp. 26, 28-30; RX-10, p. 5; CX-101, Bates 1713. This material was disposed of on April 19, 2001. RX-10, Att. F; CX-101, Bates 1783-84; CX-18, Bates 217-18. Six "verification samples" were collected from the excavated area and sent to the "Houston Laboratories" for analysis. RX-10, p. 4, Table 1, Figure 3, and Att. C; CX-101, Bates 1767-75. Four sidewall and two floor samples were taken. RX-10, p. 4; CX-101, Bates 1712. The samples were analyzed for lead only. RX-10, p. 4, Tables 1 and 2, Att. C; CX-101, Bates 1712, 1722-24, 1767-1775. Respondent summarizes these results by stating that: "Analytical results indicate that all verification samples submitted for lead analysis were below applicable Michigan Act 451, Part 21 Generic Residential Soil [DCC] for lead of 400 mg/kg." RX-10, p. 4. *See also*, RX-10, Table 2, p. 2; CX-101, Bates 1724.

On April 18, 2001, Strong Steel disposed of the two 55-gallon drums of material which had been excavated on April 11, 2000 from the "battery storage / temporary compaction area," and which had been stored at the Strong Steel site from April 11, 2000 until April 18, 2001. RX-10, p. 3, Att. E (waste manifest); CX-101, Bates 1781 (waste manifest).[25]

III. Statutory and Regulatory Background

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difference between "totals analysis" and the "TCLP test" as follows: "[Totals analysis] is where you ... analyze the sample to find the total amount of material present... And that is not a TCLP value... [for which] you have to go through the extraction first to find out how much of the lead, for example, would be extracted out of the sample and be mobile in the environment... [T]he totals can show you if the constituent you're interested in is present. It can't tell you if the waste is hazardous or not." Tr. 11/18/03, p. 266. *See also*, Tr. 11/19/03, p. 7.

[25]*See also*, CX-18, Bates 171; RX-10, p. 3; Tr. 12/9/03, pp. 270, 274; Tr. 12/10/03, pp. 20-21, 24.

The Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§ 6901 *et seq.*, is commonly known as RCRA. The Michigan State authorized RCRA implementing regulations are set forth at MAC Part 299, and the federal RCRA implementing regulations are set forth at 40 C.F.R. Parts 260-279.

RCRA has been described as follows:

> RCRA is a comprehensive environmental statute designed to protect the public health and environment by ensuring the proper handling of solid and hazardous wastes. 42 U.S.C. § 6902(a). RCRA regulates the generation, treatment, storage, transportation, and disposal of solid and hazardous wastes. *See* 42 U.S.C. §§ 6922-6925. This comprehensive regulatory scheme is frequently described as "cradle-to-grave" oversight. *See* Sierra Club v. United States Dept. of Energy, 770 F. Supp. 578, 579 (D. Colo. 1991); *see also* H.R. Rep. No. 96-1016, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120.
>
> Hazardous waste is tracked and regulated from the point of generation, through storage, transportation, and treatment, and to the point of ultimate disposal. The intent of this regulatory scheme is to minimize the potential for public health and environmental problems resulting from improper management of hazardous waste. The potential for public health and environmental problems, including hazards associated with fire, explosion, direct contact, and contamination of air, surface water, and groundwater resulting from inadequate management is well-documented. *See, e.g.*, H.R. Rep. No. 94-1491, at 17-24 (1976), *reprinted in* 1980 U.S.C.C.A.N. 6238, 6254-6261 (documenting hazardous waste tragedies in several states).

U.S. v. Power Engineering Co., 10 F. Supp. 2d 1145, 1147 (D. Colo. 1998).

It has been further stated that –

> RCRA was enacted as an amendment to the Solid Waste Disposal Act in an attempt by Congress to deal with problems posed by the general disposal of wastes in this country as well as the particular problems associated with the disposal of hazardous substances. Pub. L. No. 94-580, 1976 U.S. Code Cong. & Admin. News (90 Stat.) 2795, 2798; H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. 1, at 2-5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6239-43. The Act, amended three times since its initial enactment,[26] authorizes the EPA

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[26]The initial statute was amended by the Quiet Communities Act of 1978, Pub. L. No. 95-609, § 7, 1978 U.S. Code Cong. & Admin. News (92 Stat.) 3079, 3081-84, 1978 U.S. Code Cong. & Admin. News 7569; [the] Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 1980 U.S. Code Cong. & Admin. News (94 Stat.) 2334, 1980 U.S. Code Cong. & Admin. News 5019; [and the] Hazardous and Solid Waste Amendments of 1984, Pub.L. No. 98-

> to identify hazardous wastes, to promulgate standards for operators of hazardous waste facilities, and to issue permits for the operation of hazardous waste disposal facilities. *See* 42 U.S.C. §§ 6921-25... RCRA is a remedial strict liability statute which is construed liberally. United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1383 (8th Cir. 1989); United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 738 (8th Cir. 1986), *cert. denied,* 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987).

U.S. v. Production Plated Plastics, Inc., 742 F. Supp. 956, 959-60 including n.3 (W.D. Mich. 1990).

And that –

> [RCRA] was enacted by Congress in 1976 "to establish a comprehensive federal program to regulate the handling of solid waste." Environmental Defense Fund v. EPA, 852 F.2d 1309 (D.C. Cir. 1988). Under subtitle C of the RCRA, 42 U.S.C. §§ 6921-6939e, the treatment, storage, and disposal of hazardous waste can only be undertaken pursuant to a permit that specifies the conditions under which the waste will be managed. 42 U.S.C. § 6925.
>
> RCRA section 3008(a)(1) authorizes the EPA to enforce any requirement of RCRA subtitle C. 42 U.S.C. § 6928(a)(1). Violations of the RCRA, including applicable federal and authorized state regulations (*see* 42 U.S.C. § 6926), are subject to the assessment of civil or criminal penalties and compliance orders. 42 U.S.C. § 6928(a) & (d).

Hoosier Spline Broach Corp. v. U.S. EPA, 112 F. Supp.2d 763, 764 (S.D. Ind. 1999). *See also*, U.S. v. T&S Brass and Bronze Works, Inc., 681 F. Supp. 314, 316 (D. S.C. 1988) ("Section 3005 of RCRA, 42 U.S.C. § 6925, requires every owner or operator of a TSD [("Treatment, Storage, or Disposal")] facility to obtain a permit to operate the facility."); Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371 (7th Cir. 1986); and 45 Fed. Reg. 33084, 33084-33085 (May 19, 1980).

RCRA is "a tough statute designed to address potentially life-threatening problems." U.S. v. Allegan Metal Finishing Co., 696 F. Supp. 275, 286 (W.D. Mich. 1998). In order to achieve RCRA's fundamental goal of "cradle-to-grave" oversight, the "EPA relies to a substantial extent on accurate self-reporting." U.S. v. JG-24, Inc., 331 F. Supp.2d 14, 57 (D. P.R. 2004).[27]

616, 1984 U.S. Code Cong. & Admin. News (98 Stat.) 3221, 1984 U.S. Code Cong. & Admin. News 5576.

[27]*See also, A.Y. McDonald Industries, Inc.,* 2 E.A.D. 402, 418 (EAB 1987), *quoting A.Y. McDonald Industries, Inc.*, 1986 WL 69026, EPA Docket No. 85-H-0002 (ALJ, April 23, 1986)

Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), and 40 C.F.R. part 271, subpart A, the Administrator of the U.S. EPA ("Administrator") may authorize a state to administer the RCRA hazardous waste program in lieu of the federal program when the Administrator deems that the state program is equivalent to, consistent with, and no less stringent than, the federal hazardous waste program.[28] On October 16, 1986, the Administrator granted final authorization to the State of Michigan, effective October 30, 1986, to administer a state hazardous waste program in lieu of the federal RCRA hazardous waste management program. 51 Fed. Reg. 36804 (Oct. 16, 1986). The authorized Michigan Hazardous Waste Management Program was incorporated by reference into the Code of Federal Regulations. *See* 54 Fed. Reg. 7420 (Feb. 21, 1989). Michigan subsequently received federal authorization for its RCRA used oil management standards on June 1, 1999. 64 Fed. Reg. 10111 (Mar. 2, 1999). Accordingly, Michigan regulations governing the generation, transportation, treatment, storage, and disposal

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"'The notification ... requirements are crucial to the effective enforcement of RCRA. The law is not designed to allow hazardous waste facilities to operate until they are discovered by the EPA. Instead, the burden is placed on the facility owners and operators to analyze and report their operations to the EPA (or the state if there is an approved state program in effect).' ... In other words, the notification and permit requirements go to the very heart of the RCRA program. If they are disregarded, intentionally or inadvertently, the program cannot function."

[28]As Judge McGuire wrote in *Bil-Dry Corp.*, EPA Docket No. RCRA-III-264 (Initial Decision, Oct. 8, 1998):

> "...[I]t is well-established that authorized state hazardous waste programs must be 'consistent with' and 'equivalent to' the federal regulations in effect at the time of authorization. RCRA §§ 3006(b), 42 U.S.C. §§ 6926(b). *See also*, Chemical Waste Management , Inc. v. Templet, 967 F.2d 1058 (1992), *cert. denied,* 113 S.Ct. 1048, 122 L.Ed. 2d 357 ... Under RCRA, federal guidelines establish *minimum* hazardous waste control standards below which a state hazardous waste program may not operate, although a state may institute stricter standards. State ex rel. Iowa Dept. Of Water, Air and Waste Management v. Presto-X Co., 417 N.W. 2d 199 (1987). RCRA sets a floor, rather than a ceiling, for state regulation of hazardous wastes. Old Bridges Chemicals, Inc. v. New Jersey Dept. of Environmental Protection, C.A.3 (N.J.) 965 F.2d 1287 (3rd 1992), *cert. denied*, 113 S.Ct. 602, 121 L.Ed. 2d 538. In People v. Roth, 492 N.Y.S. 2d 971, 129 Misc.2d 381 (1985), the Court held that although the Congress, in enacting the Solid Waste Disposal Act, did not choose to occupy the hazardous waste field to the total exclusion of states, it did choose to establish minimum ecological standards and preempt states from establishing less stringent rules, and thus the Commissioner of Environmental Control was mandated to adopt, as a minimum, the federal list of hazardous wastes."

Bil-Dry Corp., slip op. at 15.

of hazardous waste and the management of used oil are the operative regulations in this enforcement proceeding. *M.A. Bruder & Sons, Inc.*, 10 E.A.D. __, slip op. at 5 n.3 (EAB, July 10, 2002). However, pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928, the EPA retains the authority to enforce any requirement of the authorized Michigan program. *Id; Bil-Dry Corp.*, 9 E.A.D. 575, 576 n.1 (EAB 2001); *Rybond, Inc.*, 6 E.A.D. 614, 616 n.1 (EAB 1996); *CID-Chem. Waste Mgmt. of Ill., Inc.*, 2 E.A.D. 613 (CJO 1988).

IV. Discussion, Findings and Conclusions as to Liability

A. Count III – Failure to Respond to Releases of Used Oil or Hazardous Waste

Count III of the Complaint alleges that Respondent failed to respond to releases of used oil in violation of MAC § 299.9810(3) and 40 C.F.R. § 279.22(d) for at least 179 days, or, alternatively, that Respondent failed to respond to releases of hazardous waste in violation of MAC §§ 299.9601(1) and (2), 299.9607, and 40 C.F.R. §§ 264.56(b), (e) and (g), for at least 179 days. *See* Complaint, ¶¶ 79-81; CX-106, Bates 1919). Complainant states that "[t]he Complaint is pled in the alternative ... [so that] liability would attach if Respondent failed to respond to releases of either hazardous waste or used oil." Complainant's Post-Hearing Brief ("CPHB") at 45.

1. The Law

Regarding "used oil," MAC § 299.9810(3) states that "[a] used oil generator shall comply with the provisions of 40 C.F.R. §§ 279.22." Section 279.22, 40 C.F.R., in turn, states:

> Used oil generators are subject to ... the requirements of this subpart.
>
> * * *
>
> (d) Response to releases. Upon detection of a release of used oil to the environment ..., a generator must perform the following cleanup steps:
>
> (1) Stop the release;
>
> (2) Contain the released used oil;
>
> (3) Clean up and manage properly the released used oil and other materials; and
>
> (4) If necessary, repair or replace any leaking used oil storage containers or tanks prior to returning them to service.

Used oil is defined broadly to include "any oil which has been refined from crude oil, or any synthetic oil, which has been used and which as a result of the use, is contaminated by physical or chemical impurities." MAC § 299.9109(p). *See also*, 40 C.F.R. § 279.1. A used oil generator is "any person, by site, whose act or process produces used oil or whose act first causes used oil to become subject to regulation." MAC § 299.9109(w); 40 C.F.R. § 279.1. However, "used oil" which is mixed with a "hazardous waste" is subject to regulation not as "used oil," but rather as a "hazardous waste," as MAC § 299.9809(2)(a) states that:

(2) The following materials are not subject to regulation as used oil under the provisions of R. 299.9810 to R. 299.9816, but may be subject to regulation as a hazardous waste under part 111 of the act and these rules:

(a) A mixture of used oil and hazardous waste...

See also, 40 C.F.R. § 279.10(b).

Regarding "hazardous waste," MAC § 299.9601 states, in part:

(1) The standards in this part apply to owners and operators of all facilities that treat, store, or dispose of hazardous waste, except as otherwise specifically provided in these rules.
(2) Treatment, storage, or disposal facilities ... shall be in compliance with all of the following rules: ...

(b) [MAC]. 299.9607 Contingency plan and emergency procedures.

MAC § 299.9607(1) states, in part: "Owners or operators of hazardous waste treatment, storage, and disposal facilities shall maintain a contingency plan for the facility and comply with all of the provisions of 40 C.F.R. part 264, subpart D, regarding the plan and emergency procedures..." In turn, 40 C.F.R. part 264, subpart D, at § 264.56, states in part that:

(b) Whenever there is a release, fire, or explosion, the emergency coordinator must immediately identify the character, exact source, amount, and areal extent of any released materials...
(e) During an emergency, the emergency coordinator must take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread to other hazardous waste at the facility...
(g) Immediately after an emergency, the emergency coordinator must provide for treating, storing, or disposing of recovered waste, contaminated soil or surface water, or any other material that results from a release, fire, or explosion at the facility.

The initial question, then, is whether the evidence demonstrates that releases of used oil and/or hazardous waste occurred on Respondent's property, and if so, when. As explained below, a preponderance of the evidence demonstrates that Samples SS1 and SS3, collected in the "significantly deteriorated asphalt areas," contained primarily "used oil," but that the oil was mixed with at least one "hazardous waste" in the form of gasoline, spent solvents, or lead. Further, a preponderance of the evidence demonstrates that the Sample SS2, collected from the "puddle" in the "temporary compaction / battery storage area," was primarily a "hazardous waste" in the form of gasoline. This evidence consists of witness testimony and documentation regarding observations of Respondent's site and operation, as well as the numerous laboratory analyses of the samples together with expert testimony interpreting those analyses. Therefore, if the Strong Steel site is a "treatment, storage, or disposal facility" ("TSD" or "TSD facility"), then the materials found in all three samples are subject to regulation as hazardous waste (but not

as "used oil"). The evidence further demonstrates that the releases occurred not later than July 22, 1999 (the date of EPA's multi-media inspection), and that Respondent failed to properly respond to the releases until at least April 11, 2000 (the date of the first Inland Waters / CRA excavation), a time well in excess of 179 days.[29]

2. Samples SS1, SS2, and SS3 are "Hazardous Waste"

a. Non-Laboratory Evidence

Mr. Powers took a number of photographs during the July 22, 1999 inspection, entered as CX-1.[30] Those photographs included CX-1, Bates 8-12 (photographs #s 8-12), depicting the southern "pie-wedge" area of the site where the samples were later taken. Tr. 11/18/03, pp. 155, 159. Describing this area, Mr. Powers testified: "...[W]e observed squashed cars that were stacked along the outside edge of this area and ... noticed large puddles on the ground. Some of them smelled like gasoline." *Id.* at 155. Describing photographs #8 and #9, Mr. Powers explained:

...[T]his area was very oily and greasy, the ground was, and had large puddles and

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[29]Respondent arguably did not properly respond to the releases until April 19, 2001, when Respondent disposed of the material which was excavated by Inland Waters on March 1, 2001. However, since Complainant seeks a penalty for only 179 days of violation, this Tribunal need not reach that question.

[30]CX-1, Bates 1-18, contains 18 photographs taken by Mr. Powers on July 22, 1999. Mr. Powers' "Declaration" of May 21, 2001 at CX-86 (not to be confused with Mr. Powers' "Declaration" of June 20, 2002 at CX-87) states: "During the July 22, 1999 inspection ... I took pictures of my observations and kept a log of those photographs. The number of each photo on the log appears on the reverse side of the copy of the photograph." CX-86, Bates 1200, ¶ 11. The "log" of the photographs is entered as the last page of "Attachment 1" ("Interim Summary Report: SPCC Inspection, July 22, 1999, Strong Steel Products, 6464 Strong Street, Detroit MI" (Draft 9/2/99)) to Mr. Powers' "Declaration of June 20, 2000," at CX-87, Bates 1228. (Mr. Powers's photo log also appears as an attachment to Mr. Opek's "Declaration" at CX-111). The photographs entered at CX-1, Bates 1-18, are also entered as CX-86, Bates 1204-1221, but in a different order, and without Mr. Powers' handwritten numbers (which correspond to the numbers in the "log,") on the back. The photographs entered as CX-1, Bates 1-18, *are* in proper order, so that CX-1, Bates 1-18 does correspond to "photographs ## 1-18" in the "photo log" at CX-86, Bates 1228. Mr. Powers' handwritten numbers on the back of the photographs at CX-1 do appear in the upper right-hand corner of the back of the photographs, although they have been partially obscured by a hole-punch. In any event, while some of the photographs at CX-86, Bates 1204-1221 may show slightly more clearly visible "sheens" or "puddles" on the ground (due perhaps to copying exposure), they are otherwise identical to the photographs entered as CX-1, Bates 1-18.

> a very strong gas odor, and I took a picture of it ... and then a close-up picture on [photograph #9] of a gas tank out in the middle of this puddle, and you can see various shades of black oil and oil films on the ground and very black oily ... dirt and a discarded, crumpled up gas can – or, you know, auto tank.

Id. at 156. Photograph #11 is another photograph of the same puddle, gas tank, and tire depicted in photographs #8 and #9, taken from a different angle to show "the extent of the oily ground in this area." *Id.* at 157. Regarding the puddles, Mr. Powers elaborated: "They looked like oil. They cast a sheen on the puddles. It was dark, opaque oil and there was a heavy oily smell and gasoline odor." *Id.* at 156. Mr. Powers explained that "there's different types of oil, and ... you can tell gasoline. It doesn't smell like motor oil." *Id.* at 173. Mr. Powers further testified that photograph #10 depicted "some of the gas tanks that were up against this pile of cars ... and you can see they're pretty mangled and crumpled up in a pile..." *Id.* at 157. In the same southern portion of the site, Mr. Powers testified that photograph #12 depicted "a pile of miscellaneous auto parts, including more gas cans. There's a puddle of oily liquid in the middle of that pile..." *Id.* at 159. Mr. Powers also testified that photograph #13 depicted automobile batteries on the ground in the northern portion of the southern "pie-wedge" which had been "smashed" (*Id*. at 162), and that in that same area, photograph #14 depicted a "partially disassembled" car with "fluid leaking out underneath it. One of the fluids looked dark like ... used motor oil. The other one looked like anti-freeze." *Id*. Mr. Powers further explained that "[i]n the southern portion of the facility there was a strong gasoline odor," and that he observed "dark, oily puddles." *Id.* at 166-167. Finally, Mr. Powers opined that:

> It's sort of obvious when cars come in off the street, they probably have a gallon or two of residual gasoline in the bottom of the oil tank or the gas tanks. And if you rip them off, like the guy that was lifting his up to throw it in the roll off box, you're going to get a little bit of gas that comes out. And the same way with engine oil, brake fluid, transmission fluid, radiator fluid.

Id. at 214. *See also*, CX-86; CX-87 (Declarations of Ross Powers dated May 21, 2002 and June 20, 2002, respectively).

George Opek, the EPA inspector who led the July 22, 1999 multimedia inspection, gave his direct testimony by a written declaration dated November 10, 2003 and entered as CX-111, with nine attached "Exhibits," which he authenticated while testifying by telephone. *Id.* at 225-227.[31] Mr. Opek's declaration states that Exhibit #2 "[i]s a copy of my Compliance Evaluation Report on the Strong Steel Products' facility which was based on my observation during my inspection in July of 1999." CX-111, p. 2. That Report, dated September 14, 1999, states that "the U.S. EPA team observed on installation's ground, spills of used oil, gasoline, and acid.

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[31]Exhibit #9 to Mr. Opek's Declaration is a letter from Mr. Opek explaining that, at the time of hearing, he was unable to travel due to injuries sustained in an automobile accident, but that he could "be available via conference call." CX-111, Exhibit #9.

These spills were significant enough to cause a threat to the environment, and to the human health." CX-111, Exhibit #2, p. 2. The Report explains that "we spotted huge puddles of spilled gasoline, used oil, and car fluids... [and] we felt a strong odor coming from those spills." *Id.* The Report further states that "[t]he inspection team observed, that on the installation's ground was spilled used oil, and other fluids, that resulted from careless handling, and torn open parts containing such fluids" (*Id*. at 3); that [t]he inspection team observed gasoline tanks torn open, and drained on installation's ground" (*Id.*); and that "[t]he inspection team observed large puddles of used oil on the installation's ground." *Id.* at 4. Mr. Opek further testified that "there was so much gasoline still in the facility and on the grounds that there was a very imminent danger to the situation." Tr. 11/18/03, p. 244.

Ann Vogen, an MDEQ Environmental Quality Analyst, inspected the Strong Steel site on numerous occasions from 1999 through 2002 for purposes of Michigan's scrap tire regulations. Tr. 11/19/03, pp. 81-84; CX 79; CX 80; CX 82; CX 84. Regarding her inspection of July 21, 1999, Ms. Vogen testified that "there was a very strong gasoline odor," (Tr. 11/19/03, p. 89), and that:

> They [Strong Steel employees] had indicated to me that they're not supposed to but they'll sometimes get cars in with gasoline and when they take the tanks off of the vehicles, the gasoline will spill on the ground. I had also talked to Mr. Tomlinson about the explosion complaints we had had and he had just indicated that it doesn't harm the equipment and it's not harmful to the staff.

Id. Ms. Vogen's testimony echoes her field notes and a letter from herself to Anthony Benacquisto, dated August 4, 1999 and entered as CX-80.[32]

Regarding her inspection on March 13, 2001, Ms. Vogen testified that she observed "some oil staining" on the ground and smelled the odor of gasoline, and explained that there "were some small puddles that had a sheen on it ... [and] appeared to be oil." Tr. 11/19/03, p. 93. Ms. Vogen's notes from her March 13, 2001 inspection similarly record "some oil sheen areas on ground (particularly near crushed autos) – also petro odor on site." CX-82, Bates 1132.

Regarding her inspection of July 30, 2002, Ms. Vogen testified that "a Highway[33]

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[32]CX-80 is identical to CX-38.

[33]This reference to "Highway" in the transcript appears to refer to "Hi-Way Auto Equipment of Taylor, Inc." ("Hi-Way"). *See, e.g.*, CX-75, Bates 930; CX-84, Bates 1140; CX-90, Bates 1238. Ms. Vogen explained that "[Hi-Way] has a salvage yard in the Taylor area." Tr. 11/19/03, p. 97. Specifically, "[Hi-Way] is licensed for automobile dismantling and selling of used auto parts... Hi-Way receives ... automobiles ... and flattens automobiles for transportation to off-site scrap metal processors... Hi-Way tenders material to Strong Steel, and Strong Steel essentially purchases such material, for scrap metal recovery." CX-75, Bates 931 (April 12,

flatbed had pulled on the site and had ... crushed cars stacked on it and there were fluids leaking from the flatbed onto the ground." Tr. 11/19/03, p. 96. That truck with fluid leaking from the crushed cars onto the ground is depicted in photographs taken by Ms. Vogen and entered as CX-82, Bates 1134 and 1139. Tr. 11/19/03, p. 97. Ms. Vogen followed up her July 30, 2002 inspection with a letter to Anthony Benacquisto stating, in part, that "Department staff observed a dark oily liquid dipping from the vehicles, to the flat bed, and finally to the ground." CX-84, Bates 1140; Tr. 11/19/03, p. 99. Ms. Vogen's notes from her July 30, 2002 inspection similarly record "stained soils" and "Hi Way truck w/ crushed cars had oil dripping off bed of truck (advised driver + Strong Steel staff)." CX-84, Bates 1142; Tr. 11/19/03, p. 100.

Reginald Arkell, a "Civil Investigator" with the EPA Office of Criminal Enforcement, Forensics and Training in Chicago, while never actually visiting the Strong Steel site, conducted an investigation in connection with the present case by researching records and interviewing a number of people, the results of which are compiled in a voluminous "Investigation Report" entered into the record as CX-91, Bates 1250-1505. Tr. 11/19/03, pp. 119-120, 125-126, 164; CX-91. Mr. Arkell interviewed George Zagresky, a Safety Officer with the Michigan Department of Consumer & Industry Services, Bureau of Safety and Regulation, who inspected the site on July 12, 1999 in response to citizen complaints about explosions from gas tanks going through the shredder. CX 91, Bates 1498-1504; Tr. 11/19/03, pp. 131, 134-137. Mr. Arkell testified regarding his conversation with Mr. Zagresky as follows:

> One of the first things he stated was he had a vivid recollection of observing a stack of pre-crushed vehicles that was sitting on a cement pad ... and that ... what appeared to be gasoline that was pouring down or – dripping or pouring down off of these vehicles onto the ground and onto the cement pad and on the surrounding soil...

Tr. 11/19/03, p. 132. This testimony is supported by Mr. Zagresky's own written report, which states: "...[W]hen gas tanks are removed operators of front end loaders are utilizing the forks to separate [sic] steel straps holding gas tanks to crushed vehicles - when turning vehicles over on cement pad gas will spill out onto cement pad – gas will either set on cement or catch on fire." CX-91, Bates 1500.

Mr. Arkell also interviewed Fred James, an Inspector with the City of Detroit Buildings and Safety Engineering Department, who inspected the Strong Steel site on May 17, 1999, in response to complaints from people living near the site about explosions caused by gasoline tanks in the shredder. Tr. 11/19/03, pp. 146-148; CX 91, Bates 1312-1317. Mr. Arkell testified that Mr. James had told him that he (Mr. James) "observed some of the vehicles being crushed, and he did actually see some of the gas tanks being crushed" in the shredder. Tr. 11/19/03, pp. 148-149. This testimony is supported by Mr. James' own written report, which states: "The manager – Steve – admitted that there had been explosions at the facility caused by mistakenly

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2002 Hi-Way Response to CAA Information Request).

leaving gas tanks on cars when they were being crushed." CX-91, Bates 1314.

Mr. Arkell also interviewed Violet Brown, a resident living near the Strong Steel facility, who had written a letter dated April 30, 1999 to the City of Detroit complaining of explosions at the site. Mr. Arkell testified that Ms. Brown said that "[s]he had lived within a block of the facility at the time she wrote the letter and she basically reiterated what was in the letter, that there were explosions ... at Strong Steel Products about two to three times a week..." This testimony is supported by Ms. Brown's letter, which states that the Strong Steel site is "a half block from my home" and that "[t]hese explosions occur as often as three times a week." CX-91, Bates 1315.[34]

Michael Beaudoin, Strong Steel's "Director of Engineering" responsible for environmental compliance and remediation until July, 2001 (Tr. 12/9/03, pp. 88, 100-101)), testified that during the July 22, 1999 inspection he "saw drips of oil on the ground" and "a sheen on the surface of a puddle" and smelled gasoline in the temporary compaction area. *Id.* at 83-85. Mr. Beaudoin further described the puddle from which Mr. Powers and Ms. Elliott collected sample SS2 on August 2, 1999, as "a puddle area that was adjacent to some cars that had liquid in it, had mud in it, and so I think the sample ... was a combination of a liquid sludgy material... At most it was six feet in diameter by an inch deep." Tr. 12/9/03, p. 53.

Finally, Steven Benacquisto, referring to the photograph (CX-1, Bates 6) of a flatbed truck loaded with approximately 15 to 20 crushed automobiles, candidly explained that: "This load, I'm sure they had some liquid dripping from them. All crushed bodies have a little bit." Tr. 11/19/03, p. 331. Mr. Benacquisto elaborated that such "liquids" would be composed of "automotive liquids" including "some oils." *Id.* Referring to the large puddle of liquid depicted in another photograph (CX-1, Bates 8), Mr. Benacquisto stated that "it was a combination of dirt, mud and some oil that was in the mud from the car bodies." *Id.* at 332. Mr. Benacquisto further testified that Strong Steel would accept shipments of crushed automobiles with "a drip here and there." *Id.* at 350. Finally, Mr. Benacquisto testified about "whole" and/or "uncrushed" cars, in this regard, as follows:

> Q: And it's your testimony that [in July, 1999] you would have rejected some loads that had gas tanks if you knew that at that time?
> ...
> A: ...If it had gas in the gas tank.
> Q: But you'd accept them if they had the gas tank?
> A: We try to tell them no but that's some of the ones we've, you know, got stuck with.
> Q: And how would you tell if there was gas in the gas tank?
> A: Well, basically if the car's, you know, empty, then there's not a lot of gas

[34]CX-91, Bates 1312-1313 documents numerous other citizen complaints about explosions at the Strong Steel facility.

in there; if it's, you know, a junked car towed in.

Q: Okay. So there wasn't any visual inspection of the gas tank to determine that they're empty?

A: No.

Id. at 347. Actually, Mr. Benacquisto had previously explained that from the time Strong Steel began operation in 1997 until "shortly after July, 1999," it was Strong Steel's policy to *accept* cars with gas tanks, but only if they were empty. *Id.* at 303-304. Sometime after July, 1999, however, Strong Steel changed its policy so that it would *not* accept cars with gas tanks in order to address citizen complaints about explosions, but this led to the problem of suppliers removing the gas tanks just outside the Strong Steel facility and leaving them littering the surrounding neighborhood, according to Mr. Benacquisto. *Id.* at 303-305.

In any event, from March, 1997 through July, 1999, it was the policy of Strong Steel to accept whole uncrushed automobiles with the gas tank intact. Strong Steel would *assume* that the gas tanks were empty, as explained by Mr. Benacquisto, and would either tear them off with a front-end loader (CX-91, Bates 1500) or simply send them through the shredder. However, the evidence in the record demonstrates that the intact gas tanks were *not* "empty." Mr. Powers estimated that whole "junked" cars would have "a gallon or two" of gasoline in their gas tanks. Tr. 11/18/03, pp. 214, 218. Mr. Ring estimated that such cars would have "one to three gallons" of gasoline in their tanks (Tr. 12/9/03, p. 281; Tr. 12/10/03, p. 80; RX-28, p. 14), and approximately 1.5 gallons of oil. RX-28, p. 14. As Respondent concedes, ". . . gasoline . . . was occasionally spilled when [Strong Steel's] employees attempted to remove gasoline tanks from cars so that they could be safely processed by the shredder." RPHB at 48-49 (emphasis added).[35] Thus, as a conservative estimate, the evidence demonstrates that the "whole" automobiles accepted by Strong Steel during this time contained about 2 gallons of gasoline and/or oil each. Strong Steel's November 11, 2003 RCRA § 3007 Information Request Response ("Strong 2003 RCRA Response") shows that Strong Steel accepted approximately

[35]Mr. Ring's estimates were made for the purposes of writing the "Summary Report" on Strong Steel's planned Automobile Dismantling & Resource Recovery Facility ("ADRRF") entered as RX-28. Mr. Ring explained how he reached his conclusions as follows: "I talked with different people in the industry. I talked to some dismantlers and they gave me an estimate of the volume of gasoline, oil, anti-freeze, that they typically find in automobiles, but I believe that the people I talked to were looking more at automobiles donated from charities, which typically have more gasoline in them than a peddler might have... [so] it doesn't have to do with the actual Strong Steel plant. It's not data collected from that plant." Tr. 12/9/03, pp. 281-282. However, this Tribunal finds that Mr. Ring's estimates of "1 to 3 gallons of gasoline" and "1.5 gallons of used oil" per uncrushed vehicle provides a good estimate of the amount of such materials contained in the uncrushed automobiles coming into the Strong Steel facility from March, 1997 through July, 1999.

41,178 "uncrushed" automobiles between March, 1997 and July, 1999.[36] RX-27, p. 1. The Strong 2003 RCRA Response explains that it is "using the term 'uncrushed' as opposed to 'whole cars' as that is the best we could do; that is, cars typically come in with batteries, gas tanks and other pieces already removed and are not 'whole.'" RX-27, p. 1. However, Mr. Steven Benacquisto testified that approximately 90% of the uncrushed cars accepted by Strong Steel came from "dismantlers" who "strip them out." Tr. 11/19/03, p. 327-328. Thus, it appears that at least 10% of the "uncrushed" cars were "whole cars." Therefore, Strong Steel accepted approximately 4,117[37] "whole cars" between March, 1997 and July, 1999, thereby releasing, as a conservative estimate, approximately 8,234 gallons[38] of gasoline and used oil.

b. Laboratory Evidence

(1) Expert Witness Analyses

CX-16 is the E&E "Letter Report" summarizing the ASI laboratory analyses of the three samples collected by Mr. Powers and Ms. Elliott on August 2, 1999. The ASI analytical data is entered as CX-99. The E&E Letter Report summarizes the sample results in "Table 1" at Bates 114-115. Complainant's expert witness Sue Rodenbeck Brauer testified regarding these sample results.[39] Regarding ASI SS1, Ms. Brauer testified that the BTU value, the oil and grease value, the total metals including lead, and the total petroleum hydrocarbons ("TPH") value indicate that SS1 contained used oil. Tr. 11/18/03, pp. 80-81. Regarding ASI SS2, Ms. Brauer testified that the lead level, the metals, the BTU, the organic hydrocarbons (Benzene, Ethylbenzene, Toluene, and Zylenes), and the low flash point (ignitable at 81 degrees Fahrenheit), indicate that SS2 was a mixture of used oil and gasoline. *Id.* at 81-82. Regarding ASI SS3, Ms. Brauer testified that the BTU value, the flash point, the TPH value, the oil and grease value, the lead content, and the TCLP metals indicate that SS3 contained used oil. *Id.* at 83-84.

The Respondent's contractor Novi Laboratories also conducted analyses of the "split samples" provided to Mr. Beaudoin from the August 2, 1999 sampling. These results are entered as attachments to the May 5, 2000 CRA report at CX-18, Bates 173-181.[40] Samples "SS1,"

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[36] 6,628 + 22,706 + (0.5)(23,689) = 41,178.5.

[37] 41,178 x .10 = 4,117.8.

[38] 4,117 "whole cars" x 2 gallons of gasoline and/or oil = 8,234 gallons.

[39] Ms. Brauer was qualified as an expert in "used oil and geology." Tr. 11/18/03, p. 63.

[40] The Novi results are also entered as attachments to the June 19, 2001 CRA report at CX-101 and RX-10. While the May 5, 2000 CRA report refers to SS2 as having come from the "Battery Storage Area," the June 19, 2001 CRA report refers to SS2 as having come from the "Temporary Compaction Area." However, as noted *supra*, the two designations refer to one and the same area.

"SS2," and "SS3" in the Novi/CRA reports correspond to those same sample designations in the E&E/ ASI reports. Tr. 11/18/03, p. 87. Regarding the Novi SS1, Ms. Brauer testified that the levels of three metals (cadmium, chromium, and lead) indicate that the sample contained used oil, and nothing indicated that it was mixed with a hazardous waste. *Id.* at 87-88. Regarding Novi SS2, Ms. Brauer testified that the lead level and the TCLP results for barium, cadmium, and chromium indicate that the sample contained used oil, and that the chlorinated organic chemicals indicated that it may have been mixed with a "spent solvent or a degreaser." *Id.* at 85-86. Regarding Novi SS3, Ms. Brauer testified that the elevated lead level and the presence of cadmium and chromium indicate that the sample contained used oil, and nothing indicated that it was mixed with other hazardous wastes. *Id.* at 86-87.

Ms. Brauer summarized: "There is ... soil sampling data conducted by both ... E&E, and by ... CRA, ... and the constituents that were detected in some of the samples, particularly sample [SS1] and sample [SS3], include contaminants that I associate with used oil... I also ... saw, in one sample [SS2], that the chemicals present would be found in gasoline but not in used oil ... unless the used oil had been mixed." Tr. 11/18/03, p. 73.

Complainant's expert chemist John Fowler also testified regarding the ASI and Novi laboratory analyses.[41] Regarding ASI SS1, Mr. Fowler testified that the BTU value, the oil and grease result, the semi-volatile analysis, the TCLP value for lead, and the TPH value indicated the presence of used oil, and that the low levels of benzene and ethylbenzene indicated that "there was little or no gasoline in the sample." Tr. 11/19/03, pp. 15-17. However, Mr. Fowler stated that gasoline could have been present in the soil at an earlier time, since gasoline "will evaporate very quickly." *Id.* at 17. Regarding ASI SS2, Mr. Fowler testified that the high TPH value, the high BTU value, the chromatograms, the flash point of 81 degrees Fahrenheit, the benzene results, the lead value, and the values for other volatiles such as ethylbenzene and xylenes indicate that the sample was "a mixture of gasoline and possibly some oil as well." *Id.* at 17-20. Specifically, Mr. Fowler opined that "probably somewhere around 50 to 60% of the sample[] was gasoline." *Id.* at 18. Even more specifically, Mr. Fowler calculated that the "puddle" from which the SS2 sample was taken contained 4.2 gallons of gasoline.[42] Tr. 12/10/03, p. 125. Regarding ASI SS3, Mr. Fowler testified that the BTU value, the oil and grease results, the TPH results, and the lead results indicate that the sample contained used oil, and that the low benzene and xylenes levels "tend to indicate ... that ... little or no gas[oline] [was] in the sample." Tr. 11/19/03, pp. 19-20. Regarding the "gas chromatograms" in the ASI report (CX-99, Bates 1587 for SS1, Bates 1603 for SS2, and Bates 1596 for SS3), Mr. Fowler testified that those test results indicated the presence of "motor oil" in SS1 and SS3, and gasoline in SS2. Tr. 11/19/03, pp. 22-24.

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[41]Mr. Fowler was recognized as an expert in the field of chemistry. Tr. 11/19/03, p. 4.

[42]Indeed, the cover page to the ASI results (CX-99) states: "Sample SS2 appears to be mainly gasoline." CX-99, Bates 1521.

Mr. Fowler also testified regarding the Novi Laboratory analyses. Regarding Novi SS1, Mr. Fowler stated that the sample was "contaminated with lead," but he could not tell the source. *Id.* at 42. Mr. Fowler similarly stated that Novi SS3 was "RCRA toxic for lead," but that the source of the contamination was not clear. *Id.* at 41. Regarding Novi SS2, Mr. Fowler stated that the sample "appears to be very heavily contaminated with gasoline, along with possibly ... several chlorinated solvents." *Id.* at 38.

Mr. Fowler also testified regarding the "Houston Laboratory" analyses of the "verification samples" taken during the April 11, 2000 Inland Waters excavation. Regarding sample 6 from the "temporary compaction area" (CX-18, Bates 197), where SS2 had been collected, Mr. Fowler stated that the sample contained a quantity of methyl tert-butyl ether ("MTBE"), explaining that MTBE "is a gasoline additive so if you see that, you suspect that there was gasoline there at one point." Tr. 11/19/03, pp. 50-51. Mr. Fowler further opined that the volatile organic compounds (ethylbenzene, toluene, and xylenes) found in "verification sample 2" from the southern "significantly deteriorated asphalt area" (CX-18, Bates 188), where SS3 had been collected, indicated that there may have been trace amounts of gasoline in the sample. Tr. 11/19/03, p. 51.

Paul Wiseman, a CRA "Quality Assurance Chemist"[43] and Respondent's expert in the field of "analytical chemistry,"[44] also spoke to the E&E / ASI laboratory analyses. Referring to the "Sample Results" Table in the E&E report (CX-16, Bates 114-115), Mr. Wiseman first addressed many of the parameters found for SS1 and SS3 (the "soil samples"). Mr. Wiseman stated that the results for "oil and grease" do not necessarily mean that the samples must have contained "used oil," because "[o]il and grease is not a specific procedure," and "[t]here are a number of other constituents...; biological lipids, animal fats, vegetable oils, waxes, soaps, that could also be ... determined to be oil and grease. Asphalt may contribute." Tr. 12/9/03, pp. 227-28. Mr. Wiseman stated that positive results for BTU (a measure of heat content) did not necessarily mean that samples must have included used oil, noting that "anything that burns has some level of heat content, ... asphalt would have a significant heat content." *Id.* at 230. Mr. Wiseman also stated that the presence of metals in the samples did not necessarily indicate that the samples must have contained used oil because "[t]he metals ... could also come from other sources, atmospheric deposition, paint chips, other coatings, batteries." *Id.* at 231. Mr. Wiseman stated that the results for volatile organics may indicate the presence of gasoline but do not indicate used oil because "[u]sed oil would be a much heavier range of hydrocarbons than the volatile portion." *Id.* at 233. On balance, then, Mr. Wiseman stated that many of the parameters found for SS1 and SS3 could be individually explained by the presence of something other than "used oil," but he did not rule out the possibility that the samples contained "used oil."[45] Further,

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[43]Tr. 12/9/03, p. 217.

[44]Tr. 12/9/03, p. 235.

[45]Mr. Wiseman's testimony regarding the analyses of SS1 and SS3 is more fully addressed, *infra*, regarding Respondent's hypothesis that the samples contained asphalt, which,

Mr. Wiseman agreed that "if ... [one knew] that the sample was collected from an area that was contaminated with used oil, ... it [would] be fair to assume that it's consistent with those results [of the SS1 and SS2 analyses]..." *Id.* at 243.

Regarding SS2 (the "liquid sample"), Mr. Wiseman succinctly stated: "There is significant evidence to indicate that it does have gasoline present but the data did not decisively identify used oil..." *Id.* at 237.

(2) Laboratory Reports

The E&E/ASI sample analysis shows that sample SS2 was above the RCRA TCLP limit specified in MAC §§ 299.9212(4) and 299.9217 (Table 201a) and 40 C.F.R. § 261.24 for lead (RCRA waste code D008) and Benzene (RCRA waste code D018). Specifically, SS2 contained 43.5 mg/l of Lead (as a "TCLP Metal"), while the regulatory limit is 5.0 mg/l, and 6,230 ppm of Benzene, while the regulatory limit is 0.5 mg/l.[46] CX-16, Bates 115. In addition, sample SS2 was ignitable at 81 degrees Fahrenheit, and was therefore a "characteristic hazardous waste" for "ignitability," being below the regulatory limit of 140 degrees Fahrenheit set forth in MAC § 299.9212(1)(a) and 40 C.F.R. § 261(a)(1). CX-16, Bates 114.

In addition, the CRA Report summarized the Novi Labs results for sample SS2 as follows:

> Analytical results ... [for sample SS2] identified elevated concentrations of regulated parameters, including benzene, chlorobenzene, 1,4-dichlorobenzene, 1,2-dichlorobenzene, tetrachloroethylene, trichloroethylene, and lead. Additionally, the sample was identified as ignitable.

RX-10, p. 2; CX-101, Bates 1710. Specifically, the Novi results show that sample SS2 was above the RCRA TCLP limits as follows:

Chemical	TCLP Limit	Sample Results	RCRA Waste Code
Benzene	0.5 mg/l	559 mg/l	D018
Chlorobenzene	100 mg/l	2,969 mg/l	D021
1,4-Dichlorobenzene	7.5 mg/l	967 mg/l	D027

Respondent argues, could explain the analytical results.

[46]"Parts per million" (ppm) equates with "milligrams per liter" (mg/l) for a liquid sample. Tr. 11/19/03, p. 19, ln. 8, 22-23; Tr. 11/18/03, p. 261, ln. 21-23.

1,2-Dichloroethane	0.5 mg/l	36 mg/l	D028
Tetrachloroethylene	0.7 mg/l	6.2 mg/l	D039
Trichloroethylene	0.5 mg/l	3.6 mg/l	D040
Lead	5.0 mg/l	27 mg/l	D008

RX-10, Att. A, pp. 1-2; CX-18, Bates 174-175; CX-101, Bates 1726-1727. The CRA/Novi analysis further shows that SS2 was ignitable at 70 degrees Fahrenheit, and was therefore a "characteristic hazardous waste" for "ignitability." RX-10, Att. A, p. 2; CX-18, Bates 175; CX-101, Bates 1727.

In addition, the CRA Report summarized the Novi results for samples SS1 and SS3 as follows: "Analytical results from ... [SS1 and SS3] identified elevated concentrations of lead." RX-10, p. 2; CX-101, Bates 1710. Specifically, the Novi results show that samples SS1 and SS3 contained 6.7 mg/l and 22 mg/l of lead, respectively; both above the RCRA TCLP limit of 5.0 mg/l. RX-10, Att. B, pp. 2, 4; CX-18, Bates 178, 180; CX-101, Bates 1730, 1732. Based on Respondent's CRA / Novi analyses, Judge McGuire correctly found that: "... Complainant can establish that soil at Respondent's site was contaminated with substances identified by the waste codes D001 (ignitable), D008 (Lead), D018 (Benzene), D021 (Chlorobenzene), D027 (1,4-Dichlorobenzene), D028 (1,2-Dichloroethane), D039 (Tetrachloroethylene) and D040 (Trichloroethylene) above the regulatory toxicity level." Order on Accelerated Decision at 24 (citations omitted).

This Tribunal concludes that the totality of the evidence, including the laboratory analyses and expert testimony interpreting those analyses, along with the testimony of eyewitnesses regarding their observations of Respondent's site and operation, demonstrates that samples SS1 and SS3 were mainly "used oil," but were mixed with "hazardous wastes" such as gasoline, and that sample SS2 was mainly a "hazardous waste" in the form of gasoline. Therefore, pursuant to MAC § 299.9809(2)(a) and 40 C.F.R. § 279.10(b), the wastes of which samples SS1, SS2, and SS3 are representative are subject to regulation as hazardous waste rather than as used oil.

c. Respondent's Arguments

Indeed, Respondent concedes that "the analytical evidence shows that some of the materials sampled on August 2, 1999 constituted hazardous waste for ignitability and for some, but not all, of the waste codes alleged in ¶¶ 54-65 of the Amended Complaint," and that "some, but not all, of the hazardous constituents detected in these materials may have come from the gasoline that was occasionally spilled when [Strong Steel's] employees attempted to remove gasoline tanks from cars..." RPHB at 48-49. However, Respondent advances a number of arguments contending that the laboratory analyses are either unreliable or are explained by something other than the actions of Strong Steel. Specifically, Respondent contends that: 1) the

sampling methodology was unreliable; 2) the samples may have been compromised while in Ms. Elliot's custody; 3) Samples SS1 and SS3 may contain asphalt; and 4) atmospheric deposition and/or previous industrial uses of the Strong Steel site could account for the analytical results.

(1) Unreliable Sampling Methodology

Respondent argues that "the sampling methodology employed by [Complainant's] contractor [Cheryl Elliott for E&E] was unreliable." RPHB at 19. Specifically, Respondent contends that "The contractor's field notes were grossly deficient, she failed to take any field blanks, trip blanks or equipment blanks, and she used the wrong collection jars for VOCs [("Volatile Organic Compounds")]." *Id.* Respondent cites the testimony of Constance Boris (Ph.D., Civil Engineering), Respondent's expert in "environmental investigations sampling." Tr. 12/9/03, p. 121.

(a.) Deficient Field Notes

First, regarding Ms. Elliott's field notes from the August 2, 1999 sampling entered as CX-28, Dr. Boris pointed out that the field notes contained no sketch to show where the samples were taken, no indication of whether the sampling tools were decontaminated between samples, no specific description of the sampling tools or method, and no indication of the depth of the sample. Tr. 12/9/03, pp. 126-131. However, Dr. Boris's concerns regarding the lack of a sketch showing the location of the samples seemed to be later allayed upon examining Figure 2 of the CRA report entered as RX-10, as she testified:

> Well, figure two ... has the figures showing exactly many of the things I said we should show; Strong Street. I now know, for the first time, that the facility is on the southern side of Strong Street, and I know where ... your building areas are... This is telling... This is good. I have a scale. I can figure out exactly – if I have to ... collect duplicate samples, I can come right over here and figure out exactly where you are and where I should be.

Tr. 12/9/03, pp. 194-195.[47] The remainder of Dr. Boris's critique of Ms. Elliott's field notes does not demonstrate that the sampling was done *in*correctly, but only that Dr. Boris simply *cannot tell* from the field notes whether the sampling was done correctly or incorrectly.[48]

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[47]The CRA Report was generated by Respondent's, and not Complainant's, contractor. In any event, however, Dr. Boris's concerns regarding the lack of a sketch are clearly put to rest by RX-10, Figure 2.

[48]Dr. Boris testified: "Q: Can you tell me, from the documents you reviewed, if she collected it correctly or not? A: I can't tell much of anything from her field notes." Tr. 12/9/03, p. 143.

However, the declarations of Erin Newman (EPA Region 5 Scientist, who previously worked for E&E[49]), state in part:

> E&E was approved to assist EPA in sample collection and analysis under Superfund. E&E was required to follow established protocols for sample collection, preservation and transmittal. This included using collection tools and sample jars free of any previous contaminants, decontaminating sample equipment between each sample, logging location and sampling time, individually labeling each sample jar, and assuring security of the samples through a Chain of Custody (COC) Form... From my review of the files, I can ascertain that E&E followed established protocols for sample collection, preservation and transmittal during the July 1999 site visit.

CX-110 (signed) and CX-117 (unsigned), ¶ 6.[50] Ms. Newman testified by telephone and authenticated those declarations in lieu of direct testimony.[51] Tr. 11/20/03, pp. 78-81. Thus, a preponderance of evidence in the record demonstrates that Ms. Elliott followed "established protocols for sample collection, preservation and transmittal,"[52] and Dr. Boris's concerns derived of the *lack* of information contained in the field notes are mere speculation.

(b.) Lack of Field, Trip, or Equipment Blanks

Second, Respondent argues that Ms. Elliott "failed to take any field blanks, trip blanks or equipment blanks." RPHB at 19. Dr. Boris explained that a "field blank" is a sampling container with distilled water in it that is opened at the sampling site during sample collection and then sealed when sampling is completed in order to test for "atmospheric deposition" that

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[49]CX-110, ¶¶ 1- 2; CX-117, ¶¶ 1- 2.

[50]Ms. Newman explained that CX-117 (unsigned) was an earlier draft which differs from CX-110 in that CX-117 contains the following final sentence of paragraph 8: "Although the samples in this case were collected on 8/2/99 and not shipped until 8/5/99, they must have been housed our [sic] E&E secure warehouse during that time period, per our sampling procedures." CX-117, ¶ 8; Tr. 11/20/03, pp. 82-84. Ms. Newman stated that she deleted the sentence from the final draft (CX-110) because it "didn't seem necessary ... based on what I was asked..." Tr. 11/20/03, p. 83.

[51]Ms. Newman was unable to testify in person due to her recovery from surgery. CX110, ¶ 9.

[52]"Representative Sampling Methods" required by the RCRA regulations are addressed at 40 C.F.R., Part 261, Appendix I.

should not be counted against the actual sample;[53] a "trip blank" is another un-used sample container that accompanies the actual sample container from the laboratory to the site and back in order to detect any contaminants that were introduced during transportation; and an "equipment blank" is a sample of water that has been poured through the sampling device "after you have cleaned the sampling device" to make sure it has been properly cleaned. Tr. 12/9/03, pp. 137-139. Ms. Newman stated that it did not appear that Ms. Elliott took any "field blanks." Tr. 11/20/03, p. 89. Indeed, the record does not indicate that Mr. Elliott collected "field blanks," "trip blanks," or "equipment blanks." Again, however, Ms. Newman's Declarations and testimony demonstrate that Ms. Elliott followed "established protocols for sample collection, preservation and transmittal," and Dr. Boris admitted that the RCRA regulations at 40 C.F.R., Part 261, Appendix I require a sample to be "representative," but "leave[] [how you are to collect the sample so that it will be representative] up to the judgment of the person..." Tr. 12/10/03, p. 201. *See also*, Tr. 12/10/03, pp. 153-154. Ms. Newman similarly testified that "trip blanks" are not always required. Tr. 11/20/03, p. 91. Simply put, the regulations do not require field blanks, trip blanks, or equipment blanks.

Further, even if "established protocol" called for the "blanks," the record in this case demonstrates that the lack of such blanks would have little or no effect on the weight to be accorded the sampling results. Regarding "atmospheric deposition," Dr. Boris testified, referring to CX-18, Bates 174 (the Novi Labs "Analytical Report" contained in Respondent's May 8, 2000 Response to Complainant's "RCRA § 3007 Information Request"), as follows:

> Q: Where it says toxicity characteristic benzene. What's the regulatory level for benzene?
> A: 0.5 [milligrams per liter].
> Q: And what was the sample results from the extract?
> A: 559 [milligrams per liter].
> Q: Okay. And without a trip blank, are you suggesting that the atmospheric deposition of benzene is that high?
> A: ... no it wouldn't be this high but it certainly would be a part of it.

Tr. 12/9/03, p. 178. Mr. Fowler similarly testified that the lack of "trip blanks" or "field blanks" in this case did not affect the reliability of the data because the levels found of certain contaminants was so high. Mr. Fowler explained:

> A: Those type of blanks are taken because the instruments we have now in the laboratories are incredibly sensitive. They can see parts per million, parts per billion, even parts per trillion in some cases. So you have to be careful, especially with the volatile organics that you're not getting

[53]Ms. Newman testified that "[a] field blank is where you collect a sample of something you expect not to be contaminated. For, example, a soil sample would probably be collected off-site at a separate location." Tr. 11/20/03, p. 88.

contamination. But the levels in these samples were so high, that really is not an issue.

Q: And when you say they're high, they're above the parts per billion; is that correct?

A: In the case of the SS2, 60 percent of the sample approximately was volatiles. So a very high percentage.

Tr. 12/10/03, pp. 126-127.

Mr. Fowler also stated that "just because you fail some – one of the quality control steps, that data may be still fully acceptable because of the concentration of the contaminant or the nature of the sample. You really have to look at the individual cases..." Tr. 11/19/03, p. 60. Mr. Fowler's opinion is in accord with case law on this point. For example, in United States v. WCI Steel, Inc., 72 F. Supp. 2d 810 (N.D. Ohio 1999), the United States brought an action against a steelmaker for operating three wastewater ponds as "hazardous waste units" without permits in violation of RCRA. The court held that strict adherence to the testing method adopted by the EPA is not required to show a violation of RCRA, and that reliability and accuracy of samples must be evaluated on a case-specific basis with the deviation from protocol going to the weight of the evidence. The court observed:

> Other courts have held that the failure to adhere to SW-846's precise framework does not stop a finding of hazardous substances. *See, e.g.*, United States v. Taylor, 802 F. Supp. 116, 119 (W.D. Mich. 1992), *vacated on other grounds*, 8 F.3d 1074 (6th Cir. 1993) (sample analyzed under a test method not approved by EPA sufficient to establish threat of contamination under CERCLA). Further, failure to rigidly adhere to SW-846 does not render the sampling evidence inadmissible. People v. Hale, 29 Cal.App.4th 730, 734, 34 Cal.Rptr.2d 690 (1994) ("We discern no per se rule which automatically precludes the introduction of evidence of disposal of hazardous waste just because the gathering of the sample does not follow every jot and tittle of the EPA manual."). Any deviation from the guidance goes to the weight of the evidence and not its admissibility. People v. Sangani, 22 Cal.App.4th 1120, 1136-1137, 28 Cal.Rptr.2d 158 (1994) ("Failure to follow precise regulatory or statutory requirements for laboratory tests generally does not render the test results inadmissible, but instead goes to the weight accorded to the evidence.").

U.S. v. WCI Steel, 72 F. Supp. 2d at 823-824 (footnote omitted).[54]

In the present case, this Tribunal finds that the three samples collected by Ms. Elliott on

[54]*See also,* 60 Fed. Reg. 66344, 66387 (Dec. 21, 1995): "EPA believes it is important to retain the practical approach whereby a single composite sample of a waste at some arbitrary point in time or space during a short visit is considered sufficient for enforcement purposes."

August 2, 1999 are "representative" of the material from which they were collected, and that they are reliable and credible even if generally "established protocol" *may* have called for field blanks, trip blanks or equipment blanks, which were not taken in this case.

(c.) Incorrect VOC Collection Jars

Third, regarding Respondent's contention that Ms. Elliott "used the wrong collection jars for [Volatile Organic Compounds]," Dr. Boris testified as follows:

> Q: ... What kind of collections or jars or containers is one supposed to use to collect samples to be analyzed for volatiles?
> A: ... It should be glass and should ... have ... a special kind of septum with a Teflon lid. The septum is essentially a membrane that separates the plastic cap from the material itself, and that's what you use to collect volatiles. ...
> Q: Did the sampler use that kind of equipment? ...
> A: No... She used a 16 ounce glass container with, I believe, a plastic lid.

Tr. 12/9/03, p. 141. As neither Dr. Boris nor the Respondent explained the specific purpose of the "septum," this Tribunal is left to assume that the septum is used to prevent the loss ("volatilization") of the Volatile Organic Compounds ("VOCs"). Dr. Boris further testified, regarding sample integrity generally:

> Q: When you say [that if] it's too warm that it might lose some of your constituents, what constituents would you lose?
> A: You would probably lose volatiles, of course.
> Q: Would you lose metals?
> A: No.
> Q: And if you lost volatiles, what would that do to your sample results? Would it bias it high or low?
> A: It would make it lower.

Tr. 12/9/03, pp. 161-162. Respondent argues, "Even if the sampling errors may be more likely to result in a decrease rather than an increase in the reported results for certain constituents, that would be enough to interfere with the ability of an analytical chemist to formulate an accurate opinion on what the substance was." RPHB at 19-20 (emphasis added).

As noted *supra* in section IV.A.2.b. of this Initial Decision, expert testimony presented by both parties stated that the presence of VOCs indicates the presence of gasoline.[55] Therefore, to the extent that the bottles used by Ms. Elliott *may* not have strictly conformed to generally "established protocol," any error was harmless because it would have tended to show the absence, not the presence, of a hazardous waste. That is, the deviation from protocol would not affect the

[55] *See, e.g.*, Tr. 11/19/03, p. 51 (Mr. Fowler); Tr. 12/9/03, p. 233 (Mr. Wiseman).

reliability of laboratory analyses finding the presence of VOCs.

(d.) Conclusion

A preponderance of evidence in the record demonstrates that Ms. Elliott followed "established protocols for sample collection, preservation and transmittal,"[56] and that the three samples collected by Ms. Elliott on August 2, 1999 are "representative"[57] of the materials from which they were collected. Respondent's speculations regarding sample collection errors are not compelling and do not cast doubt on the representative nature of the samples or the accuracy of the laboratory analyses. Dr. Boris's concerns regarding Ms. Elliot's field notes are pure speculation. Regarding the absence of sample "blanks," Dr. Boris explained that the RCRA regulations at 40 C.F.R., Part 261, Appendix I require a sample to be "representative," but "leave[] [how you are to collect the sample so that it will be representative] up to the judgment of the person..." Tr. 12/10/03, p. 201. This Tribunal finds Ms. Elliott's samples to be reliable and credible even if Ms. Elliott did not follow "every jot and tittle"[58] of the non-mandatory "protocol" described by Dr. Boris. Finally, regarding the VOC collection jars, to the extent that the bottles used by Ms. Elliott *may* not have strictly conformed to Dr. Boris' "protocol," any such deviation was harmless because it would not affect the reliability of laboratory analyses finding the presence of VOCs which *did* remain despite the possible use of a type of jar which might allow VOCs to escape.

(2) Samples Compromised While in Ms. Elliot's Custody

Dr. Boris also suggested that the samples could have been compromised while in Ms. Elliott's custody between the time she collected them on August 2, 1999 and the time that FedEx picked them up on August 5, 1999.[59] Dr. Boris noted that the samples "sat around for three days" (Tr. 12/9/03, p. 132), and stated that "[i]t violates, you know, to a certain extent, what you should do when you have samples. When you collect samples, you want to get them to the lab as soon as you can." *Id.* at 157.[60] Specifically, Dr. Boris opined that somebody could "spill something" into the samples, the ice could melt which might "smear the label," the samples might become too warm causing a loss of VOCs, or the samples could become too cold which might break the glass

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[56]*See* CX-110, ¶ 6 (Declaration of Erin Newman).

[57]*See* 40 C.F.R., Part 261, Appendix I; Tr. 12/10/03, p. 201 (Dr. Boris).

[58]*See* U.S. v. WCI Steel, 72 F. Supp.2d at 824, *quoting* People v. Hale, 29 Cal.App.4th at 734.

[59]*See* CX-99, Bates 1522-1 (Chain of Custody form).

[60]*See also*, Tr. 12/9/03, pp. 160-161: "I don't know if their integrity was compromised during a three day period stored in some unknown location without 24 hour supervision."

containers. Tr. 12/9/03, pp. 158, 161-162. However, the ASI report at CX-99, Bates 1521, states: "The samples were received in good condition on 8-6-99 under Chain-of-Custody. All analysis was completed within legal holding times." Dr. Boris stated that this means that "the samples were not broken." Tr. 12/9/03, p. 160. Further, the unsigned Declaration of Erin Newman states: "Although the samples in this case were collected on 8/2/99 and not shipped until 8/5/99, they must have been housed our [sic] E&E secure warehouse during that time period, per our sampling procedures." CX-117, ¶ 8. Ms. Newman testified as follows:

> Q: Was the fact that [the samples] were collected on August 2 and not shipped until three days later somehow different than what you would have expected to have occurred?
> A: No, it's not.
> Q: Was it a deviation from any of ... Ecology and Environment's standard practices?
> A: No, it was not.

Tr. 11/20/03, pp. 83-84.

This Tribunal finds Ms. Newman's testimony in this regard to be credible. The statement in the ASI report that "[t]he samples were received in good condition" is reasonably construed to mean at least that the containers were not broken, that they did not appear to have anything spilled into the sample, and that the labels were not illegible. As discussed above, any loss of VOCs before analysis would not impair the credibility of the levels of VOCs which *were* found in the samples. The record contains no evidence to suggest that any of the things that Dr. Boris hypothesizes *could* have happened while the samples were in Ms. Elliott's custody actually *did* happen. To the contrary, the Chain of Custody form at CX-99, Bates 1522-1, the ASI report cover letter at CX-99, Bates 1521, the Declaration of Ms. Newman at CX-117, and the testimony of Ms. Newman all suggest that nothing compromised the integrity of the samples while in Ms. Elliott's custody. Finally, the CRA/Novi analyses of Mr. Beaudoin's "split samples," which were not in Ms. Elliott's custody, are generally in accord with the E&E/ASI analyses.

(3) Samples SS1 and SS3 Contained Asphalt

In addition, Respondent hypothesizes that samples SS1 and SS3 contained not "used oil" but asphalt, which, Respondent argues, could explain some of the analytical results for those samples.[61] Respondent argues:

> Mr. Wiseman also explained that positive results for TPH, BTU, oil and grease, phenanthrene, and pyrene indicate the presence of asphalt. (Tr. V at 228, 231 and

[61]Importantly, Respondent's "asphalt" argument speaks only to the question of whether "used oil" was present in samples SS1 and SS3. The argument does not speak to sample SS2 or to the presence of any non-used oil hazardous wastes in any of the samples.

232.) This begins to make sense, because Region 5 employee Erin Newman stated that Region 5's contractor's practice was to include chunks of asphalt in the sample taken from an area of "deteriorated asphalt." (Tr. III at 92.)

RPHB at 20 (emphasis added).

Respondent mischaracterizes Mr. Wiseman's cited testimony. Mr. Wiseman actually testified as follows, referring to the "Sample Results" set forth in Table 1 of the E&E "Letter Report" (CX-16, Bates 114-115).

Q: ... Does the fact that we have some substantial numbers reported for oil and grease mean that the substance from which ... those samples were taken must have included used oil?
A: No. Oil and grease is not a specific procedure. Oil and grease determines concentration of contaminants based on ... similar physical properties, primarily their solubility in the solvent that's used to extract them, whether it be freon or hexene. There are a number of other constituents that would also be soluble in freon or hexene; biological lipids, animal fats, vegetable oils, waxes, soaps, that could also be present in that material and be determined to be oil and grease. Asphalt may contribute.
Q: Why would asphalt test positive for oil and grease on these tests?
A: ... [A]nything that is soluble in that solvent is going to contribute to that oil and grease result, and asphalt includes a number of constituents that would be soluble in freon or hexene.
Q: So if a sampler ... included some crumbled pieces of asphalt in the sample, would that asphalt likely lead to a positive result for oil and grease?
A: It very well could contribute to the concentration that you get in your result.

Tr. 12/9/03, pp. 227-228 (emphasis added). Regarding "BTU," Mr. Wiseman testified:

Q: ... Does the fact that we have positive results for BTU for samples SS-1 and SS-3 mean that the material from which the samples were taken must have included used oil?
A: No, not necessarily. BTU, or British Thermal Units, is a measure of heat content, and just about anything that burns has some level of heat content, and that heat content could be attributed to bio mass, wood chips or wood or – asphalt would have a significant heat content. Gasoline also has a heat content value.

Id. at 230-231 (emphasis added). Regarding "phenanthrene" and "pyrene," Mr. Wisman testified:

Q: Going back to the results for semi-volatile organics ... [c]an you tell us what phenanthrene and pyrene represent?

A: They don't really represent anything specific. Both phenanthrene and pyrene are present in petroleum products. They may also be present in asphalt.

Id. at 231-232 (emphasis added). Finally, regarding "TPH,"[62] Mr. Wiseman testified:

Q: ... [D]o the numbers reported here for SS-1 and SS-3 for TPH DRO/GRO, do those indicate necessarily that the material from which those samples were taken contained used oil?
A: I'm really not sure what those numbers mean and what those numbers are based on so it's very difficult to answer that ... but ... I don't believe that alone is a characteristic of used oil.

Id. at 233-234 (emphasis added).

When considered in its entirety, the testimony of Mr. Wiseman, cited by Respondent, does not support Respondent's contention that "Mr. Wiseman ... explained that positive results for TPH, BTU, oil and grease, phenanthrene, and pyrene *indicate the presence* of asphalt." RPHB at 20 (emphasis added). Rather, Mr. Wiseman's testimony is more fairly characterized as suggesting that asphalt is one of many things (including used oil) that *could* contribute to a positive result for "oil and grease," for BTU, and for phenanthrene and pyrene; and that he cannot say for sure, based solely on the TPH values, *what* the sample is. That is, Mr. Wiseman stated that *some* of the parameters found for SS1 and SS3 could be *individually* explained by the presence of something other than "used oil," such as asphalt, but he did not rule out the possibility that the samples contained "used oil." Complainant's expert witnesses Ms. Brauer and Mr. Fowler also recognized some chemical similarities between asphalt and used oil.[63] However, Mr. Fowler stated that the test for total petroleum hydrocarbons ("TPH") "would not be affected at all" (Tr. 12/10/03, p. 126) by the presence of asphalt, and pointed out that any asphalt would be removed from the sample under the Toxicity Characteristic Leaching Procedure ("TCLP"),[64] and that the E&E samples were found to be acceptable. Tr. 11/19/03, pp. 69-70. Thus, Mr. Wiseman's testimony suggests that *some* amount of *some* of the test results for SS1 and SS3 *could* be explained by the presence of asphalt, as well as by the presence of used oil. Even if the

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[62]"TPH (DRO/GRO)" refers to "Total petroleum hydrocarbon (diesel-range organic / gasoline-range organic)." CX-16, Bates 115.

[63]Ms. Brauer agreed that "some constituents of asphalt pavement are petroleum and they would have some similarities to the chemical make-up of various oils..." Tr. 11/18/03, p. 130. Mr. Fowler agreed that the presence of asphalt in a sample "could contribute to a high BTU reading," testified that he "suspect[ed] that some components of ... asphalt would be measured to be in the oil and grease test," and agreed that new asphalt could "give you a positive hit for some of the semi-volatiles." Tr. 11/19/03, p. 66.

[64]*See* 40 C.F.R. §261.24.

record demonstrated that samples SS1 and SS3 in fact contained asphalt (which it does not), Mr. Wiseman's testimony, in light of all of the other testimonial and documentary evidence discussed above, would not rise to a preponderance of evidence establishing that asphalt alone, and not "used oil," was responsible for the test results.

Further, Respondent relies entirely upon the testimony of Ms. Newman, as follows, in support of its argument that samples SS1 and SS3 did in fact contain some amount of asphalt. Ms. Newman testified:

> Q: ... [B]ased on your knowledge either as a project manager who collected samples herself or with direct knowledge with Ms. Elliott, if you went to a site where there was broken up asphalt and you wanted to sample the site, would you collect, within the sample container, asphalt?
> A: Would I sample asphalt or would I collect it within a sample?
> Q: Would you collect it within a sample.
> A: Yes, sometimes we would have to collect things like asphalt, particularly on sites where the soil isn't necessarily just pure dirt per se but, you know, is a mix-mash of other debris, then yes, often that would be inside of the sample.

Tr. 11/20/03, pp. 91-92. Ms. Newman is speaking here in the abstract. This testimony does not establish that asphalt was, in fact, collected by Ms. Elliott with samples SS1 and SS3 in this case.

The record simply does not support Respondent's hypothesis that asphalt contained in samples SS1 and SS3, rather than used oil, accounted for the test results.

(4) Atmospheric Deposition and Previous Industrial Uses

Finally, although Respondent concedes that "some, but not all, of the hazardous constituents detected in these materials [sampled on August 2, 1999] may have come from the gasoline that was occasionally spilled when [Strong Steel's] employees attempted to remove gasoline tanks from cars," Respondent posits that "at least some of the hazardous constituents, including lead, may have originated from atmospheric deposition from former lead smelters in the area (RX 16), and from previous industrial occupants of the property going back to 1910. (Tr. V at 266-68)." RPHB at 48-49 (emphasis added).[65]

Respondent's "atmospheric deposition" hypothesis is an affirmative defense which Respondent must prove by a preponderance of the evidence. 40 C.F.R. § 22.24. The evidence in

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[65] *See also*, RPHB at 24: "As for the other two solid samples taken that day (SS1 and SS3), the testimony does not prove that the substances detected must have come from used oil, but may well have come from the asphalt, gasoline, atmospheric deposition, or in the fill material placed there by previous owners or occupants of the property..."

the record does not support Respondent's contention in this regard.

A three page article appearing in the October 27, 2003 *Detroit Free Press*, entitled "Cleanup of Former Lead Plant to Begin" was cited by Respondent in support of its "atmospheric deposition" theory. RX-16.[66] However, no testimony was presented to suggest that this was directly related to the Strong Steel site. No evidence was presented to link the article to the Strong Steel site, nor has Respondent attempted to explain what the precise significance of the article is (*e.g.*, what *specific amounts* of which *specific contaminants* it suggests have been atmospherically deposited at *specific sites* relevant to the present case).

Dr. Boris testified as follows regarding "atmospheric deposition:"

> You're in the heart of Detroit. You've got an incinerator, the Detroit incinerator that's known ... for emissions of things like mercury and lead, atmospheric deposition. You're close to an automotive plant with paint booths and VOCs. You just have – in this ... location, you've got too much possible cross contamination so you have to take a field blank.

Tr. 12/9/03, p. 138. However, as discussed above regarding field blanks, Dr. Boris conceded, referring to the Novi Labs analysis, that the sample results would not have atmospheric deposition of benzene at levels as high as that found in SS2 (559 mg/L), even if the site was near an automotive plant or processing facility. Tr. 12/9/03, pp. 178-179. Dr. Boris similarly testified regarding the sample result for 1,4 Dichlorobenzene (waste code D027), which has a regulatory limit of 7.5 mg/L, but for which Novi Labs found, in CX-18, Bates 174, a result of 967 mg/L. Tr. 12/9/03, pp. 179-180.

Regarding "previous industrial occupants," Respondent relies entirely on the testimony of Mr. Ring, who testified as follows:

> A: I specifically looked into the history and the past uses of the *adjacent* property which revealed some information about the history of the Strong Steel facility and other adjacent properties.
> Q: And what kind of uses had the Strong Steel property been put to in the past, before 1997?
> A: Industrial use was the main use for it and *the only one I really can remember*. The Strong Steel facility was the location of the Packard Motor Car Company back to at least 1939, and *I believe* it was industrial prior to that, back to at least 1910. *I'm not positive* if it was the Packard Motor Car Company or of it was something else... *I believe* portions of it were used as a trucking terminal and portions of it *may have* been used as a steel facility.

[66]RX-16 contains a fourth page which is part of a different article which was not admitted into the record. Tr. 11/18/03, p. 120.

I know adjacent to the Strong Steel facility ... was Detroit Steel Processing Company, *I believe*. Further west was Ginsburg (phon) and Son Metal Processing, and those were back to at least 1910.

Q: Would those kinds of uses ... potentially lead to the creation or disposal of different hazardous substances on a property used for those purposes?

A: They *may have*.

Tr. 12/9/03, pp. 267-268 (emphasis added). However, although Mr. Ring testified that he had performed "phase one" and "phase two site assessments" for Ferrous Processing "prior to acquisition" of some *other properties* (Tr. 12/9/03, pp. 261-262), he testified that neither he nor anyone else at CRA had performed an environmental investigation of *the Strong Steel facility* before Ferrous Processing acquired it, and that he has not "performed any environmental investigations or soil borings or things of that nature after Strong Steel acquired the property in 1997," except in connection with the Inland Waters excavations. *Id.* at 266. Mr. Ring further clarified that he had not conducted any tours of the Strong Steel facility prior to acquisition. Tr. 12/10/03, p. 12. Further, Steven Benacquisto agreed that in October 1997 the Strong Steel facility was a "clean facility." Tr. 11/19/03, p. 321.

To find that "atmospheric deposition" or "previous industrial occupants" are responsible for any portion of the used oil or hazardous waste found on and in the ground at the Strong Steel facility, based on the evidence presented by Respondent, would be pure speculation. Mr. Ring's memory regarding prior owners of the Strong Steel site and/or adjacent properties is far from certain, and Respondent provides no documentation in support of his testimony. Further, Respondent provides no evidence, documentary or otherwise, to show that there were in fact any *specific contaminants* that were deposited at the Strong Steel site prior to Respondent's ownership. Therefore, Respondent has failed to carry its burden of presenting a preponderance of evidence in support of its affirmative defense that "atmospheric deposition" or "previous industrial occupants" are responsible for any part of any used oil or hazardous waste present in or on the ground at the Strong Steel facility as of August 2, 1999 (the date on which the samples were collected).

d. Conclusion

For all of the foregoing reasons, a preponderance of the evidence in the record demonstrates that samples SS1 and SS3 were mainly "used oil," but were mixed with "hazardous wastes" such as gasoline, and that sample SS2 was mainly a "hazardous waste" in the form of gasoline. Respondent has failed to show that the sampling methodology employed by Cheryl Elliott was unreliable due to deficient field notes, the lack of field, trip or equipment blanks, or the use of an incorrect type of collection jar for VOCs. Respondent has also failed to show that the samples were compromised while in Ms. Elliott's custody, that samples SS1 and SS3 contained not "used oil" but asphalt, or that any hazardous constituents originated from

atmospheric deposition or previous industrial occupants. Therefore, this Tribunal finds that Respondent is responsible for the presence of the hazardous wastes of which samples SS1, SS2, and SS3 are representative. Further, because the wastes are mixtures of "used oil" and hazardous wastes, pursuant to MAC § 299.9809(2)(a) and 40 C.F.R. § 279.10(b), the wastes of which samples SS1, SS2, and SS3 are representative are subject to regulation not as "used oil," but rather as "hazardous waste."

3. Strong Steel Facility is a "Treatment, Storage, or Disposal" Facility

Regarding hazardous waste (as opposed to "used oil"), Count III of the Amended Complaint alleges that Respondent failed to respond to releases of hazardous waste in violation of MAC §§ 299.9601(1) and (2), 299.9607, and 40 C.F.R. §§ 264.56(b), (e) and (g). Amended Complaint, ¶¶ 79-81; CX-106, Bates 1919. The hazardous waste regulations at MAC § 299.9601 state that:

> (1) The standards in this part apply to owners and operators of all facilities that *treat, store, or dispose of hazardous waste*...
> (2) *Treatment, storage, or disposal facilities* ... shall be in compliance with all of the following rules: ...
> (b) *[MAC] 299.9607* Contingency plan and emergency procedures.

(Emphasis added). MAC § 299.9607(1) states: "Owners or operators of hazardous waste *treatment, storage, and disposal facilities* shall maintain a contingency plan for the facility and comply with all of the provisions of 40 C.F.R. part 264, subpart D, regarding the plan and emergency procedures..." (Emphasis added). In turn, 40 C.F.R. part 264, subpart D, at § 264.56, sets forth certain requirements in the event of a release of hazardous waste, including that the facility determine the extent of the release, contain the release, and properly dispose of the hazardous waste.

Because the requirements of MAC §§ 299.9601 and 299.9607 and 40 C.F.R. § 264.56 to respond to releases of hazardous waste apply to "treatment, storage, or disposal facilities" ("TSDs" or "TSD facilities"), the next question is whether the Strong Steel facility is such a "TSD facility." Specifically, Complainant has alleged that Respondent is a "disposal facility." Amended Complaint ¶ 88.B. For the reasons discussed below, this Tribunal finds that Strong Steel is a "disposal facility," and is therefore a "TSD facility."

The term "facility" is defined by MAC § 299.9103(r) as follows:

> "Facility" means all contiguous land and structures, other appurtenances, and improvements on the land used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units, such as 1 or more landfills or surface impoundments, or combinations of operational units. For the purpose of implementing corrective action under part 111 of the act, "facility" shall include all contiguous property under the control of the owner or operator...

The federal regulations at 40 C.F.R. § 260.10 contain parallel language.

> The term "disposal" is defined by MAC § 299.9102(bb) as follows:
>
> "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous waste into or on land or water in such manner that the hazardous waste or a constituent of the hazardous waste might enter the environment, be emitted into the air, or discharged into water, including groundwater.

The federal regulations at 40 C.F.R. § 260.10 contain parallel language.

> The term "disposal facility" is defined by MAC § 299.9102(cc) as follows:
>
> "Disposal facility" means a facility or a part of a facility at which hazardous waste, as defined by these rules, is intentionally placed into or on any land or water and at which hazardous waste will remain after closure. The term "disposal facility" does not include a corrective action management unit into which remediation wastes are placed.

(Emphasis added). The federal regulations at 40 C.F.R. § 260.10 contain parallel language.

The preamble in the Federal Register to the rule setting forth the definition of "disposal facility" in 40 C.F.R. § 260.10 states:

> Regardless of whether a discharge of hazardous waste is intentional or not, the human health and environmental effects are the same. Thus, intentional and unintentional discharges are included in the definition of "disposal."
>
> However, the Agency agrees that permits logically can only be required for intentional disposal of hazardous waste. Therefore, the definition of "disposal facility" has been modified to indicate the Agency's intent that the term does not apply to activities involving truly accidental discharge of hazardous waste.
>
> In addition, the definition has been further modified to make it clear that only facilities at which hazardous waste is to remain after closure are, for the purposes of these regulations, disposal facilities.

45 Fed. Reg. 33066, 33068 (May 19, 1980) (emphasis added).[67]

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[67]The preamble to a regulation may be consulted in determining the administrative construction and meaning of the final version of the regulation. Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 158 (1982); Martin v. American Cyanamid Co., 5 F.3d 140, 145 (6th Cir. 1993); Wyoming Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 53 (D.C. Cir.

Respondent argues that the Strong Steel facility does not meet the definition of "disposal facility" because "any spills were unintended, and ... Strong Steel ... has properly remediated the spill areas..." RPHB at 14 (citations omitted). That is, Respondent argues that: 1) the placement of hazardous materials into or on land or water was unintentional; and that 2) no hazardous waste was ever intended to "remain after closure." Therefore, Respondent argues that "[b]ecause its property does not meet the definition of 'disposal facility,' Strong Steel had no obligation to ... respond to releases under Count III." *Id.* at 16. Respondent relies in large measure on Judge McGuire's September 9, 2002 Order on Accelerated Decision, in which Judge McGuire, in the context of Count VI[68] of the original Complaint (alleging failure to properly notify), found a genuine issue of material fact as to whether the Strong Steel facility was a TSD facility because Complainant had failed to so allege in the original Complaint. Judge McGuire explained:

> Complainant posits that Respondent not only generated hazardous waste at its site but also was a treatment, storage, and disposal facility ("TSDF"), and failed to notify Michigan that it was disposing of hazardous waste on its property...
>
> Complainant is able to establish that Respondent disposed of hazardous waste on its property based upon the sampling evidence, the Hazardous Waste Manifests, and the Waste Characterization Report. ... The evidence supports a conclusion that hazardous automotive constituents were discharged, *i.e.*, spilled, leaked, etc., into the soil at Respondent's site. Thus, Respondent "disposed" of hazardous waste because the automotive waste stream was discharged, dumped, spilled, or leaked, etc., into or on the land in such a manner that the hazardous waste entered the soil at Respondent's property...
>
> Having concluded that Respondent disposed of hazardous waste on its property, the next factual inquiry is whether Respondent is the owner or operator "of a *facility* for the treatment, storage, or disposal" of hazardous waste. RCRA § 3010(a). The EPA regulations implementing RCRA define facility as "all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste." 40 C.F.R. § 260.10. The regulations also provide a more specific definition for a disposal facility – "disposal facility means a facility or part of a facility at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain after closure." *Id.*
>
> Although Respondent may have been disposing of hazardous waste on its property, it is unclear, as a matter of fact, whether Respondent operates a "facility" that subjects it to the notification requirements of Section 3010(a) of RCRA and its

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1999).

[68]While Count III of the *Amended* Complaint speaks to both "hazardous waste" and "used oil," Count III of the *original* Complaint spoke only to "used oil," so that Judge McGuire did not have occasion to address the "TSD facility" question in the context of Count III of the original Complaint.

> implementing regulations. Complainant failed to allege in the Complaint that Respondent operates a "facility" as defined by RCRA, 40 C.F.R. § 261.10, or MAC § 299.9103(l).[69] Because of this factual and jurisdictional omission, the undersigned cannot conclude that there is no genuine issue of material fact.

Order on Accelerated Decision at 31-33 (emphasis added).

Respondent argues that "Region 5 has completely ignored ALJ McGuire's warning that it would have to plead and prove that Strong Steel's plant was a 'disposal facility'..." RPHB at 13. However, under the heading of Count III, the Amended Complaint *does* allege that "Strong was the owner or operator of a hazardous waste disposal facility ..." Amended Complaint ¶ 88.B (emphasis added). This Tribunal finds that the evidence in the record demonstrates that Strong Steel meets the definition of "disposal facility" set forth at MAC § 299.9102(cc), as that term, appearing in 40 C.F.R. § 260.10 and parallel regulations in other states, has been interpreted and applied by the EPA and by the courts. A review of those interpretations follows.

In the case of *Everwood Treatment Co., Inc. and Cary W. Thigpen*, 1995 WL 441847, EPA Docket No. RCRA-IV-92-15-R (ALJ July 7, 1995) ("*Everwood I*"), the Administrative Law Judge (ALJ) held that the respondents' actions in burying accidentally spilled hazardous waste in a plastic-lined pit and holding it there for an extended period constituted the operation of a "hazardous waste disposal facility," and that the respondents' claimed intention to remove the hazardous waste at a future date did not relieve them of the obligation to obtain a permit.

There, Everwood Treatment Company had used a copper, chromate, and arsenic ("CCA") solution as part of its wood treatment process. The use of the CCA solution produced a sludge classified under EPA hazardous waste codes D004 for arsenic and D007 for chromium, which the respondents usually placed in drums and shipped to a permitted disposal facility. In June 1990, a pipe burst, releasing approximately 50 to 60 gallons of hazardous waste in a spill of about 10 feet in diameter. Using a backhoe, the respondents excavated three to four cubic yards of contaminated soil and placed it on a concrete slab, where it was treated with lime. Having no drums to put the contaminated soil into, the respondents dug a pit six feet in diameter and four feet deep, lined it with two layers of polyvinyl, treated the pit with lime, and, hauling the contaminated soil in one load on a flatbed truck, dumped the contaminated soil into the pit after it had been on the concrete slab for approximately four hours. The respondents then covered the contaminated soil with a 7,000 pound steel door and covered the area with the clean soil that had been removed to create the pit. Although the respondents ordered drums which would arrive in four to six weeks, the respondents claimed that they were in the process of moving to a new facility and planned to remove the contaminated soil when they moved in November, 1990. However, responding to an anonymous tip, the Alabama Department of Environmental Management ("ADEM") and the EPA investigated the site in February, 1991 and discovered the

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[69] It appears that the citations here to the regulations defining "facility" or "disposal facility" in the Order on Accelerated Decision are in error.

buried hazardous waste. Pursuant to an ADEM proposed order, Everwood hired Environmental Management Services ("EMS") to perform a site assessment in November, 1991, and in April, 1992, Everwood received approval from the ADEM to excavate the contaminated area. Everwood, through EMS, had the site excavated in June 1992. An area 11 feet in diameter by 9.5 feet deep was excavated and shipped to a permitted disposal facility. In January, 1993, EPA tested a number of samples at the site, concluding that "concentrations [were] substantially below the regulatory levels of 5 ppm for arsenic and chromium (40 CFR § 261.24(b))." *Everwood I*, Finding of Fact # 33.

EPA filed a thirteen-count Complaint and Compliance Order seeking a penalty of $497,500 for, *inter alia*, operating a hazardous waste disposal facility without a permit. The proposed penalty for that count included a 25% increase ($89,500) for "willfulness" because the respondents "knew of the toxicity of the waste and its proper handling, but elected not to manifest the waste off site." *Everwood I*, Finding of Fact # 37.

The respondents first argued that they did not operate a "disposal facility" because they were engaged in treatment or containment during an "immediate response" to a discharge of hazardous waste. The ALJ held:

> 4. An "immediate response" to the spill ... was not over until a reasonable time had elapsed in which Everwood could obtain drums or other suitable containers in which to store the contaminated material. Because ... a maximum of two to three weeks would be required to obtain drums and Everwood held the waste in the excavation far beyond this period, Everwood became subject to RCRA standards applicable to owners and operators of hazardous waste treatment, storage and disposal facilities (40 CFR Part 264).
>
> 5. Everwood's action in placing the contaminated material in a lined excavation at its plant prima facie constituted "disposal" of hazardous waste ... and its action in holding the waste in the excavation beyond the time an "immediate response" was over ... constituted operation of a "disposal facility" (40 CFR § 260.10).

Everwood I, Conclusions 4 and #5 (emphasis added).

The respondents in *Everwood I* next argued that they did not operate a "disposal facility" because they had always planned to remove the hazardous waste; that is, because waste would not "remain after closure." The ALJ observed that:

> The phrase "at which waste will remain after closure" is not part of the statutory definition of "disposal," but instead is contained in the regulatory definition of "disposal facility." The preamble to the initial RCRA regulation[70] makes it clear

[70] 45 Fed. Reg. 33066, 33068 (May 19, 1980), quoted *supra*.

> that, although it was recognized that the statutory definition of "disposal" did not include any requirement that "waste remain after closure," the inclusion of the phrase was in no sense inadvertent and such a requirement was considered essential to the existence of a "disposal facility." It is therefore concluded that, while mere "placement" of hazardous waste in or on the land equals "disposal," a requirement that "waste remain after closure" is essential to the existence of a "disposal facility."

Everwood I at 22 (footnotes omitted). As noted above, the respondents in *Everwood* had already excavated and disposed of the hazardous material to the satisfaction of the ADEM in June, 1992. Nevertheless, the ALJ found that:

> ...[A]cceptance of claims such as those presented by Everwood here that it intended to remove and dispose of the contaminated soil in the containment unit at an indefinite future date, as a defense to the charge it was operating a hazardous waste disposal facility without a permit, would open a potentially wide avenue for the avoidance of RCRA requirements and the evidence supporting such claims must be closely scrutinized... Placement of the contaminated soil in the ground was prima facie disposal and the creation of a hazardous waste disposal management unit or facility without a permit. *See Gordon Redd Lumber Company*, [5 E.A.D. 301 (EAB, 1994)], where respondent was held to have the burden of going forward with evidence to show entitlement to the 90-day storage exemption provided by 40 CFR § 262.34 from regulations otherwise applicable to TSD facilities (slip opinion at 32). The exemption here, if it qualifies as such, is even more tenuous and it is concluded that under all of the circumstances, Everwood's claimed intention to remove the waste from the containment unit when the Irvington plant was closed is too indefinite to relieve Respondents of the obligation to obtain a permit.

Everwood I at 23-24 (emphasis added).

Thus, the ALJ found the respondents in *Everwood I* to have operated a "disposal facility," based upon their intentional holding of accidentally spilled hazardous waste for more than two to three weeks (the time necessary for an "immediate response," *i.e.*, to obtain drums). However, regarding the penalty calculation, since the ALJ found that the "immediate response" could have lasted for two to three weeks, he concluded that "the 25 percent upward adjustment calculated by Complainant, because Mr. Thigpen did not immediately manifest the contaminated material off site to a licensed TSD facility, has no proper basis." *Everwood I* at 25. That is, the ALJ rejected the penalty increase which had been based on the "willfulness" factor found in the 1990 RCRA Penalty Policy, imposing a total penalty of $59,700.

The EPA appealed the ALJ's penalty determination to the EAB, which "vacate[d] the Presiding Officer's penalty determination and assess[ed] a penalty of $273,750," based in part on the EAB's finding that the violation was "willful." *Everwood Treatment Co., Inc. and Cary W.*

Thigpen, 6 E.A.D. 589, 591 (EAB, 1996) ("*Everwood II*"). Neither the EPA nor the respondents appealed the liability determination. *Id.* at 590-591.

Regarding the seriousness of the violation, the EAB held:

> ...[T]he Presiding Officer concluded that ... [Everwood's] burial and holding of the material in the burial pit constituted operation of a disposal facility... Through this unpermitted burial of hazardous waste in a concealed location at the facility, Everwood engaged in precisely the type of activity that RCRA was enacted to prevent... Such violations go to the heart of the RCRA program.

Id. at 603-604 (citations and footnote omitted) (emphasis added). Regarding "willfulness," the EAB stated that "under the totality of the circumstances" (*Id*. at 612), "Everwood's actions in burying the contaminated soil were willful and therefore justify an upward adjustment in the gravity-based penalty." *Id.* at 611.

The respondents appealed the EAB's decision to a Magistrate Judge, who wrote a Report and Recommendation to the U.S. District Court for the Southern District of Alabama recommending that the federal District Court grant summary judgment to the EPA. The District Court did grant summary judgement to the EPA, holding in part:

> ...[T]he EAB's finding of willfulness is supported by substantial evidence in the record of this case... In making this finding, the court is persuaded by petitioners' failure to report the spill or to remove the contaminated waste in the seven months prior to the administrative inspection that uncovered the violations... The question of whether an action was willful is a finding of fact.

Everwood Treatment Co., Inc. and Cary W. Thigpen v. U.S. Environmental Protection Agency, 1998 U.S. Dist. LEXIS 927, *27, including n.13 (S.D. Ala. 1998) ("Everwood III") (emphasis added).

In the present case, Complainant cites the *Everwood* cases for the proposition that "Respondent was the owner or operator of a disposal facility because the evidence demonstrates that Respondent intentionally placed hazardous waste into or onto the land and it has not completed closure," arguing that "[i]n *Everwood III* the District Court affirmed the [EAB's] reversal of the Presiding Officer's finding that the Respondent's actions were not willful." Complainant's Post-Hearing Reply Brief ("CPHRB") at 41 (emphasis added). Complainant's reliance on the *Everwood* cases regarding "intent" is somewhat misplaced in that, while the findings of the EAB and the District Court in *Everwood II* and Everwood III, respectively, regarding "willfulness" speak to the penalty calculation under the Penalty Policy, they do not speak to a determination of *liability* based upon the construction of the word "intentionally" in the regulatory definition of "disposal facility." Indeed, no party appealed the ALJ's determination of liability in *Everwood I*, and the "willful" factor in the RCRA Penalty Policy is simply not the same as the "intent" referenced in the "disposal facility" definition. However, for that very

reason, the ALJ's finding that Everwood *was* a "disposal facility" in *Everwood I* is instructive. This is so in two respects: the "intent" to "dispose" and the "intent" to "clean close."

First, regarding the "intent" to "dispose," it appears that the one-time spill from the broken pipe was an archetypal "truly accidental discharge" which does not convert a "generator" into a "disposal facility." However, once the hazardous waste was placed in the ground (ostensibly with the intent to later remove it), Everwood's "action in holding the waste in the excavation beyond the time an 'immediate response' was over ... constituted operation of a 'disposal facility.'" *Everwood I*, Conclusion # 5. That is, even accepting Everwood's argument that it did not "intend" to leave the material in the ground indefinitely, its doing so with the *knowledge* of its presence converted Everwood into a disposal facility.

In the present case, the actions of Strong Steel in initially placing hazardous wastes into or on the ground are more analogous to Everwood's placing the hazardous wastes in the excavated pit than to the spillage from the broken pipe. This is so because the releases of hazardous waste at Strong Steel were ongoing releases, endemic to the daily operation of the facility, that were done *routinely* and with the *knowledge* that they were occurring.[71] This is simply not analogous to a one-time "*truly* accidental" break in a pipe. However, *even if* this Tribunal were to believe that Strong Steel's ongoing releases from the automobiles were the type of "truly accidental discharges" contemplated by the rule, Strong Steel clearly had knowledge that contaminated soil was present in or on the ground upon receiving the ASI analyses of Mr. Beaudoin's "split samples" taken on August 2, 1999 (the "Analytical Reports" are dated August 10, 1999)[72], but made no attempt to ascertain the extent of contamination and/or remove the contaminated soil until the first Inland Waters excavation eight months later on April 11, 2000. Further, that first excavation was not entirely successful, and Strong Steel had knowledge that contaminated soil remained at the site upon receiving the results of the verification samples taken after the April 11, 2000 excavation,[73] but took no action to remove those hazardous wastes until the *second* Inland Waters excavation nearly a year later on March 1, 2001.[74] Strong Steel's knowingly holding

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[71]This point is addressed more fully, below, in the discussion of Fishel v. Westinghouse Elec. Corp., 617 F. Supp. 1531 (M.D. Pa. 1985).

[72]RX-10, Attachments A and B; CX-101, Bates 1725-1732.

[73] The verification sample results are dated April 27, 2000. RX-10, Table 1; CX-101, Bates 1734-35.

[74]On March 1, 2001, Inland Waters conducted a second excavation because verification sample S-JL-003 collected and analyzed in April, 2000 from the southern "significantly deteriorated asphalt area" had shown significantly elevated levels of lead. Mr. Ring testified: "Q: ... When did you receive those verification samples in April of 2000, the sample results? A: I believe it was near the end of April, probably two to three weeks after they were collected [on April 11, 2000]. ... Q: So from April of 2000 to March of 2001, the same soil sat there; is that correct? A: Yes." Tr. 12/10/03, pp. 33-34. In fact, the two 20-cubic yard roll-off boxes

hazardous wastes in the ground from August, 1999 (when Respondent received the "split sample" results) to March, 2001 (when Inland Waters performed the second excavation) is directly analogous to Everwood's knowingly holding hazardous wastes beyond the two to three weeks necessary for an "immediate response" in that case.

Second, regarding the "intent" to "clean close," despite the fact that the Everwood site had *already* been cleaned up to the satisfaction of the ADEM, the ALJ found that any claim by a party that they intended, during the period of the disposal, to remove the hazardous waste is "too indefinite" to save the party from TSD facility designation. *Everwood I* at 24. The ALJ first states that any such claims "would open a potentially wide avenue for the avoidance of RCRA requirements and the evidence supporting such claims must be *closely scrutinized*." *Id.* at 23. (emphasis added). The ALJ then goes on to find that such evidence in that case, consisting of Mr. Thigpen's testimony, upon close scrutiny, is *credible*. *Id.* at 23-24 (emphasis added). However, the ALJ *nevertheless* finds that "Everwood's claimed intention to remove the waste from the containment unit when the Irvington plant was closed is *too indefinite* to relieve Respondents of the obligation to obtain a permit." *Id.* at 24. (emphasis added).[75] Thus, the ALJ found that the evidence must be "closely scrutinized" for both "credibility" *and* "definiteness."

In the present case, Respondent argues:

> ...[T]he evidence shows that ... Strong Steel ... has properly remediated the spill areas to levels that are safe for residential use. (RX 10 and 11). The MDEQ has accepted Strong Steel's report of its remediation in accordance with Part 201 of the Natural Resources and Environmental Protection Act, Michigan's counterpart of Superfund, and acknowledged that "we have evaluated the data and the contaminant levels were below generic residential criteria for the parameters tested at the three areas of concern." (RX 11).

RPHB at 14. That the "MDEQ has accepted Strong Steel's report of its remediation" (to the extent that it may have done so[76]) does not – as the respondents' having excavated to the satisfaction of the ADEM in *Everwood* did not – suggest that Respondent intended, *at the time of*

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excavated on March 1, 2001 were not finally disposed of until April 19, 2001. RX-10, Att. F; CX-101, Bates 1783-84; CX-18, Bates 217-18.

[75]*See also*, U.S. v. Power Engineering Co., 191 F.3d 1224, 1232 (10th Cir. 1999): "Defendants essentially contend that any generator currently disposing of hazardous waste on their facility does not have to comply with regulations for TSD facilities so long as they intend to clean up the waste before closure. There is no basis in the provision cited for such a sweeping subjective loophole."

[76]The extent to which "MDEQ has accepted Strong Steel's report of its remediation" is addressed more fully, *infra*, in the "Compliance Order" discussion regarding Respondent's argument that "RCRA closure is moot."

the "disposal,"[77] to ultimately remove all hazardous wastes, such that the Strong Steel facility was not a facility "at which hazardous waste will remain after closure."

Next, in Fishel v. Westinghouse Elec. Corp., 617 F. Supp. 1531 (M.D. Pa. 1985), neighbors of a Westinghouse manufacturing plant sued the plant for, *inter alia*, violations of RCRA stemming from the leakage of stored hazardous wastes into the ground. In denying the defendant's motion to dismiss, the court shed some light on the meaning of the statement in the preamble to the regulatory definition of "disposal facility" in the Federal Register that "permits logically can only be required for intentional disposal of hazardous waste." 45 Fed. Reg. 33066, 33068 (May 19, 1980). In Fishel, the court first observed that:

> We reject plaintiffs' contention that an accidental discharge of wastes could subject Westinghouse to ... regulation [as a "disposal facility"]... [The definition of "disposal facility"] clearly contemplates *intentional conduct* on the part of the operator. This construction of the regulations makes sense, of course, because *a person could hardly be called upon to obtain a permit for property upon which he does not anticipate disposing of wastes*.

Fishel, 617 F. Supp. at 1537 (emphasis added). However, the court's ultimate finding and underlying reasoning strongly suggests that the "intentional conduct" necessary was not the intent to "dispose" of hazardous waste, but simply the intent to "use ... [the] plant site" in such a way that hazardous waste came to be disposed. The court explained:

> Westinghouse ... contends that, because it never intentionally used its plant site *as a dump*, it did not have to meet the permit requirement and regulations promulgated to enforce RCRA in connection with disposal facilities...
>
> [W]e conclude that plaintiffs have stated a good cause of action for a *hazardous waste facility disposal* violation based upon the storage of solvents on two areas of the plant...
>
> The complaint sets forth two areas of misconduct by Westinghouse at its plant. One was the cleaning of grates over a storm drain; the other was the storage and eventual *leakage* of solvents into the ground at two locations on the plant site. In connection with the *latter* conduct, we believe that the allegations of the complaint can fairly be read to charge Westinghouse with *intentional disposal* of wastes on the site and, hence, *the site comes within the definition of a waste disposal facility*...
>
> Therefore, Westinghouse's *intentional use of its plant site* could result in its being subject to regulations as a disposal facility [under the definition of "disposal facility" at 40 C.F.R. § 260.10].

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[77] As noted *supra*, although Judge McGuire declined to find that the Strong Steel facility was a "disposal facility," he did determine that a "disposal" of hazardous wastes occurred on the Strong Steel site. Order on Accelerated Decision at 31-33.

Id. at 1537-1537 (citations omitted) (emphases added).

Westinghouse surely did not "intend" for the "leakage" which constituted the "disposal" to occur. An intent to "use[] its plant site as a dump" was not the "intentional conduct" necessary to find an "intentional disposal." Rather, it was Westinghouse's "intentional use of its plant site" in such a way that "eventual leakage" occurred which subjected the plant to regulation as a "disposal facility." Similarly, in the present case, Strong Steel need not have "intended" to use its facility as a dump in order to be a "disposal facility." It does not help Respondent's position that it was not the *goal*, *purpose*, or *objective* of the Strong Steel operation to place hazardous material into or on the land. The purpose of the Strong Steel operation was to "shred" automobiles (and other items) in order to obtain sellable ferrous material. Strong Steel is a "disposal facility" because the "disposal" of hazardous wastes was a necessary byproduct of the intentional manner in which Strong Steel operated its facility in pursuit of that objective. Such disposal, while not the primary *objective* of the operation, was done routinely and with Respondent's knowledge.

That the disposal was routine, ongoing daily, and done with Respondent's knowledge is clear from the following facts: Strong Steel processes approximately 2,000 tons of scrap metal per day, the vast majority of which consists of "junked" automobiles. Tr. 11/21/03, p. 66. Between March, 1997 and July, 2003, Strong Steel processed approximately 756,572 vehicles, averaging 9,826 vehicles per month. RX-27 at 1. Steven Benacquisto estimated that Strong Steel received 400-500 vehicles per day in 1999. Tr. 11/19/03, p. 327. Mr. Beaudoin similarly estimated that Strong Steel processes 300 to 500 vehicles per day. Tr. 12/9/03, pp. 49-50. At times, there may be "over a thousand cars stacked up on the site." Tr. 12/9/03, p. 50. Between March 1997 and July 2004, Strong Steel received approximately 643,096 crushed vehicles and 113,476 uncrushed vehicles. RX-27. Steven Benacquisto testified that Strong Steel receives approximately 100 uncrushed vehicles per day. Tr. 11/19/03, pp. 326-327. Mr. Beaudoin testified that Strong Steel routinely crushed the uncrushed vehicles on the site. Tr. 12/9/03, pp. 75-76. As discussed in detail, *supra*, in section IV.A.2.a of this Initial Decision, the testimony and concomitant documentation presented by Mr. Powers, Mr. Opek, Ms. Vogen, and Mr. Arkell (regarding his interviews with Mr. Zagreski, Mr. James, and Ms. Brown), clearly demonstrates that gasoline, used oil, and other automotive fluids routinely leaked from both the crushed and uncrushed vehicles onto the Strong Steel site. This finding is supported also by the testimony of Respondent's witnesses, demonstrating that they had knowledge of routine releases of used oil and gasoline. For example, Mr. Beaudoin testified that during the July 22, 1999 inspection he "saw drips of oil on the ground" and "a sheen on the surface of a puddle" and smelled gasoline in the temporary compaction area. Tr. 12/9/03, pp. 83-85. Steven Benacquisto, referring to the photograph of a flatbed truck loaded with approximately 15-20 crushed automobiles (CX-1, Bates 6), forthrightly explained that: "This load, I'm sure they had some liquid dripping from them. *All crushed bodies have a little bit*." Tr. 11/19/03, p. 331 (emphasis added). Mr. Benacquisto elaborated that such "liquids" would be composed of "automotive liquids" including "some oils." *Id.* Referring to the large puddle of liquid depicted in the photograph at CX-1, Bates 8, Mr. Benacquisto stated that "it was a combination of dirt, mud and some oil that was in the mud from the car bodies." *Id.* at 332. Mr. Benacquisto further testified that Strong Steel would accept shipments of crushed automobiles with "a drip here and there." *Id.* at 350. Indeed, Respondent

acknowledges that "[s]ome ... of the hazardous constituents detected in [the soil] may have come from *the gasoline that was occasionally spilled when [Strong Steel's] employees attempted to remove gasoline tanks from cars*..." RPHB at 48-49 (emphasis added). Also as discussed in detail, *supra*, in section IV.A.2.a of this Initial Decision, the evidence (including the testimony of Respondent's witness Mr. Ring and RX-28) demonstrates that, by a conservative estimate, Strong Steel processed approximately 4,117 "whole cars" (10% of the "uncrushed cars," which were 10% of all cars) between March 1997 and July 1999, thereby releasing approximately 8,234 gallons of gasoline and used oil into or on the land. Considering the totality of the evidence, it is simply not believable that Respondent was unaware of this "leakage." The release of hazardous wastes occasioned by this operation was not a "truly accidental discharge" contemplated by the rule, such as the broken pipe in *Everwood*, but rather, as in Fishel, resulted from Strong Steel's "intentional use of its plant site" in such a way that "leakage" occurred which subjects Strong Steel to regulation as a "disposal facility."

Next, in U.S. v. Allegan Metal Finishing Co., 696 F. Supp. 275 (W.D. Mich. 1988), the court found that the defendant operated a "disposal facility" in that it placed hazardous wastewater, generated as a byproduct of its operation as a metal finishing facility, into two "holding ponds," despite the defendant's assertion that it had no knowledge that the wastewater was "hazardous waste," and that it had no intent that any hazardous waste would "remain after closure." There, the court stated.:

> Here, defendant argues that while it intended to place its wastewaters in the holding ponds, it did so "without the knowledge or understanding that they would subsequently be characterized as 'hazardous' and certainly with no intent that they would remain after closure." Defendant argues further that its EPA-approved closure plan is characterized as a "clean-close" which apparently means that the wastes in the ponds are to be completely excavated and transported off-site for disposal.
>
> I simply cannot accept defendant's crabbed definition of "land disposal facility" *drawn from the regulatory definition of "disposal facility"* found at 40 C.F.R. § 261.10... Nor will I read into the statute some "state of mind" requirement as to whether the waste and/or wastewater at issue is "hazardous" *or whether the defendant intended the waste to remain [after closure]*. It its clear that a facility is subject to regulations *as a "disposal facility,"* and/or a "land disposal facility" *where the facility is "intentionally used" to discharge hazardous waste*. Even more important, the civil violations of RCRA provisions are properly characterized as strict liability offenses.

Id. at 287 (citations omitted) (emphasis added). Thus, as in Fishel, the "intentional conduct" which subjected the Allegan Metal facility to regulation as a "disposal facility" was not the intentional disposal of hazardous waste, but the intentional "use of the facility" in such a way that hazardous waste was thereby disposed – the defendant in Allegan Metal need not have even been aware that the solid waste was "hazardous waste." Further, as in *Everwood*, the court in Allegan Metal was unpersuaded by the defendant's claimed intention to remove the hazardous waste,

despite the fact that the defendant had an EPA-approved "clean closure" plan in place.

Respondent here might argue that Allegan Metal is distinguishable from the instant case in that, while Allegan Metal *intentionally* "place[d] its wastewaters in the holding ponds," the placement of used oil and gasoline on the ground at the Strong Steel site was the "unintentional" consequence of its processing of crushed, uncrushed, and/or "whole" automobiles. However, for the reasons discussed above, this Tribunal finds that Strong Steel *routinely* and *knowingly* allowed hazardous waste to be placed into and on the ground. To allow regulation of a "disposal facility" to turn on whether the operator "intentionally placed" hazardous waste on the ground or "knowingly allowed" hazardous waste to be placed on the ground would eviscerate the purposes of RCRA to "... assur[e] that hazardous waste management practices are conducted in a manner which protects human health and the environment." 42 U.S.C. § 6902(a)(4).[78] The EPA included the word "intentionally" in the definition of "disposal facility" to exempt "truly accidental discharge of hazardous waste" because "permits logically can only be required for intentional disposal..." 45 Fed. Reg. 33066, 33068 (May 19, 1980). As articulated by the court in Fishel, "a person could hardly be called upon to obtain a permit for property upon which he does not anticipate disposing of wastes." Fishel, 617 F. Supp. at 1537. In the present case, Respondent did anticipate (or should have anticipated) disposing of the thousands of gallons of hazardous waste generated by its automobile recycling operations, and Respondent's routine and knowing allowance of hazardous waste emplacement on the ground was simply not a "truly accidental discharge" as contemplated by the rule.

Next, in Westfarm Assoc. v. International Fabricare Institute, 846 F. Supp. 422 (D. Md. 1993), a property owner (Westfarm) brought an action under RCRA and other statutes against an adjoining landowner dry cleaners' trade association after discovering perchloroethylene ("PCE"), a hazardous substance, in the groundwater under its (Westfarm's) land. The defendant had for years been pouring PCE wastes down a drain which lead to a cracked sewer pipe. *Id.* at 427. In ruling on cross-motions for summary judgment, the court held, in part, that the defendant was *not* a "disposal facility." The court explained:

> Westfarm asserts that because the Tech Road site is a TSD facility, IFI must comply with the applicable regulations in the Maryland hazardous waste

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[78] *See also,* U.S. v. Power Engineering, 10 F. Supp.2d 1145, 1147 (D. Colo. 1998) ("The intent of this regulatory scheme is to minimize the potential for public health and environmental problems resulting from improper management of hazardous waste. The potential for public health and environmental problems, including hazards associated with fire, explosion, direct contact, and contamination of air, surface water, and groundwater resulting from inadequate management is well-documented. *See, e.g.,* H.R. Rep. No. 94-1491, at 17-24 (1976), *reprinted in* 1980 U.S.C.C.A.N. 6238, 6254-6261 (documenting hazardous waste tragedies in several states.")); U.S. v. Allegan Metal Finishing Co., 696 F. Supp. 275, 286 (W.D. Mich. 1998) ("[RCRA] is a tough statute designed to address potentially life-threatening problems."); 45 Fed. Reg. 33084, 33084-33085 (May 19, 1980).

program pertaining to such facilities. In opposition to those assertions, IFI argues that the Tech Road site was neither a disposal facility nor a treatment facility.

... [T]he Maryland regulations broadly define the term "disposal" to include both active and passive human activity. However, those same regulations define a "disposal facility" narrowly as "a facility or part of a facility at which hazardous waste is *intentionally* placed into or on any land or water, and at which waste will remain after closure." COMAR 26.13.01.03B(16) (emphasis added). IFI argues that it never intentionally placed PCE in the soil or groundwater at the Tech Road site, and the plaintiff has failed to submit evidence to support an inference to the contrary. Although IFI admittedly poured PCE wastes down the drain and placed PCE wastes in its dumpster, this Court cannot conclude that IFI *intended* the PCE to leak into the ground or groundwater at the Tech Road site or to remain there indefinitely. As a result, this Court cannot conclude that IFI is the owner and operator of a disposal facility under the Maryland hazardous waste program.

Westfarm, 846 F. Supp. at 435 (italics in original) (underlining added). As in *Everwood*, the "truly accidental discharge" at issue in Westfarm involved a broken pipe. The defendant in Westfarm intended to pour the hazardous waste down the drain (and through the sewer pipe), but did not intend for the waste to spill into or on the land through the cracks in the sewer pipe. It also appears that the defendant did not have *knowledge* that such was occurring. These facts are clearly distinguishable from those in the present case. Here, it is *not* the case that Strong Steel containerized the hazardous wastes dripping or pouring from the automobiles as they were processed, from which containers or conduits the wastes spilled due to a failure of the container or conduit. Rather, Strong Steel knowingly allowed the waste to be placed directly into or on the ground.

In U.S. v. Power Engineering Co., 10 F. Supp. 2d 1145 (D. Colo. 1998) ("Power Engineering I"), the EPA brought suit against a metal refinishing facility under RCRA for, *inter alia*, illegal disposal of hazardous waste. The court described the facts at issue as follows:

From 1978 to 1992, hazardous waste *leaked* into the soil beneath the Facility's 17 chrome-plating tanks... Beginning in 1985 and concluding in 1994, [Power Engineering Co. ("PEC")] installed additional containment structures underneath the plating tanks.

During installation of these additional containment structures, PEC *excavated some, but not all, of the soil* beneath [the] plating tanks. Although PEC *knew* that the soil was discolored by chrome contamination, PEC did not investigate the precise toxicity of the soil or ascertain the quantity of contaminated soil. PEC placed some of the excavated soil into three *open waste piles*... These three waste piles remain there today. PEC placed the remainder of excavated soil into fifty-five gallon drums, which PEC eventually shipped to a permitted waste disposal facility in 1993.

PEC utilizes "air scrubbers" ... to draw air from above the plating baths located inside the Facility's main building...

> Beginning in 1978, a yellow/orange liquid *leaked* from air scrubbers down the west side of the Facility's main building into the soil. The [Colorado Department of Public Health and Environment ("CDPHE")] assayed this liquid in 1992 and determined that it contained 250,000 ppm of hexavalent chromium, 50,000 times the concentration permissible in soil. Despite having *knowledge of the leaking liquid* since the late 1980's, and despite being informed by the CDPHE in 1992 that *allowing such liquid to leak into the soil constituted illegal disposal*, PEC did nothing to repair the leaks until August 1994. Although the yellow/orange liquid no longer leaks down the west side of the Facility's main building into the soil, the *soil remains contaminated*.

Power Engineering I, 10 F. Supp. 2d 1150-1151 (citations omitted) (emphases added). Thus, the facts at issue in Power Engineering closely parallel those at issue in the present case, where Strong Steel knowingly allowed hazardous waste to leak onto the ground and into the soil, constituting illegal "disposal,"[79] and first excavated some, but not all, of the contaminated soil (*i.e.*, the first Inland Waters excavation on April 11, 2000), but allowed some contaminated soil to remain in the ground for nearly a year before finally excavating the rest (*i.e.* the second Inland Waters excavation on March 1, 2001).

The court in Power Engineering I granted the EPA's motion for a preliminary injunction requiring TSD facilities to provide financial assurances for improper disposal of hazardous waste. The defendants in Power Engineering I appealed the District Court's Order for Preliminary Injunction to the Tenth Circuit in U.S. v. Power Engineering Co., 191 F.3d 1224 (10th Cir. 1999) ("Power Engineering II"). There, the defendants argued that:

> ...[E]ven if they are disposers of hazardous waste, they are not a disposal facility and therefore not a TSD facility. Defendants rely on C.C.R. § 260.10, which defines a "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 after closure*." Defendants argue that because they intend "to remedy the contamination of the site while PEC is still a going concern," no waste will remain after closure, thereby precluding them from being a disposal facility by definition.
>
> We find no merit to this argument. Defendants essentially contend that any generator currently disposing of hazardous waste on their facility does not have to comply with regulations for TSD facilities so long as they intend to clean up the waste before closure. There is no basis in the provision cited for such a sweeping subjective loophole. As an initial matter, the intent element in the definition of "disposal facility" pertains to whether hazardous waste was "intentionally placed" on land or water, not whether the polluter intends the hazardous waste to remain. *Cf.* United States v. Allegan Metal Finishing Co., 696 F. Supp. 275, 287 (W.D.Mich. 1988) (refusing to read into 42 U.S.C. § 6925(e), interim status

[79] *See, e.g.*, Order on Accelerated Decision at 31-33.

> provision for "land disposal facility," "a state of mind requirement," based on the regulatory definition of "disposal facility," as to "whether the defendant intended the waste to remain [after closure]" (quotations omitted)). As the EPA has indicated, the purpose of the intent element in the definition of "disposal facility" is "to indicate the [EPA's] intent that the term does not apply to activities involving truly accidental discharge of hazardous waste," because the EPA posits that "permits logically can only be required for intentional disposal of hazardous waste." 45 Fed.Reg. 33066, 33068 (1980).

Power Engineering II, 191 F.3d at 1232 (italics in original) (underlining added). Thus, on facts very similar to those at issue in the present case, the defendants in Power Engineering II advanced the very same arguments to the Tenth Circuit as does Strong Steel here regarding their "intent" to "dispose" and their "intent" that no hazardous waste "remain after closure" in connection with the definition of "disposal facility." As did the ALJ in *Everwood* and, even more forcefully, the court in Allegan Metal, the court in Power Engineering II soundly rejected the latter argument. Although the Power Engineering II court did not squarely address the former argument, the court found that it too held "no merit."

This Tribunal similarly finds that, because Strong Steel knowingly and routinely allowed hazardous waste to leak onto the ground and remain in the soil beyond the time necessary for an "immediate response," the Strong Steel facility is a "disposal facility" within the meaning of MAC § 299.9102(cc) and 40 C.F.R. § 260.10.[80]

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[80]In regard to this Count, the Complaint does not explicitly allege that Strong Steel is a "*storage facility*" as well as, or as an alternative to being, a "disposal facility." The term "storage" is defined by MAC § 299.9107(dd) as follows: "'Storage' means the holding of hazardous waste for a temporary period at the end of which the hazardous waste is treated, disposed of, or stored elsewhere" and the federal regulations at 40 C.F.R. § 260.10 contain parallel language. "Facility" is defined as indicated in the main text above. However, neither the Code of Federal Regulations nor the Michigan Administrative Code define the term "*storage facility*" (as compared to "disposal facility"). The Complaint alleged and the evidence shows that Respondent stored on its site hazardous waste in two 55-gallon drums for over a year before, indicating that the Strong Steel site *was* a "storage facility," at least as regards to those drums. *See*, discussion *supra* at section D.5. regarding Count VI as well as Complaint, ¶ 60 ("From at least April 11, 2000 to April 18, 2001, Strong stored at the Strong facility at least 2 fifty five gallon drums containing contaminated soils excavated from the battery storage area."); ¶ 130. B. ("Strong's actions identified in paragraphs 47-66 and consisting of ... retaining drums [of hazardous waste] on-site for over one year, and subsequently transporting the ... drums off-site for disposal at another location is indicative of storage of hazardous waste at Strong Steel. The Strong property . . . was a facility as that term is defined in MAC § 299.9103(1) [40 C.F.R. § 260.10];" see, also ¶¶ 134, 134, RX-10, p. 3, Att. E (waste manifest); CX-101, Bates 1781 (waste manifest).

4. Respondent Failed to Properly Respond for At Least 179 Days

Count III of the Amended Complaint alleges that Respondent failed to respond to releases of hazardous waste in violation of MAC §§ 299.9601(1) and (2), 299.9607, and 40 C.F.R. §§ 264.56(b), (e) and (g), for at least 179 days. Complaint, ¶¶ 79-81. Those provisions, taken together, require TSD facilities to immediately identify the character and extent of a release of hazardous waste, contain the release, and properly dispose of the hazardous waste.[81] As discussed above, the evidence in the record demonstrates that Strong Steel is a "disposal facility," and that hazardous waste was present in and on the ground at least as of August 2, 1999 (the date on which Mr. Powers and Ms. Elliott collected samples SS1, SS2, and SS3). Respondent did not "immediately identify the character, exact source, amount, and areal extent of any released materials," as required by 40 C.F.R. § 264.56(b). Rather, Respondent did not identify the full extent of the release until the second Inland Waters excavation on March 1, 2001. Similarly, Respondent did not "take all reasonable measures necessary to ensure that ... releases do not ... spread" or "provide for ... disposing of ... contaminated soil ...," as required by 40 C.F.R. §§ 264.56(e) and (g), until the second Inland Waters excavation on March 1, 2001. Even if Respondent's first excavation on April 11, 2000 was deemed an adequate response,[82] Respondent still would have failed to respond for well over 179 days.

For all of the foregoing reasons, Respondent failed to respond to releases of hazardous waste in violation of MAC §§ 299.9601(1) and (2), MAC § 299.9607, and 40 C.F.R. §§ 264.56(b), (e) and (g), for at least 179 days, as alleged in Count III of the Amended Complaint.

B. Count IV – Illegal Storage or Disposal of Used Oil on the Ground

Count IV of the Amended Complaint alleges that Respondent illegally stored or disposed of "used oil" and does not pertain to "hazardous waste." Respondent explains that "Count IV alleges illegal storage *or* disposal as an *alternative* basis for liability. Liability will attach under Count IV if either alternative is proven." CPHB at 54 (emphases added). More specifically, the Amended Complaint alleges:

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[81] More specifically, owners and operators of TSD facilities must "immediately identify the character, exact source, amount, and areal extent of any released materials," "take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread," and "provide for treating, storing, or disposing of recovered waste, contaminated soil or surface water, or any other material that results from a release, fire, or explosion at the facility." 40 C.F.R. §§ 264.56 (b), (e), and (g), applicable to TSD facilities via MAC §§ 299.9601(1) and (2), and MAC § 299.9607(1).

[82] As discussed above, the April 11, 2000 excavation is not an adequate response because the verification samples taken from that excavation demonstrated that toxic levels of lead remained in the ground, yet Respondent allowed the soil to remain in the ground until March 1, 2001, when Inland Waters excavated another 40 cubic yards of soil.

> Strong violated MAC § 299.9810(4) [40 C.F.R. 279.12(a) and 279.22(a)] when it disposed of the used oil on the ground and thus stored it in a unit other than a used oil tank or container... Alternatively, at the time it placed or allowed the placement of used oil on the ground Strong did not have a state or federal permit for such activities. Strong's actions constituted disposal of used oil. Consequently, Strong violated MAC § 299.9816 (40 C.F.R. Supart I)...

Amended Complaint, ¶¶ 100(A) and (B) (emphasis added).

Count IV of the original Complaint alleged only that Respondent illegally "stored" used oil on the ground. Original Complaint, ¶¶ 89-100. Judge McGuire denied Complaint's Motion for Accelerated Decision on that Count due to the existence of a genuine issue of material fact as to whether samples SS1, SS2, and/or SS3 consisted of "used oil." Order on Accelerated Decision at 15. In so doing, Judge McGuire noted that:

> ...[I]t is part of Complainant's prima facie case to prove that Respondent was "storing" used oil on the ground... [T]here appears to be little, if any legal basis to support the alleged violation. The undersigned therefore remains skeptical that Complainant will be able to prove that Respondent was in fact "storing," as that term is defined by applicable regulation, used oil on the ground.

Order on Accelerated Decision at 17, n.13. Complainant thereafter amended Count IV of the Complaint to include "disposal" of "used oil" on the ground as an "alternative" basis for liability.

In the present case, as discussed *infra* regarding Count VI, were it necessary to decide whether Respondent illegally "stored" or, alternatively, "disposed of" used oil on or in the ground, this Tribunal would find that the used oil was not "stored" on or in the ground, but rather was "disposed of" on or in the ground.

This Tribunal, however, need not reach that question in the context of Count IV, which alleges that Respondent illegally stored or disposed of *used oil*. As noted *supra*, "used oil" which is mixed with "hazardous waste" is subject to regulation not as "used oil," but rather as "hazardous waste." *See* MAC § 299.9809(2)(a) and 40 C.F.R. § 279.10(b). This Tribunal has already found that samples SS1, SS2, and SS3 are representative samples of mixtures of "used oil" and "hazardous waste." While Count IV of the Amended Complaint alleges illegal storage and disposal of "*used oil*," Count VII alleges illegal storage and disposal of "*hazardous waste*." Indeed, Michael Beedle, the EPA Investigator who calculated the penalty proposed in the Amended Complaint, stated that the penalty sought for Count IV is "compressed" into Count VII because: "... since Count IV dealt with disposal, in part, and then Count VII dealt with disposal, in part again, disposal and storage of hazardous waste on the ground, I felt that it would be appropriate to seek one penalty for these violations." Tr. 11/19/03, p. 249.

The material which samples SS1, SS2, and SS3 represent is a mixture of "used oil" and "hazardous waste." Therefore, pursuant to MAC § 299.9809(2)(a) and 40 C.F.R. § 279.10(b), it

is subject to regulation as "hazardous waste" as alleged in Count VII of the Amended Complaint, but it is *not* also subject to regulation as "used oil" as alleged in Count IV of the Amended Complaint. Count IV of the Amended Complaint is therefore dismissed.

C. Count V – Failure to Label Used Oil Containers

Count V of the Amended Complaint alleges that Respondent failed to properly label containers of "used oil." Specifically, the Amended Complaint alleges that:

> The liquids contained within the 250 gallon [above ground storage tank ("AST")] identified in paragraph 26,[83] in drums located within buildings at the facility and in the automobiles and their engine oil pans identified in paragraph 47 - 49 were ... used oil... Strong violated MAC 299.9810(3) [40 C.F.R. § 279.22(c)] when it stored the used oil in the AST, drums, automobiles and their engine oil pans without labeling or marking them "Used Oil."

Amended Complaint, ¶¶ 108 and 111 (emphasis added).

MAC § 299.9810(3) states that: "A used oil generator shall comply with the provisions of 40 C.F.R. §§ 279.22..." The federal regulations at 40 C.F.R. § 279.22(c)(1), in turn, state that: "Containers and above-ground tanks used to store used oil at generator facilities must be labeled or marked clearly with the words 'Used Oil.'"

1. The Above Ground Storage Tank ("AST") and the "Automobiles and Oil Pans"

The original Complaint did not allege a failure to label "drums," but only a failure to label the AST and the "automobiles and their engine oil pans." The Amended Complaint sets forth the additional allegation regarding failure to label "drums." In its Post-Hearing Brief, however, Complainant states that it "is withdrawing that portion of the Complaint alleging labeling deficiencies for the 250 gallons above ground storage tank." CBHB at 56. Further, regarding the automobiles and oil pans, Judge McGuire granted Respondent's Motion for Accelerated Decision on Count V "regarding its obligation to label the automobiles and engine oil pans" (Order on Accelerated Decision at 21), finding that "this inquiry turns on whether automobiles and engine oil pans at Respondent's site are containers," (*Id*. at 19), and concluding that the "EPA did not envision that automobiles and engine oil pans would constitute proper storage units under the Used Oil Management regulations." *Id.* at 20. Thus, Judge McGuire's ruling on this issue became the law of this case and may not be relitigated in subsequent stages of this proceeding

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[83]Paragraph 26 of the Amended Complaint states: "A 250 gallon AST was located at the Strong facility in the finished products building. This AST was used to collect waste oil."

except to prevent plain error.[84] *See, e.g., J.V. Peters & Co.*, 7 E.A.D. 77, 93 (EAB 1997), *aff'd sub nom. Shillman v. United States*,1:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part*, 221 F.3d 1336 (6th Cir. 2000), *cert. denied sub nom. J.V. Peters & Co. v. United States*, 69 U.S.L.W. 3269 (Jan. 8, 2001) (citing JAMES W. MOORE, MOORE'S FEDERAL PRACTICE PP 404[1] & 404[10](2d ed. 1991)) (a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation); *Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 482 (EAB 1999); *Lyon County Landfill*, 2002 EPA App. LEXIS 4, *27 , 2002 EPA App. LEXIS 4 (EAB 2002); *Rogers Corporation*, 2000 EPA App. LEXIS 28, * , 2000 EPA App. LEXIS 28 (EAB 2000); *Bethenergy*, 1992 EPA App. LEXIS 74, *7; 3 E.A.D. 802 (EAB 1992) (while the doctrine of the law of the case is a heavy deterrent to vacillation on arguable issues, it is not designed to prevent the correction of plain error), *citing* 1B Moore's Federal Practice § 0.404[1] (2nd Ed. 1991).

Complainant "requests this Court to reconsider Judge McGuire's ruling as it relates to labeling of the automobiles and engine oil pans and find [that] the Respondent failed to properly label these containers." CPHB at 59. Complainant first argues that "[a]s a legal matter the definition of container does not require [that] it be a 'proper storage unit' (i.e. have structural integrity)." *Id.* at 58. Second, Complainant contends that "[f]rom a policy perspective, by requiring a container to be structurally sound Judge McGuire is exempting from the used oil management standards containers that are in poor condition." *Id.* Third, Complainant asserts that "[a]s a factual matter [Judge McGuire's] decision is predicated on his [incorrect] finding that the Respondent only received crushed cars." *Id.* at 59. *See also*, CPHRB at 75-77.

This Tribunal finds that Complainant has not shown "plain error" in Judge McGuire's ruling regarding the labeling of "automobiles and their engine oil pans" in the context of Count V of the Complaint. Therefore, Complainant may raise such issue, if Complainant deems it appropriate, in a proper appeal of this Initial Decision. However, the undersigned will not reopen and reconsider Judge McGuire's ruling in this regard at this stage of the administrative proceeding.

2. The Six Drums

Therefore, the only remaining allegation of "failure to label 'used oil' containers" pertains to six[85] 55-gallon "drums" observed by Mr. Opek and photographed by Mr. Powers in the

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[84] Plain error is defined as an error "so obvious and substantial that failure to correct it would infringe a party's due process rights and damage the integrity of the judicial process." Black's Law Dictionary 563 (7th ed. 1999).

[85]Complainant argues that "[t]he Complaint is not limited to six drums. It states that the Respondent failed to label drums with the words used oil. See, paragraphs 108, 110 and 111. <u>*The evidence produced at hearing does, however, rely on the photographs of six drums*</u>." CPHRB at 71, n.50 (emphases added). Indeed, the evidence in the record regarding failure to

"finished products building" (a.k.a. the "stacker building"),[86] located in the northwestern corner of the Strong Steel facility,[87] on July 22, 1999. *See* CPHB at 56. Complainant does not allege that these drums contained "used oil" derived from the scrap automobiles, but rather that the drums contained used "hydraulic and other oils" which had been used to lubricate equipment at the Strong Steel facility such as the "shredder and conveyor boxes..., loaders and other equipment which was serviced by Michigan CAT and Wolverine Tractor and Equipment." CPHB at 57 (citations and footnote omitted). Complainant summarizes:

> For the unlabeled drums, the evidence produced at hearing consisted of the photographs taken by Mr. Powers, his observations of the drums; his notes and recollection of Mr. Opek's activities; and the information from Vesco and Respondent.

CPHB at 56. Complainant further explains:

> Complainant did not cite to Mr. Opek's testimony to establish liability. It relied on the testimony of Mr. Powers, Ms. Brauer and the information request responses by Respondent and Vesco. Complainant consciously did not rely on Mr. Opek because of his absence from this case... Complainant offered Mr. Opek as a witness primarily to authenticate his inspection report. Mr. Opek's inspection report is credible because it was made at or near the time of the inspection. It was based on Mr. Opek's review of his notes.

CPHRB at 69 (footnotes omitted).

Thus, in support of the alleged failure to label the six drums of "used oil," Complainant draws this Tribunal's attention to Mr. Powers' testimony, photographs, and notes; Ms. Brauer's testimony; the RCRA § 3007 Information Request Responses from Respondent and Vesco Oil Corporation ("Vesco"); and Mr. Opek's September 14, 1999 "inspection report" attached as "Exhibit #2" to Mr. Opek's November 10, 2003 "Declaration," although Complainant expressly does not rely upon Mr. Opek's oral testimony or, apparently, the November 10, 2003 "Declaration" itself.

a. The Photographs of the Six Drums

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label drums pertains to the six drums shown in the photograph entered at CX-1, Bates 3, and the argument presented at the hearing in this matter focused on these six drums with regard to Count V of the Amended Complaint. Complainant has not presented any argument or evidence that any other *particular* drums contained "used oil." Therefore, this Tribunal construes Count V to pertain only to the six drums depicted in the photograph at CX-1, Bates 3.

[86]*See, e.g.*, Tr. 11/21/03, p. 135 (ln. 2-4); Tr. 11/19/03, pp. 310 (ln. 11-13), 339 (ln. 1-6).

[87]CX-85; CX-115.

The contents of the drums depicted in the photographs at CX-1, Bates 2 and 3, is not at all discernable from the photographs alone, and this Tribunal declines Complainant's invitation to infer the contents from the condition of the drums. Complainant argues:

> The drums were being handled in a manner that would suggest that they were not product. They were not neatly stacked. They were not shrink wrapped like the drums of product identified in photo 1. They were stored in a dark area at the northern end of the facility. This is an area that was a distance from the main entrance to the building. It was some distance from where vehicles could easily come in with shipments of new drums.
>
> The drums were in a condition that you would anticipate they contained waste not product. They were rusted; their seals were gone; and there was oil at the base of the drums. Other drums in the area were leaking what appeared to be oil. The labels that were on the drums were in poor shape.

CPHB at 56-57 (citations omitted).[88]

In response to this argument, Respondent presented the testimony Ms. Carroll, who stated that the barrels contained new unused "hydraulic oil or grease,"[89] and that while the shrink-wrapped drums in photograph # 1 were from a recent shipment, the virgin oil in the non-shrink-wrapped drums in photograph # 3 had been partially extracted for use. Tr. 11/21/03, pp. 91-92.[90] Steven Benacquisto similarly testified:

> Q: And would you look at [CX-1, Bates 3]? ... Those are not new oil cans as they came to you, are they?
> A: Well, no. They've been – the wrapping's been taken off of them, okay, but some oil has been probably taken out of them, but there's still new oil in there.
> Q: These ... cans here with these aging marks on them contain fresh oil?
> A: You have to understand. The building they're in, it's a very dirty, dusty

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[88]*See also*, CPHRB at 73: "The drums were rusted, with grease or oil on them. They were located in the back of the Finished Products Building. . . . . If as Respondent suggests the Finished Products Building was a generally dirty environment you would expect the drums to be sealed. Otherwise, the material inside the drums could become contaminated."

[89]Ms. Carroll explained that "The red [drums] would either be hydraulic oil or grease and the blue [drums] would be coolant or anti-freeze product ... [because] it's just the way the manufacturer distributes them or color codes them." Tr. 11/21/03, p. 90.

[90]*See also*, [First] Affidavit of Lisa Carroll, ¶ 5: "I recognize the drums shown in the pictures identified as photos #2 and #3. These drums did not contain used oil, but contained either new hydraulic oil or antifreeze. We keep these drums in the stacker building to hold unused products until needed." CX-93, Bates 1507.

building.

Q: But don't they look rusted to you?
A: Yes, they do.
Q: Well, how old do you think these cans are? ...
A: I couldn't tell you how old they are... It's a very dirty environment.
Q: Did you ever put used oil, oil that you collected from your plant, back into cans ... and store them?
A: No.

Tr. 11/19/03, pp. 367-368.

This Tribunal agrees with Complainant that the six drums in photograph # 3 (CX-1, Bates 3) were in such a condition that one *might* well guess that they did not contain fresh oil (or any other new, unused, and/or fresh product). The dirtiness of the "finished products building" does not explain the rust on the drums, which rust Steven Benacquisto acknowledged that he recognized. Rather, the rust and generally poor condition of the drums tends to show that they are not new (although suggesting a precise age would be pure speculation), and perhaps that they have been exposed to moisture. However, the conclusion that, because the drums appear to be old, one might guess that the contents of the drums are old, does not tend to show what, if anything, the drums in fact contained, let alone that they contained "used oil." The photographs alone, depicting the condition and location[91] of the drums, does not approach a preponderance of the evidence that the drums contained *anything* in particular. In this regard, while this Tribunal finds Respondent's suggestion that the drums depicted in photograph # 3 contained the same "fresh oil product" as the drums depicted in photograph #1 to be highly suspect, Respondent's point is nevertheless well taken that "the condition of the drums provides no rational basis to conclude that they contain used oil... [and] [s]uch a conclusion would be pure speculation." RPHB at 31.

b. Mr. Opek's Investigation of the Six Drums

This Tribunal notes that Mr. Opek is, in fact, the only person to have conducted any sort of "investigation" of the six drums here at issue. Yet, Mr. Opek's testimony sheds little light on either the contents of the drums or his "investigation." Mr. Opek testified:

Q: Do you recall what penalty you suggested for Count Five, which was supposed to be failure to label used oil containers?
A: I do not recall.
Q: Does ... $7,150 sound about right?

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[91]Regarding the location of the drums "in the back of the [building]" (CPHB at 73), one might speculate that new product would logically be loaded from back to front, so that the oldest drums would in fact be at the back of the building while the newest drums would be near the entrance.

A: Sounds about right.
Q: Do you recall how many containers of used oil that were not labeled that you had in mind when you came up with that number?
A: It's not what I had in my mind. That was in my notes, so whatever is in my notes that is what the number of ***drums*** were.
Q: Okay. We don't have your notes.
A: I don't have them either. That would help both of us.

Tr. 11/18/03, p. 247 (emphases added).[92] However, while Mr. Opek calculated the proposed penalty for the *original* Complaint, Mr. Beedle calculated the proposed penalty for the *Amended* Complaint.[93] Because the original Complaint *did not allege a failure to label "drums"* of used oil (but only the AST and the automobiles and their oil pans), it is illogical to conclude (and this Tribunal does not so conclude) that Mr. Opek considered the "drums" *at all* in calculating the penalty proposed by the *original* Complaint.

Mr. Opek also authenticated his "Declaration" of November 10, 2003 and its eleven attachments. Tr. 11/18/03, pp. 226-228, 240. That "Declaration" states, in part, that "EXHIBIT #2 [i]s a copy of my Compliance Evaluation Report [a.k.a., September 14, 1999 "inspection report"] on the Strong Steel Products' facility which was based on my observation during my inspection in July of 1999." CX-111 at 2. That "inspection report" of September 14, 1999 does not mention "drums" at all. *Id.* at "Exhibit #2," pp. 1-4. Nevertheless, the November 10, 2003 "Declaration" also states:

> EXHIBIT # 4 [i]s a copy of a photograph of six (6) 55 gallon oil drums that were stored in violation of RCRA used oil regulations. At the time of the inspection, these oil drums were located in the scrap building (See Exhibit #6). *The violation was determined by visual, smell, color, and fluidity test examination.*

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[92]Mr. Opek explained: "Normally, the way I do my inspections and ... paperwork is that after the inspection I have my hand notes and ... whenever I have time to get back to each inspection, then I do write a typed report... So this report has been obviously written September the 14th, which is two months later, something like that. And it's based on all my handwritten notes in my own notebook." Tr. 11/18/03, pp. 241-242. However, Mr. Opek's handwritten notes were not offered into evidence, as Complainant explained: "Complainant could not locate field notes from Mr. Opek." Complainant's Post-Hearing Reply Brief ("CPHRB") at 70, n.49.

[93]Complainant's Motion for Leave to Amend the Complaint was filed on August 1, 2003. Mr. Opek testified on November 18, 2003 that "... I do not recall exactly the [original] penalty calculation... I've been out of the office *for two years* and this case is not fresh in my memory at this time. I did not review our file and I cannot tell you any numbers ... at this moment." Tr. 11/18/03, p. 246 (emphasis added). Therefore, Mr. Opek was disassociated with this case well before the Complaint was Amended to include an allegation of failure to label "drums" of "used oil."

CX-111 at 2 (emphases added). "Exhibit # 4" is a copy of the photograph of the six drums entered as CX-1, Bates 3 and CX-86, Bates 1210. This statement in Mr. Opek's November 10, 2003 "Declaration" is the *only* evidence in the record suggesting that Mr. Opek *may* have looked inside the drums, and as discussed below, is in contrast to significant evidence to the contrary.[94] Further, Complainant expressly does not rely on this "Declaration" to establish liability, but rather upon Mr. Opek's "inspection report." CBPH at 56; CPHRB at 69. Complainant states that:

> Complainant offered Mr. Opek as a witness primarily to authenticate his *[September 14, 1999] inspection report*. Mr. Opek's report is credible because it was made *at or near the time of the inspection*. It was *based on Mr. Opek's review of his notes*.

Id. (emphases added). Thus, it is important not to confuse Mr. Opek's November 10, 2003 "Declaration" with his September 14, 1999 "inspection report." If the latter is "credible because it was made at or near the time of the inspection," then the corollary implication is that the former is *not* credible because it was *not* made at or near the time of the inspection. While the "Declaration" suggests that Mr. Opek may have looked inside the six drums, the "inspection report" does not mention "drums." Similarly, while Mr. Opek's testimony suggests that he based his original proposed penalty to some extent on the existence of unlabeled "drums" of "used oil," (a proposition severely undermined by the fact that the original Complaint did not allege the failure to label "drums" of used oil), he admitted that he could not remember any more specific information about the "drums" without his field notes. As already noted, Complainant was unable to produce those field notes. However, since Complainant suggests that Mr. Opek's September 14, 1999 "inspection report" is "credible" because "[i]t was based on Mr. Opek's review of his notes," (CPHRB at 69, footnote omitted), and because that "inspection report" does not mention "drums" of used oil, it is reasonable to conclude that Mr. Opek's notes did not mention "drums" of used oil, either.

Finally, Attachment # 10 to Mr. Opek's "Declaration" is Mr. Powers' "photo log" corresponding to the photographs taken by Mr. Powers on July 22, 1999 and entered as CX-1, Bates 1-18. Regarding photograph #3, the photo log states: "Oil storage barrels, 6 'used oil' drums." CX-111, Att. 10. At this point, then, it is useful to turn to an examination of Mr. Powers' testimony.

c. Mr. Powers' Testimony, Photographs, and Notes

Mr. Powers' first "Declaration" of May 21, 2002 states: "During the July 22, 1999 inspection I observed and photographed ... six drums containing used oil (photo #3)." CX-86,

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[94]Complainant acknowledges: "Since his accident in March of 2002 Mr. Opek has not been involved with this case. It is no wonder that Mr. Opek's testimony might have some inconsistencies in it related to present recollection of past events." CPHRB at 69, n.48. Mr. Opek's direct "testimony" consisted of his November 10, 2003 "Declaration."

Bates 1201, ¶ 17. Mr. Powers's second "Declaration" of June 20, 2002 also contains the "photo log" describing photograph # 3 as "Oil storage barrels, 6 'used oil' drums." CX-87, Bates 1228. That June 20, 2002 "Declaration" elaborates:

> The drums in photos #2 and #3 were located at the time of the inspection at the north end of [the finished products] building. I photographed these drums at the request of George Opek. *I entered a description of the drums on my photo log based on the statements of others during the inspection – <u>most likely George Opek</u>.*

CX-87, Bates 1222, ¶ 1 (emphases added).

Mr. Powers similarly testified as follows:

> Q: And Mr. Powers, if I could turn your attention to [CX-1, Bates 3]? Can you describe for us what was depicted in that photo?
> A: These were some drums... They looked like they had been used. The drum's [sic] seals were gone on them and they were rusted so I took a picture of those drums, and I had put down that they were used oil. *I think that was based on conversations with George Opek and the Strong Steel staff.*

Tr. 11/18/03, p. 152 (emphasis added). Mr. Powers elaborated:

> Q: Now, what does it mean when it says used oil in quotes there [on the photo log]?
> A: Well, that's what I was trying to recall. I was going around asking what was in the oil tanks and drums in order to document ... for the purposes of the SPCC ... what was oil storage. And for some reason, I marked down, used oil. *I think it was because either George Opek told me that was used oil or in <u>his</u> conversations with Strong officials they told <u>me</u> that was used oil in those drums*.[95] So that's why I put that down.
> Q: Did either you or George Opek or anybody else from EPA perform any tests on those drums or their contents?
> A: *<u>No. We didn't open any drums</u>*.

Tr. 11/18/03, pp. 195-196 (emphases added).

Thus, Mr. Powers clearly did not himself determine what the six drums contained. His

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[95] Due to the contradiction in this statement between "his conversations" and "they told me," it is unclear whether Mr. Powers means to say that Strong Steel officials made the statements directly to Mr. Powers, or rather that Strong Steel officials made the statements to Mr. Opek, who then repeated them to Mr. Powers.

testimony that nobody from the inspection team ever "open[ed] any drums" directly contradicts any implication which could be drawn from the statement in Mr. Opek's November 10, 2003 "Declaration" that "[t]he violation was determined by visual, smell, color, and fluidity test examination" to the effect that the drums were opened and the contents in any way evaluated. CX-111 at 2. Indeed, nothing in any of the "Exhibits" and/or attachments to Mr. Opek's "Declaration," including the September 14, 1999 "inspection report," suggests that Mr. Opek determined *what* was in the six drums, let alone *how* such a determination was made. Similarly, Mr. Opek offered no testimony whatsoever to suggest how he determined that the six drums contained used oil, or that he either looked in the drums or spoke with a Strong Steel employee about the contents of the drums. Therefore, the statement in Mr. Opek's "Declaration" that "[t]he violation was determined by visual, smell, color, and fluidity test examination," written over four years after the inspection and without the aid of his notes, must be completely discounted in light of Mr. Powers' certitude that they "didn't open any drums," and his belief that the determination that the six drums contained "used oil" was made based on unsubstantiated statements made to either Mr. Powers or Mr. Opek by unknown Strong Steel "officials."

Thus, Mr. Powers essentially says, simply, that he wrote down "Oil storage barrels, 6 'used oil' drums" in his photo log because Mr. Opek told him that the six drums contained "used oil," and that while nobody ever opened any of the drums (let alone sampled them), Mr. Powers thinks that somebody from Strong Steel told Mr. Opek that the drums contained used oil. The question comes back, then, to Mr. Opek.[96]

d. Other Testimony Regarding Mr. Opek's Investigation of the Six Drums

Mr. Powers' somewhat uncertain belief that someone at Strong Steel told Mr. Opek that the drums contained used oil is directly contradicted by the testimony of Mr. Beaudoin, who testified:

> Q: Mr. Beaudoin were you with Mr. Opek when he observed drums located in the finished product, shipping and storage area?
> A: Yes... He asked the crowd that was with him in general what was contained in those ... drums. And the site personnel responded to him...
> Q: And do you remember what the individuals from Strong Steel said was located ... in those drums?

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[96]Mr. Beedle confirmed that: "... [A] photograph was taken of these drums that weren't labeled. *Mr. Opek is the one that identified them as used oil*." Tr. 11/19/03, p. 257 (emphases added). *See also, Id.* at 259 (Mr. Beedle): "I did look at ... the 3 picture ... the pictures I know *George identified* as used oil that were – used oil drums that were not labeled." (Emphases added). Ms. Brauer similarly testified that she "inferred" that someone from Strong Steel had told George Opek that the drums contained used oil, although Mr. Opek never told her that. Tr. 11/18/03, pp. 123-124.

A: Well, their belief was *fresh oil product*.

Tr. 12/9/03, pp. 97-98 (emphasis added).

Steven Benacquisto's testimony supports Mr. Powers' statement that they "didn't open any drums," as Mr. Benacquisto stated:

Q: When you were walking around with him, did George or anybody else from EPA look inside any drums or tanks?
A: In the ... stacker building, ... there's new drums there of oil, ... and he, you know, swished them around... He just kind of shook the drum.
Q: ... Did he look inside?
A: No.
Q: Do you recall whether those drums had tops or closures on them?
A: There was tops on them. There was one hole, though, the small hole on the top, you know, that you'd put a spicket [sic] in or something, was open.
Q: Did you see George or anybody else from EPA do any kind of tests on any of these drums or their contents aside from swishing them around?
A: No... [E]verybody ... was just kind of like following George. He was just kind of leading the tour so no, no one else did anything... He was kind of just showing them ... what a scrap operation is.

Tr. 11/19/03, pp. 310-311. *See also, Id.* at 338-339.

Similarly, both Ms. Carroll (Tr. 11/21/03, p. 89) and Mr. Beaudoin (Tr. 12/9/03, p. 49) testified that, during the July 22, 1999 inspection, they did not see Mr. Opek or any other inspector test or sample any drums.

e. The Information Request Responses from Respondent and Vesco Oil Corporation

As noted above, Complainant argues that "[f]or the unlabeled drums, the evidence produced at hearing ... [included] the information from Vesco and Respondent." CPHB at 56. More specifically, Complainant argues:

> *Judge McGuire found that the Respondent used drums to empty used oil into the 250 gallon [AST]. Order, p. 4.* The evidence supports the fact that the Respondent did generate used oil that it containerized in drums. The Respondent had equipment at the facility which used hydraulic and other oils for lubrication. The shredder and conveyor boxes used hydraulic oils. The loaders and other equipment used oil which was serviced by Michigan CAT and Wolverine Tractor and Equipment... Although these companies serviced the equipment they did not transport all of the collected used oil from Strong. For example, Wolverine Tractor and Equipment only transported 30% of the waste oil it generated at

> Strong. (CX 18, 000256).
>
> Vesco Oil transported the waste oil from Strong once enough was accumulated for disposal. Prior to September 26, 2000, Vesco had not picked up waste oil from Respondent. Prior to that date there were no shipments of used oil from Respondent's facility. On that date Vesco picked up 970 gallons of used oil in 40 drums from Respondent's facility. (SB, TrVI, p. 146; CX 103, 001804).
>
> Based on the facts presented it is *reasonable to infer* that some, if not all, of the waste oil Vesco picked up was present in drums at the facility during the inspection on July 22, 1999.

CPHB at 57 (citations and footnotes omitted) (emphasis added). Complainant elaborates:

> [The evidence] demonstrates that Respondent accumulated used oil on-site until there was enough to ship. Michigan CAT and Wolverine did not transport off-site any oil other than the oil their equipment produced. CX 18, p. 000168, A.2. It also establishes that Respondent used Vesco for the accumulated shipments. CX 18, p. 000168, A.2. ... Prior to July 28, 1999, Vesco had not provided Respondent with any tanks to store the used oil in. CX 103, p. 001803, A.4 and p. 001807, Q.4. The only shipment of used oil from Strong to Vesco occurred in September of 2000 and consisted of 40 drums of used oil. CX 103, p. 001803, A.3 and 4; p. 001807, Q.3 and 4; SRB, TRVI, p. 146... The evidence therefore, supports that at the time of the inspection there was used oil generated by Respondent and which had not been shipped off-site by either Michigan CAT, Wolverine or Vesco.

CBHRB at 74-75 (citations of footnote omitted).

As an initial matter, this Tribunal notes that Judge McGuire's reference to "drums" in the last sentence of the second full paragraph on page 4 of his Order on Accelerated Decision appears to actually intend to refer to "containers." Judge McGuire found:

> Located in the finished products area, is a 250 gallon [AST] which contains used oil. See Answer ¶¶ 26, 108, 110; Complt's Ex. 64 (Respondent's SPCC Plan). Also in this area are small containers such as drums. *See Complt's Ex. 64 at 10*. *Respondent uses these drums to transport used oil to the 250 gallon AST*. Id.

Order on Accelerated Decision at 4 (emphases added). CX-64 of Complainant's Pre-hearing Exchange ("PHE") – Respondent's SPCC Plan – is identical to CX-64 entered into evidence at the hearing. Judge McGuire's citation in support of his statement that "Respondent uses these drums to transport used oil to the 250 gallon AST" – Complainant's PHE CX-64 at 10 – actually states: "One 250-gallon ... waste oil tank is located in the finished product building. *Waste oil is emptied into this tank from smaller containers*." CX-64, Bates 803, ¶ 5.2.1.3 (emphases added). Thus, to the extent that Complainant may rely on the quoted portion of the Order on Accelerated Decision for the proposition that Respondent transferred used oil into the AST from unlabeled "drums," such reliance is misplaced.

Complainant's remaining argument is, in essence, that prior to the July 22, 1999 inspection, Respondent used hydraulic oil in its machinery, thereby generating "used oil;" that Respondent did not have a functioning[97] "used oil" AST until July 28, 1999; that Michigan CAT and Wolverine Tractor and Equipment ("Wolverine") serviced the equipment (including changing the oil) but only transported some, but not *all*, of the used oil that it removed from the equipment off-site; and that on September 26, 2000, Vesco picked up 970 gallons of used oil in 40 drums from the Strong Steel facility. Therefore, Complainant reasons, there *must* have been *some* unlabeled drums of used oil at the Strong Steel facility as of the July 22, 1999 inspection. The unstated assumption in this logical syllogism is that the inspectors, during the July 22, 1999 inspection, inspected *all* of the drums at the facility and determined that *none* of the drums were labeled "used oil."[98] Before turning to the merits of this argument, this Tribunal notes that nothing in this argument indicates that the *particular six drums* in the photograph at CX-1, Bates 3, contained "used oil."[99]

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[97]It remains somewhat unclear whether Complainant alleges the absence of a "used oil / waste oil" AST at all, or the absence of a properly labeled AST, or that an AST existed but was not used and/or was not properly labeled. As discussed below, while the matter is not entirely clear, it appears that the 250-gallon AST depicted at CX-1, Bates 4, which is *not* labeled "used oil," was present in the Finished Products Building on July 22, 1999 but was empty, and that the 250-gallon AST depicted in RX-4-9, which *is* labeled "used oil," was not present at the Strong Steel site on July 22, 1999.

[98]Apparently in support of this unstated premise that any and all drums must have been inspected (or at least observed) by the inspectors on July 22, 1999, Complainant elicited testimony from Ms. Carroll at the hearing that all "drums" of any kind were generally kept in the "finished products/stacker building." Tr. 11/21/03, p. 132, ln. 17-25; p. 134, ln. 22 - p. 135, ln.16. However, Ms. Carroll's testimony in this regard was not entirely unequivocal, as she stated: "...*mostly* the barrels are always in this particular area." *Id.* at 132, ln. 24-25 (emphasis added). Further, Complainant *itself* argues, in refuting Ms. Carroll's testimony that she knew the contents of the six drums in CX-1, Bates 3, that: "...Strong did not have a system of inventory control of its drums... LC, TrIV, p. 131. Strong's control of drums was so out of control that two drums of hazardous waste were located outdoors in the yard area for over one year. FR, TrVI, pp. 24-25." CPHRB at 72-73. Complainant cannot have it both ways. While all or most of the "drums" on the site *may* have been housed in the "finished products building," the record does not show by a preponderance of the evidence that *all* of the drums on the site *were* so housed. Indeed, as Complainant correctly points out, (and as discussed *infra* regarding Count VII of the Amended Complaint), the record indicates that at least two "drums" were *not* so housed for almost a year from April 11, 2000 until March 1, 2001. In any event, *even if* all of the drums were so housed, nothing in the record suggests that the inspectors on July 22, 1999 "inspected" or even attempted to determine whether *all* of the drums in the "finished products/stacker building" contained "used oil" and/or bore "used oil" labels.

[99]Again, Complainant argues that "[t]he Complaint is not limited to six drums. It states that the Respondent failed to label drums with the words used oil." CPHRB at 71, n.50.

It is clear that Respondent did, in fact, use hydraulic oil in its machinery. Mr. Beaudoin testified that such equipment used by Strong Steel includes "loaders," "cranes," "forklifts," and the "shredder." Tr. 12/9/03, p. 106. However, what happens to the "used oil" which is ultimately changed out of the machinery is entirely *un*clear from the record.

Strong Steel's May 8, 2000 RCRA § 3007 Information Request Response ("Strong 2000 RCRA Response")[100] states:

> Strong does not service its own equipment but instead relies upon [*Wolverine*] and *Michigan CAT* to service and maintain its equipment and vehicles. Any *oil changes* are performed by *these entities*. *Vesco Oil* has been retained to dispose of *waste oil once enough is accumulated for disposal*.

CX-18, Bates 168, ¶ 2 (emphases added). Thus, this statement is somewhat ambiguous as to whether it is the responsibility of Wolverine and/or Michigan CAT (or other "vendors" such as "Buck's Oil," as mentioned below) to dispose of the oil it changes out of the machinery, or whether, instead, it is the *sole* responsibility of Vesco to collect and dispose of such oil once a critical "accumulation" is achieved. Regarding "oil changes," Mr. Beaudoin testified as follows:

> A: [Strong Steel] has loaders, they have cranes, fork lifts.
> Q: ... how was the oil handled from those?
> A: To my knowledge, it's recovered by a contractor, a vendor. *Michigan Cat* [sic] or *Wolverine Oil* or somebody like that comes to the site and performs routine maintenance on the vehicles...
> Q: Okay. And what would happen to the hydraulic oil that was in the shredder?...
> A: Again, my understanding is that an outside vendor performs the maintenance on those facilities and *they take away the oil*.
> Q: Okay. And who would have been the outside vendor?
> A: I don't know. They – I know I had contracts with *Buck's Oil*, Wolverine Oil. Those are two that I recall.

Tr. 12/9/03, pp. 106-107 (emphases added).[101] However, Strong Steel's SPCC Plan, which is

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However, Complainant admits that: "*The evidence produced at hearing does, however, rely on the photographs of six drums*." *Id.* (emphases added).

[100]The Strong 2000 RCRA Response at CX-18 is not to be confused with Strong Steel's August 18, 2003 RCRA § 3007 Information Request Response ("Strong 2003 RCRA Response") at CX-105.

[101]*See also*, Tr. 11/21/03, p. 138 (Ms. Carroll): "As far as used oil on preventative maintenance on the machines, that was all taken care of through the vendor we had servicing them."

signed by Mr. Beaudoin (CX-64, Bates 796), states:

> One 250-gallon, double-walled, *waste oil* tank is located in the finished product building. *Waste oil is emptied into this tank* from smaller containers. Prior to the transfer, the volume of oil in the containers is compared to the available storage in the AST.

CX-64, Bates 803, ¶ 5.2.1.3 (emphases added). Thus, it appears that the testimony of Mr. Beaudoin and Ms. Carroll can be reconciled with the SPCC Plan (and ¶ 2 of the Strong 2000 RCRA Response can be reconciled with itself) only if "waste oil" is *different* from the "used hydraulic oil" that is changed out of the machines by Wolverine, Michigan CAT, Buck's Oil, et cetera (the "vendors"). In that case, there would be no conflict within Respondent's various statements: used hydraulic oil "changed" out of the machines would be completely removed by the "vendors," while "waste oil" would be "accumulated" in the 250-gallon AST in the finished products building until Vesco came and disposed of it. Unfortunately, however, the record reflects no distinction between "changed oil" and "waste oil."

The ambiguity does not end there. Part of Complainant's logical syllogism is that Respondent did not have a functioning "used oil" AST until July 28, 1999, as Complainant argues: "Prior to July 28, 1999, Vesco had not provided Respondent with any tanks to store the used oil in. CX 103, p. 001803, A.4 and p. 001807, Q.4." CPHRB at 74. However, it remains unclear which "250 gallon AST" is referred to in ¶ 5.2.1.3 of the September 1, 1999 SPCC Plan (CX-64, Bates 803). CX-1, Bates 4 is a photograph of a relatively old looking AST which does not appear to be labeled "used oil," but which is labeled "H.W.B.F. ONLY."[102] RX-4-9, on the other hand, is a photograph of a relatively new looking AST which is clearly labeled "USED OIL." Mr. Beaudoin stated that he did not believe that *either* AST was the one referenced in the SPCC Plan, testifying:

> Q: ... Is the tank depicted in [RX-]4-9 [marked 'used oil'] the tank that is referred to in [CX-64, Bates 803]?
> A: I'm not sure. I believe it's not.
> Q: Okay... if I could turn your attention to [CX-1, Bates 4 (not marked 'used oil')] ... [i]s that the tank that's referenced in [CX-64, Bates 803]?
> A: No."

Tr. 12/9/03, pp. 108-109. However, the photograph of the AST at CX-1, Bates 4, was taken by Mr. Powers on July 22, 1999,[103] and Mr. Beaudoin testified that the AST depicted at CX-1, Bates 4 *was* on the Strong Steel site on July 22, 1999, and that "Mr. Opek banged on the side of it" to

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[102]The record does not indicate what "H.W.B.F." stands for.

[103]*See* CX-87, Bates 1228 (Mr. Powers' "photo log"), which describes CX-1, Bates 4 as "Hydraulic Oil Tank 'H.W.B.F. only,' empty mobile skid-tank."

determine that it was empty. Tr. 12/9/03, p. 109. So, while it remains unknown precisely when the newer "used oil" AST at RX-4-9 arrived at the Strong Steel facility,[104] it is clear that the older "H.W.B.F." AST was present on July 22, 1999, although Mr. Beaudoin claims that it is *not* the "waste oil" AST referenced in ¶ 2 of the SPCC Plan (which AST also still remains unidentified).

Adding yet another layer of ambiguity to the "AST" confusion is Vesco's July 28, 2003 RCRA § 3007 Information Request Response ("Vesco 2003 RCRA Response") at CX-103. Complainant's Information Request asked: "What was the date you installed the tank identified in Attachment 3?" CX-102, Bates 1799, ¶ 6. "Attachment 3" is a copy of CX-1, Bates 4 (Mr. Powers' photograph of the "H.W.B.F." AST). *See* CX-102, Bates 1801. Vesco's response states: "The tank identified in attachment 3 was delivered and sold to the customer August 3, 1999. The installment was probably on *July 28, 1999*. No other replacement at this time." CX-103, Bates 1803, ¶ 6 (emphasis added). This is apparently the origin of Complainant's statement that: "Prior to *July 28, 1999*, Vesco had not provided Respondent with any tanks to store the used oil in. CX 103, p. 001803, A.4 and p. 001807, Q.4." CPHRB at 74 (emphasis added). There are at least three inconsistencies here. First (and most importantly), the referenced AST *was* clearly present *prior* to July 28, 1999, because Mr. Powers photographed it on July 22, 1999 and Mr. Beaudoin recalled observing Mr. Opek "bang on it" on July 22, 1999. Second, Vesco could not have "delivered" the AST on August 3, 1999, but "installed" it on July 28, 1999, because it is impossible that they "installed" it before they "delivered" it. Third, while Complainant cites to ¶ 4 of Vesco's RCRA Response for the date of "July 28, 1999," Complainant apparently intends to cite to ¶ 6 of the Response.

Next, Complainant states that the only time Vesco removed "waste oil" from the Strong Steel facility was on September 26, 2000, arguing that: "Prior to September 26, 2000, Vesco had not picked up waste oil from Respondent... On that date Vesco picked up 970 gallons of used oil in 40 drums from Respondent's facility. (SB, TrVI, p. 146; CX 103, 001804)." CPHB at 57. *See also*, CBHRB at 74-75: "The only shipment of used oil from Strong to Vesco occurred in September of 2000 and consisted of 40 drums of used oil. CX 103, p. 001803, A.3 and 4; p. 001807, Q.3 and 4; SRB, TRVI, p. 146." Complainant's argument in this regard again relies on the hopelessly flawed Vesco RCRA Response at CX-103, as well as the testimony of Ms. Brauer (based on her conversation with a Vesco representative). Paragraphs # 3 and # 4 of the July 28, 2003 Vesco RCRA Response state:

> 3. The only waste oil pick up to date was made on September 26, 2000. See the attached invoice copy date September 26, 2000.
> 4. The only date of shipment of waste oil is on the attached invoice date

[104]Mr. Beaudoin testified that the "Used Oil" AST depicted in the photograph at RX-4-9 was not present at the Strong Steel facility on July 22, 1999. Tr. 12/9/03, p. 79, ln. 10-16.

September 26, 2003 [sic[105]].

CX-103, Bates 1803. The attached invoice, dated September 26, 2000 reflects: "Shipped 970 Gal. W.O. / Used Oil Pick Up – Gallons" and charges Respondent for a "Drum Pump Out Fee." CX-103, Bates 1804. Ms. Brauer testified regarding the Vesco RCRA Response and attached Invoice as follows:

> A: ... I spoke with Bruce Baringer ... the general manager of Vesco Oil Corporation ... [l]ast week...
> Q: ... [W]hen you talked to Vesco, did they indicate at all to you if they had picked up any used oil from the Strong facility ... ?
> A: Yes. They told me that they had made only this one pickup [on September 26, 2000].
> Q: And did they tell you where they picked up the used oil from? Was it from a tank, a container, the ground?
> A: Well, I suggested how we had sort of backdoor calculated what it might have been picked up from, but they corrected me and calculated that it had been picked up from ***40 drums***.
> Q: I'm sorry. I couldn't hear you.
> A: The oil was picked up from ***40 drums***.

Tr. 12/10/03, pp. 145-146 (emphases added).

As noted above, Respondent relies on the Vesco RCRA Response and Invoice, along with the testimony of Ms. Brauer, for the proposition that Vesco transported 970 gallons of "used oil" in "40 drums" from the Strong Steel facility on September 26, 2000, and that Vesco had not transported any "used oil" from Strong Steel prior to that date. CPHB at 57; CBHRB at 74-75. While the cited evidence may suggest such an inference (and the concomitant inference that some or all of the "40 drums" were present at some time prior to September 26, 2000), the evidence simply does rise to a preponderance to show that unlabeled "drums" of "used oil" were present on the Strong Steel site on July 22, 1999. First, the Vesco RCRA Response is riddled with mistakes, inconsistencies, and/or inaccuracies. Most glaringly, the document states: "The tank identified in [CX-1, Bates 4] was delivered and sold to the customer August 3, 1999. The installment was probably on July 28, 1999." As discussed above, that tank was clearly present and installed at Strong Steel as of the July 22, 1999 inspection, so Vesco's response # 6 is entirely inaccurate. Also, response # 6 is *internally* contradictory, in that the tank could not have been "installed" prior to "delivery." Also, Vesco's response # 4 states that Vesco picked up a shipment of "waste

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[105]Ms. Brauer testified that she had spoken to Bruce Baringer, General Manager of Vesco Oil Corporation, the week of December 1, 2003 (the week before her testimony on December 10, 2003), and that Mr. Baringer told Ms. Brauer that the date of "September 26, 2003" in ¶ 4 of Vesco's Response (CX-103, Bates 1803) was a "typographical error," and that the "date in item 4 should be September 26, *2000."* Tr. 12/10/03, pp. 145-146 (emphasis added).

oil" on September 26, 2003, when the Invoice reflects the date of September 26, *2000*. While Complainant has explained the "2003" date in response #4 as a "typographical error," the pervasive inaccuracies in this relatively simple response (including a *material* error in response # 6) casts the accuracy of the entire document in doubt. Second, while the Invoice refers to a "Drum Pump Out Fee" and an "Additional Drum Pump Out Fee," Complainant has offered no explanation of the significance or precise meaning of these terms. One might imagine that the term is generically used to refer to pumping out any type of "container," including AST's, or perhaps it refers to some subsequent stage of handling by Vesco. In any event, any conclusion as to the meaning of these terms based on the record of this case would be pure speculation. Third, neither Vesco's RCRA Response nor the Invoice references "40 drums." Rather, the Invoice references "970 gallons" of "W.O. / Used Oil Pick Up." If the "used oil" were contained in drums such as the 55-gallon drums depicted in CX-1, Bates 3, then "970 gallons" would have been contained in approximately *seventeen* - not forty - drums. Thus, Ms. Brauer's statement that Vesco "corrected me and calculated that it had been picked up from 40 drums" (Tr. 12/10/03, p. 146) is highly suspect. That is, the veracity of Ms. Brauer's testimony regarding what Mr. Baringer told her is not in question, but given the sloppy and inaccurate RCRA Responses previously provided by Mr. Baringer, together with the vast difference between seventeen and forty drums without any explanation of how Mr. Baringer "calculated that it had been ... 40 drums," Mr. Baringer's (and thus Ms. Brauer's) conclusion that the "970 gallons" reflected by the Invoice translates into "40 drums" is also highly suspect.[106] Fourth, even if the evidence supported a conclusion that "40 drums" of "used oil" were present at the Strong Steel facility on September 26, 2000, this does not necessarily lead to the conclusion that the "40 drums" (or any portion thereof) were present at the Strong Steel facility over a year earlier at the time of the inspection on July 22, 1999, as Complainant alleges, or even that the "40 drums" on September 26, 2000, if they then existed, were not properly labeled.

Finally, Respondent argues that "although [Wolverine and Michigan CAT] serviced the equipment they did not transport all of the collected used oil from Strong. For example, Wolverine Tractor and Equipment only transported 30% of the waste oil it generated at Strong. (CX 18, 000256)." CPHB at 57. CX-18 is the Strong 2000 RCRA Response. CX-18, Bates 256, cited by Complainant, is a letter from Wolverine stating, in part:

> We are transporters of used oil out of the equipment we service at Strong. As a service to Strong Steel, *we transport about 30% of waste oil per year from Strong*. Then transported from our facility by Pacific Oil Co., under EPA # MIG000027286.

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[106]In addition, this Tribunal notes that Ms. Brauer's statement that Vesco "calculated that it had been picked up from 40 drums" does not necessarily lead to the conclusion that Vesco recalled picking up *actual "drums"* from Strong Steel, but only that Vesco extrapolated some calculation based on the amount of used oil picked up and the amount of oil usually contained in some type of "drum."

CX-18, Bates 256 (emphasis added). This Tribunal agrees with Respondent that the italicized portion of the above quotation, when "[r]ead carefully, ... makes no sense," (RPHB at 32), or at least finds that it is hopelessly ambiguous. Complainant suggests that the meaning of this clause is that Wolverine changes the oil in the machinery which it services, and then transports 30% of the "used oil" it thus collects, leaving behind the other 70% at the Strong Steel facility. However, Complainant offers no explanation for this counter-intuitive and seemingly nonsensical interpretation. Alternatively, perhaps, Complainant suggests that Wolverine transports 30% of the total "used oil" generated by the service of Strong Steel's machinery. However, this would fail to account for the other "vendors" (such as Michigan CAT and "Buck's Oil"), and would fail to explain how Wolverine is able to determine the total amount of used oil generated by Strong Steel's machinery. This Tribunal finds that the most logical reading of this clause is that 30% of the total waste oil transported *by Wolverine* annually (from all sources) comes from Strong Steel. This interpretation would not necessarily imply that Wolverine did not transport off-site all of the "waste oil" it collected from the machinery it serviced at Strong Steel (some of which is not serviced by Wolverine). Again, however, without some documented explanation of the meaning of this ambiguous statement, any interpretation is pure speculation.

The most significant evidence that Respondent held "used/waste lubricating/hydraulic oil" generated by the operation of its machinery, including the loaders, cranes, forklifts, and/or shredder, is Strong Steel's SPCC Plan, together with the Strong 2000 RCRA Response. The SPCC Plan states:

> One 250-gallon, double-walled, *waste oil tank* is located in the finished product building. *Waste oil is emptied into this tank* from smaller containers. Prior to the transfer, the volume of oil in the containers is compared to the available storage in the AST.

CX-64, Bates 803, ¶ 5.2.1.3 (emphasis added). The Strong 2000 RCRA Response states:

> Strong does not service its own equipment but instead relies upon [Wolverine] and Michigan CAT to service and maintain its equipment and vehicles. Any oil changes are performed by these entities. *Vesco Oil has been retained to dispose of waste oil once enough is **accumulated** for disposal*.

CX-18, Bates 168, ¶ 2 (emphases added). For the reasons discussed above, the Vesco 2003 RCRA Response and September 26, 2000 Invoice, together with Ms. Brauer's testimony regarding her conversation with Mr. Baringer of Vesco and the Wolverine letter of April 20, 2000 (regarding "30%"), do not tend to show that "40 unlabeled drums" (or any portion thereof) of "used oil" were present at the Strong Steel facility at the time of the inspection on July 22, 1999, as alleged by Complainant, let alone that the *particular* six drums depicted in the photograph at CX-1, Bates 3 were such drums. However, despite the testimony of Mr. Beaudoin and Ms. Carroll that the "vendors" removed all "use hydraulic/lubricating oil" which they changed out from the machinery, what ¶ 5.2.1.3 of the SPCCP Plan and ¶ 2 of the Strong 2000 RCRA Response *may* suggest is that Strong Steel did hold "waste oil" (from some unknown source) in

the AST marked "H.W.B.F. ONLY" (CX-1, Bates 4)[107] until enough "waste oil" had accumulated for Vesco to collect, remove, and dispose of the "waste oil."[108] However, the evidence in the record indicates that the "H.W.B.F." AST was empty during the July 22, 1999 inspection, and Complainant has withdrawn its allegation regarding "failure to label" an AST.

In short, while it appears that Complainant failed to catch Respondent's hand in the cookie jar regarding the "H.W.B.F." AST, such speculation is beyond the scope of this Initial Decision. What is *within* the scope of this Initial Decision for the purposes of this discussion of the RCRA Information Request Responses is whether such Responses, as discussed above, prove by a preponderance of the evidence that some number of unlabeled "drums" of "used oil" existed at the Strong Steel facility on July 22, 1999, and in particular, whether the six drums depicted in the photograph at CX-1, Bates 3 are such unlabeled drums of "used oil." For all of the foregoing reasons, this Tribunal finds that the RCRA Information Request Responses do not establish such proof.

f. Conclusion

Both Complainant and Respondent cite to the same two administrative decisions for the proposition that the July 22, 1999 inspection did or did not, respectively, establish that the six drums depicted in CX-1, Bates 3 contained "used oil." Those cases are *Dearborn Refining Company*, EPA Docket No. RCRA-05-2001-0019 (Initial Decision, Aug. 15, 2003), and *Bil-Dry Corp.*, EPA Docket No. RCRA-III-264 (Initial Decision, Oct. 8, 1998). *See* CPHRB at 71; RPHB at 27-29.

Citing *Dearborn*, Respondent argues:

> The traditional way for an EPA Region to prove what a substance is, is to take a sample of the substance and have it analyzed. For example, Region 5 sampled at least 20 aboveground used oil tanks and 5 drums at another plant in Detroit to prove violations of the used oil requirements. *In the Matter of Dearborn Refining Company*, Docket No. RCRA-05-2001-0019 (ALJ Gunning, Initial Decision Aug. 18 [sic], 2003, at 16).

RPHB at 27-28. Complainant also cites *Dearborn*, arguing:

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[107]This inference may also be buttressed by Mr. Beaudoin's testimony that the "Used Oil" AST depicted in the photograph at RX-4-9 was not present at the Strong Steel facility on July 22, 1999. Tr. 12/9/03, p. 79, ln. 10-16. That is, some time subsequent to July 22, 1999, Respondent did acquire a properly labeled "used oil" AST, suggesting, perhaps, that they had theretofore been in need of one, making do with some other container(s), such as the "H.W.B.F." AST.

[108]This Tribunal expresses no opinion, however, as to whether such evidence would rise to the level of a preponderance if such an allegation were presently before it.

> The definition [of 'used oil'] does not require sampling. In the *Dearborn Refining* case the Region established that used oil was in many of the tanks by either visual observation of the inspector or admissions by the Respondent.

CPHRB at 71 (emphasis added). Judge Gunning's Initial Decision in *Dearborn* in fact held:

> [T]he preponderance of the evidence ... supports a finding that most of the aboveground tanks and containers at the facility were used to store or process used oil. *First and foremost, Respondent has never disputed that it operates a used oil processing facility,* and it *stipulated* to such at the hearing... [T]he *majority of the facility was identified* by Dearborn President Aram Moloian..., as well as by Dearborn employee Gagik Gabrielyan..., as being associated with the processing of used oil. *Furthermore, sampling conducted by the EPA found at least twenty aboveground tanks and five drums* at the site that contained liquids consistent with used oil. Ms. Erin White Newman, who climbed and measured Dearborn's aboveground tanks..., *observed liquids consistent with used oil inside many of the tanks* and sumps.

Dearborn Refining Company, slip op.at 16 (citations omitted) (emphases added). The EAB held that Judge Gunning's Initial Decision was "affirmed in its entirety." *Dearborn Refining Company* (Final Order), RCRA (3008) Appeal No. 03-04 (Sept. 10, 2004), slip op. at 5 (unpublished Final Order) (http://www.epa.gov/boarddec/orders/dearborn.pdf).

Thus, *Dearborn* does support the contentions of both parties in the present case, in that Judge Gunning in *Dearborn* relied on some combination of sampling, admissions, and/or visual observations of the inspectors to determine the contents of the various tanks and containers there at issue. As Complainant asserts, "[t]he definition [of used oil] does not require sampling."[109] CPHRB at 71. Indeed, not *all* of the tanks and containers in *Dearborn* were sampled. However, as Respondent asserts, "Region 5 sampled at least 20 aboveground used oil tanks and 5 drums" in *Dearborn*. Further, although this Tribunal expresses no opinion regarding Respondent's assertion that chemical analysis of a sample is the "traditional way for [EPA] to prove what a substance is," this Tribunal does note that the chemical analysis of a sample will in most cases be more probative of a substance's identity than visual observation. In any event, *Dearborn* is not

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[109] As noted *supra* in section IV.A of this Initial Decision, "used oil" is defined broadly under MAC § 299.9109(p) and 40 C.F.R. § 279.1. Ms. Brauer testified that "There's no chemical definition of used oil either in the statute or in the regulations... Q: And does a generator of used oil have to use sampling to determine whether or not they're handling used oil? A: No. Q: And what might an individual use, independent of sampling, to determine if there's used oil there? A: Knowledge of the product and its application." Tr. 11/18/03, pp. 97-98. *See also, Id.* at 121 (Ms. Brauer): "I testified earlier that there's no chemical definition of used oil. You don't have to have a certain concentration of any constituent in order for a material to meet the definition of used oil."

particularly instructive in the present case because, while Judge Gunning in *Dearborn* relied on some combination of sampling, admissions, and/or visual observations, here Complainant relies on *none* of those indicia to support its contention that the six drums in CX-1, Bates 3 contained used oil on July 22, 1999. Rather, no samples were taken, the evidence indicates that the drums were never opened so that the contents could be viewed, and the evidence does not support Complainant's contention that some unknown Strong Steel "officials" told Mr. Opek that the drums contained used oil, particularly in the absence of any such indication from Mr. Opek himself in his testimony, "Declaration," or "Inspection Report," and in light of evidence to the contrary in the form of Mr. Beaudoin's testimony (Tr. 12/9/03, pp. 97-98, quoted *supra*). In short, the contents of *no* tank or drum on the Strong Steel site was *ever* sampled and analyzed, and *Dearborn* is therefore inapposite.

Next, citing *Bil-Dry Corp.*, Respondent states that "[t]he ALJ refused to impose liability for the four-month period between the first and second inspections [on December 11, 1995 and April 9, 1996, respectively], holding that Region 3 had failed to prove that a violation had occurred during that time." RPHB at 28. Complainant, on the other hand, contends that:

> In *Bil-Dry* the Board did not address, let alone hold, that the December 11, 1995, inspection was insufficient because the Region did not sample. Region III subsequently collected the samples because the contents of the drums were unknown; they pre-dated the Respondent's ownership of the facility; and the Respondent asserted a lack of knowledge of their contents.

CPHRB at 71. Judge McGuire's Initial Decision in *Bil-Dry* in fact held:

> EPA's penalty calculation *infers* Respondent's liability for Drums 2-4 from December 11, 1995. However, it has offered <u>no definitive evidence</u> which would establish liability for these specific drums as of that date... [Inspector Jones'] December 11 inspection report <u>only generally notes "the way drums are stored and the condition of these drums in both areas</u>." <u>No samples were taken</u> and no identification of Drums 2-4 was ever made until the follow-up inspection and testing on April 9-10, 1996.
>
> Thus, the evidence has failed to establish any violations pertaining to Drums 2-4 as of December 11, 1995. Respondent's liability can only be viewed in the context of the April 1996, inspection and any test results emanating therefrom.

Bil-Dry Corp., RCRA-III-264, at 20 (Initial Decision, Oct. 8, 1998) (citations omitted) (italics in original) (underlining added).[110]

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[110]The EAB noted that: "According to the Presiding Officer, the Region failed to prove that any violations pertaining to Drums Nos. 2-4 occurred as of December 11, 1995, at the time of Inspector Jones' inspection. Instead, the multi-day violation was found to have begun as of April 9, 1996. *The Region did not appeal this holding*." *Bil-Dry Corporation*, 9 EAD 575, 587,

Thus, again, *Bil-Dry* does support the propositions for which it is cited by both parties in the present case. As Respondent contends, Judge McGuire did refuse to impose liability for the time period between the first and second inspections because the EPA had failed to prove the contents of the drums at issue by a preponderance of the evidence. As Complainant argues, neither Judge McGuire nor the EAB held that the first inspection "was insufficient because the Region did not *sample*." CPHRB at 71 (emphasis added). However, Judge McGuire *did* find (and the EPA did not appeal the finding to the EAB) that EPA's "inference" of liability from the first inspection's observations of "the way [the] drums [were] stored and the condition of these drums," absent sampling or any other "definitive evidence," "failed to establish any violations." As Complainant in the present case observes, in *Bil-Dry* "Region III subsequently collected the samples because the contents of the drums were unknown."

However, *Bil-Dry* is instructive in the present case because the evidence derived from the first inspection in *Bil-Dry* (on December 11, 1995) regarding "drums 2-4" there at issue is closely analogous to the evidence derived from the July 22, 1999 inspection in the present case regarding the six drums depicted in the photograph at CX-1, Bates 3. Here, Complainant presents no credible evidence of "admissions," there were no "visual inspections" of the *contents* of the drums, and no samples were taken. Rather, as in *Bil-Dry*, Complainant *infers* the contents of the drums from the condition and location of the drums themselves. As did Judge McGuire in *Bil-Dry*, this Tribunal similarly finds that Complainant, relying on such evidence, has failed to meet its burden of proof under section 22.24 of Consolidated Rules of Practice (40 C.F.R. Part 22) to show by a preponderance of the evidence that the six drums in CX-1, Bates 3 contained "used oil" on July 22, 1999.

As discussed above, this Tribunal further finds that none of the evidence presented by Complainant – including that pertaining to Mr. Opek's investigation, Mr. Powers' testimony, photographs and notes, and the RCRA Information Request Responses from Respondent and Vesco – demonstrates by a preponderance of the evidence that either the six drums in CX-1, Bates 3, or any other drums present at the Strong Steel facility on July 22, 1999,[111] contained "used oil." Therefore, Count V of the Amended Complaint is dismissed.

D. Count VI – Failure to Properly Notify of Hazardous Waste Generation, Storage, and Disposal

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n.14 (EAB, Jan. 18, 2001) (citations omitted) (emphasis added).

[111]As noted *supra*, because the evidence and argument regarding Count V has focused on the six drums in CX-1, Bates 3, this Tribunal construes Count V to pertain only to those six drums. However, having considered Complainant's evidence and argument – including the RCRA Information Request Responses from Respondent and Vesco and related exhibits – this Tribunal further finds that Complainant has failed to demonstrate by a preponderance of the evidence that any *other* "drums" on the Strong Steel site contained "used oil" on July 22, 1999.

1. Complainant's Allegations

Count VI of the Amended Complaint alleges:

> On and prior to at least July 22, 1999, Strong had not notified U.S. EPA of all of the hazardous wastes it generated or that it was storing or disposing of hazardous waste on its property as required by section 3010(a) of RCRA, 42 U.S.C. § 6910(a), MAC § 299.9301 [40 C.F.R. § 262.12]. This constitutes one violation of MAC § 299.9301 [40 C.F.R. § 262.12] and section 3010(a) of RCRA, 42 U.S.C. § 6910(a) [sic[112]].

Amended Complaint at 28, ¶ 131 (emphasis added). By Order dated October 27, 2003, this Tribunal granted Complainant's Motion for Leave to Amend the Complaint, which Motion explained:

> [T]he Complainant is proposing to ... clarify that the Respondent's notification was in violation of state and federal rules because the Respondent failed to accurately notify of all of the hazardous wastes it generated *and failed to notify that it stored or disposed of hazardous waste*. Judge McGuire stated in his [Order on Accelerated Decision] that the Complaint can properly be read broadly enough to encompass an allegation that Respondent "failed to properly notify of all the wastes handled at its site." September Order, *slip op.* 28. He, however, refused to read it broadly enough to encompass allegations that the Respondent failed to notify that it was storing or disposing of hazardous waste. September Order, *slip op. 22, FN18 and p. 33*... [T]he Complainant is proposing to amend ... [the Complaint] to allege that Respondent's notifications were deficient because it did not notify of all of the hazardous wastes that it generated *and that it was storing or disposing of hazardous waste*.

Complainant's Motion for Leave to Amend Complaint at 12 (emphasis added).[113] Thus, the Amended Complaint alleges that Respondent failed to properly notify the EPA or the State of Michigan that it was: 1) generating hazardous wastes; 2) disposing of hazardous wastes; and 3)

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[112]Complainant incorrectly cites to "42 U.S.C. § 6910(a)," which does not exist. Section 3010(a) of RCRA corresponds to 42 U.S.C. § 6930(a).

[113]Further, Complainant has withdrawn its allegation that Respondent did not have an EPA Identification Number. *See* Complainant's Motion for Leave to Amend Complaint at 12: "[T]he Complainant is proposing to withdraw that portion of Count VI which alleges that the Respondent did not have an EPA identification number. Complainant indicated in its Motion for Accelerated Decision that is [sic] was withdrawing this element."

storing hazardous wastes.[114]

Further, in its Post-Hearing Reply Brief, Complainant references 40 C.F.R. § 262.11 in regard to Count VI, stating: "Complainant asserts that these deficiencies, failure to notify of all of the wastes it generated and that it treated, stored or disposed of hazardous waste, resulted in the Respondent's violations of section 3010 of RCRA *and 40 CFR 262.11*." CPHRB at 79 (footnote omitted) (emphasis added).

For the reasons discussed below, this Tribunal finds that, on and prior to July 22, 1999, Respondent had not notified the U.S. EPA, or the State of Michigan pursuant to 42 U.S.C. § 6926, of all of the hazardous wastes that it generated, stored, and disposed of on its property, thus violating Section 3010(a) of RCRA, 42 U.S.C. § 6930(a), and its Michigan and federal implementing regulations.

2. Review of Statutory and Regulatory Provisions Cited

Section 3010(a) of RCRA, 42 U.S.C. § 6930(a), states:

> **(a) Preliminary notification**
> Not later than ninety days after promulgation of regulations under section 6921[*i.e.*, August 17, 1980[115]] of this title identifying ... any substance as

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[114]Complainant further explains: "[T]he Respondent did not notify of all of its waste generation activities and failed to notify as a storage or disposal facility. *The storage and disposal aspects ... are pled <u>alternatively</u>*... Respondent's actions constituted disposal by virtue of its placement of hazardous waste on the ground and allowing it to enter the soils and subsurface soils... [T]he Respondent's actions can be considered storage based on Respondent's subsequent excavation and off-site disposal of the contaminated soils. *An <u>additional</u> basis for failing to notify of its <u>storage</u> activities is the Respondent's storage of the two drums of hazardous waste for a year*." CPHB at 60 (emphases added). Thus, it is important to recognize that there are two different "storage" allegations, one of which is pled in the "alternative" and the other of which stands alone. Regarding "failure to notify of *disposal* activities," Complainant contends that Respondent's action in placing and "holding" contaminated soil *in the ground* could either be characterized as "disposal" or "storage." However, regarding "failure to notify as a *storage* facility," Complainant contends that the "storage" consisted of Respondent keeping the two 55-gallon drums of contaminated soil, which had been excavated by Inland Waters on April 11, 2000, on site until April 18, 2001.

[115]Section 3001 of RCRA, 42 U.S.C. § 6921, pertains to "Identification and listing of hazardous waste." The "RCRA Section 3001 regulations" are set forth at 40 C.F.R. Part 261 ("Identification and Listing of Hazardous Waste"), and were promulgated on May 19, 1980. *See* 45 Fed. Reg. 33084 (May 19, 1980). Therefore, "ninety days after promulgation of regulations under section 6921 of this title" is August 17, 1980.

> hazardous waste..., any person generating or transporting [listed or characteristic hazardous waste] or owning or operating a facility for treatment, storage, or disposal of such substance shall file with the Administrator (or with States having authorized hazardous waste permit programs under section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person.

42 U.S.C. § 6930(a) (bold type in original).

Section 262.11, 40 C.F.R., states in part that: "A person who generates a solid waste ... must determine if that waste is a hazardous waste..." Sections 262.12(a) and (b), 40 C.F.R., state that "[a] generator must not treat, store, dispose of, transport, or offer for transportation, hazardous waste without having received an EPA identification number from the Administrator...." and that "[a] generator who has not received an EPA identification number may obtain one by applying to the Administrator using EPA form 8700-12..."

MAC § 299.9301(3) states in part that "[a] generator who treats, stores, or disposes of hazardous waste on-site shall comply with ... [t]he provisions of ... R. 299.9303..." In turn, MAC §§ 299.9303(1) and (4) state that "[a] generator shall not treat or store, dispose of, or transport or offer for transportation, hazardous waste without having received an EPA identification number from the regional administrator or the regional administrator's designee," and that "[a]pplications for EPA identification numbers shall be made on state form EQP5150..."

3. Respondent Failed to Notify that it Was Generating Hazardous Wastes

On November 25, 1997, Respondent filed a Notification of Hazardous Waste Activity ("1997 Notification") with the MDEQ. RX-5, pp. 2-3; CX-30, Bates 414-415; Tr. 12/9/03, p. 45.[116] This 1997 Notification, which Respondent submitted to cover the "fluff"[117] from the

[116]Respondent's "Notifications of Hazardous Waste Activity" were filed using Michigan State form EQP5150, as required by MAC § 299.9303(4), which requires that "[a]pplications for EPA identification numbers shall be made on state form EQP5150." Michigan State form EQP5150 is the authorized State equivalent of EPA form 8700-12. *See, e.g.*, RPHB at 46; RX-5, p. 2 (footer); CX-30, Bates 414 (footer); CX-41, Bates 752 (footer): "U.S. EPA Form 8700-12 is replaced by the Michigan Notification Form EQP5150 (rev. 03/98)."

[117]Ms. Vogen explained that "auto fluff" is "the residual after the metals are pulled out. It would consist of things like seat cushions, stuff that's going to end up being land filled." Tr. 11/19/03, p. 83.

shredder,[118] identified Respondent as a Large Quantity Generator ("LQG")[119] of Cadmium (D006) and Lead (D008). *Id.*

On April 18, 2001, Respondent filed a second Notification of Hazardous Waste Activity ("2001 Notification") with the MDEQ. CX-41, Bates 752-755. This 2001 Notification, which Respondent submitted to cover the two 55-gallon drums of contaminated soil which had been excavated by Inland Waters on April 11, 2000,[120] identified Respondent as a LQG of Benzene (D018), Chlorobenzene (D021), 1,2-Dichloroethane (D028), Tetrachloroethylene (D039), Trichloroethylene (D040), and Lead (D008). CX-41, Bates 753.

Thus, the 2001 Notification identified Respondent as a LQG of the following hazardous wastes, which the 1997 Notification had not identified: Benzene (D018), Chlorobenzene (D021), 1,2-Dichloroethane (D028), Tetrachloroethylene (D039), and Trichloroethylene (D040). As discussed below, if Respondent was a generator of these hazardous wastes on or before November 25, 1997, then Respondent failed to notify the U.S. EPA or the State of Michigan as a generator of hazardous waste in violation of Section 3010(a) of RCRA, 42 U.S.C. § 6930(a), and its implementing regulations.

Judge McGuire, in his Order on Accelerated Decision, found that: "This Court can conclude that Respondent *generated* the hazardous wastes that were found *in the soil* on its property..." Order on Accelerated Decision at 23 (emphasis added). That is, Respondent generated the wastes which were identified in the 2001 Notification,[121] and those wastes were

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[118]*See* Tr. 12/9/03, p. 45 (Mr. Beaudoin); CX-105, Bates 1826, ¶ 10.

[119]A "Large Quantity Generator" generates "[g]reater than 1,000 kg/mo (2,200 lbs.)." CX-30, Bates 415.

[120]This Tribunal finds that the 2001 Notification was submitted in order to cover the two 55-gallon drums of contaminated soil based on the following: On April 18, 2001 (the same day that Respondent submitted its 2001 Notification to MDEQ), Respondent disposed of the two 55-gallon drums of contaminated soil which had been excavated on April 11, 2000 from the "temporary compaction / battery storage area," and which had been stored at the Strong Steel site from April 11, 2000 until April 18, 2001. RX-10, Att. E (waste manifest); CX-101, Bates 1781 (waste manifest). Susan Johnson signed both the 2001 Notification and the waste manifest for the two drums. CX-41, Bates 753; CX-101, Bates 1781. Further, with the exception of "1,4-Dichlorobenzene (D027)," the waste codes listed on the 2001 Notification match exactly the Novi Laboratory results for sample SS2 (the liquid sample collected from the "temporary compaction / battery storage area" – the same area from which the two drums of contaminated soil were excavated), for hazardous wastes found above the regulatory toxicity level. *See* RX-10, Att. A, pp. 1-2; CX-18, Bates 174-175; CX-101, Bates 1726-1727.

[121]Indeed, the *purpose* of the 2001 Notification is to identify Respondent as a "Large Quantity *Generator*" of the listed wastes.

present in the contaminated soil which was excavated on April 11, 2000. Judge McGuire further found that "*fluids which arrived in the automobiles at Respondent's site contaminated the soil on Respondent's property*" (*Id*. at 26 (citations omitted) (emphases added)), and that:

> [T]he court can reasonably infer that the hazardous constituents in the soil *came from automobiles that Respondent accepted at its site*. The evidence supports a conclusion that hazardous automotive constituents were discharged ... into the soil at Respondent's site. Thus, Respondent "disposed" of hazardous waste because the *automotive waste stream* was discharged ... into or on the land in such a manner that the hazardous waste entered the soil at Respondent's property.

Id. at 31-32 (emphases added). As previously discussed, Judge McGuire's findings in his Order on Accelerated Decision constitute the "law of the case" in this proceeding. Further, this Tribunal has already found, in regard to Count III, *supra*, that Respondent has failed to show that any hazardous constituents found in the soil at the Strong Steel site originated from atmospheric deposition or previous industrial occupants. Therefore, all of the hazardous wastes listed on the 2001 Notification were generated by Respondent processing "junked" automobiles (including accepting "crushed" automobiles, crushing "uncrushed" and/or "whole" automobiles, and shredding the automobiles) in order to recover sellable ferrous metallic content.

a. Respondent Was Generating the Hazardous Wastes Listed on the 2001 Notification On or Before the Date on Which Respondent Filed the 1997 Notification

Respondent's primary argument against liability on Count VI is that Complainant has not shown by a preponderance of the evidence that Respondent was generating, *at the time it filed its first Notification on November 25, 1997*, those hazardous wastes which were listed on the April 18, 2001 Notification but which were not listed on the 1997 Notification (*i.e.*, Benzene (D018), Chlorobenzene (D021), 1,2-Dichloroethane (D028), Tetrachloroethylene (D039), and Trichloroethylene (D040)). Respondent argues:

> No statute or regulation requires a generator to include in its notification each and every hazardous waste code that may possibly apply to wastes that it will generate... Region 5 has made absolutely no effort ... to prove that Strong Steel generated any hazardous wastes other than D006 [(Cadmium)] and D008 [(Lead)] during the three month period immediately before it submitted its hazardous waste notification in November, 1997... Nor does a generator who previously notified have a duty to submit a new notification if it begins to generate new wastes.

RPHB at 43-44 (footnote and citations omitted) (emphasis in original).

Respondent made this same argument on cross motions for Accelerated Decision. Judge McGuire held:

> *The undersigned agrees with Respondent that it was not obligated to file a subsequent notification identifying newly generated hazardous wastes*. In the preamble to the promulgated "Notification of Hazardous Waste Activity, Form 8700-12," the EPA directly addressed a "person's" obligation to renotify. *See* 45 Fed. Reg. 12746, 12747 (Feb. 26, 1980).
>
> > Persons who have provided proper notification of hazardous waste activity may later begin to handle additional hazardous wastes not included in the original notification. In the administration of this program, EPA will not require these persons to file a new notification under Section 3010 with respect to those wastes. Such a requirement would be costly to both EPA and the regulated community with no corresponding benefit.
>
> 45 Fed. Reg. at 12747.

Order on Accelerated Decision at 28-29 (footnote omitted) (emphasis added). Further, noting that "the preamble also states that '[a]ny hazardous wastes handled during the three-month period immediately prior to the date of filing the notification *must* be included [and] [n]otifiers *may* also include other wastes which they anticipate they will be handling.' 45 Fed. Reg. at 12748," (*Id*. at 30, n.26 (emphasis added)), Judge McGuire held:

> [I]t is a factual question whether in 1997 Respondent was generating hazardous wastes that were not listed on its 1997 Notification. In order for Respondent to be found liable for violating Section 3010(a) of RCRA under this theory of liability, *Complainant must prove that in 1997 Respondent was handling all of the wastes that were subsequently found in 1999/ 2000 on Respondent's property* thereby establishing that Respondent's original Notification was not proper.

Id. at 30-31 (emphasis added). Judge McGuire therefore denied Complainant's motion for Accelerated Decision on Count VI of the original Complaint. *Id.* at 31.

This Tribunal has already found that all of the hazardous wastes listed on the 2001 Notification were generated by Respondent's processing of "junked" automobiles, and Judge McGuire has previously found that Respondent "generated" and "disposed" of the hazardous wastes found on its property, and that such hazardous wastes "*came from the automobiles that Respondent accepted at its site*." *Id.* at 32 (emphases added). *See also, Id.* at 26 and 31. Therefore, the only remaining question is whether Respondent was generating those hazardous wastes[122] on or during the three months prior to November 25, 1997. Steven Benacquisto testified that Strong Steel was "a shredding operation" "in 1997 when Strong Steel acquired [the property]" (Tr. 11/19/03, p. 293), and further explained that "... in '97 they had just started running full..." Tr. 11/19/03, p. 294. Strong Steel began operation as a scrap metal processing

[122]Benzene (D018), Chlorobenzene (D021), 1,2-Dichloroethane (D028), Tetrachloroethylene (D039), and Trichloroethylene (D040).

facility at the Strong Steel site on or about March 27, 1997. Amended Complaint, ¶ 16; Amended Answer, ¶ 16. There is simply nothing in the record to suggest that Strong Steel's operation was materially different at any time between November 25, 1997 (the first "Notification") and April 18, 2001 (the second "Notification"). The hazardous wastes listed on the 2001 Notification (but not listed on the 1997 Notification) were a by-product of Strong Steel's processing of "junked" automobiles as "a shredding operation." That "shredding operation" was "running full" on or before November 25, 1997. In fact, between March 27, 1997 and November 25, 1997, Strong Steel had already processed approximately 5,589 "uncrushed" and 51,273 "crushed" automobiles (RX-27 at 1),[123] thereby releasing, as a conservative estimate, 1,116 gallons of used oil and/or gasoline before it filed its first "1997 Notification."[124] There is simply nothing in the record to suggest that this waste stream changed between November 25, 1997 and

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[123]RX-27, p. 1, states that Strong Steel processed 6,628 "uncrushed" automobiles during the period "Mar 97 - Dec 97." March 27 through December 31 is 279 days. Thus, assuming that Strong Steel began operations on March 27, 1997, Strong Steel processed approximately 23 "uncrushed" cars per day during this period (6,628 uncrushed cars ÷ 279 days = 23.75 uncrushed cars/day). RX-27, p. 1, further states that Strong Steel processed 59,033 "crushed" automobiles during the period "Mar 97 - Dec 97." By the same analysis, therefore, Strong Steel processed approximately 211 "crushed" cars per day during this period (59,033 crushed cars ÷ 279 days = 211.59 crushed cars/day). March 27, 1997 (the day the "shredding" operations began) through November 25, 1997 (the day of the first "Notification") is 243 days. Therefore, by the time Strong Steel filed its first "Notification" on November 25, 1997, it had already processed approximately 5,589 "uncrushed" automobiles (23 cars/day × 243 days = 5,589 cars), and 51,273 "crushed" automobiles (211 cars/day × 243 days = 51,273 cars).

[124]As explained in detail in section IV.A.2.a of this Initial Decision, *supra*, from March 1997 through July 1999, it was the policy of Strong Steel to accept "whole" uncrushed automobiles with the gas tank intact. Strong Steel would *assume* that the gas tanks were empty, and would either tear them off with a front-end loader or simply send them through the shredder. However, the evidence in the record demonstrates that the intact gas tanks were not, in fact, "empty," but as a conservative estimate, the evidence demonstrates that the "whole" automobiles accepted by Strong Steel during this time contained at least 2 gallons of gasoline and/or oil each. Tr. 11/18/03, pp. 214, 218; Tr. 12/9/03, p. 281; Tr. 12/10/03, p. 80; RX-28, p. 14; RX-28, p. 14. Thus Although RX-27 explains that it is "using the term 'uncrushed' as opposed to 'whole cars' as that is the best we could do; that is, cars typically come in with batteries, gas tanks and other pieces already removed and are not 'whole,'" (RX-27, p. 1), Steven Benacquisto testified that approximately 90% of the "uncrushed" cars accepted by Strong Steel came from "dismantlers" who "strip them out." Tr. 11/19/03, p. 327-328. Thus, at least 10% of the "uncrushed" cars were "whole" cars. Therefore, Strong Steel accepted approximately 558 "*whole* cars" between March 27, 1997 and November 25, 1997, (5,589 "uncrushed" cars × 10% = 558.9 "whole" cars), thereby releasing, by a conservative approximation, 1,116 gallons of gasoline and/or used oil before it filed its first "1997 Notification" (558 "whole cars" × 2 gallons of gasoline and/or used oil = 1,116 gallons).

April 18, 2001.[125] Based on the totality of the testimony and evidence along with the arguments of counsel, this Tribunal finds that Respondent was, on or before November 25, 1997, a generator of all of the hazardous wastes listed on the 2001 Notification. Therefore, Respondent failed to properly notify the U.S. EPA or the State of Michigan as a generator of hazardous waste in violation of Section 3010(a) of RCRA, 42 U.S.C. § 6930(a), and its Michigan and federal implementing regulations.

b. Respondent Was Required to Notify Pursuant to RCRA § 3010

(1) Notification is Required Beyond the "Preliminary Notification Period" in 1980

Respondent further argues, however, that "Strong Steel did not violate RCRA § 3010(a) because that section required notification only by entities that were conducting hazardous waste activity in November, 1980." RPHB at 39 (heading of ¶ 2). Respondent's argument is based on the first sentence of Section 3010(a), which states, under the heading "Preliminary notification," that the required notification must be filed "*[n]ot later than ninety days after promulgation of regulations under section 6921 of this title* identifying ... any substance as hazardous waste..." 42 U.S.C. § 6930(a) (emphasis added).[126] Respondent contends that the italicized portion of the above quotation:

> ...clearly show[s] that this section imposes a <u>one-time reporting obligation</u> applicable only to persons who were generating, transporting, storing, or disposing of hazardous substances *ninety days after May 19, 1980, when the RCRA Part 261 regulations were promulgated*. 45 Fed. Reg. 33084 (May 19, 1980).

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[125]Sometime after July, 1999, Strong Steel changed its policy so that it would *not* accept cars with gas tanks in order to address citizen complaints about explosions in the shredder. Tr. 11/19/03, pp. 303-305. In any event, however, from March 1997 through July 1999, it was the policy of Strong Steel to accept whole uncrushed automobiles with the gas tank intact. This change in policy (while allegedly leading to the littering of the surrounding community with torn-off gas tanks) may have arguably decreased to some extent the waste stream going into the soil on the Strong Steel site from that point *forward*, but it does not tend to show that the wastes found in August 1999 and listed on Respondent's April 18, 2001 "Notification" were not present on November 25, 1997. Indeed, if this change in policy suggests anything, it is that *more* of the hazardous wastes listed on the 2001 Notification were going into the soil at the Strong Steel site from March 27, 1997 to July 1999 than after the change in policy in July 1999.

[126] "[N]inety days after promulgation of regulations under section 6921 of this title [on May 19, 1980]," (the regulations under RCRA § 3001, 42 U.S.C. § 6921, being 40 C.F.R. Part 261), is August 17, 1980. *See* 45 Fed. Reg. 33084 (May 19, 1980).

RPHB at 39-40, including n.7 (underlining in original) (italics added).[127] Respondent therefore concludes: "In short, no matter what it did, Strong Steel could not have violated § 3010(a) of RCRA because Strong Steel did not exist *in November, 1980*, and was not conducting any hazardous waste activity at that time." RPHB at 41 (emphasis added).[128]

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[127]Although Respondent here asserts that the notification requirements apply only to generators in operation "*ninety days after* May 19, 1980" (RPHB at 40 (emphasis added)), Respondent goes on to assert on the next page of its brief that the notification requirements apply only to generators in operation "*as of* May 19, 1980." *Id.* at 41 (emphasis added). This confusion may reflect the fact that while RCRA § 3010(a) states that the notification must be filed "[n]ot later than *90 days after [May 19, 1980*]" (emphasis added), the "Public Notice" published at 45 Fed. Reg. 12746, 1248 (Feb. 26, 1980) pursuant to Section 3010 states that: "The proposal required persons conducting hazardous waste activities to notify with respect to those wastes handled '*at the time of promulgation [May 19, 1980] or revision of Section 3001 regulations*.' ... Any hazardous wastes handled *during the three-month period immediately prior* to the date of filing the notification must be included." (Emphases added). Thus, regarding the "Preliminary Notification Period," Section 3010(a) requires notification by generators in operation *as of* May 19, 1980, but such generators have until *ninety days after* May 19, 1980 to notify (*i.e.*, until August 17, 1980), and such notification must include all hazardous waste handled during the three-month period prior to notification, no matter when that notification is made between May 19, 1980 and August 17, 1980.

[128]Respondent's reference to "November, 1980" is somewhat puzzling, in that "ninety days after promulgation of regulations under section 6921 of this title is *August 17, 1980*. That is, the "Preliminary Notification" period referenced in RCRA § 3010(a) is May 19, 1980 to August 17, 1980. Perhaps Respondent has confused "ninety days after *promulgation*" of the regulations with the "*effective date*" of the regulations. The Preamble to the Final Rule setting forth 40 C.F.R. Part 261 states: "These regulations ... become *effective* on *November 19, 1980*, which is six months from the date of promulgation as Section 3010 requires." 45 Fed. Reg. 33084, 33084 (May 19, 1980) (emphasis added). This distinction between the "Preliminary Notification Period" (*90 days* after promulgation of 40 CFR Part 261) and the "effective date" of 40 CFR Part 261 (*6 months* after promulgation of 40 CFR Part 261) may be of consequence in that it could be interpreted in at least two different ways. First, it could be interpreted to mean that all generators *who were in operation as of the date of promulgation of Part 261 (May 19, 1980)*, must have filed a notification and received an EPA Identification Number by the "effective date" of Part 261 (November 19, 1980). Alternatively, however, the distinction could indicate that after the "effective date" of Part 261 (November 19, 1980), all generators, *regardless of when they began (or begin) operation*, must file a notification and receive an EPA Identification number. This latter interpretation appears to make more sense because all generators who were in operation as of May 19, 1980 were *already* required to file a notification and receive an EPA Identification Number by the end of the "Preliminary Notification Period" (August 17, 1980).

Conversely, Complainant relies to some extent on the *last* sentence of Section 3010(a) of RCRA for the proposition that "[t]he notification requirements of section 3010 of RCRA are applicable equally to new and existing companies." CPHRB at 81-82 (footnote omitted). The last sentence of RCRA § 3010(a) states: "No identified or listed hazardous waste subject to this subchapter may be transported, treated, stored, or disposed of unless notification has been given as required under this subsection." 42 U.S.C. § 6930(a). Complainant argues that "[t]his sentence does not predicate notification on a company's existence in 1980." CPHRB at 82.

The "Public Notice / Publication of Notification Form," entitled "Preliminary Notification of Hazardous Waste Activity" and published at 45 Fed. Reg. 12746 (Feb. 26, 1980), was issued "to provide a mechanism for implementation of Section 3010." *Id.* at 12749.[129] It is useful to consider this "Public Notice" in its entirety as it sheds much light on the issue of who must notify under Section 3010 of RCRA. The "Summary" of the "Public Notice" states:

> Section 3010 of [RCRA], 42 U.S.C. 6930 requires any person who generates or transports hazardous waste or who owns or operates a facility for the treatment, storage, or disposal of hazardous waste to notify the [EPA] (or States having authorized hazardous waste permit programs) of the hazardous waste activity *within 90 days of the promulgation or revision of RCRA Section 3001 regulations* [*i.e.*, August 17, 1980]. This notification will give EPA and the public a *"snapshot" of the hazardous waste activity regulated under RCRA.*

45 Fed. Reg. 12746, 12746 (Feb. 26, 1980) (emphases added). Section II ("Background") of the "Public Notice" states: "Section 3010 requires *all persons engaging in hazardous waste management* activities to notify EPA or States having authorized hazardous waste permit programs." *Id.* (emphasis added). Section III ("Implementation") of the "Public Notice" states:

> EPA has identified approximately 400,000 persons, businesses, and Federal Agencies which may be required to file notifications. EPA will mail to each of these persons a notification package... The notification must be filed with EPA *within 90 days of promulgation of 40 CFR Part 261* [*i.e.*, by August 17, 1980]. Each notification package will also include several pre-printed labels for use in filing the notification. The twelve-digit (12) number on the upper left hand corner of each label is that person's *EPA Identification Number*. It must be used on

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[129]The "Action" set forth at 45 Fed. Reg. 12746-12754 (Feb. 26, 1980) was not a "Final rule," but rather a "Publication of notification form." *Id.* at 12746. Section VIII of the Preamble ("Use of Public Notice in Lieu of Final Promulgation of Regulations"), states: "EPA has ... decided not to promulgate notification regulations, but to issue this Public Notice instead. The effect of this notice is, first, to *provide a mechanism for implementation of Section 3010*; second, to *establish a certification statement which must be signed by anyone submitting a notification*, and third, to establish a procedure for submission of claims of confidentiality." *Id.* at 12748-12749 (emphases added).

hazardous waste manifests and annual and other reports. Persons who do not receive notification packages will be *assigned an EPA Identification Number upon receipt by EPA of their notifications*.

Id. at 12746-12747 (emphases added). Section IV ("Who Must File") of the "Public Notice" states:

> *In order to transport, offer for transportation, treat, store, or dispose of hazardous waste, after the* ***effective date*** *of 40 CFR 261* ***[November 19, 1980***[130]*], a person must have filed a notification and received an EPA Identification Number*. Regulations governing the notification process were proposed on July 11, 1978 (43 Fed. Reg. 29908 *et seq*.)[[131]]. The proposed regulation stated that persons conducting hazardous waste activities "at the time of promulgation or revision of Section 3001 regulations" were required to file a notification. Many commenters requested that the Agency clarify the question of who must file. EPA, accordingly, has been more specific in the instructions to the form...
>
> It should be emphasized that the notification process applies in general to persons handling hazardous waste *at the time of promulgation or amendment of the Section 3001 regulations*...
>
> Hazardous waste management facilities which are no longer in operation are not required to notify because it is EPA's view that *the intent of Congress was that the Notification process was to be a snapshot of current hazardous waste management practices* for the benefit of EPA and the public...
>
> ***Generators of hazardous waste who begin operation after the initial notification period must, prior to shipping hazardous waste, apply for an EPA Identification Number using the Notification Form in accordance with the regulations published under Section 3002 [of RCRA] (40 CFR Part 262)****...*
>
> Persons who have provided proper notification of hazardous waste activity may later begin to handle additional hazardous wastes not included in the original notification. In the administration of this program, EPA will not require these persons to file a new notification under Section 3010 with respect to those wastes. Such a requirement would be costly to both EPA and the regulated community with no corresponding benefit.

Id. at 12747 (emphases added). Section V ("Information Required") of the "Public Notice"

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[130]The "effective date" of 40 C.F.R. Part 261 is November 19, 1980. 45 Fed. Reg. 33084 (May 19, 1980). Again, the "effective date" (November 19, 1980) is not to be confused with "ninety days after promulgation of regulations under section 6921" (August 17, 1980).

[131]As noted above, the "proposed regulations" were abandoned as "EPA ... decided not to promulgate notification regulations, but to issue this Public Notice instead." 45 Fed. Reg. 12746, 12748 (Feb. 26, 1980).

states:

> Section 3010 requires a person who notifies EPA of his hazardous waste activity to state "the location and general description of such activity and *the identified or listed hazardous wastes handled*." ...
>
> It should be noted that ***following the effective date of the hazardous waste regulatory program (6 months after promulgation of Section 3001) [i.e., on November 19, 1980] the determination as to toxicity must be completed by generators for each waste as required by 40 CFR Part 262***, *Standards Applicable to Generators of Hazardous Waste*... ***The Act requires all persons who handle hazardous waste to notify***. The purpose of Section 3010 is to provide EPA information on the identity and hazardous waste handled by persons involved in hazardous waste activities. *This information is essential for EPA's implementation of the Act*...
>
> The proposal required persons conducting hazardous waste activities to notify with respect to those wastes handled "*at the time of promulgation or revision of Section 3001 regulations*." The instructions in this final Public Notice are more specific regarding the time period to be used. Any hazardous wastes handled during the *three-month period immediately prior to the date of filing* the notification *must* be included. Notifiers *may* also include other wastes which they anticipate they *will* be handling.

Id. at 12747-12748 (emphases added).

As noted above, Section IV ("Who Must File") of the "Public Notice" stated: "Many commenters requested that the Agency clarify the question of who must file. EPA, accordingly, has been more specific in the instructions to the form." *Id.* at 12747. The "Instructions for filing Notification of Hazardous Waste Activity – EPA Form 8700-12: General Instructions" is set forth in numerous sections at 45 Fed. Reg. 12752-12754 (Feb. 26, 1980). Under the heading of "Who Must File," the "Instructions" state: "[RCRA] requires *anyone* who generates or transports hazardous waste, or who owns or operates a facility for treating, storing, or disposing of hazardous waste to notify EPA of their activity." *Id*. at 12752 (emphasis added). Under the heading of "What Information Should Be Filed," the "Instructions" state:

> When filing a notification, you *must identify the hazardous wastes that you handle* and give a general description of your activity including its location. You can submit all this information by simple [sic] completing the enclosed EPA Form 8700-12.

Id. (emphasis added).

Under the heading of "When To File," the "Instructions" contain four subcategories. Under the first subcategory, "Within 90-days of Publication of Regulations Under Section 3001 of RCRA," the "Instructions" state: "Anyone who conducts hazardous waste activity must file a

notification *within 90 days after EPA publishes regulations under Section 3001 of RCRA [i.e.*, by August 17, 1980]." 45 Fed. Reg. 12752 (Feb. 26, 1980) (emphasis added). Under the second subcategory, "Within 90-days of Any Amendments to Section 3001," the "Instructions" state: "If you handle any wastes which are identified or listed as hazardous by an amendment to the Section 3001 regulations, you must file a notification covering these wastes *within 90 days after the amendment is published*." *Id.* (emphasis added). Under the third subcategory, "***New Generators and Transporters***" (emphases added), the "Instructions" state:

> ***If you begin to generate hazardous waste and have not previously filed a notification, you must comply with the regulations for obtaining an EPA Identification Number published under Section 3002 of RCRA (40 CFR Part 262) before you transport hazardous waste or offer your hazardous waste to a transporter***.

Id. (emphases added). Under the fourth subcategory, "***Treatment, Storage and Disposal Facilities***" (emphases added), the "Instructions" state:

> If you own or operate a facility where hazardous waste is treated, stored, or disposed, and you do not file a notification during the 90-day period following the initial publication of the Section 3001 regulations [*i.e.*, by August 17, 1980], you will not be allowed to continued [sic] your hazardous waste activities until you obtain a hazardous waste permit. Similarly, *if you plan to open a* ***new*** *hazardous waste [TSD] facility, you* ***must obtain a hazardous waste permit*** *before commencing operations. Owners or operaters [sic] of new facilities need not submit a notification,* ***since your permit application will fulfill your notification requirements***.

Id. (emphases added).

With this background in mind, this Tribunal finds that the "notification" requirements of RCRA § 3010 apply to generators of hazardous waste and TSD facilities which came into being and/or began operations even *after* either "90 days after promulgation of 40 CFR Part 261 on May 19, 1980" (*i.e.*, August 17, 1980), or the "effective date" of those regulations on November 19, 1980. The "Public Notice / Publication of Notification Form" at 45 Fed. Reg. 12746-12754 stands in lieu of regulations promulgated under Section 3010 of RCRA, explaining in detail the operation of Section 3010 and setting forth the "Notification Form 8700-12" which must be used (or its State equivalent) in notifying the EPA or an authorized State of hazardous waste activity. Section VIII of the Public Notice ("Use of Public Notice in Lieu of Final Promulgation of Regulations"), explains:

> EPA's primary reason for proposing regulations rather than a Public Notice was to establish rules covering the authorization of States to receive the notification (Limited Interim Authorization). However, EPA decided ... to abandon the concept of Limited Interim Authorization. EPA has therefore decided not to

> promulgate notification regulations, but to issue this Public Notice instead. *The effect of this notice is, first, to provide a mechanism for implementation of Section 3010; second, to establish a certification statement which **must** be signed by anyone submitting a **notification**...*

45 Fed. Reg. 12746, 12748-12749 (Feb. 26, 1980) (emphases added).

The "Public Notice / Publication of Notification Form" specifically addresses "generators" who begin operation *after* "the initial notification period" (*i.e.*, after August 17, 1980), explaining that:

> Generators of hazardous waste *who begin operation after the initial notification period must*, prior to shipping hazardous waste, *apply for an EPA Identification Number using the Notification Form* in accordance with the regulations published under Section 3002 [of RCRA] (40 CFR Part 262).

Id. at 12747 (emphases added). Regarding "*New Generators* and Transporters" (emphasis added), the "Instruction for filing Notification ... Form 8700-12," published as part of the "Public Notice / Publication of Notification Form" specifically states:

> If you begin to generate hazardous waste and have not previously filed a notification, *you must comply with the regulations for obtaining an EPA Identification Number published under Section 3002 of RCRA (40 CFR Part 262)* before you transport hazardous waste or offer your hazardous waste to a transporter.

Id. at 12752 (emphases added). Regarding "Treatment, Storage and Disposal Facilities," the "Instructions" explain:

> [I]f you plan to open a *new* hazardous waste treatment, storage, or disposal facility, you must obtain a hazardous waste permit before commencing operations. *Owners or operaters [sic] of new facilities need not submit a notification, since your permit application will fulfill your notification requirements*.

Id. (emphases added). Thus, the "Public Notice / Publication of Notification Form," including the "Instructions for filing Notification ... Form 8700-12," along with Form 8700-12 itself, published at 45 Fed. Reg. 12746-12754 in order "to provide a mechanism for implementation of *Section 3010* ... [and] *establish a certification statement* which must be signed by anyone submitting a *notification*" (emphases added), clearly contemplates "notification requirements" for generators and TSD facilities which come into being or begin operations "after the initial notification period" (*i.e.*, after August 17, 1980). Indeed, the statement that "[o]wners or operaters [sic] of *new facilities* need not submit a notification, *since your permit application will fulfill your **notification requirements***" would be entirely superfluous if "notification requirements" under RCRA § 3010 did not extend beyond the initial "90 days after promulgation" of 40 C.F.R. Part

261 on May 19, 1980.

Therefore, RCRA § 3010 requires notification even for handlers of hazardous waste who come into being and/or begin operations after the "Preliminary Notification Period" in 1980.

(2) The Requirement to Notify *After* the "Preliminary Notification Period" Flows from RCRA § 3010

In a related but distinct argument, Respondent further contends that "the obligation of new generators, transporters, and storage and disposal facilities ... flow not from § 3010(a), but from 40 CFR Parts 262, 263, and the obligation of TSDF's to obtain a permit before operating..." RPHB at 41. However, the "Public Notice / Publication of Notification Form," which establishes "a mechanism for *implementation of Section 3010*" and also *establishes the Notification Form itself*, clearly contemplates a regulatory scheme such that "notification requirements" "*using the notification form*" to obtain an EPA identification number *pursuant to Section 3002 of RCRA, 42 U.S.C. § 6922, and 40 C.F.R. Part 262*, extend beyond the "preliminary notification period" identified in the first sentence of Section 3010(a). That is, RCRA Section 3002 and 40 C.F.R. Part 262 are part and parcel of the "mechanism for implementation of Section 3010."

Section 3002 of RCRA, "Standards applicable to generators of hazardous waste," states, in part:

> (a) ... the Administrator shall promulgate regulations establishing such standards... [as] shall establish requirements respecting – ...
> (4) furnishing of information on the general chemical composition of such hazardous waste to persons transporting, treating, storing, or disposing of such wastes...

42 U.S.C. § 6922(a)(4). Those regulations are set forth at 40 C.F.R. Part 262. Section 262.11, 40 C.F.R. requires generators of solid waste to determine if the waste is hazardous.[132] 40 C.F.R. § 262.12, in turn, requires generators of hazardous waste to obtain *an EPA identification number* "***using EPA form 8700-12***." 40 C.F.R. § 262.12(b) (emphases added). "EPA form 8700-12," of course, is the "Notification Form" set forth in the "Public Notice / Publication of Notification Form," published at 45 Fed. Reg. 12746-12754 in order "to provide a mechanism for *implementation of* ***Section 3010*** ." Thus, while the obligation to notify (after the "Preliminary Notification Period ending August 17, 1980) in order to obtain an EPA identification number is set forth at RCRA § 3002(a)(4) and 40 C.F.R. §§ 262.11 and 262.12, that obligation flows initially from RCRA § 3010 and the Notification Form established by the Public Noticed issued pursuant thereto. Put another way, the "post-Preliminary Notification Period" obligation to notify

[132] *See also*, Comment to 40 C.F.R. § 261.20: "§ 262.11 of this chapter sets forth the generator's responsibility to determine whether his waste exhibits one or more of the characteristics identified in this subpart."

flows *from* Section 3010 and Notification Form 8700-12 and *through* Section 3002 and 40 C.F.R. Part 262. Therefore, in the present case, Respondent's failure to properly notify on November 25, 1997, is properly characterized as a violation of RCRA § 3010 and 40 C.F.R. §§ 262.11 and 262.12, along with MAC §§ 299.9301 and .9303.[133]

This intimate connection between RCRA § 3010 and 40 C.F.R. Part 262 is explicitly recognized in 40 C.F.R. § 260.41, Appendix I to Part 260 – Overview of Subtitle C Regulations, which states:

> Figure 4 is a flowchart which ... points out that all people who handle hazardous waste are either: (1) Generators of hazardous waste, (2) transporters of hazardous waste, (3) owners or operators of hazardous waste treatment, storage, or disposal facilities, or (4) a combination of the above. Figure 4 indicates that **all of these people must notify EPA of their hazardous waste activities in accordance with the *Section 3010 Notification* Procedures (see 45 FR 12746 *et seq*.), and obtain an *EPA identification number***... If a person generates hazardous waste, Figure 4 indicates that he must comply with the ***part 262 rules***.

40 C.F.R., App. I to Part 260 (emphases added). *See also*, "Figure 4," which indicates that "All persons who handle hazardous waste subject to control under Subtitle C..." must "Notify EPA *according to Section 3010 of RCRA & Obtain [an] EPA ID Number*." *Id.* at Figure 4 (emphasis added).[134]

In addition, the MDEQ believes Respondent's 1997 Notification to have been submitted pursuant to Section 3010 of RCRA. In a December 9, 1997 letter from the MDEQ to Strong Steel, by which the MDEQ issued Respondent's EPA Identification Number, the MDEQ states: "The [MDEQ] has received a Notification of Regulated Waste Activity form *which was submitted pursuant to Section 3010 of the federal Resource Conservation and Recovery Act, 42 U.S.C. 6930* and Part 111 ... of Michigan's Natural Resources and Environmental Protection Act..." CX-30A, Bates 411 (emphases added).

Further, the EAB has found that an allegation of failure to properly notify, where the respondent began operations *after* the "Preliminary Notification Period" referenced in RCRA § 3010(a), constituted a violation of Section 3010, was "substantially justified" and "had a reasonable basis in law." In the case of *Hoosier Spline Broach Corporation*, 7 E.A.D. 665 (EAB July 2, 1998), *aff'd sub nom*. Hoosier Spline Broach Corp. v. U.S. E.P.A., 112 F. Supp. 2d 763

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[133]Again, MAC §§ 299.9301 and 299.9303 require that "[a]pplications for EPA identification numbers shall be made on state form EQP5150." Michigan State form EQP5150 is the authorized State equivalent of EPA form 8700-12. *See, e.g.*, RPHB at 46; RX-5, p. 2 (footer); CX-30, Bates 414 (footer); CX-41, Bates 752 (footer).

[134]*See also*, "Figure 4" at 45 Fed. Reg. 33066, 33082 (May 19, 1980).

(S.D. Ind. 1999), the EAB considered whether the respondent was entitled to attorney fees under the Equal Access to Justice Act ("EAJA"). There, the respondent ("Hoosier") manufactured steel cutting tools used in the airline and automobile industries. As part of its manufacturing process, Hoosier produced a "grinding sludge," which "[f]or two years, *from February 1990 until February 1992*, Hoosier discarded ... as non hazardous waste in a waste pile at its Facility." Hoosier, 112 F. Supp. 2d at 765 (emphasis added).[135] After sample analyses revealed that the grinding sludge was in fact "hazardous waste," the EPA filed a four-count complaint, count one of which:

> ...alleged violations of *40 C.F.R. § 262.11* and *RCRA § 3010* during the period *September 1990 to May 1992*, in connection with Hoosier's alleged failure to make a timely hazardous waste determination, to properly notify EPA of regulated hazardous waste activities, and to obtain an EPA identification number.

Hoosier, 7 E.A.D. at 671 (emphases added). The EAB elaborated:

> ...Hoosier's liability for the violations ... (covering failure to comply with certain operating standards applicable to TSD facilities) is predicated upon its alleged failure to comply with notification and application requirements within the *1990 to 1992 time frame*... [T]he Region's complaint is based on acts and/or omissions within the 1990 to 1992 period.

Hoosier, 7 E.A.D. at 687 (footnote omitted) (emphasis in original).[136]

The case eventually settled on terms favorable to the respondent, who then sought attorney fees under EAJA. The EAB denied Hoosier's claim for attorney fees because the EAB found that "the Region's position in the underlying RCRA enforcement proceeding ... [was] substantially justified..." *Id.* at 707. The U.S. District Court, noting that "'... an agency's position is substantially justified [only] if it has a reasonable basis in law and fact' – that is, if it is 'justified to a degree that could satisfy a reasonable person,'" (Hoosier, 112 F. Supp. 2d at 768 (citations omitted)), upheld the EAB's determination that the EPA's pursuit of its RCRA complaint was "substantially justified." Therefore, the EAB and the U.S. District Court found that a complaint alleging a violation of *RCRA § 3010* and 40 C.F.R. § 262.11 for a *failure to notify* regarding hazardous waste generation in 1990 to 1992 – *well after* the "Preliminary Notification Period"

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[135] *See also, Hoosier Spline Broach Corp.*, EAJA-V-W-16-93 (Recommended Decision, Sept. 17, 1996) at 2: "A RCRA compliance inspection of Respondent's facility was made on *February 21, 1992*, ... during ... which a waste pile of grinding sludge was found... For approximately *the past two years Respondent had been storing its grinding sludge* at that location." (Footnote omitted) (Emphasis added).

[136] *See also*, Hoosier, 112 F. Supp. 2d at 767: "... EPA's Complaint concerned only waste generated and placed in Hoosier's waste pile between 1990 and 1992." (Citation omitted).

referenced in RCRA § 3010(a) (May 19, 1980 - August 17, 1980) or the "effective date" of 40 C.F.R. Part 261 (November 19, 1980) – was "substantially justified" and "had a reasonable basis in law." While nothing in any of the three *Hoosier* decisions indicates whether Hoosier was "in operation" in May, 1980, the decisions clearly indicate that the "hazardous waste generation" did not begin to occur until 1990. Further, while this Tribunal acknowledges that the *Hoosier* cases did not *directly* address the question of whether the notification requirements of RCRA § 3010 extend beyond August 17th or November 19th, 1980,[137] their findings of "substantial justification" for such an allegation strongly support the conclusion that the notification requirements of RCRA § 3010 do so extend and are ongoing.

Finally, the respondent in *Harmon Electronics, Inc.*, RCRA-VII-91-H-0037 (Initial Decision, Dec. 12, 1994), made an argument closely paralleling that advanced here by Strong Steel. In *Harmon Electronics*, ALJ Vanderheyden rejected that argument, finding:

> As a public welfare statute designed to protect human health and the environment, RCRA should not be construed narrowly. Respondent, however, seeks an interpretation that vitiates the public interest and goes against the stated purpose of RCRA. **According to respondent, it had a one-time obligation to obtain a permit, which was a completed offense when it failed to comply back in 1980. But for this instance, it could have continued to treat, store and dispose of hazardous waste without a permit incorporating the safeguards necessary for protection of human health and environment.** If this view were adopted, the regulatory framework of RCRA would be futile, as an offender could disregard these fundamental conditions without penalty simply by not complying within five years, while the consequences of hazardous waste disposal continued unabated. Settled principles of statutory construction compel avoidance of a result which runs counter to the broad goals which Congress intended to achieve, in the absence of an unmistakable directive that is lacking here. As respondent's interpretation would undermine the purposes of RCRA, it is rejected.

Harmon Electronics, Inc., RCRA-VII-91-H-0037 (Initial Decision, Dec. 12, 1994) at 27 (1994 EPA ALJ LEXIS 35) (citations omitted) (emphasis added), *aff'd*, 7 E.A.D. 1 (1997), *rev'd sub nom. on other grounds*, Harmon Industries, Inc. v. Browner, 19 F. Supp. 2d 988 (W.D. Mo. 1998), *aff'd*, 191 F.3d 894 (8th Cir. 1999). This Tribunal similarly rejects Respondent's contention in the present case that RCRA § 3010 does not requires notification beyond the "preliminary notification period" in 1980.

(3) Summary

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[137]Senior ALJ Harwood noted in *Hoosier*, EAJA-V-W-16-93 (Recommended Decision, Sept. 17, 1996) at 8: "The legal basis for Complainant's position that this waste, if hazardous, is subject to the requirements cited in the complaint, *is not really questioned*. What is questioned is the factual basis for Complainant's position that the waste was D007 waste." (Emphasis added).

In summary, Respondent's argument that "Strong could not have violated § 3010(a) of RCRA because Strong Steel did not exist in November, 1980" (RPHB at 41) appears to be, in essence, that *even if* its 1997 Notification (submitted pursuant to RCRA § 3002, 40 C.F.R. §§ 262.11 and .12, and MAC §§ 299.9301 and .9303 in order to obtain an EPA Identification Number) was deficient in that it failed to list all of the hazardous wastes then being generated, it is not liable under Count VI of the Amended Complaint because (according to Respondent) Complainant cited the wrong section (3010) of RCRA as the basis for the violation. However, Respondent admits that "the obligation of new generators ... and storage and disposal facilities would flow ... from 40 CFR Part[] 262 ... and the obligation of TSDF's to obtain a permit before operating under the corresponding ... State regulations..." *Id.* As described above, 40 C.F.R. Part 262 was promulgated pursuant to RCRA § 3002 and includes 40 C.F.R. §§ 262.11 and 262.12, which require generators of hazardous waste to *notify* EPA or authorized States of all hazardous waste to be transported, stored, or disposed of; such notification being achieved by applying for an *EPA identification number* *using Form 8700-12*, or State equivalent, as established in the Public Notice/Publication of Notification Form published at 45 Fed. Reg. 12746, *et seq*., (Feb. 26, 1980) "to provide a mechanism for *implementation of Section 3010*." *Id.* at 12749 (emphases added). Thus, the requirement that "new generators" notify in order to obtain an EPA Identification number flows originally from RCRA § 3010 and its explanatory Public Notice.

The issue is confused to some extent by the fact that Complainant has withdrawn that portion of Count VI which alleged a "failure to have an U.S. EPA Identification Number," as required by RCRA § 3002(a)(4), 40 C.F.R. § 262.12, and MAC § 299.9303 (*via* MAC § 299.9301(3)(a)), because Respondent did, in fact, have an EPA Identification Number. However, because that EPA Identification Number was obtained based on the 1997 Notification, and the 1997 Notification failed to list all of the wastes then being generated, the 1997 Notification was deficient and Respondent therefore failed to *properly* notify under the cited statues and regulations. Although Complainant has withdrawn the allegation that Respondent failed to obtain an EPA Identification Number, the gravamen of Count VI remains that Respondent's 1997 Notification, used to obtain that EPA Identification Number, was deficient.

Finally, Complainant, in the Amended Complaint, continues to allege that the *improper notification* was a violation of MAC §§ 299.9301 and .9303, 40 C.F.R. § 262.12, and RCRA § 3010(a). Amended Complaint, ¶¶ 113, 131. Respondent does not suggest that an improper notification submitted in order to obtain an EPA Identification Number is not a violation of MAC §§ 299.9301 and .9303, and 40 C.F.R. § 262.12,[138] but argues only that it is not a violation of RCRA ¶ 3010(a). However, the "notification" requirements set forth in those regulations flow originally from RCRA ¶ 3010 and the "Public Notice/Publication of Notification Form" published at 45 Fed. Reg. 12746, *et seq*., (Feb. 26, 1980).

To find that a generator of hazardous waste need not notify the EPA or an authorized State

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[138]In fact, Respondent admits that "the obligation of new generators ... and storage and disposal facilities would flow ... from 40 CFR Part[] 262..." RPHB at 41.

of hazardous waste it intends to treat, store, dispose of, or transport simply because the generator began generating the hazardous waste *after* promulgation of the requirements for "identification and listing of hazardous waste" (40 C.F.R. Part 261) would eviscerate the purposes of the Act and lead to an absurd result. In any event, *regardless* of whether Complainant properly alleged a violation of RCRA § 3010(a) in Count VI of the Amended Complaint, there is no question that Complainant properly alleged violations of MAC §§ 299.9301 and .9303,[139] and 40 C.F.R. § 262.12, for failure to properly notify in the course of obtaining an EPA Identification Number.

For all of the forgoing reasons, this Tribunal finds that Respondent's 1997 Notification was deficient in that it failed to list all of the hazardous wastes then being generated, and that this failure constituted a violation of MAC §§ 299.9301 and 299.9303 and 40 C.F.R. § 262.12. In addition, as Appendix I to 40 C.F.R. Part 260 makes clear, and as the EAB implicitly found in *Hoosier Spline Broach Corporation*, 7 E.A.D. 665 (EAB July 2, 1998), *aff'd sub nom*. Hoosier Spline Broach Corp. v. U.S. E.P.A., 112 F. Supp. 2d 763 (S.D. Ind. 1999), Respondent's failure to properly notify constituted a violation of RCRA § 3010, 42 U.S.C. § 6930.

c. Respondent Violated MAC §§ 299.9301 and 299.9303 By Filing a Deficient Notification in 1997, Despite Having Obtained an EPA Identification Number

Respondent further argues that:

> Because Strong Steel did indeed obtain an EPA ID number in 1997, it cannot have violated MAC §§ [sic] 299.9303, because that section does nothing more than prohibit the generator from treating, storing, disposing or transporting hazardous waste without having received an EPA ID number.

RPHB at 43. That is, Respondent apparently takes the frankly outrageous position that a generator need not *accurately* and *completely* notify the EPA or authorized State of *all* of the hazardous waste it handles, as long as it obtains an EPA identification number. This argument elevates form over substance to the point of rendering the entire exercise of obtaining the EPA identification number utterly pointless. This Tribunal rejects Respondent's argument and finds that any "notification" submitted in order to obtain an EPA identification number under RCRA or its federal or authorized state implementing regulations must contain *any and all* hazardous wastes currently being handled by the generator. Indeed, this was the legal conclusion reached by Judge McGuire in ruling on cross motions for Accelerated Decision in this case, as he held:

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[139] As Judge McGuire observed in his Order on Accelerated Decision in this case, due to EPA's delegation of administration of the RCRA program to the State of Michigan: "Michigan regulations govern the generation, transportation, treatment, storage, and disposal of hazardous waste and the management of used oil in this enforcement proceeding." Order on Accelerated Decision at 4.

> [I]t is a factual question whether in 1997 Respondent was generating hazardous wastes that were not listed on its 1997 Notification. In order for Respondent to be found liable for violating Section 3010(a) of RCRA under this theory of liability, Complainant must prove that *in 1997 Respondent was handling all of the wastes that were subsequently found in 1999/ 2000 on Respondent's property thereby establishing that Respondent's original Notification was not proper*.

Order on Accelerated Decision at 30-31 (emphasis added).

The correctness of this conclusion is clear from a review of the relevant regulatory provisions. Section 271.10(a), 40 C.F.R., states in part that: "... States must require new generators to contact the State and obtain an EPA identification number before they perform *any activity subject to regulation* under the approved State hazardous waste program..." (Emphases added). Section 262.12(b), 40 C.F.R., states in part that: "A generator who has not received an EPA identification number may obtain one by applying to the Administrator *using EPA form 8700-12*." (Emphases added). MAC § 299.9303(4) states in part that: "Applications for EPA identification numbers *shall be made on state form EQP5150*..." (Emphases added). Michigan State form EQP5150 is the authorized State equivalent of EPA form 8700-12.[140]

Under the heading of "What Information Should Be Filed," the "Instructions" for filing notifications using EPA form 8700-12 state:

> When filing a notification, you *must identify the hazardous wastes that you handle* and give a general description of your activity including its location. You can submit all this information by simple [sic] completing the enclosed EPA Form 8700-12.

Id. at 12752 (emphases added). Section X of Michigan form EQP5150, requiring a signature of the "owner, operator, or an authorized representative," states:

> Certification. I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that *the submitted information is true, accurate, and* ***complete***. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

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[140]Michigan State form EQP5150 states: "U.S. EPA Form 8700-12 is replaced by the Michigan Notification Form EQP5150 (rev. 03/98)." CX-41, Bates 752 (footer). Respondent explains that Michigan form EQP5150 is the "Michigan counter-part" to EPA form 8700-12. RPHB at 46.

CX-30, Bates 415 (emphases added); RX-5, p. 3 (emphases added).[141]

Section V ("Information Required") of the "Public Notice / Publication of Notification Form" issued pursuant to Section 3010 of RCRA states:

> Section 3010 requires a person who notifies EPA of his hazardous waste activity to state "the location and general description of such activity and *the identified or listed hazardous wastes handled*." ...
>
> The Act requires all persons who handle hazardous waste to notify. The purpose of Section 3010 is to provide EPA information on the identity and hazardous waste handled by persons involved in hazardous waste activities. *This information is essential for EPA's implementation of the Act*.

45 Fed. Reg. 12746, 12747-12748 (Feb. 26, 1980) (emphases added).

The above-quoted language clearly evinces an intent that notification identifying the hazardous wastes being handled must include *all* of the hazardous wastes being handled. Indeed, this appears to be a simple common sense conclusion, as the purposes of RCRA to ensure the proper handling of hazardous wastes would otherwise be eviscerated. The RCRA regulatory scheme is one of "'cradle-to-grave' regulation of hazardous waste." 45 Fed. Reg. 33066, 33066 (May 19, 1980). In order to achieve this "cradle-to-grave" oversight, the "*EPA relies to a substantial extent on accurate self-reporting*." U.S. v. JG-24, Inc., 331 F. Supp. 2d 14, 57 (D. P.R. 2004) (emphasis added).[142] In the present case, Strong Steel's suggestion that generators need not include *all* of the hazardous wastes they handle on Michigan's notification form EQP5150 in order to obtain an EPA identification number is an improperly narrow interpretation of the statute that runs counter to Congressional intent and undermines the purposes of RCRA. As such, it is rejected.

d. Conclusion

For all of the forgoing reasons, this Tribunal finds that, on and prior to at least July 22,

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[141]Respondent's 1997 Notification was signed by "Clarence X. Watts, Quality Manager." CX-30, Bates 415; RX-5, p. 3.

[142]*See also*, A.Y. McDonald Industries, Inc., 2 E.A.D. 402, 418 (EAB 1987), *quoting A.Y. McDonald Industries, Inc.*, 1986 WL 69026 (E.P.A. Apr. 23, 1986) (NO. 85-H-0002): "'The notification ... requirements are crucial to the effective enforcement of RCRA. The law is not designed to allow hazardous waste facilities to operate until they are discovered by the EPA. Instead, the burden is placed on the facility owners and operators to analyze and report their operations to the EPA (or the state if there is an approved state program in effect).' ... In other words, the notification and permit requirements go to the very heart of the RCRA program. If they are disregarded, intentionally or inadvertently, the program cannot function."

1999, Respondent had not properly notified the U.S. EPA, or the State of Michigan pursuant to 42 U.S.C. § 6926, of all of the hazardous wastes that it generated on its property. Specifically, the 2001 Notification identified Respondent as a LQG of the following hazardous wastes, which the 1997 Notification had not identified: Benzene (D018), Chlorobenzene (D021), 1,2-Dichloroethane (D028), Tetrachloroethylene (D039), and Trichloroethylene (D040). All of the hazardous wastes listed on the 2001 Notification were generated by Respondent's processing of "junked" automobiles, and Respondent was, on or before November 25, 1997, a generator of all of the hazardous wastes listed on the 2001 Notification. Therefore, Respondent failed to properly notify the U.S. EPA or the State of Michigan as a generator of hazardous waste in violation of Section 3010 of RCRA, 42 U.S.C. § 6930; 40 C.F.R. §§ 262.11 and .12; and MAC §§ 299.9301 and .9303.

This Tribunal rejects Respondent's argument that " no matter what it did, Strong Steel could not have violated § 3010(a) of RCRA because Strong Steel did not exist in November, 1980, and was not conducting any hazardous waste activity at that time." RPHB at 41. The "notification" requirements of RCRA § 3010 apply to generators of hazardous waste and TSD facilities which come into being and/or begin operations even *after* either "90 days after promulgation of 40 CFR Part 261 on May 19, 1980" (*i.e.*, August 17, 1980), or the "effective date" of those regulations (*i.e.*, November 19, 1980), who submit a "notification" in order to obtain an EPA Identification Number. Respondent's 1997 Notification was deficient in that it failed to list all of the hazardous wastes *then* being generated, and this violation is properly characterized as a violation of RCRA § 3010 and 40 C.F.R. §§ 262.11 and 262.12, along with MAC §§ 299.9301 and 299.9303.

This Tribunal further rejects Respondent's argument that: "Because Strong Steel did indeed obtain an EPA ID number in 1997, it cannot have violated MAC §§ [sic] 299.9303, because that section does nothing more than prohibit the generator from treating, storing, disposing or transporting hazardous waste without having received an EPA ID number." RPHB at 43. Strong Steel's suggestion that generators need not include *all* of the hazardous wastes they handle on Michigan's notification form EQP5150 in order to obtain an EPA identification number is an improperly narrow interpretation of the statute that "vitiates the public interest," runs counter to Congressional intent, and undermines the purposes of RCRA. Rather, this Tribunal finds that any "notification" submitted in order to obtain an EPA identification number under RCRA or its federal or authorized State implementing regulations must contain *any and all* hazardous wastes currently being handled by the generator.

4. Respondent Failed to Notify that it Was Disposing of Hazardous Wastes

As an initial matter, it is useful, here, to reiterate the subtle distinctions between the various allegations of "storage" and "disposal" alleged in Count VI. Complainant explains:

> [T]he Respondent did not notify of all of its waste generation activities and failed to notify as a storage or disposal facility. *The storage and disposal aspects of this*

Count are pled alternatively. It is alleged that Respondent's actions constituted *disposal* by virtue of its placement of hazardous waste on the ground and allowing it to enter the soils and subsurface soils. As with Count IV, the Respondent's actions can be considered *storage* based on Respondent's subsequent excavation and off-site disposal of the contaminated soils. *An additional basis for failing to notify of its storage activities is the Respondent's storage of the two drums of hazardous waste for a year*.

CPHB at 60 (emphases added). Thus, it is important to recognize that there are two different "storage" allegations, one of which is pled in the "alternative" and the other of which stands alone. Regarding "failure to notify of *disposal* activities," Complainant contends that Respondent's action in placing and allowing to remain contaminated soil *in the ground* could either be characterized as "disposal" or "storage." However, regarding "failure to notify as a *storage* facility," Complainant contends that the "storage" consisted of Respondent's keeping the two 55-gallon drums of contaminated soil, which had been excavated by Inland Waters on April 11, 2000, on site until April 18, 2001.

For the following reasons, this Tribunal finds that Respondent's action in placing and allowing to remain contaminated soil on and in the ground at the Strong Steel facility constituted illegal "disposal" of hazardous waste, but did not constitute "storage" of hazardous waste.

a. Allowing Hazardous Waste to Contaminate Soil and Allowing Such Soil to Remain Until Subsequent Excavation and Off-Site Disposal Constituted "Disposal" but not "Storage"

Section 1004(33) of RCRA , 42 U.S.C. § 6903(33), states that: "The term 'storage,' when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste." The term "storage" is further defined by MAC § 299.9107(dd) as: "the holding of hazardous waste for a temporary period at the end of which the hazardous waste is treated, disposed of, or stored elsewhere." The federal regulatory definition at 40 C.F.R. § 260.10 is essentially identical.[143] Neither RCRA nor its implementing regulations (C.F.R. or MAC) define "containment." However, MAC § 299.9102(o) and 40 C.F.R. § 260.10 define "container" as "any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled."

In Connecticut Coastal Fishermen's Ass'n. v. Remington Arms Co., Inc., 989 F.2d 1305 (2nd Cir. 1993) ("Remington Arms,"), suit was brought against the operators of a skeet shooting club, alleging, *inter alia*, that the club was violating RCRA by operating a "hazardous waste storage facility" in that the club was "storing" lead shot scattered in the waters of Long Island Sound. There, the court held:

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[143]The federal definition contains a comma (",") after the word "period."

> The lead shot and clay targets now scattered in the waters of Long Island Sound *at no time have been contained or held*. Moreover, the very essence of Coastal Fishermen's complaint is that Remington left the debris in the Sound with *no intention of taking additional action*. Hence, the alleged storage of the waste logically *may not be an interim measure as the regulations require*. Coastal Fishermen therefore failed to state a valid claim that Remington owns or operates a hazardous waste storage facility...

Remington Arms, 989 F.2d at 1316 (emphasis added). In South Road Associates v. International Business Machines, Inc., 216 F.3d 251 (2nd Cir. 2000), the Second Circuit summarized its holding in Remington Arms as follows:

> As to whether Remington was "operating a hazardous waste *storage* facility," we ... dismissed the claim ... because the statutory definition of "storage" ... does not include the act of leaving waste "with no intention of taking additional action." [Remington Arms, 989 F.2d] at 1316 (*citing* 42 U.S.C. § 6903(33); 40 C.F.R. § 260.10).

South Road Associates, 216 F.3d at 254 (italics in original) (underlining added). Thus, the Second Circuit focused on two things: 1) whether the waste was "contained," and 2) whether the operator intended to remove the waste. Answering both questions in the negative, the court found the action not to be "storage."

Similarly, in U.S. v. Power Engineering Co., 10 F. Supp. 2d 1145 (D. Colo. 1998) ("Power Engineering I"), the court held that a metal refinishing facility's retention of three open waste piles composed of contaminated soil which had been excavated from beneath its plating tanks did not constitute illegal "storage" of hazardous waste under RCRA, but rather constituted continuing "disposal." There, the court held:

> The United States also contends that defendants' retention of the three open waste piles composed of contaminated soil excavated from beneath the plating tanks constitutes illegal "storage" of hazardous waste. Indeed, this waste is not stored in containers or properly labeled. Further, this waste has accumulated for several years. While I hold ... that this disposal of hazardous waste now occurs at the Facility, I cannot conclude that defendants currently store hazardous waste in violation of Colorado regulations.
>
> "Storage" is defined as "the *containment* of hazardous waste, either on a temporary basis [or] for a period of years, *in such a manner as not to constitute disposal of such hazardous waste.* 42 U.S.C. § 6903(33) (emphasis added). Defendants dumped the contaminated soil onto the land "so that such ... hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters" and, hence, they engaged in "disposal." Because the dumping constitutes ongoing illegal disposal, and because the United States has stipulated that defendants' creation of the

> uncontained waste piles constituted "disposal," I conclude that no evidence exists of current illegal storage.

Power Engineering I, 10 F. Supp. 2d at 1160 (citations omitted) (emphasis in original). Thus, while apparently focusing, as did the Second Circuit to some extent in Remington Arms, on the lack of "containment," the court in Power Engineering I seems also to suggest that the statutory definition of "storage" is such that "storage" ("in such a manner as not to constitute disposal") is mutually exclusive of "disposal." Having found that the waste piles constituted "disposal," the court declined to find that the same waste piles also constituted "storage."

In the present case, the hazardous waste on and in the ground at the Strong Steel facility, in light of Remington Arms and Power Engineering I, appears *not* to have been under "containment," as that term is contemplated by the definition of "storage" at 42 U.S.C. § 6903(33). Further, in finding that the Strong Steel facility is a "disposal facility" in section IV.A.3 of this Initial Decision, *supra*, this Tribunal has already found that Strong Steel did not, at the time of the disposal, intend to remove the hazardous waste from the ground. Therefore, this Tribunal finds that the hazardous waste in the soil was not "stored" on or in the ground, but rather was "disposed of" on or in the ground.

b. Respondent Was Required, but Failed, to Notify of Its "Disposal" Activities

The allegations in Count VI regarding "failure to notify" pertain not only to "generators" of hazardous waste, but also to those "storing" or "disposing of" hazardous waste. Amended Complaint at 28, ¶ 131. The statutes and regulations discussed *supra* regarding Respondent's failure to notify as a "generator" apply also to "storage and disposal facilities."[144]

As discussed *supra* in section IV.A.3 of this Initial Decision (finding that Strong Steel is a TSD facility in the context of Count III), Judge McGuire in his Order on Accelerated Decision found that Respondent had "generated" and "disposed" of hazardous waste at the Strong Steel site, but denied Complainant's Motion for Accelerated Decision on Count VI because Complainant had failed to specifically allege in the original Complaint that the Strong Steel

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[144] *See, e.g.*, RCRA Section 3010(a), 42 U.S.C. § 6930(a) ("... any person generating ... [hazardous waste] or owning or operating a facility for treatment, *storage* or *disposal* of such substance shall file ... a notification...") (emphases added); 40 C.F.R. § 262.12(a) ("A generator must not treat, *store*, *dispose of*, transport, or offer for transportation, hazardous waste without having received an EPA identification number...) (emphases added); MAC § 299.9301(3)(a) ("A generator who treats, *stores*, or *disposes of* hazardous waste on-site shall comply with all of the following requirements with respect to that waste... (a) The provisions of ... R. 299.9303...") (emphases added); MAC § 299.9301(1) ("A generator shall not treat or *store*, *dispose of*, or transport ... hazardous waste without having received an EPA identification number...") (emphases added).

facility was a "TSD facility." Due to this omission in the original Complaint, Judge McGuire found that: "Although Respondent may have been disposing of hazardous waste on its property, it is unclear, as a matter of fact, *whether Respondent operates a "[TSD] facility" that subjects it to the notification requirements of Section 3010(a) of RCRA and its implementing regulations*." Order on Accelerated Decision at 33 (emphases added).

This Tribunal has already found, regarding Count III, *supra*, that the Amended Complaint did allege that the Strong Steel facility was a TSD facility, that the Strong Steel Facility *was*, at all relevant times, a TSD facility, and that the Strong Steel facility was, more specifically, a "disposal facility." That discussion fully addresses Respondent's argument under Count VI that "Strong Steel was not required to notify as a TSD Facility" (RPHB at 45 (heading of ¶ 5)), and that "Respondent is entitled to judgement on Count VI, because ... Strong Steel was not a 'disposal facility.'" *Id.* at 48. Respondent's argument in this regard is rejected and the Strong Steel facility is found to be a "TSD facility" for the reasons discussed above. Further, because the "TSD" issue was the only genuine issue of material fact identified by Judge McGuire regarding liability under Count VI for failure to notify of "disposal" of hazardous waste, this Tribunal finds that Respondent failed to notify the U.S. EPA or the State of Michigan of its hazardous waste "disposal" activities in violation of RCRA Section 3010, 42 U.S.C. § 6930; 40 C.F.R. § 262.12; and MAC §§ 299.9301 and 299.9303, as alleged in Count VI of the Amended Complaint.

5. Respondent Failed to Notify that it Was Storing Hazardous Wastes

As stated above, the allegations in Count VI regarding "failure to notify" pertain also to "storing" hazardous waste, and the statutes and regulations discussed *supra* regarding Respondent's failure to notify as a "generator" apply also to "storage." Amended Complaint at 28, ¶ 131; RCRA Section 3010, 42 U.S.C. § 6930; 40 C.F.R. § 262.12; MAC §§ 299.9301 and .9301. Complainant alleges that such "storage" consisted of Respondent's keeping the two 55-gallon drums of contaminated soil, which had been excavated by Inland Waters on April 11, 2000, on site until April 18, 2001.[145] Respondent challenges this allegation in conjunction with its argument regarding its obligation to notify of "disposal activities," arguing that it is not required to so notify because it is not a TSD facility. RPHB at 45-46, 48. For the reasons discussed above, Respondent's argument in this regard is rejected. Thus, the only remaining question is whether Respondent's holding of the two 55-gallon drums of contaminated soil for over a year constitutes "storage" under the applicable regulations.

As discussed above, Section 1004(33) of RCRA states that: "The term 'storage,' when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste." RCRA § 1004(33), 42 U.S.C. § 6903(33). The term "storage" is further

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[145]Judge McGuire did not consider the "storage" aspect of Count VI because he found that illegal "storage" was not specifically alleged under Count VI of the original Complaint. Order on Accelerated Decision at 22, n.18.

defined by MAC § 299.9107(dd) as: "the holding of hazardous waste for a temporary period at the end of which the hazardous waste is treated, disposed of, or stored elsewhere." The federal regulatory definition at 40 C.F.R. § 260.10 is essentially identical. Neither RCRA nor its implementing regulations (C.F.R. or MAC) define "containment." However, MAC § 299.9102(o) and 40 C.F.R. § 260.10 define "container" as "any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled."

Also as discussed above, in considering whether an activity constitutes "storage" under RCRA, the courts in Remington Arms, 989 F.2d 1305 (2nd Cir. 1993); South Road Associates, 216 F.3d 251 (2nd Cir. 2000); and Power Engineering I, 10 F. Supp. 2d 1145 (D. Colo. 1998) ("Power Engineering I"), focused on whether the waste was "contained," and whether the operator intended to ultimately remove the waste – positive answers to those questions indicating that an activity *does* constitute "storage."

In the present case, Inland Waters excavated contaminated soil on the Strong Steel property on April 11, 2000. CX-18, Bates 170; RX-10, p. 3; Tr. 12/9/03, p. 61. Inland Waters performed the excavation at the direction of CRA (Tr. 12/9/03, p. 62; 12/10/03, p. 18), under the supervision of Mr. Ring. Tr. 12/9/03, p. 62. Inland Waters excavated approximately one cubic yard of soil from the "battery storage / temporary compaction area" and placed it into two 55-gallon drums, which were then "stored on [Strong Steel] property." RX-10, p.3.

On March 1, 2001, Inland Waters returned to the Strong Steel site for a second excavation because the verification samples collected and analyzed in April, 2000 had shown significantly elevated levels of lead. RX-10, p. 4, Tr. 12/10/03, p. 29. Mr. Ring testified:

> Q: ... When did you receive those verification samples in April of 2000, the sample results?
> A: I believe it was near the end of April, probably two to three weeks after they were collected [on April 11, 2000]. ...
> Q: So from April of 2000 to March of 2001, the same soil sat there; is that correct?
> A: Yes.

Tr. 12/10/03, pp. 33-34.[146] During the March, 2001 excavation, Inland Waters, again under the supervision of Mr. Ring, located the two drums which had been excavated and "stored" on April 11, 2000. *See, e.g.*, Tr. 12/9/03, p. 274.

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[146]Respondent's action in knowingly allowing the contaminated soil to remain *in the ground* in the southernmost "significantly deteriorated asphalt area" from approximately April 11, 2000 until March 1, 2001 arguably constituted "storage" of hazardous waste, in that the evidence may suggest that Respondent intended to ultimately remove that contaminated soil. However, because the hazardous waste was not "containerized," this Tribunal finds that such action was part of Respondent's "disposal" activities rather than its "storage" activities.

On April 18, 2001, Strong Steel disposed of the two 55-gallon drums of material which had been excavated on April 11, 2000 from the "battery storage / temporary compaction area," and which had been stored at the Strong Steel site from April 11, 2000 until April 18, 2001. RX-10, p. 3, Att. E (waste manifest); CX-101, Bates 1781 (waste manifest).

Mr. Ring's May 5, 2000 memorandum to Ms. Johnson regarding the April 11, 2000 excavation states: "The soils contained in the four 20 cubic yard roll-off boxes were disposed off Site... [T]he soils contained in the three [sic] 55-gallon drums ... *remain on-Site awaiting disposal approval*." CX-18, Bates 171 (emphases added). Mr. Ring's June 19, 2001 letter to the MDEQ explains: "The soils were placed in two 55-gallon drums and *stored* on [Strong Steel] property." RX-10, p. 3. Mr. Ring testified: "We returned to the site *in 2001*, excavated additional material, sent that material off-site, *and also sent off two drums of soil that had been containerized back in 2000*." Tr. 12/9/03, p. 270 (emphases added). Mr. Ring explained: "[W]e ... assumed that the contractor [Inland Waters] was going to handle the disposal of these drums... [I]n 2001 ... we did the second remediation, where we located those drums and actually sent them off site for disposal..." Tr. 12/9/03, p. 274. Mr. Ring elaborated:

> A: ... CRA did not contract with Inland Waters directly, so I believe their role was to do the excavation work and possibly dispose of the material.
> Q: And who was to oversee the disposal of the material?
> A: Well, that's where we ran into a little problem I think... Normally, it would be CRA's responsibility, and that's why I was saying I believe that we have a little issue, something fell through the cracks. I didn't know if Mike Beaudoin was going to oversee that and handle that or if CRA was supposed to.

Tr. 12/10/03, pp. 20-21. Finally, Mr. Ring testified:

> Q: Mr. Ring, in terms of the drums, did Mr. Lambert or anyone tell you where they were stored at the Strong Steel facility site? ...
> A: *They were stored near the southern end of the property* within a berm of soil.

Tr. 12/10/03, p. 24 (emphases added).

Respondent's action in keeping the two 55-gallon drums of contaminated soil (hazardous waste) at the Strong Steel facility for over a year from April 11, 2000 until April 18, 2001, constituted "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste," and therefore constituted "storage" under Section 1004(33) of RCRA , 42 U.S.C. § 6903(33). Further, such action fits the definition of "storage" set forth at MAC § 299.9107(dd) and 40 C.F.R. § 260.10, as "the holding of hazardous waste for a temporary period at the end of which the hazardous waste is

treated, disposed of, or stored elsewhere."[147] Although neither RCRA nor its implementing regulations (C.F.R. or MAC) define "containment," the two 55-gallon drums fit the definition of "container" set forth at MAC § 299.9102(o) and 40 C.F.R. § 260.10, as "any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled." Further, Respondent's actions demonstrate that Strong Steel intended to ultimately remove the two drums, thus fitting the definition of RCRA "storage" under the analyses of Remington Arms, South Road Associates, and Power Engineering I.[148] Therefore, this Tribunal finds that Respondent failed to notify the U.S. EPA or the State of Michigan of its hazardous waste "storage" activities in violation of RCRA Section 3010, 42 U.S.C. § 6930; 40 C.F.R. § 262.12; and MAC §§ 299.9301 and .9303, as alleged in Count VI of the Amended Complaint.

6. Conclusion

On and prior to at least July 22, 1999, Respondent had not properly notified the U.S. EPA or the State of Michigan of all of the hazardous wastes that it generated on its property. Specifically, the 2001 Notification identified Respondent as a LQG of certain hazardous wastes which the 1997 Notification had not identified, and Respondent was, on or before November 25, 1997, a generator of all of the hazardous wastes listed on the 2001 Notification. The notification requirements of RCRA § 3010 apply to generators of hazardous waste and TSD facilities which come into being and/or begin operations even *after* either "90 days after promulgation of 40 CFR Part 261 on May 19, 1980" (*i.e.*, August 17, 1980), or the "effective date" of those regulations (*i.e.*, November 19, 1980), who submit a "notification" in order to obtain an EPA Identification Number. Any "notification" submitted in order to obtain an EPA identification number under RCRA or its federal or authorized State implementing regulations must contain *any and all* hazardous wastes currently being handled by the generator. Respondent's 1997 Notification was deficient in that it failed to list all of the hazardous wastes *then* being generated. Therefore, Respondent failed to properly notify the U.S. EPA or the State of Michigan as a *generator* of hazardous waste as required by Section 3010 of RCRA, 42 U.S.C. § 6930; 40 C.F.R. § 262.12; and MAC §§ 299.9301 and .9303.

Further, Respondent's action in placing and allowing to remain contaminated soil on and in the ground at the Strong Steel facility from at least July 22, 1999 until at least March 1, 2001, while not constituting "storage" of hazardous waste, did constitute "disposal" of hazardous waste. Therefore, Respondent failed to notify the U.S. EPA or the State of Michigan of its hazardous waste *disposal* activities as required by RCRA Section 3010, 42 U.S.C. § 6930; 40 C.F.R. § 262.12; and MAC §§ 299.9301 and .9303.

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[147]The federal definition contains a comma (",") after the word "period."

[148]As of hearing in this case, Respondent had neither filed an application for a permit to operate a TSD facility, nor had it properly notified the U.S. EPA or the State of Michigan of its storage activities.

In addition, Respondent's actions in keeping the two 55-gallon drums of contaminated soil at the Strong Steel facility from April 11, 2000 until April 18, 2001 constituted "storage" of hazardous waste. Therefore, Respondent failed to notify the U.S. EPA or the State of Michigan of its hazardous waste *storage* activities as required by RCRA Section 3010, 42 U.S.C. § 6930; 40 C.F.R. § 262.12; and MAC §§ 299.9301 and .9303.

Therefore, on and prior to at least July 22, 1999, Respondent had not notified the U.S. EPA or the State of Michigan of all of the hazardous wastes that it *generated*, or that it was *storing* and *disposing* of hazardous waste on its property, constituting one violation of RCRA Section 3010, 42 U.S.C. § 6930; 40 C.F.R. § 262.12; and MAC §§ 299.9301 and .9303, as alleged in Count VI of the Amended Complaint.

E. Count VII – Disposal and Storage of Hazardous Waste Without a Permit

Count VII of the Amended Complaint alleges that Respondent *"stored" and "disposed"* of hazardous waste without a permit in violation of Section 3005 of RCRA, 42 U.S.C. § 6925;[149] 40 C.F.R. § 270.10(f); and MAC § 299.9502(1). Amended Complaint at 28-29, ¶¶ 132-135. Specifically, regarding "disposal," the Amended Complaint alleges that: "On and prior to at least July 22, 1999, Strong did not have an operating license for the disposal of hazardous waste at its facility." *Id.* at ¶ 135. Regarding "storage," the Amended Complaint further alleges that:

> Strong's action of placing hazardous waste on the ground, excavating those hazardous wastes out of the ground, placing them in drums and roll-off boxes for subsequent treatment, and storage or disposal off-site ... constituted storage of hazardous waste as defined by MAC § 299.9107 [40 C.F.R. § 260.10].

Amended Complaint at 29, ¶ 134.

Judge McGuire has already granted Complainant's Motion for Accelerated Decision as to liability for "disposal" of hazardous waste without a permit under Count VII of the original Complaint, holding that:

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[149]The Amended Complaint alleges, in part, that "Section 3005 of RCRA, 42 U.S.C. § 6905 ... requires a permit for [operating TSD] facilities," and that Respondent's actions "constituted at least one violation of ... 42 U.S.C. § 6905." Amended Complaint at ¶¶ 133 and 135, respectively. Respondent argues: "... Strong Steel [cannot] have violated 42 U.S.C. § 6905, because that section has nothing to do with the permitting of storage or disposal facilities." RPHB at 50, n.11. Indeed, 42 U.S.C. § 69*0*5 pertains to "Application of this chapter and integration with other Acts." However, while 42 U.S.C. § 69*0*5 corresponds to RCRA Section 100*6*, 42 U.S.C. § 69*2*5 corresponds to RCRA Section 300*5*, which pertains to "Permits for treatment, storage, or disposal of hazardous waste." In light of the fact that ¶ 133 of the Amended Complaint correctly cites to "Section 300*5* of RCRA" (emphases added), it is clear that the citations in Count VII of the Amended Complaint to "42 U.S.C. § 6905" are merely clerical errors, and that Count VII intends to cite to "42 U.S.C. § 6925."

> The Court has already concluded that the Respondent disposed of the hazardous waste on its property. Thus, the threshold inquiry here is whether Respondent had a permit or operating license for this disposal. Respondent has admitted that it did not have an operating license for the disposal of hazardous waste on its property. *See* Answer ¶ 135. Because Respondent did not have a permit to dispose of hazardous waste on its property it is consequently liable for disposing of hazardous waste without a permit. *See In re Capozzi Custom Cabinets*, Docket No. RCRA-5-2000-005, 2002 EPA ALJ LEXIS 8, *17-22 (Initial Decision, Feb. 11, 2002) (holding that Respondent's action of dumping hazardous waste on its property without a permit violated Section 3005(a) of RCRA). As such, Complainant's Motion for Accelerated Decision as to this count is **GRANTED**.

Order on Accelerated Decision at 37 (bold type in original). However, Judge McGuire denied Complainant's Motion for Accelerated Decision as to liability for "storage" of hazardous waste without a permit under Count VII of the original Complaint, holding that:

> ... Complainant seeks liability for illegally storing hazardous waste without a permit. Such an allegation seeks liability beyond what was pled in the Complaint for Complainant only alleged liability for illegally disposing of hazardous waste without a permit. The Complaint is pled broadly enough to put Respondent on notice that EPA considered it to have stored hazardous waste without a permit. However, it would be unfair to Respondent to grant Accelerated Decision on an allegation not conspicuously pled in the Complaint. ... [T]he Court does not consider this issue properly before it and thus, will not address Respondent's alleged liability for "illegally storing hazardous waste."

Order on Accelerated Decision at 34-35 (citations and footnote omitted).

Subsequent to Judge McGuire's Order on Accelerated Decision, this Tribunal granted Complainant's Motion for Leave to Amend the Complaint, which Motion explained: "Complainant proposes to amend Count VII of the Complaint to allege that the Respondent illegally *stored* hazardous waste without a permit." Complainant's Motion for Leave to Amend Complaint at 11 (emphasis added). As noted above, the Amended Complaint does so allege.[150]

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[150]Somewhat inconsistently with the Amended Complaint itself, Complainant's Post-Hearing Brief states that "[t]he Complaint was amended to add *as an alternative basis* that Respondent stored hazardous waste without a permit." CPHB at 63 (emphasis in original). Complainant did not specifically address Count VII in its Post-Hearing Reply Brief. However, the Amended Complaint alleges that: "Strong's actions ... as alleged in paragraphs 60-66 constituted storage of hazardous waste..." Amended Complaint at 29, ¶ 134. Paragraph 60 of the Amended Complaint alleges that: "From at least April 11, 2000 to April 18, 2001, Strong stored at the Strong facility at least 2 fifty five gallon drums containing contaminated soils..." *Id.* at 13, ¶ 60. Therefore, this Tribunal understands "storage" to be an *additional* basis for liability under Count VII of the Amended Complaint based upon the two 55-gallon drums, and not an

Therefore, Respondent's liability for "disposal" of hazardous waste without a permit in violation of Section 3005 of RCRA, 42 U.S.C. § 6925; 40 C.F.R. § 270.10(f); and MAC § 299.9502(1), remains the "law of this case" in this proceeding, and the only question before this Tribunal regarding liability under Count VII of the Amended Complaint is whether Respondent also "stored" hazardous waste without a permit in violation of the cited provisions.

Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), states in part: "... the treatment, storage, or disposal of any ... hazardous waste [identified or listed under this subchapter] ... is prohibited except in accordance with ... a permit [issued pursuant to this section]."

40 C.F.R. § 270.10(f) states in part: "... no person shall begin physical construction of a new [hazardous waste management] facility without having submitted parts A and B of the permit application and having received a finally effective RCRA permit." Respondent argues that: "Strong Steel cannot have violated 40 CFR § 270.10(f), because that applies only to EPA administered permit programs, and is not effective in a State like Michigan, which operates its own approved hazardous waste program." RPHB at 50, n.11. However, as Judge McGuire pointed out in his Order on Accelerated Decision in this case:

> The federal regulations which implement the Section 3005 permit requirement, codified at 40 C.F.R. Part 270, embody the basic prohibition against the "treatment, storage, or disposal of hazardous waste by any person who has not applied for or received a RCRA permit." 40 C.F.R. § 271.1(b).

Order on Accelerated Decision at 34. Subpart A of Part 270, 40 C.F.R. § 270.1(a)(1), states: "These permit regulations establish provisions for the Hazardous Waste Permit Program under Subtitle C of [RCRA]. They apply to EPA *and to approved States* to the extent provided in part 271." (Emphasis added). Subpart A of Part 271, in turn, at 40 C.F.R. § 271.1(c), states: "... many of the provisions of part[] 270 ... are made applicable to States by the references contained in § 271.14." Section 271.14, in turn, states:

> All State programs under this subpart must have legal authority to implement each of the following provisions and must be administered in conformance with each; except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements: ...
> (d) *Section 270.10 – (Application for a permit)*; ...

(Emphasis added). Therefore, Respondent's contention that "40 CFR § 270.10(f) ... applies only to EPA administered permit programs, and is not effective in ... Michigan..." (RPHB at 50, n.11), is rejected.

The State of Michigan's permit regulations for the construction and operation of TSD

"alternative" basis for liability based upon a theory that Respondent "stored" hazardous wastes in or on the ground.

facilities is codified at MAC § 299, Part 5. MAC § 299.9502(1) "... requires an operating license for the treatment, storage, and disposal of any hazardous waste..."

Respondent Answers the Amended Complaint by stating: "Strong Steel admits that it did not have an operating license for ... the storage of hazardous waste; however, Strong Steel denies that it needed, or that it was in violation for not having, an operating license or permit." Amended Answer at 13, ¶ 135. Respondent's essential argument is that it cannot be liable under MAC § 299, Part 5, because it is not a TSD facility. Respondent asserts:

> Region 5 complains that two drums containing less than one cubic yard of waste were physically present at Respondent's property for longer than they should have been. This situation is not the kind ... for which an operating license or permit is required.
>
> ... MAC § 299.9502(1) ... and all of Part V of MAC § 299, applies only to "treatment, storage, or disposal facilit[ies]." ... Strong Steel's plant does not meet the definition of "disposal facility," nor is it a storage facility, for the same reasons discussed above [regarding Count VI]. Therefore, it cannot have violated MAC § 299.9502(1).

RPHB at 50 (footnote omitted) (emphasis in original).

This Tribunal has already concluded, regarding Count VI, *supra*, that Respondent's actions in keeping the two 55-gallon drums of contaminated soil at the Strong Steel facility from April 11, 2000 until April 18, 2001 constituted "storage" of hazardous waste within the meaning of RCRA § 1004(33), 42 U.S.C. § 6903(33), and MAC § 299.9107(dd). Further, this Tribunal has already concluded, regarding Count III, *supra*, that the Strong Steel facility is a "TSD facility." Thus, the inquiry here is whether Respondent had a permit or operating license for the "storage" of the two 55-gallon drums of hazardous waste. Respondent has admitted that it did not have an operating license for the storage of hazardous waste on its property. *See* Amended Answer ¶ 135. Because Respondent did not have a permit to store hazardous waste on its property, Respondent is liable for storing hazardous waste without a permit in violation of Section 3005 of RCRA, 42 U.S.C. § 6925; 40 C.F.R. § 270.10(f); and MAC § 299.9502(1), as alleged in Count VII of the Amended Complaint.

F. Count VIII – Land Disposal of Hazardous Waste Without Treatment

1. The Allegation and Order on Accelerated Decision

Count VIII of the Amended Complaint alleges that, on and prior to at least July 22, 1999, Respondent "land disposed" of characteristic hazardous wastes *without meeting the treatment standards*[151] set forth in 40 C.F.R. Part 268, Subpart D (§§ 268.40 - 268.49), constituting one

[151]Count VIII is distinct from Count VII in that Count VII alleged "disposal" without a *permit*, while Count VIII alleges "land disposal" without meeting *treatment standards* prior to

violation of MAC § 299.9311 and 40 C.F.R. § 268.9(c). Amended Complaint at 29 and 33, ¶¶ 137 and 148.

MAC § 299.9311(1) states: "Generators of hazardous waste shall comply with the applicable requirements of 40 C.F.R. part 268." 40 C.F.R. § 268.9(c) states that: "... no prohibited [characteristic] waste ... may be land disposed unless the waste complies with the treatment standards under subpart D of this part."

Judge McGuire has already granted Complainant's Motion for Accelerated Decision as to liability on Count VIII of the original Complaint, finding that Respondent "land disposed" of "characteristic hazardous waste" without meeting the relevant treatment standards. Order on Accelerated Decision at 37-40. That Order on Accelerated Decision remains the "law of the case" in this proceeding, and the reasoning of the Order's finding under Count VIII need not be reiterated here.

2. Complainant's Stipulations at Hearing Regarding the Houston Laboratories' "Totals Analyses" of the CRA / Inland Waters April 11, 2000 Excavation "Verification Samples," Which Were not "TCLP Analyses," Do Not Alter the Order on Accelerated Decision

Although Count VIII was not altered in the Amended Complaint, Complainant stipulated at hearing to certain changes to paragraph 59 of the Amended Complaint, which altered paragraph 145 of the Amended Complaint, thus affecting to some degree some specific findings in Judge McGuire's Order granting Complainant's Motion for Accelerated Decision as to liability on Count VIII. These changes were in regard to the Houston Laboratories' analyses of the six "verification samples" collected by CRA / Inland Waters during the April 11, 2000 excavation. Specifically, Houston Laboratories performed only "totals analyses," which do not yield a "TCLP"[152] value which can be used to determine whether a "toxicity characteristic" hazardous waste exceeds the regulatory limit under RCRA.[153] Complainant explains:

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disposal. As Judge McGuire explained: "The undersigned has already concluded that Respondent disposed of hazardous waste on its property, and that that waste was disposed of on the ground, including the land. Thus, germane to this inquiry is whether Respondent 'land disposed' those hazardous wastes in violation of Part 268... Characteristic hazardous wastes, *e.g.*, the types of wastes found in Respondent's soil, can only be land disposed if 'the waste complies with the treatment standards under subpart D of [Part 268].' ... Respondent land disposed hazardous wastes in violation of Part 268 for failing to treat the hazardous wastes prior to land disposal." Order on Accelerated Decision at 38-40 (citations omitted).

[152]*See, e.g.*, Tr. 11/19/03, p. 46, ln. 7 (Mr. Fowler); Tr. 12/10/03, p. 28 (Mr. Ring).

[153]40 C.F.R. § 261.24(a) states: "A solid waste ... exhibits the characteristic of toxicity if, *using the Toxicity Characteristic Leaching Procedure [("TCLP")]*, ... the extract from a representative sample of the waste contains any of the contaminants listed in table 1 at the

> At hearing Complainant stipulated ... that Respondent's confirmatory sample results presented in paragraph 59 [of the Amended Complaint] were total sample results not TCLP sample results. The Complainant agreed that those results should not be interpreted as exceeding the regulatory concentration for those constituents (para. 59, TrI, p.18). The change in paragraph 59 resulted in a similar change in paragraph 145 [of the Amended Complaint] to the extent the proof relied upon were the Respondent's sample results. Therefore, Complainant stipulated that it was not possible to say that the confirmatory sample results for arsenic (D004), cadmium (D006) and chromium (D007) were *per se* in excess of the TCLP limit for those constituents.

CPHB at 67 (italics in original) (underlining added). More specifically, at hearing, Complainant stipulated that: 1) Arsenic (D004) should be stricken from ¶ 145 of the Amended Complaint (Tr. 11/18/03, p. 21, ln. 13-15); 2) Arsenic (D004) and Barium (D005) should be stricken from the last sentence of the first full paragraph of page 24 of the Order on Accelerated Decision (*Id*. at p. 22, ln. 16-18); and 3) Arsenic (D004) should be stricken from footnote 32 on page 40 of the Order on Accelerated Decision (*Id*. at p. 23, ln. 2-6). Therefore, Complainant's stipulations at page 67 of its Post-hearing Brief, along with the stipulations made at hearing (Tr. 11/18/03, pp. 20-24), stipulate that Arsenic (D004), Barium (D005), Cadmium (D006) and Chromium (D007) were not shown, *solely* on the basis of the Houston Laboratories' analyses of the CRA / Inland Waters April 11, 2000 excavation "verification samples," to be "per se" in excess of the TCLP limit for "toxicity characteristic" hazardous waste.

However, this Tribunal has already found that the evidence in the record clearly demonstrates that characteristic hazardous wastes (exhibiting both the "toxicity characteristic" and the "ignitability characteristic") were present *on and in* the ground at the Strong Steel site on and prior to at least July 22, 1999, as summarized in the following two paragraphs. *See, e.g.*, Sections IV.A.1. and IV.D.4 of this Initial Decision, *supra*.

For example, regarding characteristic hazardous waste *on* the ground, the E&E/ASI sample analyses of the samples collected by Complainant on August 2, 1999 shows that sample SS2 was above the RCRA TCLP limit specified in MAC §§ 299.9212(4) and 299.9217 (Table 201a) and 40 C.F.R. § 261.24 for lead (D008) and Benzene (D018), in that SS2 contained 43.5 mg/l of Lead (as a "TCLP Metal," as opposed to a "Total Metal"), while the regulatory limit is 5.0 mg/l; and SS2 contained 6,230 ppm of Benzene, while the regulatory limit is 0.5 mg/l. CX-

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concentration equal to or greater than the respective value given in that table." (Emphasis added). *See also*, 45 Fed. Reg. 33084, 33110-33112 (May 19, 1980). Mr. Fowler explained the difference between "totals analysis" and the "TCLP test" as follows: "[Totals analysis] is where you ... analyze the sample to find the total amount of material present... And that is not a TCLP value... [for which] you have to go through the extraction first to find out how much of the lead, for example, would be extracted out of the sample and be mobile in the environment... [T]he totals can show you if the constituent you're interested in is present. It can't tell you if the waste is hazardous or not." Tr. 11/18/03, p. 266. *See also*, Tr. 11/19/03, p. 7.

16, Bates 115. ("Parts per million" (ppm) equates with "milligrams per liter" (mg/l) for a liquid sample. Tr. 11/19/03, p. 19, ln. 8, 22-23; Tr. 11/18/03, p. 261, ln. 21-23. *See also, Hoosier Spline Broach Corporation*, 7 E.A.D. 665, 671, n.13 (EAB, July 2, 1998)). In addition, sample SS2 was ignitable at 81 degrees Fahrenheit, and was therefore a "characteristic hazardous waste" for "ignitability," being below the regulatory limit of 140 degrees Fahrenheit set forth in MAC § 299.9212(1)(a) and 40 C.F.R. § 261(a)(1). CX-16, Bates 114. Further, Respondent's August 2, 1999 "split sample" analyses done by Novi Laboratories show that sample SS2 was above the RCRA TCLP limits specified in MAC §§ 299.9212(4) and 299.9217 (Table 201a) and 40 C.F.R. § 261.24 as follows:

Chemical	TCLP Limit	Sample Results	RCRA Waste Code
Benzene	0.5 mg/l	559 mg/l	D018
Chlorobenzene	100 mg/l	2,969 mg/l	D021
1,4-Dichlorobenzene	7.5 mg/l	967 mg/l	D027
1,2-Dichloroethane	0.5 mg/l	36 mg/l	D028
Tetrachloroethylene	0.7 mg/l	6.2 mg/l	D039
Trichloroethylene	0.5 mg/l	3.6 mg/l	D040
Lead	5.0 mg/l	27 mg/l	D008

RX-10, Att. A, pp. 1-2; CX-18, Bates 174-175; CX-101, Bates 1726-1727. The CRA/Novi analysis further shows that SS2 was ignitable at 70 degrees Fahrenheit, and was therefore a "characteristic hazardous waste" for "ignitability," being below the regulatory limit of 140 degrees Fahrenheit set forth in MAC § 299.9212(1)(a) and 40 C.F.R. § 261(a)(1). RX-10, Att. A, p. 2; CX-18, Bates 175; CX-101, Bates 1727. In addition, the Novi results show that samples SS1 and SS3 were above the RCRA TCLP limit for lead (5.0 mg/l) specified in MAC §§ 299.9212(4) and 299.9217 (Table 201a) and 40 C.F.R. § 261.24, in that SS1 contained 6.7 mg/l of lead, and SS3 contained 22 mg/l of lead. RX-10, Att. B, pp. 2, 4; CX-18, Bates 178, 180; CX-101, Bates 1730, 1732. Based on Respondent's CRA/Novi analyses of the "split samples" taken by Mr. Beaudoin on August 2, 1999, Judge McGuire correctly found: "Based solely upon Respondent's sample results from *August 2, 1999*, Complainant can establish that soil at Respondent's site was contaminated with substances identified by the waste codes D001 (ignitable), D008 (Lead), D018 (Benzene), D021 (Chlorobenzene), D027 (1,4-Dichlorobenzene), D028 (1,2-Dichloroethane), D039 (Tetrachloroethylene) and D040 (Trichloroethylene) above the regulatory toxicity level." Order on Accelerated Decision at 24 (citations omitted) (emphasis added).

Further, regarding characteristic hazardous waste *in* the ground, Inland Waters excavated contaminated soil from the "battery storage / temporary compaction area" and the "two areas of significantly deteriorated asphalt immediately south of the Temporary Compaction Area" to a

depth of approximately one foot on April 11, 2000. RX-10, p.3; CX-18, Bates 170; RX-10, p. 3; Tr. 12/9/03, pp. 61-62; Tr. 12/10/03, p. 18. Six "verification samples" were collected from the bottom of the excavated areas and sent to Houston Laboratories for "totals analyses." RX-10, Tables 1 & 2, Att. C; CX-101, Bates 1722-1724, 1733-1766. Respondent summarizes the results, in part, by stating that: "[Sample] S-JL-003 was collected from the eastern edge of the [southern deteriorated asphalt area] from an approximate *depth of 1 foot [below ground surface ("bgs")*] and ... *lead was detected at 4,040 mg/kg*, above the Residential DCC [("Direct Contact Criteria")] of 400 mg/kg and the Industrial DCC of 900 mg/kg." RX-10, p. 4 (emphases added). *See also*, RX-10, Table 2, p. 1; CX-101, Bates 1723. Mr. Fowler testified regarding the Houston Laboratories analysis that "verification sample 6" from the "temporary compaction area" contained a quantity of MTBE, which "is a gasoline additive so if you see that, you suspect that there was gasoline there at one point." Tr. 11/19/03, pp. 50-51 (emphasis added). Mr. Fowler further opined that the volatile organic compounds (ethylbenzene, toluene, and xylenes) found in "verification sample 2" from the southern "significantly deteriorated asphalt area" indicated that there may have been trace amounts of gasoline in the sample. Tr. 11/19/03, p. 51. On March 1, 2001, Inland Waters returned to the Strong Steel site for a second excavation due to the significantly elevated levels of lead found on April 11, 2000, and excavated additional contaminated soil to a *depth of three feet* in the southernmost "significantly deteriorated asphalt area." RX-10, pp. 4-5, Tr. 12/10/03, pp. 26, 28-30; CX-101, Bates 1713. Regarding "TCLP" versus "totals analyses," Mr. Fowler testified: "Q: ... [I]f a sample showed a total was done under total's [sic] analysis, does that mean that it's insignificant? A: No, it doesn't, it shows that that constituent is there." Tr. 11/19/03, p. 7. *See also*, *Id.* at 46, ln. 12-13. While "TCLP" analyses were not performed on the "verification samples" taken at depths of one to three feet, this Tribunal finds that the totality of the evidence demonstrates that toxicity characteristic hazardous waste (lead) and ignitability characteristic hazardous waste (gasoline) were present *in* the ground on and prior to at least July 22, 1999.

Therefore, Complainant's stipulations regarding Paragraphs 59 and 145 of the Amended Complaint do not alter Judge McGuire's ultimate finding of liability under Count VIII of the Amended Complaint in his Order on Accelerated Decision in this case.

3. Respondent's Further Arguments

Nevertheless, Respondent articulates three arguments against liability under Count VIII in its Post-Hearing Brief. All three arguments, in essence, reiterate the argument Respondent asserted in its Opposition to Accelerated Decision on Count VIII,[154] that since the Houston Laboratories' "below ground surface" analyses yielded only "totals analyses" and not "TCLP analyses," Complainant must rely upon the ASI and Novi Labs analyses of the August 2, 1999 samples (SS1, SS2, and SS3), which were collected from soils atop the "deteriorated asphalt."

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[154]Judge McGuire observed: "Respondent ... asserts that ... Respondent [did not] engage[] in 'land disposal' because the hazardous waste on Respondent's property was found in soil on top of the 'asphalt or concrete pad.' *See* Respondent's Opposition to Complainant's Motion for Accelerated Decision at 27." Order on Accelerated Decision at 38.

Therefore, Respondent argues, it cannot be shown to have "land disposed" (*i.e.*, according to Respondent, directly onto or into *bare earth*) characteristic hazardous wastes above TCLP limits.

a. Asphalt is not "Land"

First, Respondent contends:

> ... [V]irtually the entire surface of Respondent's property is covered by asphalt and concrete. Thus, any batteries or gasoline removed from incoming automobiles would have been placed on this pad, rather than on "land." ... *Although it is true that Strong Steel's remediation efforts did include the removal of quantities of "contaminated soil," those materials were in fact not native soil, but ... were largely dirt and debris tracked in by vehicles entering the plant*. Therefore, there is insufficient evidence that any "land disposal" occurred at Strong Steel. The cases that Region 5 cites for the proposition that discharge onto concrete is "land disposal" are all Superfund [Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")] cases, not RCRA cases, and have *nothing to do with "land disposal."* (Region 5 Brief at 40).

RPHB at 51-52 (citations omitted) (italics added) (underlining in original).

(1) Question Already Answered by Order on Accelerated Decision

This argument fails, first, because it has already been explicitly rejected by Judge McGuire in his Order on Accelerated Decision in this case. Judge McGuire found that:

> "[L]and disposal" as that term is defined by EPA regulations, refers to the placement of hazardous waste "in or on the land ..." 40 C.F.R. § 268.2. This is a very broad definition which includes Respondent's disposal of hazardous waste on the deteriorated asphalt pad at its property.

Order on Accelerated Decision at 39 (citations omitted).

(2) Evidence Demonstrates that Characteristic Hazardous Waste Was Present Beneath the Asphalt

In addition, this argument fails because Respondent's assertion that its "remediation efforts" removed "dirt ... tracked in by vehicles" but "not native soil" is simply not accurate. As explained above, Inland Waters excavated over 80 cubic yards of contaminated soil to a depth of *one foot below the asphalt* and April 11, 2000, and another 40 cubic yards of contaminated soil to

a depth of *three feet below the asphalt* on March 1, 2001.[155] Respondent's assertion that this material – found up to three feet <u>*below*</u> the asphalt – was "tracked in by vehicles" is frankly incredible. As explained in detail above in multiple sections of this Initial Decision, while no "TCLP" analyses were performed on the "verification samples" taken at depths of one to three feet, this Tribunal finds that the totality of the evidence (including fact and expert witness testimony as well as laboratory analyses and other documentary evidence) demonstrates that characteristic hazardous waste was present *in* the ground on and prior to at least July 22, 1999.

(3) "CERCLA Cases" Apply the RCRA Definition of "Disposal," Which Includes the Term "Into or On any Land"

Further, while the cases cited by Complainant for the proposition that "[c]ourts have held that disposal has occurred where there is a discharge onto concrete or into a manufacturing plant" (CPHB at 40 (citations omitted)) do arise under CERCLA, those cases are applying the definition of "disposal" found in RCRA. For example, in <u>Amland Property Corp. v. Aluminum Corp. of America</u>, 711 F. Supp. 784 (D. N.J. 1989), the court held:

> *The definition of "disposal," for the purposes of CERCLA, is set forth in the Solid Waste Disposal Act [as amended by RCRA]*:
>
> > the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste *into or on any land* or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.
>
> 42 U.S.C. § 6903(3) [RCRA § 1004(3)] (incorporated at 42 U.S.C. § 9601(29) [CERCLA § 101(29)[156]]). Alcoa contends that the conduct ... complained of here –

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[155]Regarding the four 20-cubic yard roll-off boxes excavated on April 11, 2000, the waste manifests show that the material was contaminated with Lead (D008). RX-10, Att. F; CX-101, Bates 1785-86; CX-18, Bates 219-220. Regarding the two 55-gallon drums excavated on April 11, 2000, the waste manifests show that the material was contaminated with "D001" (Ignitability). RX-10, Att. E; CX-101, Bates 1781. Further, as discussed, *supra*, in section IV.D.3 of this Initial Decision, this Tribunal has found that Respondent filed its second Notification of Hazardous Waste Activity on April 18, 2001 (CX-41, Bates 752-755) in order to cover the two 55-gallon drums of contaminated soil which had been excavated by Inland Waters on April 11, 2000, which identified Respondent as a LQG of Benzene (D018), Chlorobenzene (D021), 1,2-Dichloroethane (D028), Tetrachloroethylene (D039), Trichloroethylene (D040), and Lead (D008). CX-41, Bates 753. In addition, Regarding the two 20-cubic yard roll-off boxes excavated on March 1, 2001, the waste manifests show that the material was contaminated with Lead (D008). RX-10, Att. F; CX-101, Bates 1783-84; CX-18, Bates 217-218.

[156]CERCLA § 101(29), 42 U.S.C. § 9601(29), states: "The term[] 'disposal' ... shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C.A. § 6903]."

> the spilling of PCB-containing fluids onto the floor of an industrial plant – is not disposal "into or on any land or water," in that the interior of a building falls within neither of those categories... *I find that disposal within the plant is disposal "into or on any land or water" within the meaning of CERCLA.*
>
> *The few reported decisions concerning this issue have held that placement of hazardous wastes inside an enclosed manufacturing facility may constitute disposal of such waste into or on any land* so as to satisfy the CERCLA definition. In BCW Associates Ltd. v. Occidental Chemical Corp., Civ. No. 86-5947, 1988 WL 102641 (E.D.Pa. Sept. 29, 1988), the floors and fixtures of a warehousing facility came to be covered by a layer of dust as a result of the operations of Firestone Tire & Rubber Company, a previous tenant. When the warehouse was reactivated ... it was discovered that the dust was contaminated by lead. Firestone ... argued that disposal within the warehouse fell outside § 9601(29) in that such disposal was not disposal into or on land. *The court rejected this "unduly narrow" interpretation of the definition of "disposal," noting that "[i]t is clear that Congress intended the term 'land' to encompass buildings and other types of real estate*." *Id.* at 43...

Amland Property Corp., 711 F. Supp. at 791-792 (citations omitted) (emphasis added). Because the CERCLA cases cited by Complainant interpret the term "land" in the definition of "disposal" *found in RCRA* to include "the floor of an industrial plant" and "buildings and other types of real estate," those cases *are* instructive in the present case arising under RCRA.

(4) Respondent's Activities Meet the Statutory and Regulatory Definitions of "Land Disposal"

Finally, in addition to defining "disposal" at RCRA Section 1003(3), 42 U.S.C. § 6903(3), RCRA also defines "land disposal" at Section 3004(k), 42 U.S.C. § 6924(k) as follows:

> For the purposes of this section, the term "land disposal," when used with respect to a specified hazardous waste, shall be deemed to include, but not be limited to, any placement of such hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave.[157]

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[157]"Land treatment facility" is defined as "a facility or part of a facility at which hazardous waste is applied onto *or incorporated into* the soil surface..." 40 C.F.R. § 260.10 (emphasis added). This Tribunal notes that this definition does not include an "intent" element, and that hazardous waste *was* "incorporated into" the soil *beneath* the "deteriorated asphalt" at the Strong Steel site, as discussed above. "Surface impoundment" is defined as "a facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (*although it may be lined with man-made materials*), which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well..." *Id.* (emphasis added). This Tribunal notes that this

The implementing regulations at 40 C.F.R. § 268.2(c) define "land disposal" as:

> ...placement in or on the land, except in a corrective action management unit or staging pile, and *includes, but is not limited to,* placement in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, underground mine or cave, *or placement in a concrete vault, or bunker intended for disposal purposes*.

(Emphases added). MAC § 299.9105(a) similarly defines "land disposal," adding that "[t]he term also means placement in or on the land by means of open detonation and open burning where the residues continue to exhibit 1 or more of the characteristics of hazardous waste."

As Judge McGuire observed in his Order on Accelerated Decision, the term "land disposal" "is a very broad definition." Order on Accelerated Decision at 39. *See, e.g.*, U.S. v. Allegan Metal Refinishing Co., 696 F. Supp. 275, 286-288 (W.D. Mich. 1988). As the EAB noted in *Everwood Treatment Co., Inc. and Cary W. Thigpen*, 6 E.A.D. 589 (EAB, 1996) ("*Everwood II*"):

> The Agency's land disposal restrictions were ... designed to prohibit land disposal of certain groups of hazardous wastes unless "it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit ... for as long as the wastes remain hazardous." The restrictions are designed to ensure that hazardous waste will only be land disposed if the wastes involved as well as the disposal unit meet very stringent requirements.

Id. at 606 n.29 (citations omitted).

The Michigan and Federal regulations explicitly contemplate that "land disposal" includes "placement in a concrete vault or bunker intended for disposal purposes." Although these definitions of "land disposal" include the concept of "intent" regarding the *use* of "a concrete vault or bunker," no "intent" is required for "*disposal*" to occur. *See, e.g.*, Allegan Metal, 696 F. Supp. at 286-288,[158] and the discussion of "TSD facilities," *supra*, in Section IV.A.3 of this Initial Decision. That is, where "disposal" ("into or on land," with not "intent" element) has occurred on concrete, and the courts have clearly held that "land" in the definition of "disposal" extends well

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definition, as part of the "land disposal" definition, contemplates that "land disposal" may occur where the "disposal" is onto an area "lined with man-made materials," *i.e.*, not onto bare earth.

[158]The court in Allegan Metal stated: "I simply cannot accept defendant's crabbed definition of "land disposal facility"... Nor will I read into the statute some 'state of mind' requirement as to whether the waste and/or wastewater at issue is 'hazardous' or whether the defendant intended the waste to remain [after closure]." Allegan Metal, 696 F. Supp. at 287 (citation omitted).

beyond bare earth to include such things as "the floor of an industrial plant," it would be an absurd result if "land disposal" thus occurred only where the concrete was "intended" for such a use. Here, that the "disposal" occurred on asphalt which may or may not have been "intended for disposal purposes" does not negate the fact that Respondent "land disposed" of the characteristic hazardous wastes without meeting the applicable treatment standards. Further, this Tribunal has already found that Respondent did, in fact, "intend" to dispose of hazardous wastes such that it became a "disposal facility." In any event, the evidence demonstrates that hazardous constituents *did* reach the native soil beneath the "deteriorated asphalt" to a level of between one and three feet "below ground surface."

For all of these reasons, this Tribunal rejects Respondent's contention that it did not "land dispose" of hazardous wastes because such wastes were initially placed on the "deteriorated asphalt" at the Strong Steel site, rather than directly onto bare earth.

b. Batteries and Gasoline Were Not "Intended for Disposal Purposes"

Second, and relatedly, Respond argues: "[T]hose items [batteries or gasoline] would not have been placed on the pad 'intended for disposal purposes,' but only briefly before they were to be removed." RPHB at 52.

Judge McGuire, noting that "RCRA is a strict liability statute," has already explicitly rejected this argument in his Order on Accelerated Decision at 32-33.

To the extent that this argument is aimed at the "intended for disposal purposes" language in the definitions of "land disposal" onto "a concrete vault or bunker" at 40 C.F.R. § 268.2(c) and MAC § 299.9105(a)(ix), that argument has been fully addressed, *supra*, and is rejected.

To the extent that this argument suggests that Respondent did not "intend" to dispose of hazardous wastes in the form of used oil, gasoline, or other automotive fluids, that argument has also been fully addressed, *supra*, and is rejected.

Finally, to the extent that this argument suggests that Strong Steel employees intended to or did "recycle" any batteries found in the "junked" vehicles,[159] that argument has already been rejected by Judge McGuire in his Order on Accelerated Decision at 32. Further, the EPA, in promulgating 40 C.F.R. Part 261, has also explicitly rejected this argument. *See* 45 Fed. Reg. 33084, 33091-33092 (May 19, 1980) ("Legal Authority to Regulate Wastes That Are Used, Re-used, Recycled or Recovered"). This Tribunal also rejects Respondent's argument in this regard.

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[159] *See, e.g.*, RPHB at 10-11: "Strong Steel inspects incoming vehicles ... for batteries, and removes any that the supplier may have failed to remove. Strong Steel's employees set aside any such batteries, and either reuse them in their own vehicles or sell them to battery recycling facilities." (Citations omitted).

c. Suppliers and Previous Industrial Uses are Responsible for the Hazardous Wastes

Third, Respondent argues:

> [T]he analytical results do not prove that Strong Steel was the entity that disposed of those [hazardous] constituents... They were likely present in the dirt that suppliers' trucks tracked into the property... Strong Steel's property was used for industrial purposes for at least 67 years before Strong Steel acquired it in 1997. The hazardous constituents discovered in 1999 are just as likely attributable to activities of Strong Steel's suppliers and previous occupants of the property.

RPHB at 52.

Respondent's argument regarding "dirt tracked into the property" has already been addressed, *supra*, in section IV.F.3.a.2 of this Initial Decision and is rejected. Further, Respondent's contention in this regard is an affirmative defense for which Respondent has failed to meet its burden of proof.

Respondent's argument that the hazardous constituents found on and in the ground at the Strong Steel facility are due to "previous industrial uses" has similarly been addressed, *supra*, in section IV.A.2.c.4 of this Initial Decision and is rejected.

4. Conclusion

For all of the forgoing reasons, this Tribunal finds no reason to depart from Judge McGuire's Order on Accelerated Decision regarding Count VIII of the Original Complaint,[160] and finds that on and prior to at least July 22, 1999, Respondent "land disposed" of characteristic hazardous wastes without meeting the treatment standards set forth in 40 C.F.R. Part 268, Subpart D (§§ 268.40 - 268.49), constituting one violation of MAC § 299.9311 and 40 C.F.R. § 268.9(c), as alleged in Count VIII of the Amended Complaint.

G. Count IX – Failure to Retain Land Disposal Determination Records

1. The Allegations and Order on Accelerated Decision

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[160] As discussed *supra*, Judge McGuire's rulings in his Order on Accelerated Decision constitute the "law of the case" in this proceedings, and may not be relitigated in subsequent stages of this proceeding except to prevent plain error, defined as an error "so obvious and substantial that failure to correct it would infringe a party's due process rights and damage the integrity of the judicial process" (Black's Law Dictionary 563 (7th ed. 1999)). *See, e.g., J.V. Peters & Co.*, 7 E.A.D. 77, 93 (EAB 1997); *Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 482 (EAB 1999).

a. The Alleged "Land Disposal Determination" Violations

Count IX of the Amended Complaint alleges that Respondent failed to retain records of the determination, required by MAC § 299.9311 and 40 C.F.R. § 268.7(a)(1) as to whether the hazardous wastes it generated had to be treated prior to being land disposed in violation of MAC § 299.9311 and 40 C.F.R. § 268.7(a)(6). Amended Complaint at 33-34, ¶¶ 150-152, 157. Specifically, the Complaint alleges:

> On and prior to at least July 22, 1999, Strong failed ... to have records of its determination that its hazardous wastes were restricted from land disposal pursuant to 40 C.F.R. 268.7(a)(6). Consequently, this constitutes one violation of MAC § ... 299.9311 [40 C.F.R. 268.7(a)(6)].

Amended Complaint at 34, ¶ 157.[161]

b. The Alleged "Hazardous Waste Determination" Violations

The Amended Complaint also alleges that Respondent failed to determine whether the wastes it generated were "hazardous wastes" in violation of MAC § 299.9302 and 40 C.F.R. § 262.11, and that Respondent failed to retain on-site records of such determination for the three years prior to July 22, 1999 in violation of MAC § 299.9307 and 40 C.F.R. § 262.40(c). Amended Complaint at 33-34, ¶¶ 153-154, 157. Specifically, the Complaint alleges:

> On and prior to at least July 22, 1999, Strong failed to have records of its determination of the hazardous characteristics of the wastes identified in paragraph 156... Consequently, this constitutes one violation of MAC § 299.9307(1)...

Amended Complaint at 34, ¶ 157. However, as to these allegations regarding "hazardous waste determinations" (as opposed to the "land disposal determinations"), Judge McGuire has already held:

> Respondent ... [has] noted that Count IX could be read to mean that EPA is seeking ***liability*** for failing to determine if Respondent's solid waste was hazardous waste pursuant to 40 C.F.R. § 262.11. Complainant, in its Rebuttal Prehearing Exchange, states that "[t]he Complaint clearly states in ¶ 157 that it is seeking ***penalties*** for one violation of 40 C.F.R. § 268.7(a)(6) ***not § 262.11***." Complainant's Rebuttal Prehearing Exchange at 6 (footnote omitted) [(emphases

[161] Although paragraph 151 of the Amended Complaint states that "40 C.F.R. 268.7(a)(1) requires a generator of hazardous waste to determine if its waste has to be treated prior to being land disposed," the Amended Complaint does not directly allege that Respondent failed to *make* the "land disposal determination" required by 40 C.F.R. § 268.7(a)(*1*), but only that Respondent failed to *retain records* of the determination in violation of 40 C.F.R. § 268.7(a)(*6*). Amended Complaint, ¶ 157.

added)].

Order on Accelerated Decision at 41, n.34 (emphases added).

Complainant's statement that "[t]he Complaint clearly states in ¶ 157 that it is seeking penalties for one violation of 40 C.F.R. § 268.7(a)(6) not § 262.11" is, at best, ambiguous and, at worst, misleading. Paragraph 157 of the Amended[162] Complaint states in full:

> On and prior to at least July 22, 1999, Strong failed to have *records of its determination of the hazardous characteristics* of the wastes identified in paragraph 156. Strong also failed at that time to have records of its determination that its hazardous wastes were restricted from land disposal pursuant to 40 C.F.R. 268.7(a)(6). Consequently, this constitutes *one violation of MAC § 299.9307(1)* and 299.9311 [40 C.F.R. 268.7(a)(6)].

(Emphases added). As noted above, MAC § 299.9307 requires the retention of records pertaining to the "hazardous waste determination" made pursuant to 40 C.F.R. § 262.11 and its Michigan equivalent at MAC § 299.9302.[163] Therefore, contrary to Complainant's assurances, Paragraph 157 of the Complaint neither limits its allegations to the "land disposal" determination of 40 C.F.R. § 268.7(a)(6) nor "clearly states" that Count IX does not seek a "penalty" for the alleged "hazardous waste determination" violation of 40 C.F.R. § 262.11. To the contrary, Paragraph 157 *does* allege a violation of MAC § 299.9307(1), which requires retention of records of the "hazardous waste" determination made pursuant to MAC § 299.9302 *and 40 C.F.R. 262.11*.

Although Complainant's Post-Hearing Brief continues to assert *liability* for the "hazardous waste determination" violation (*See* CPHRB at 95-96), Complainant states that: "The Complainant ... agrees the *penalty* is limited to the violations of 40 C.F.R. § 268.7(a)(6)." CPHRB at 96 (emphasis added). Thus, although it is not reflected in the language of Paragraph 157 or elsewhere in Count IX of the Complaint, it now appears to be Complainant's position that Count IX has always sought *liability* for the "hazardous waste determination" violation but has never sought *penalties* for that alleged violation. However, Judge McGuire's Order on

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[162]Paragraph 157 of the original Complaint is identical to that of the Amended Complaint.

[163]MAC § 299.9307(1) states: "A generator shall keep records of any test results, waste analyses, or other determinations *made pursuant to R 299.9302* for not less than 3 years from the date that the waste was last sent to on-site or off-site treatment, storage, or disposal." (Emphases added). MAC § 299.9302(1), in turn, states: "A person who generates a waste ... shall *determine if that waste is a hazardous waste*..." (Emphases added). The language of MAC § 299.9302 tracks that of 40 C.F.R. § 262.11. Indeed, Paragraphs 153-154 of the Amended Complaint explain: "MAC § 299.9302 [40 C.F.R. 262.11] requires a person who generates a waste to determine if that waste is a hazardous waste... MAC § 299.9307 [40 C.F.R. 262.40(c)] requires a generator to retain for three years on-site records of its determination made pursuant to MAC § 299.9302 [40 C.F.R. 262.11]."

Accelerated Decision does not appear to recognize this distinction, but rather appears to take Complainant's statement that "it is seeking penalties for one violation of 40 C.F.R. § 268.7(a)(6) not § 262.11" as mooting Respondent's argument that "Count IX could be read to mean that EPA is seeking *liability* for failing to determine if Respondent's solid waste was hazardous waste pursuant to 40 C.F.R. § 262.11." Order on Accelerated Decision at 41, n.34 (emphasis added). Despite Judge McGuire's apparent reliance on Complainant's statement regarding "penalty" as laying to rest Respondent's concerns regarding "liability," Complainant never sought to clarify its position or, if Judge McGuire failed to detect an implicit distinction being drawn by Complainant, has never drawn this Tribunal's attention to any such oversight.

In any event, it is clear that Complainant does not currently seek a penalty for the alleged "hazardous waste determination" and concomitant "record keeping" violations of MAC §§ 299.9302 and 299.9307 and 40 C.F.R. §§ 262.11 and 262.40(c). Therefore, and in light of Judge McGuire's apparent understanding that the issue of "liability" for such violations had been withdrawn and/or mooted by Complainant's statement that it did not seek "penalties" for those violations, this Tribunal will only consider the allegations in Count IX of the Amended Complaint which relate to "land disposal determinations" in violation of MAC § 299.9311 and 40 C.F.R. § 268.7, and will not consider the allegations in Count IX of the Amended Complaint regarding "hazardous waste determinations" in violation of MAC §§ 299.9302 and .9307 and 40 C.F.R. §§ 262.11 and 262.40(c).

2. Discussion

Again, Count IX alleges that Respondent failed to retain records of the determination, required by MAC § 299.9311 and 40 C.F.R. § 268.7(a)(1) as to whether the hazardous wastes it generated had to be treated prior to being land disposed in violation of MAC § 299.9311 and 40 C.F.R. § 268.7(a)(6).

MAC § 299.9311(1) states: "Generators of hazardous waste shall comply with the applicable requirements of 40 C.F.R. part 268." Part 268, in turn, at 40 C.F.R. § 268.7(a)(1), states that:

> A generator of hazardous waste must determine if the waste has to be treated before it can be land disposed.

40 C.F.R. § 268.7(a)(1). Generators are to make this determination by using the treatment standards in 40 C.F.R. §§ 268.40, 268.45, or 268.49, and may make the determination by either "testing" the waste or "using their knowledge of the waste." 40 C.F.R. § 268.7(a)(1).[164]

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[164]The preamble to the final rule setting forth 40 C.F.R. Part 268 explains that, prior to determining whether a waste which is "restricted" must be treated, generators must *always* first determine whether a hazardous waste is a "restricted" waste, stating: "All of the sequences in a generator's decision-making process must commence with a determination as to whether the hazardous waste is listed in Part 268 Subpart C. If the hazardous waste is not a restricted waste,

Section 268.7(a)(6), 40 C.F.R., further requires that:

> If a generator determines that the waste or contaminated soil is restricted based solely on his *knowledge* of the waste, *all supporting data used to make this determination must be retained on-site* in the generator's files. If a generator determines that the waste is restricted based on *testing* this waste ... *all waste analysis data must be retained on-site* in the generator's files.

(Emphasis added). 40 C.F.R. § 268.7(a)(8) clarifies the data retention requirement of subsection (a)(6), stating that:

> Generators must retain on-site a copy of all notices, certifications, waste analysis data, and other documentation produced pursuant to this section for *at least three years* from the date that the waste that is the subject of such documentation was last sent to on-site or off-site treatment, storage, or disposal.

(Emphasis added).

This Tribunal has already found that Respondent "land disposed" of characteristic hazardous wastes on *and prior to* July 22, 1999, as alleged in Count VIII of the Amended Complaint. Thus, Respondent is liable under Count IX of the Amended Complaint if Respondent failed to retain on-site records of its required determination as to whether those hazardous wastes were "restricted from land disposal" without treatment. That is, since land disposal occurred at least during the three years prior to the date of inspection (*i.e.*, between the commencement of Strong Steel's operation in March, 1997 and the date of inspection on July 22, 1999), Respondent should have made "land disposal" determinations *during that period* and should have had the

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it is not subject to land disposal restrictions under Part 268. It must, nevertheless, be managed in accordance [with] Parts 264 and 265." 51 Fed. Reg. 40572, 40619 - 40620 (Nov. 7, 1986). The court further explained in Hazardous Waste Treatment Council v. U.S. EPA, 886 F.2d 355 (D.C. Cir. 1980) ("HWTC v. EPA"), *cert. denied*, 498 U.S. 849 (1990) (mem.): "Under the EPA's scheme, restricted wastes will follow *one of two paths*. *First, if the generator of the waste determines that he is managing a restricted waste and the waste does not meet the applicable treatment standards*, he must notify the treatment facility of the appropriate treatment standards, *see* 40 C.F.R. § 268.7(a)(1); the treatment facility is then required, pursuant to 40 C.F.R. § 268.7(b), to test the treatment residue to assure that the waste, once treated, meets those standards before forwarding the waste to a land disposal facility, which is also required to test the waste, 40 C.F.R. § 268.7(c)... 'These testing requirements for treatment residuals apply to generators who treat, store, and dispose onsite.' 51 Fed. Reg. at 40,598. *Alternatively, if a generator determines that he is managing a restricted waste, but that the waste can be land disposed without further treatment*, he may ship the waste directly to landfill operators, the final handlers of the waste who, under the EPA scheme, bear ultimate responsibility for testing and determining that land disposed wastes meet the applicable treatment standards. *See* 51 Fed. Reg. 40,597 (November 7, 1986)." HWTC v. EPA, 886 F.2d at 368, including n.5 (emphases added).

records of such determinations on-site *as of July 22, 1999*. In addition, since "land disposal" last occurred at least as late as July 22, 1999, Respondent was required to maintain records of "land disposal determinations" for at least three years *after* July 22, 1999; *i.e.*, through July 22, 2002.[165]

Respondent does not directly assert that it actually did, in fact, have written records of such determinations on-site as of July 22, 1999, or that it actually made any such determination prior to April, 2000.[166] Rather, Respondent argues that Complainant's inspector, Mr. Opek, did not properly request such documentation on July 22, 1999, and that a proper request for "land disposal determination" records was necessary in order to require Respondent to produce such records, so that Respondent's failure to do so cannot establish liability. Implicit in this argument is the suggestion that Complainant did not specifically ask for "land disposal determination" records until July 17, 2003, which is more than three years past July 22, 1999, such that any records which Respondent may have had regarding "land disposal" occurring on July 22, 1999[167] were no longer required to be kept. Further, Respondent argues that the regulations allow "generators" of hazardous waste to make the "land disposal determinations" using their "knowledge of the waste" (as opposed to "testing" the waste), and that no ***written*** records of such knowledge-based determinations are required to be created or kept at all. For the reasons discussed below, Respondent's arguments are rejected.

a. Proper Request, if Necessary, Was Made

Both parties to this proceeding present lengthy arguments regarding whether Mr. Opek, the EPA Inspector who conducted the July 22, 1999 "RCRA compliance" inspection, did or did not ask Strong Steel representatives for documents such as "land disposal determination records" during the July 22, 1999 inspection, and regarding whether such a request is necessary in order to establish liability. *See, e.g.*, CPHB at 70-72; RPHB at 53-60; CPHRB at 86-88, 90-92. However, this Tribunal need not decide those questions because, as explained below, Complainant *did* specifically ask for such records in its July 17, 2003 "RCRA § 3007 Information Request" (which was a proper and sufficient request), and Respondent's answer to that question, along with the other evidence in the record, demonstrates that Respondent did not have any "land

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[165]Further, as explained *infra*, the three year record retention period was "automatically extended" pursuant to 40 C.F.R. § 268.7(a)(8) upon the filing of the original Complaint in this case on September 28, 2001.

[166]Respondent states: "... Strong Steel's August 18, 2003 response to Region 5's Information Request ... points out that it did supply Region 5 with documentation of the land disposal determination that its consultants made *in April, 2000*. ... Strong Steel did provide Region 5 with a copy of the land disposal determination that it made *in April, 2000*." RPHB at 59-60 (citations omitted) (emphasis added).

[167]As stated by Complainant: "The last observed on-site [land] disposal was on July 22, 1999." CPHB at 70.

disposal determination" records on-site on or before July 22, 1999.[168]

Complainant's July 17, 2003 Information Request specifically asked:

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[168]This Tribunal notes, however, that the cases cited by Respondent for the proposition that "[w]hen an EPA inspector has not asked to see specific documents, a regulated entity cannot be penalized for not providing them" (RPHB at 53-54), are inapposite. In the case of *S&S Landfill, Inc.*, 1994 WL 594890, EPA Docket No. CAA-III-002 (Order Denying Motions for Accelerated Decision and Denying Motion to Dismiss, Sept. 22, 1994), "[t]he complaint ... charge[ed] Respondent with failing or refusing to furnish waste shipment records ... *after a proper request to do so pursuant to 40 CFR § 61.154(i)* was made by EPA." *Id.* at 1 (footnote omitted) (emphasis added). There, Judge Greene denied accelerated decision, finding there to be a genuine issue of material fact in that "[t]he complaint alleges that Respondent failed or refused to furnish waste shipment records ... upon request ... [and] Respondent denies that such a request was made." *Id.* However, the Clean Air Act regulation there at issue, 40 C.F.R. § 61.154(i), stated that asbestos disposal sites must: "Furnish *upon request*, and make available during normal business hours for inspection by the Administrator, all records required under this section." (Emphasis added). In contrast, the RCRA regulation here at issue, 40 C.F.R. § 268.7(a)(6), contains no such "upon request" language, but straightforwardly requires that: "... all supporting data used to make this determination *must be retained on-site in the generator's files*." (Emphasis added). Therefore, Judge Greene's consideration of 40 C.F.R. § 61.154(i) in *S&S Landfill* is not instructive in the present case. Indeed, to the extent that *S&S Landfill* may inform the present consideration, it is only in highlighting the fact that Section 268.7(a) does *not* require a "request" such as that required by Section 61.154(i). Similarly, the case of *Spang & Co.*, 1994 WL 118672 (Initial Decision, EPCRA-III-037 & 048, Mar. 10, 1994) ("*Spang I*"), *aff'd in part and remanded*, 6 E.A.D. 226 (EAB, Oct. 20, 1995) ("*Spang II*"), is inapposite because it deals with a regulation which does not parallel Section 268.7(a)(6) and which arises under a statute different from the one here at issue. In *Spang I*, Judge Nissen held that, under the Emergency Planning and Community Right-to-Know Act ("EPCRA"), a penalty for violation of the record keeping requirements of 40 C.F.R. § 372.10, which requires that specified records be "readily available for inspection by EPA," could not be assessed where the evidence failed to establish that a specific request to see the records was made at the time of the EPA inspection. That is, the respondent in *Spang* could not be found liable for not having the records *readily available during the inspection* (as opposed to not having them at all), where the inspector did not attempt to determine their "availability" during the inspection. The "readily available" issue in *Spang I* is readily distinguishable from the present question of whether Strong Steel created and kept on-site for three years the relevant records. There is no "readily available" language in Section 268.7(a)(6), and Mr. Opek need not have determined their "availability" *during the inspection* in order to establish liability. Unlike in *Spang*, the present question is whether Strong Steel made and kept the relevant records *at all*, not whether the records were "readily available" *during the inspection*. Put another way, the gravamen of Count IX is not Strong Steel's alleged failure to *provide* the relevant records, but rather Respondent's failure to *create and/or retain* the records.

> Have you ever determined that gasoline and other liquids from automobiles you received at your facility were *restricted from disposal on the land*? If the answer to this question is yes, then indicate the date of the determination, the person who made the determination and all information related to that determination... Identify where the documents have been kept since June 1, 1999.

CX-104, Bates 1816, ques. 4 (emphasis added). Respondent's August 18, 2003 Reply to that question was as follows:

> See the land disposal restriction determination and related information with the CRA report that Strong Steel submitted [on May 8, 2000] in response to Region 5's March 15, 2000 RCRA information request. Strong Steel has not yet located any other information confirming whether or not it ever made any other land disposal restriction determination. Such a determination, if it were made, could have been based on knowledge of the waste, which would not necessarily have resulted in the creation of any document. Depending on when the determination, if any, was made, any document may no longer be available if the regulatory retention period has expired.

CX-105, Bates 1826, ans. 4. The "CRA report" referenced in Respondent's May 8, 2000 "RCRA § 3007 Response," in turn, is dated May 5, 2000 and states:

> On *April 11, 2000*, [Inland Waters] commenced remediation activities... Soil was excavated and removed from two locations and placed into four 20 cubic yard roll-off boxes... The soils contained in the four 20 cubic yard roll-off boxes were disposed off Site... *A copy of the land ban is presented in Attachment F*.

CX-18, Bates 170-171 (emphases added). "Attachment F" to the May 5, 2000 "CRA Report" is entered as CX-18, Bates 227-229. Although it is neither signed nor dated, the document indicates the presence of "Lead" and "Cadmium."

The four 20-cubic yard roll-off boxes excavated by Inland Waters on April 11, 2000 was disposed of on April 20, 2000. RX-10, Att. F; CX-101, Bates 1785-86; CX-18, Bates 219-20. Therefore, Respondent's August 18, 2003 Response to question #4 of Complainant's July 17, 2003 Information Request, referencing the May 5, 2000 "CRA Report" contained in Respondent's May 8, 2000 Information Request Response to Complainant's March 15, 2000 Information Request, indicates that the only "land disposal determination" made by Strong Steel (which produced a written record) was conducted between April 11 and April 20, 2000 – well after July 22, 1999.

However, in stating that "[d]epending on when the determination, if any, was made, any document may no longer be available if the regulatory retention period has expired" (CX-105, Bates 1826, ans. 4), Respondent suggests that Complainant's July 17, 2003 inquiry came too late to establish liability in this case. That argument must be rejected. Section 268.7(a)(8), 40 C.F.R.,

states, in part: "The three year record retention period is *automatically extended* during the course of any unresolved enforcement action regarding the regulated activity..." (emphasis added). As noted above, since "land disposal" occurred at least during the three years prior to the date of inspection (*i.e.*, between the commencement of Strong Steel's operation in March, 1997 and the date of inspection on July 22, 1999), Respondent should have made "land disposal" determinations *during that period* and should have had the records of such determinations on-site *as of July 22, 1999*. Further, since "[t]he last observed on-site [land] disposal was on July 22, 1999" (CPHB at 70), Respondent should have retained "land disposal determination" records for at least three years *after* July 22, 1999; *i.e.*, until July 22, 2002. Although Complainant's July 17, 2003 inquiry came after that date, the three year record retention period (from July 22, 1999 to July 22, 2002) had been extended by the initiation of the present enforcement action via the filing of the original Complaint on September 28, 2001. That is, the filing of the original Complaint prior to expiration of the July 22, 2002 "deadline" effectively tolled the running of the three year retention period "during the course" of the present enforcement action until it is "resolved." Assuming *arguendo* that July 22, 1999 was the last time any "land disposal" occurred, then Respondent, when the original Complaint was filed on September 28, 2001, should have been in possession of all "land disposal determination" records pertaining to "land disposals" occurring between September 28, 1998 and July 22, 1999 (*i.e.*, all "land disposals" within the three years prior to September 28, 2001). At that point the three year retention period was "extended during the course of ... [the] enforcement action." Therefore, when Complainant specifically requested all "land disposal determination" records on July 17, 2003, Respondent should have been in possession of – and provided copies of – all records pertaining to such determinations occurring between September 28, 1998 and July 22, 1999.

Thus, to the extent that a proper request for the "land disposal determination" records may have been necessary to require production of the records and establish liability for failure to make such determinations or retain such records under Count IX of the Amended Complaint,[169] this Tribunal finds that question #4 of Complainant's July 17, 2003 RCRA § 3007 Information Request was such a proper request. Therefore, it is unnecessary to determine whether Mr. Opek asked for such records during the July 22, 1999 inspection, or whether any other request (*e.g.*, question #6 of Complainant's March 15, 2000 Information Request[170]) was sufficiently specific.

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[169]This Tribunal makes no determination as to whether a proper request for the "land disposal determination" records was necessary in order to establish liability for failure to make such determinations or retain such records under Count IX of the Amended Complaint. This Tribunal notes, however, that the cases cited by Respondent for the proposition that "[w]hen an EPA inspector has not asked to see specific documents, a regulated entity cannot be penalized for not providing them" (RPHB at 53-54), are inapposite, as explained *supra*.

[170]*See* CX-17, Bates 165: "Please provide a *hazardous waste determination* and a copy of *all chemical analyses* conducted from the used oil and waste gasoline which was scattered on the ground at [the] Strong Steel Products facility." (Emphasis added). Respondent argues that: "If Mr. Opek really did want to know whether Strong Steel had any land disposal determinations, he should have asked for them in Region 5's March 15, 2000 Information

b. Written Records of "Knowledge-Based" Determinations Were Required to Be Kept

Respondent asserts that no *written* records of "land disposal determinations" are required to be created or maintained by "generators" of characteristic hazardous wastes, because "generators" may make such determinations based upon their "knowledge of the waste" rather than by "testing" the waste. While "tests" of waste would necessarily generate a written record, Respondent suggests that determinations based on "knowledge" do not necessarily generate a written record.[171] Respondent argues:

> ... Strong Steel's August 18, 2003 response to Region 5's Information Request ... points out that it did supply Region 5 with documentation of the land disposal determination that its consultants made in April, 2000. It also points out that *if* Strong Steel had made any land disposal determinations before then, they very well *might not have resulted in any documentation being produced*, because regulations allow a land disposal determination to be made based on "knowledge of the waste," not necessarily laboratory testing. *Nothing in Michigan or EPA regulations requires a land disposal determination made on the basis of "knowledge of the waste" to be in writing*. (MAC § 299.9311; 40 CFR § 268.7(a)(6).) Thus, the fact that Strong Steel did not provide written documents in response to Q#4 of EPA's August 13, 2003 [sic[172]] Information Request (other than its reference to documents it had provided in response to Region 5's previous

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Request, but he did not. Region 5 asked only for 'hazardous waste determinations,' not land disposal determinations." RPHB at 58 (citation omitted). However, Respondent's response to Complainant's July 17, 2003 *specific* request for "land disposal determination" records merely points to the "Land Ban" document which *Respondent had supplied in response to Complainant's March 15, 2000 Information Request*. Therefore, because Respondent did, in fact, produce all of its "land disposal determination" records in response to Complainant's first Information Request on March 15, 2000, it is reasonable to conclude that the March 15, 2000 Information Request was sufficiently specific to request such records. Further, Respondent candidly states: "Strong Steel not only made the *land disposal determination*, but provided copies of that documentation to Region 5 when it did expressly request it *in May 2000* [sic]." RPHB at 64 (*citing* CX-18, Bates 226-229) (emphases added). (Respondent's reference to a "May 2000" Information Request appears to be a mistaken reference to Complainant's March 15, 2000 Information Request, since "CX-18, Bates 226-229" is the "Land Ban" attached to the CRA Report attached to Respondent's May 8, 2000 Response to Complainant's March 15, 2000 Information Request).

[171]Respondent stops short of asserting that Strong Steel did, in fact, make any such determination.

[172]Respondent apparently intends to refer to Complainant's July 17, 2003 Information Request.

> information request) does not prove that Strong Steel either failed to make land disposal determinations or failed to retain copies of any written determinations that it may have made. On the contrary, Strong Steel did provide Region 5 with a copy of the land disposal determination that it made in April, 2000.

RPHB at 59-60 (emphases added). For the following reasons, Respondent's contention that *no* written record of "knowledge-based" land disposal determinations need be created or kept by "generators" of hazardous waste under the Michigan and/or federal regulations is rejected.

The operation of the "knowledge-based determination" under 40 C.F.R. § 268.7(a)(1) was directly addressed by the court in Hazardous Waste Treatment Council v. U.S. EPA, 886 F.2d 355 (D.C. Cir. 1980) ("HWTC v. EPA"), *cert. denied*, 498 U.S. 849 (1990) (mem.). There, the petitioners sought review of the EPA's final rule regarding land disposal of solvents and dioxin, promulgated pursuant to the Hazardous Solid Waste Amendments of 1984 ("HSAA"). Specifically, the petitioners challenged, *inter alia*, "the agency's decision to allow generators to rely on their knowledge to certify that wastes are within treatment standards." HWTC v. EPA, 886 F.2d at 369. The court rejected the petitioners' challenge, finding that "EPA's decision to allow generators to rely *in appropriate circumstances* on their knowledge of their restricted waste to certify that it naturally meets treatment standards is reasonable." *Id.* at 371 (emphasis added). The court's reasoning in reaching this conclusion is highly instructive in the present case:

> ... [W]e find it neither nonsensical nor absurd to expect that generators may to some extent "know their waste" without testing each batch produced. Indeed, waste generators who apply the same methods to the same inputs in the same manner as part of the same production process every day are, after a while, likely to be in a very good position to know the hazardous contents of their waste. As we read the EPA's rules and statements during the rulemaking process, *the agency's scheme does not allow generators to make guesses about the hazardous nature of their wastes without empirical or analytical foundation. Rather, waste generators are allowed to rely on actual "knowledge" they have acquired only if such knowledge enables them to certify that their waste complies with applicable treatment standards*. Generators are *required to keep records of all data that goes into their certifications*, *see* 40 C.F.R. § 268.7(a)(4), and they are subject to penalties for erroneous certifications. Thus, contrary to petitioners' assertion that "nothing in the rule itself ... requires generators shipping wastes directly to a landfill to test the waste to determine compliance with the treatment standards," the EPA's scheme will *necessarily require **at least some initial testing** of generators' waste stream* in order to comply with the rules' plain directives. If *down the road* the generators' familiarity with their wastes does indeed render them capable of certifying the wastes' contents *without conducting more frequent testing*, then we see no reason to compel the EPA to require such unnecessary testing.
>
> ... [T]he EPA has explicitly stated that the crucial stage in the process, upon which the agency has placed its most heavy reliance, is the point at which the

> waste reaches the *land disposal facility*: at this juncture, just prior to land disposal, waste *must be rigorously tested* to confirm that it is what others have represented it to be and that it may permissibly be land disposed. Given the agency's reliance on testing by landfill owners and operators to intercept erroneously identified waste, we cannot say that the EPA acted arbitrarily or capriciously in deciding not to require elaborate and even redundant testing by generators *presumably able to identify in a large number of cases* the hazardous components of the waste they generate.

Id. at 369-370 (citation and footnotes omitted) (emphases added). Thus, given the fact that both "treatment facilities" and "land disposal facilities" are *always* required to "test"[173] restricted hazardous waste prior to land disposal, the regulations do not also require "generators" to *always* conduct such tests. However, the regulations *do* require "generators" to *always* make the *determination* as to whether the wastes are "restricted" from land disposal with or without further treatment. Since "generators" typically generate large amounts of waste by applying "the same methods to the same inputs in the same manner as part of the same production process every day," the regulations allow "generators" – "*after a while*," "*down the road*" and *as long as nothing changes*[174] – to rely on their "knowledge of the waste" *derived of "at least some initial testing"* in order to make the required determination. That is, "generators" may not simply "make guesses about the hazardous nature of their wastes without empirical or analytical foundation."

Simply put, the regulations are designed to relieve generators of the burden of "testing" every single "batch" of waste when it is clear that every single batch produced is the same. Treatment and disposal facilities are not relieved of this burden because, in accepting waste from varied sources rather than producing waste by a constant method, they cannot rely on "knowledge" because the incoming waste is inconsistent. That is, while all outgoing waste from a single source might be the same, all incoming waste from multiple sources is not the same. However, the logical necessary predicate to this rationale, explicitly recognized by the court in HWTC v. EPA, is that generators *must initially establish a baseline of knowledge by testing the outgoing waste* for an amount of time sufficient to allow the generator "to certify that their waste

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[173]*See* HWTC v. EPA, 889 F.2d at 370, n.9: "... the regulations require both treatment facilities and landfill operators to use ... the 'Toxicity Characteristic Leaching Procedure [('TCLP')]" ..."

[174]Citing 51 Fed. Reg. 40572, 40597 (Nov. 7, 1986), the court in HWTC v. EPA noted: "'A waste analysis *must* be conducted [by the generator of the waste] if there is reason to believe that the composition of the *waste has changed* or if the treatment *process has changed*.'" HWTC v. EPA, 886 F.2d at 370, n.7 (emphases added). The preamble to the rule establishing 40 C.F.R. Part 268 further states: "These testing requirements for treatment residuals apply to *generators* who treat, store, and dispose onsite. Less frequent testing may be appropriate when there are fewer and less variable waste streams at combined facilities, but waste *must be tested* if the *composition or treatment method changes*." 51 Fed. Reg. 40572, 40598 (Nov. 7, 1986) (emphases added).

complies with applicable treatment standards." While the regulations are designed to relieve generators of unnecessarily redundant testing burdens, that relief may not be used as a shield against the basic requirement that generators *always make the determination* (even if "knowledge-based") as to whether the wastes are restricted from land disposal without treatment, and that such determinations be *somewhere* rooted in real analyses rather than empty conjecture or mere anecdotal speculation.

Such "testing" and substantive analyses which much underlie even "knowledge-based" land disposal determinations will necessarily produce a *written* record. For example, HWTC v. EPA was cited by the EPA in the preamble to a rule requiring TSD facilities to determine the volatile organic concentration of hazardous waste. Just as did 40 C.F.R. § 268.7(a)(1) regarding generators' land disposal determinations, this rule allowed TSD facilities to rely on either "testing" or "knowledge" to determine the volatile organic concentration. The preamble explained:

> The subpart CC standards include provisions that allow a TSDF owner or operator to use either direct measurement or knowledge of the waste to determine the volatile organic concentration of a hazardous waste...
>
> The final subpart CC standards allow TSDF owners or operators to use their knowledge of the waste for waste determinations *(see Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 370-71 (D.C.Cir. 1989) upholding the use of generator knowledge to determine if treatment standards are met).* Information may be used that is prepared by either the facility owner or operator or by the generator of the hazardous waste. *Examples of information that could constitute acceptable knowledge include*:
>
> (1) Organic material balances for the source, process, or waste management unit generating the waste;
>
> (2) Documentation that lists the raw materials or intermediate products fed to a process showing that no organics are used in the process generating the waste;
>
> (3) Information that shows the waste is generated by a process that is substantially similar to a process at the same or another facility that generates a waste that has previously been determined by direct measurement to have a volatile organic content less than the action level;
>
> (4) Test data that provide speciation analysis results for the waste that are still applicable to the current waste management practices and from which the total concentration of organics in the waste can be computed; or
>
> (5) Other knowledge based on manifests, shipping papers, or waste certification notices.
>
> When test data are used as the basis for knowledge of the waste, the owner or operator *must provide documentation* describing the testing protocol and the means by which sampling variability and analytical variability are accounted for in the determination of the volatile organic concentration of the hazardous waste. For example, an owner or operator may use individual organic constituent concentration test data that are validated in accordance with Method 301 in

appendix A to 40 CFR part 63 as the basis for knowledge of the waste.

59 Fed. Reg. 62896, 62916 (Dec. 6, 1994) (emphases added).

Thus, as explicitly held by the court in HWTC v. EPA and recognized by the EPA, where either "testing" or "knowledge" may be used to determine the nature of hazardous waste, such as in 40 C.F.R. § 268.7(a)(1), any "knowledge-based" determinations must be rooted in some substantive analyses which produce a written record. This common sense conclusion is especially clear in light of the fact that the "determination of whether a hazardous waste treatment residue requires further treatment prior to land disposal [under 40 C.F.R. § 268.7] ... is *critical to the [regulatory] scheme*..." 51 Fed.Reg. 40572, 40596 (Nov. 7, 1986) (emphasis added).

For all of these reasons, this Tribunal rejects Respondent's argument that "if Strong Steel had made any land disposal determinations..., they very well might not have resulted in any documentation being produced, because regulations allow a land disposal determination to be made based on 'knowledge of the waste,' not necessarily laboratory testing." RPHB at 59.[175] To the contrary, this Tribunal finds that MAC § 299.9311 and 40 C.F.R. §§ 268.7(a)(1), (6), and (8) do require that any generators' determinations as to whether their hazardous waste is restricted from land disposal and/or, if so, whether such waste meets the applicable treatment standards, even if made based upon the generators' "knowledge of waste," must be rooted in some substantive analyses which produce written documentation.

c. Respondent Did Not Retain "Land Disposal Determination" Records

This Tribunal has already found that Respondent, on and prior to at least July 22, 1999, "land disposed" of hazardous wastes as alleged in Count VIII of the Amended Complaint. These wastes included used oil, gasoline, and other automotive fluids. Therefore, Respondent, as the "generator" of the hazardous waste, was required to determine whether the waste was restricted from land disposal and, if so, whether the waste met the applicable treatment standards. These determinations were required to be supported by waste analysis data, and that documentation was required to be retained on-site for at least three years from the date the waste was last disposed. In the present case, as explained *supra*, when Complainant specifically requested such records on July 17, 2003, Respondent was required to have been in possession of – and to have provided copies of – all records pertaining to "land disposal determinations" occurring between September 28, 1998 and July 22, 1999. Respondent was only able to produce slim documentation of a "Land

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[175]This Tribunal similarly rejects Respondent's argument that "it is common knowledge that gasoline is ignitable and should not be placed on the ground ... [so] [i]t is not necessary to perform laboratory tests to determine that, or to keep records of such a determination *so that one will not forget not to dispose to [sic] gasoline on the ground*." RPHB at 64 (emphasis added). The facts of this case, in which Respondent *did* routinely dispose of gasoline on the ground, clearly demonstrate otherwise.

Ban"[176] determination made in April of 2000 by CRA for a land disposal *off-site*, and no documentation at all regarding any "land disposal determinations" regarding land disposal *at the Strong Steel site*.[177] Indeed, in response to Complainant's July 17, 2003 request for the records, Respondent candidly stated that, except for the "Land Ban" document prepared by CRA in April of 2000, "Strong Steel has not yet located any other information confirming whether or not it ever made any other land disposal restriction determination." CX-105, Bates 1826, ans. 4. Because the documentation at issue was, if it existed, in the exclusive control of the Respondent, and because Respondent failed to produce the documentation after Complainant properly requested it to do so, Complainant has met its burden under 40 C.F.R. § 22.24 to demonstrate by a preponderance of the evidence that the violation occurred as set forth in the Complaint.[178]

Further, the allegations in Count IX were made in the original Complaint, filed on September 28, 2001, and were not altered in the Amended Complaint. Thus, Respondent had knowledge of Complainant's allegation that Respondent "failed ... [on and prior to at least July 22, 1999] to have records of its determination that its hazardous wastes were restricted from land disposal pursuant to 40 C.F.R. 268.7(a)(6)" (Original Complaint at 31, ¶ 157) from the inception of this case. Respondent could have easily refuted this allegation by producing the relevant records in its pre-hearing exchange, in response to either of Complainant's two RCRA § 3007 Information Requests, or at hearing. However, Respondent neither produced the records nor offered any testimony or other evidence whatsoever to suggest that any such determination was, in fact, made at all for land disposals at the Strong Steel site. Indeed, Respondent's argument stops short of asserting that any such determination was actually made, presumably because such a position would undercut Respondent's primary argument that it did not "dispose" of any hazardous waste at the Strong Steel site. Rather, Respondent focused its witness examination[179] and post-hearing argument on the assertion that Mr. Opek did not request the records during the

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[176]*See* Respondent's August 18, 2003 Response to question #4 (CX-105, Bates 1826, ans. 4) of Complainant's July 17, 2003 Information Request (CX-104, Bates 1816, ques. 4), referencing the May 5, 2000 "CRA Report" (CX-18, Bates 170-171) with its attached "Land Ban" (CX-18, Bates 227-229) contained in Respondent's May 8, 2000 Information Request Response (CX-18) to Complainant's March 15, 2000 Information Request (CX-17).

[177]The one "land disposal determination" record produced by Respondent – the April, 2000 "Land Ban" document attached to the CRA report – dealt not with "land disposal" *at the Strong Steel site*, but rather dealt with the two 20-cubic yard "roll-off boxes" which were "sent to Parma-fix Chem-Met Services for solidification / stabilization for lead, and eventually land filled." RX-10, p. 5.

[178]*See, e.g.*, 51 Fed. Reg. 40572, 40598 (Nov. 7, 1986): "... [By requiring that all waste analyses be placed in the operating record, the owners / operators [of TSD facilities] will be able to demonstrate compliance with the waste analysis requirements in § 268.7."

[179]*See, e.g.*, Tr. 11/19/03, pp. 309-11 (Steven Benacquisto); Tr. 11/21/03, p. 88 (Ms. Carroll); Tr. 12/9/03, p. 48 (Mr. Beaudoin).

July 22, 1999 inspection. As explained above, that argument is misplaced. Further, to the extent that that argument suggests that Respondent *would* have produced the records had it been properly asked, that implication is simply not believable in light of the fact that Respondent's having produced the records would have resulted in a dismissal of the allegation and completely obviated the need to litigate the issue.

Respondent's alternate argument that "generators" need not create or retain records of "knowledge-based" determinations, as explained above, is also misplaced. Again, to the extent that this argument may suggest that Respondent did, in fact, make the determinations but did not create or rely upon any physical documentation, that implication is not believable in light of the fact that Respondent did not elicit any testimony whatsoever to suggest that anyone ever made any "land disposal determination" for land disposals at the Strong Steel site, or to suggest who might have made such a determination.[180]

Finally, the conclusion that Respondent did not create or retain "land disposal determination" *records* is buttressed by the fact that the totality of the evidence strongly suggests that Respondent did not, in fact, make any "land disposal *determinations*" regarding the disposal of automotive fluids onto the ground at the Strong Steel site. Such disposal was the result of fluids leaking out of "junked" automobiles as they were delivered, stacked, stored, crushed, shredded, or otherwise processed at the Strong Steel site. Respondent emphatically argues that such "leaking" was a *de minimus* by-product of its operations, that it was "unintentional," and that it did not constitute "disposal." While this Tribunal has already found that Respondent did "intentionally dispose" of hazardous wastes at the Strong Steel site, it is clear that Respondent did not consider it necessary to conduct "land disposal determinations" pursuant to 40 C.F.R. § 268.7 with regard to this "leaking" automotive fluid (that is, Respondent's failure was the result of ignorance of the law).[181] Respondent simply processed the cars and occasionally "swept" the used oil, gasoline, and other fluids "into the shredder."[182] Because the evidence strongly suggests that Respondent did not, in fact, make any "land disposal determinations," it is reasonable to conclude that Respondent did not create or retain any records pertaining to such determinations.[183]

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[180]Although CRA apparently generated the "Land Ban" document pertaining to the *off-site* disposal of contaminated soils in April of 2000, the record contains nothing to suggest that any "land disposal determination" was made for land disposals *at the Strong Steel site*, or to suggest who might have made such a determination.

[181]Again, the one "land disposal determination" record produced by Respondent dealt not with "land disposal" at the Strong Steel site, but rather dealt with the two 20-cubic yard "roll-off boxes" which were disposed off-site. RX-10, p. 5.

[182]*See, e.g.*, Tr. 11/19/03, pp. 338, 367-368 (Steven Benacquisto).

[183]As noted above, however, while Count IX of the Amended Complaint alleges that Respondent failed to retain "land disposal determination" *records* in violation of 40 C.F.R. § 268.7(a)(6), the Amended Complaint does not directly allege that Respondent failed to *make the*

For all of these reasons, this Tribunal concludes that Respondent failed to retain records of the determination, required by MAC § 299.9311 and 40 C.F.R. § 268.7(a)(1) as to whether the hazardous wastes it generated had to be treated prior to being land disposed in violation of MAC § 299.9311 and 40 C.F.R. § 268.7(a)(6), as alleged in Count IX of the Amended Complaint.

V. Discussion, Findings and Conclusions as to Penalty

Complainant proposes a total penalty in this case in the amount of $307,450. This total amount breaks down as follows: $218,900 for Count III (including a "multi-day" component of $196,900); $0 for Count IV (penalty "compressed" into that for Count VII); $7,150 for Count V; $7,150 for Count VI; $24,750 for Count VII; $24,750 for Count VIII; and $24,750 for Count IX. *See* CX-106, Bates 1919. In addition, Complainant seeks a "Compliance Order" requiring Respondent to, *inter alia*, "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.[184]

For the reasons discussed below, this Tribunal imposes a civil administrative penalty against Respondent in the amount of $269,527. In addition, Respondent shall comply with this Tribunal's Compliance Order, as set forth below.

A. The Penalty Provisions

The Consolidated Rules of Practice provide in pertinent part that:

> [i]f the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall consider any civil penalty guidelines [or policy by EPA] issued under the Act.

40 C.F.R. § 22.27(b).[185]

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determination in violation of 40 C.F.R. § 268.7(a)(1).

[184]The final sentence of Complainant's Post-Hearing Reply Brief elaborates: "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." Complainant's CPHRB at 99-100. Thus, Complainant's proposed "Compliance Order" is the subject of the parties' post-post-hearing briefing on "RCRA Closure."

[185]The Consolidated Rules also provide that the Complainant bears the burden of proof regarding the appropriateness of the penalty. *See*, 40 C.F.R. § 22.24. *See also, John A. Capozzi, d/b/a/ Capozzi Custom Cabinets*, RCRA (3008) Appeal No. 02-01, slip op. at 28, 11 E.A.D. __

With regard to assessing a civil penalty for violations of its provisions, RCRA § 3008(a)(3) (42 U.S.C. § 6928(a)(3)) provides:

> Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty, the Administrator [or his delegatees] shall take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3).[186]

B. The RCRA Penalty Policy

1. The 2003 Penalty Policy is Applicable to the Amended Complaint

The EPA issued a RCRA Civil Penalty Policy in October, 1990 ("1990 Penalty Policy") (CX-21), and later issued a Revised RCRA Civil Penalty Policy in June, 2003 ("2003 Penalty Policy") (CX-77). Complainant calculated the penalty proposed in the Amended Complaint based upon the 2003 Penalty Policy. Amended Complaint at 39, ¶171. Respondent contends, however, that "the 1990, rather than the 2003, version of the Penalty Policy should apply." RPHB at 61. Therefore, as an initial matter, this Tribunal must determine which Penalty Policy is applicable in this case.

Mr. Opek, who calculated the penalty proposed in the *original* Complaint filed on October 28, 2001, relied on the 1990 Penalty Policy. However, Mr. Opek testified that "... I do not recall exactly the [original] penalty calculation... I've been out of the office for two years and this case is not fresh in my memory at this time. I did not review our file and I cannot tell you any numbers ... at this moment." Tr. 11/18/03, p. 246. Mr. Beedle, who calculated the penalty proposed in the *Amended* Complaint filed on October 30, 2003, relied on the 2003 Penalty Policy. Tr. 11/19/03, p. 220. Mr. Beedle explained that he did so because "[you're to use [the 2003 Penalty Policy] immediately, whether or not violations were identified before the issuance of the 2003 policy." Tr. 11/19/03, p. 217.

(EAB, Mar. 25, 2003); *New Waterbury, Ltd.*, 5 E.A.D. 529, 537 (EAB 1994); Premex, Inc. v. Commodity Futures Trading Com'n, 785 F.2d 1403, 1409 (9th Cir. 1986).

[186]*See also*, RCRA § 3008(g), 42 U.S.C. § 6928(g): "Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation." The Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461, and its implementing regulations at 40 C.F.R. § 19.4, increased the maximum daily penalty amount allowed under RCRA §§ 6928(a)(3) and (g) to $27,500 for violations occurring on or after January 31, 1997.

Complainant argues that, although the 1990 Penalty Policy was applicable to the original Complaint, the 2003 Penalty Policy is applicable to the Amended Complaint because the Amended Complaint was filed subsequent to June 2003. CBHB at 9. Specifically, Complainant states:

> The *2003 RCRA Penalty Policy* is silent on whether it applies to the present situation – Complaint amended to increase the penalty after the policy was issued. It is reasonable to read the policy as applying in this instance. The *2003 RCRA Penalty Policy* states that it is immediately applicable to actions brought after the date of the policy, *regardless of when the violations occurred*. Further it states that it is applicable to settlements of actions instituted *prior to the date of the policy*. These two sentences indicate an intension to have the policy apply to violations that predate the issuance of the policy.

CPHB at 10 (emphasis in original). Respondent, on the other hand, argues that the 2003 Penalty Policy applies only to enforcement actions "brought" after June, 2003, and that it is therefore inapplicable to the present case which was "brought" when the original Complaint was filed in September, 2001. RPHB at 60-61.

The 2003 Penalty Policy, in addition to a cover letter / memorandum regarding "Revisions to the 1990 RCRA Civil Penalty Policy" dated June 23, 2003, is entered as CX-77. The 2003 Penalty Policy states:

> The RCRA Civil Penalty Policy is *immediately applicable* and should be used to calculate penalties *sought in all RCRA administrative actions or accepted in settlement* of both administrative and judicial civil *enforcement actions brought* under the statute *after the date of the Policy, regardless of the date of the violation*. To the maximum extent practicable, the Policy shall also apply to the *settlement* of administrative and judicial *enforcement actions instituted prior to but not yet resolved as of the date the Policy is issued*.

CX-77, Bates 1020 (footnote omitted) (emphases added). Parallel language also appears in the cover letter. CX-77, Bates 1006, n.1. Thus, the 2003 Penalty Policy, by its own terms, applies to "administrative and judicial enforcement actions" "instituted" *prior to* June 23, 2003 and "brought" *after* June 23, 2003. Respondent contends that "in the case of an action 'instituted prior to but not yet resolved as of the date the Policy is issued,' ... the 2003 Penalty Policy applies only to the settlement of that action." RPHB at 62 (emphasis in original). That is, Respondent contends that where an action such as the one at hand was "brought" or "instituted" by filing the original Complaint prior to June 23, 2003, the 2003 Penalty Policy should apply to any current settlement negotiations, but the 1990 Penalty Policy should guide this Tribunal in applying the statutory penalty criteria.

This Tribunal rejects Respondent's contention that the first sentence of the quoted paragraph applies to an administrative judicial determination, while the second sentence applies

to "settlement" negotiations. That reading is rejected because the first sentence applies not only to "penalties sought in ... administrative actions," but also to "penalties ... accepted in settlement." That is, the 2003 Penalty Policy does not articulate distinct applicability based on whether the outcome is a formal Decision or a negotiated settlement. Further, the second sentence makes clear that the 2003 *is* applicable "to the maximum extent practicable" to actions instituted *prior to* June 23, 2003.

The rationale of the quoted paragraph is more easily discerned when its unstated assumption is recognized: that the proposed penalty *will already have been calculated* using the 1990 Penalty Policy for actions brought/instituted prior to July 23, 2003. Of course the 2003 Penalty Policy should be used to calculate proposed penalties (or in settlement negotiations) in Complaints filed after July 23, 2003. However, since the Policy assumes that the proposed penalty will have already been calculated for Complaints filed prior to that date, the Policy does not *require* those proposed penalties to be *re*-calculated. Rather, the Policy merely requires that it apply to "settlement" of such actions "to the maximum extent practicable."

Thus, Complainant is correct that the 2003 Penalty Policy "is silent on whether it applies ... [where the] Complaint [was] amended to increase the penalty after the policy was issued," and Complainant's point is well taken that the 2003 Policy "indicate[s] an intension to have the policy apply to violations that predate the issuance of the policy." CPHB at 10. That is, the overriding objective of the 2003 Penalty Policy "applicability" discussion is that the Policy is "immediately applicable" in *all* situations "to the maximum extent practicable."

In the present case, when Complainant amended the Complaint in October of 2003 (after issuance of the 2003 Penalty Policy) it was necessary to re-calculate the penalty to reflect the changes made by the Amendments, and it was "practicable" to use the 2003 Penalty Policy to do so. Therefore, Complainant properly relied on the 2003 Penalty Policy in calculating the penalty proposed in the Amended Complaint.[187]

Complainant asserts that:

> The substantive changes [in the 2003 Penalty Policy] were not factors in developing the proposed penalty. Mr. Beedle testified that he calculated the

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[187]Further, this Tribunal notes that although "[a]gency-issued penalty policies provide a framework that allows a presiding officer to apply his or her discretion to statutory penalty factors...," *(Allegheny Power Service Corp. and Choice Insulation, Inc.*, 9 E.A.D. 636, 655 (EAB 2001) (citations omitted)), "the [EAB] has repeatedly explained that this regulatory requirement does not compel an ALJ to use a penalty policy in making his or her penalty determination. Rather, 'a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand.'" *John A. Capozzi, d/b/a/ Capozzi Custom Cabinets*, RCRA (3008) Appeal No. 02-01, slip op. at 30, 11 E.A.D. __ (EAB, Mar. 25, 2003) (citations omitted).

> proposed penalty focusing on the gravity of the violations and the duration of the violations ("multi-day"). The major difference between the penalty proposed in the Complaint and the amended Complaint was the *increase* in the number of days of the violation. There is no significant difference in how these two penalty policies deal with gravity and duration. Consequently, as a practical matter the two policies are interchangeable on this issue.

CPHB at 10 (footnote omitted) (emphasis in original). Complainant also asserts that the "changes [in the 2003 Penalty Policy] are irrelevant to the facts presented in this case." CPHB at 10, n.4. *See also*, Tr. 11/19/03, pp. 236-237 (Mr. Beedle). Respondent, although arguing in favor of applying the 1990 Penalty Policy, fails to articulate precisely how the two policies are materially different as applied to the case at hand and does not explain how a different result might be reached under either Policy.

That being said, Respondent's examination of Mr. Beedle at hearing suggested that Respondent may be under the mis-impression that if the 1990 Penalty Policy, and not the 2003 Penalty Policy, is applicable, then this Tribunal must accept the penalty calculation done by Mr. Opek for the original Complaint and reject the penalty calculation done by Mr. Beedle for the Amended Complaint. In particular, Mr. Beedle proposes a "multi-day" penalty for Count III of the Amended Complaint in the amount of $196,900 (constituting 64% of the total proposed penalty), where Mr. Opek proposed no "multi-day" penalty. *See, e.g.*, Tr. 11/20/03, pp. 22-23.[188] To the extent that this difference is the root of Respondent's insistence on application of the 1990 Penalty Policy, Respondent has misunderstood the role of the "Penalty Policy" and the *proposed* penalty. As noted above, although the penalty policy provides a framework that allows this Tribunal to apply its discretion to statutory penalty factors, this Tribunal is not compelled to use a penalty policy at all in making its penalty determination. Neither Mr. Opek nor Mr. Beedle is responsible for determining the appropriate penalty to be assessed in this case; rather, that is, presently, the sole responsibility of this Tribunal. While the 1990 Penalty Policy – quite similarly to the 2003 Penalty Policy – provided for "multi-day penalties,"[189] this Tribunal is cognizant of the "substantive changes" made by the 2003 Penalty Policy (summarized at CX-77, Bates 1009-1010), including that: "'Moderate-major' violations have been moved out of mandatory multi-day category to presumed category; 'minor-major' violations have been moved to discretionary

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[188] *See also*, RPHB at 73: "Mr. Opek ... did not believe that multi-day penalties were appropriate... His replacement, Mr. Beedle, ... proposed multi-day penalties [for Count III of the Amended Complaint], but only because he considered them to be 'mandatory' under the 2003 Penalty Policy." More specifically, Mr. Beedle testified that the 2003 Penalty Policy states that "multi-day penalties" are "mandatory" *for "major / major" violations*, such as Count III. Tr. 11/19/03, p. 233. Indeed, the 2003 Penalty Policy does so state. *See* CX-77, Bates 1039. However, the 1990 Penalty Policy *also* states that "multi-day penalties" are "mandatory" *for "major / major" violations*. *See* CX-21, Bates 361.

[189] *See* CX-21 (1990 RCRA Penalty Policy), Bates 357-363.

category." CX-77, Bates 1009.

For all of these reasons, this Tribunal finds no reason to apply a RCRA Penalty Policy different from the 2003 Penalty Policy used by Complaint to calculate the proposed penalty in the Amended Complaint.

2. Overview of the 2003 Penalty Policy Methodology

The purposes of the 2003 Penalty Policy are to:

> [E]nsure that RCRA civil penalties are assessed in a manner consistent with Section 3008; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained.

CX-77, Bates 1019 (2003 Penalty Policy at 5).

The Policy implements the requirement in RCRA that in assessing a civil penalty the Agency take into account "the seriousness of the violation, and any good faith efforts to comply with the applicable requirements." RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3); CX-77, Bates 1018. Under this Policy, the penalty is assessed by determining the gravity-based penalty for a particular violation from a "penalty assessment matrix," adding a multi-day component to account for the duration of the violation, and adjusting the total penalty up or down for case-specific circumstances such as good faith efforts to comply, the willfulness of the violation, economic benefit gained through noncompliance, history of noncompliance, ability to pay, environmental projects to be undertaken by the violator, and other unique factors. CX-77, Bates 1015-1017.

The initial gravity-based penalty – a measurement of the seriousness of the violation – is determined by reference to two factors: potential for harm (vertical matrix axis) and the extent of deviation from a statutory or regulatory requirement (horizontal matrix axis). CX-77, Bates 1016. The potential for harm factor is made up of the following two subfactors (not shown on the matrix): 1) the risk of exposure of humans or the environment to hazardous waste,[190] and 2) the adverse effect of noncompliance on the RCRA program. CX-77, Bates 1026-1030.[191] Both the

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[190]The "risk of exposure," in turn, is made up of the following two sub-sub-factors: 1) probability of exposure, and 2) potential seriousness of contamination. *See* CX-77, Bates 1027-1028.

[191]In this regard, the Penalty Policy states that even violations that do not cause any actual impact on the environment, such as record-keeping violations, may nevertheless "create a risk of harm to the environment or human health as well as undermine the integrity of the RCRA regulatory program." CX-77, Bates 1026. Thus, the Penalty Policy recognizes that violations undermining the RCRA program can indirectly create a potential for harm to humans or the

potential for harm[192] and the extent of the deviation[193] are characterized on the matrix as either "major," "moderate," or "minor." CX-77, Bates 1029-1032. The Penalty Policy then provides recommended penalty ranges in cells on the matrix as follows:

Extent of Deviation from Requirements

	MAJOR	MODERATE	MINOR
MAJOR	$27,500 to $22,000	$21,999 to $16,500	$16,499 to $12,100
MODERATE	$12,099 to $8,800	$8,799 to $5,500	$5,499 to $3,300
MINOR	$3,299 to $1,650	$1,649 to $550	$549 to $110

[192]The Penalty Policy defines the "major," "moderate," and "minor" categories of "potential for harm" as follows:

MAJOR: (1) The violation poses or may pose a *substantial* risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or
(2) the actions have or may have a *substantial* adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

MODERATE: (1) The violation poses or may pose a *significant* risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or
(2) the actions have or may have a *significant* adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

MINOR: (1) The violation poses or may pose a *relatively low* risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or
(2) the actions have or may have a *small* adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

CX-77, Bates 1029 (emphasis added).

[193]The Penalty Policy defines the "major," "moderate," and "minor" categories of "extent of deviation" as follows:

MAJOR: 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.

MODERATE: The violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended.

MINOR: The violator deviates somewhat from the requirements but most (or all important aspects) of the requirements are met.

CX-77, Bates 1031.

Potential
for
Harm

CX-77, Bates 1032. The 2003 Penalty Policy further explains that "all references in this Policy to matrix cells consist of the Potential for Harm factor followed by the Extent of Deviation factor (*e.g.*, major potential for harm/moderate extent of deviation is referred to as major/moderate)." CX-77, Bates 1032, n.18. *See also*, Tr. 11/19/03, pp. 222.

Where the violation is a continuing one, the 2003 Penalty Policy provides for the calculation of an additional "multi-day penalty" on a separate "multi-day penalty matrix" when use of multi-day penalties is deemed appropriate.[194] A dollar amount is selected from the following multi-day matrix and multiplied by the number of days the violation continued:

Extent of Deviation from Requirements

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[194]The 2003 Penalty Policy considers multi-day penalties to be "mandatory," "presumed," or "discretionary" as follows:

> Mandatory multi-day penalties – Multi-day penalties are considered mandatory for days 2-180 of all violations with the following gravity-based designations: major-major, major-moderate. The only exception is when they have been waived or reduced, in 'highly unusual cases,'... Multi-day penalties for days 181+ are discretionary.
>
> Presumption in favor of multi-day penalties – Multi-day penalties are presumed appropriate for days 2-180 of violations with the following gravity-based designations: major-minor, moderate-major, moderate-moderate. Therefore, multi-day penalties should be sought, unless case-specific facts overcoming the presumption for a particular violation are documented carefully in the case files. The presumption may be overcome for one or more days. Multi-day penalties for days 181+ are discretionary.
>
> Discretionary multi-day penalties – Multi-day penalties are discretionary, generally, for all days of all violations with the following gravity-based designations: minor-major, moderate-minor, minor-moderate, minor-minor. In these cases, multi-day penalties should be sought where case-specific facts support such an assessment. Discretionary multi-day penalties may be imposed for some or all days. The bases for decisions to impose or not impose any discretionary multi-day penalties must be documented in the case files.

CX-77, Bates 1039-1040 (footnote omitted).

Potential for Harm

	MAJOR	MODERATE	MINOR
MAJOR	$5,500 to $1,100	$4,400 to $825	$3,300 to $605
MODERATE	$2,420 to $440	$1,760 to $275	$1,100 to $165
MINOR	$660 to $110	$330 to $110	$110

CX-77, Bates 1040.

The penalty amount may then be adjusted upward or downward based on the application of the previously-mentioned adjustment factors. CX-77, Bates 1047-1055.

C. Count III – Failure to Respond to Releases of Used Oil or Hazardous Waste

This Tribunal has already found that Respondent failed to respond to releases of hazardous waste in violation of MAC §§ 299.9601(1) and (2), MAC § 299.9607, and 40 C.F.R. §§ 264.56(b), (e) and (g), for at least 179[195] days, as alleged in Count III of the Amended Complaint. Those provisions, taken together, require owners and operators of TSD facilities to *immediately* identify the character and extent of a release of hazardous waste, contain the release, and properly dispose of the hazardous waste. The evidence in the record demonstrates that Strong Steel is a "disposal facility," and that hazardous waste was present in and on the ground at least as of August 2, 1999 (the date of collection of samples SS1, SS2, and SS3).[196] Respondent did not

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[195]The Amended Complaint cites "at least *180* days" of violation under Count III. Amended Complaint at 19, ¶ 88.A (emphases added). *See also,* CPHB at 51: "The *180* days was measured from the date of the July 22, 1999 inspection onward." (Emphases added). However, the "Penalty Summary Sheet" – Attachment I to the Amended Complaint – clearly calculates the "multi-day" penalty proposed for Count III based on "*179* days" of violation. CX-106, Bates 1919 (emphases added). Mr. Beedle explained: "Major/major penalties are mandatory for days 2 through 180 and this is just speaking to the *179* days of multi-day penalty. It was determined that Strong Steel ... [was in violation] at least for 180 days so we put in, following the [2003 Penalty Policy], 179 days for the multi-day penalty amount." Tr. 11/19/03, p. 221 (emphases added).

[196]Complainant calculates "at least 180 days" "[f]rom at least July 22, 1999 and continuing to at least April 11, 2000." Amended Complaint at 19, ¶ 88.A. *See also,* CPHB at 51: "The 180 days was measured from the date of the July 22, 1999 inspection onward." *See also,* Tr. 11/19/03, p. 233. Respondent argues, however, that "even where later tests confirm the

"immediately identify the character, exact source, amount, and areal extent of any released materials," as required by 40 C.F.R. § 264.56(b). Indeed, Respondent did not even attempt to identify the full "areal extent" of the release until the second Inland Waters excavation on March 1, 2001. Similarly, Respondent did not "take all reasonable measures necessary to ensure that ... releases do not ... spread" or "provide for ... disposing of ... contaminated soil ...," as required by 40 C.F.R. § 264.56(e) and (g), until the second Inland Waters excavation on March 1, 2001. Even if Respondent's first excavation on April 11, 2000 were deemed an adequate response,[197] Respondent still would have failed to respond for well over 179 days.

Mr. Beedle considered the "potential for harm" and the "extent of deviation," in accordance with the 2003 Penalty Policy, in determining that both "gravity factors" were "major," such that Count III constituted a "major/major" violation. Tr. 11/19/03, p. 222, ln. 11 - p. 243, ln. 15. Applying the "gravity matrix," Mr. Beedle explained that he selected a "gravity penalty" of $22,000 by choosing the lowest possible penalty within the "major/major cell." *Id.* at 228, 232. Mr. Beedle further explained that he proposed a "multi-day" penalty because the 2003 Penalty Policy states that such a penalty is "mandatory" for "major/major" violations (*Id*. at 233), and that he arrived at the "multi-day" penalty amount of $196,900 by selecting the lowest possible penalty amount within the "major/major cell" of the "multi-day matrix" ($1,100), and multiplying that number by 179 days. *Id.* at 233-235. Finally, Mr. Beedle explained that he did not consider to be warranted any "adjustments" for good faith efforts to comply, lack of good faith, history of noncompliance, environmental projects, economic benefit of noncompliance, or any other "adjustment factor." *Id.* at 238-242.

As discussed below, this Tribunal agrees with Complainant's analysis and proposed penalty regarding Count III.[198]

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presence of a violation, a multi-day penalty is appropriate beginning only *at the time when the tests occurred*." RPHB at 70 (citation omitted) (emphasis added). In the present case, the samples were collected on August 2, 1999, and the E&E Letter Report sets forth the sample results for ASI Samples SS1, SS2, and SS3, dated August 8, 1999. CX-16, Bates 114-115. Since the first time Respondent *arguably* responded to the releases was the first Inland Waters excavation on April 11, 2000, it does not matter which day is chosen as the first of the "180 days," – July 22, August 2, or August 8 – because August 8, 1999 until April 11, 2000 is still well in excess of 180 days.

[197]The April 11, 2000 excavation is not an adequate response because the verification samples taken from that excavation demonstrated that toxic levels of lead remained in the ground, yet Respondent knowingly allowed the soil to remain in the ground until March 1, 2001, when Inland Waters excavated another 40 cubic yards of soil.

[198]However, as explained *infra*, while this Tribunal chooses not to apply any "adjustment factors" to any *specific* Count, this Tribunal does exercise its discretion to apply a downward adjustment to the total proposed penalty of $307,450 in light of Respondent's construction of their Automobile Dismantling & Resource Recovery Facility ("ADRRF").

1. The Gravity-Based Penalty ("Seriousness of the Violation")

As explained above, the "gravity-based penalty" is determined by considering two factors – the "potential for harm" and the "extent of deviation" – and applying those factors to the "gravity matrix." CX-77, Bates 1026.

a. Potential for Harm

The "potential for harm" assessment is based, in turn, on consideration of two factors – "risk of exposure" and "adverse impact" on the RCRA program. *Id.* Because, as discussed below, this Tribunal finds that the "risk of exposure" and "adverse impact" due to Respondent's "failure to respond" are substantial, this Tribunal finds that the "potential for harm" resulting from Respondent's failure to respond to releases of hazardous waste as alleged in Count III is "major."

(1) Risk of Exposure of Humans or the Environment

The "risk of exposure" assessment is based on consideration of two factors – "probability of exposure" and "potential seriousness of contamination." *Id.* at Bates 1027-1028. Because, as discussed below, this Tribunal finds the "probability of exposure" and "potential seriousness of contamination" due to Respondent's "failure to respond" to be substantial, this Tribunal finds that the "risk of exposure" is substantial under the violations found for Count III.

(a.) Probability of Exposure

The Penalty Policy lists three non-exclusive factors to be considered in determining "probability of exposure:" 1) evidence of release; 2) evidence of waste mismanagement; and 3) adequacy of provisions for detecting and preventing a release. *Id.* at Bates 1027.

i.) Evidence of Release

First, regarding "evidence of release," the record in the present case contains ample evidence of a substantial and prolonged release of hazardous waste due to Respondent's failure to respond. Strong Steel processes approximately 2,000 tons of scrap metal per day, the vast majority of which consists of "junked" automobiles. Tr. 11/21/03, p. 66. Steven Benacquisto estimated that Strong Steel received 400-500 vehicles per day in 1999. Tr. 11/19/03, p. 327. Mr. Beaudoin similarly estimated that Strong Steel processes 300-500 vehicles per day. Tr. 12/9/03, pp. 49-50. At times, there may be "over a thousand cars stacked up on the site." Tr. 12/9/03, p. 50. Steven Benacquisto testified that Strong Steel receives approximately 100 uncrushed vehicles per day. Tr. 11/19/03, pp. 326-327. Mr. Beaudoin testified that Strong Steel routinely crushed the uncrushed vehicles on the site. Tr. 12/9/03, pp. 75-76. As discussed in detail, *supra*, the testimony and concomitant documentation presented by Mr. Powers, Mr. Opek, Ms. Vogen, and Mr. Arkell (regarding his interviews with Mr. Zagreski, Mr. James, and Ms. Brown), clearly demonstrates that gasoline, used oil, and other automotive fluids routinely leaked from both the

crushed and uncrushed vehicles onto the ground at the Strong Steel site. This finding is supported also by the testimony of Respondent's witnesses. *See, e.g.*, Tr. 12/9/03, pp. 83-85 (Mr. Beaudoin); Tr. 11/19/03, p. 331-332, 350 (Steven Benacquisto). Also as discussed in detail, *supra*, the evidence demonstrates that, by a conservative estimate, Strong Steel processed approximately 4,117 "whole cars" (10% of the "uncrushed cars," which were 10% of all cars) between March, 1997 and July, 1999, thereby releasing approximately 8,234 gallons of gasoline and used oil on and into the ground during this period.

ii.) Evidence of Waste Mismanagement

Second, regarding "evidence of waste mismanagement," the record shows that, rather than properly responding to releases of hazardous waste, Respondent routinely "swept" spilled gasoline and used oil "into the shredder." *See, e.g.*, Tr. 11/19/03, pp. 338, 367-368. This is not a proper "response" to a release of hazardous waste. *See, e.g.*, Tr. 11/20/03, p. 64. Alternatively, the evidence demonstrates that the gasoline, used oil, and/or other automotive fluids were simply "washed away" by the rain, into the sewer and thus possibly into the Detroit River.[199] Again, this is not a proper "response" to a release of hazardous waste. Further, the "verification samples" collected during the April 11, 2000 and March 1, 2001 Inland Waters excavations indicated *significantly* elevated levels of lead at depths of one to three feet "below ground surface."[200] All of this constitutes significant "evidence of waste mismanagement" due to Respondent's "failure to respond" under Count III.

iii.) Adequacy of Provisions for Detecting and Preventing a Release

Third, regarding "adequacy of provisions for detecting and preventing a release," the evidence demonstrates that such provisions which did exist were grossly inadequate. Those provisions consisted of: 1) Strong Steel's various "policy" signage to the effect that suppliers

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[199] *See, e.g.*, Tr. 11/18/03, p. 95 (Ms. Brauer) ("... the facility drains to a combined sewer, and in storm events and possibly other events as well, that sewer discharges directly to the Detroit River..."); Tr. 11/18/03, p. 191 (Mr. Powers) ("Q: So this sentence doesn't mean to say ... that waste oil and solid waste are going to be discharged into the Detroit River from Strong Steel, does it? ... A: ... if there was a heavy rainstorm that would wash it into the river, yes."); Tr. 12/9/03, p. 78 (Mr. Beaudoin) ("Q: Isn't it true that there are yard drains located in the area near the temporary compaction area? ... A: By yard drains I assume you're referring to catch basins that discharge the combined sewer system. And there is one at the southeast corner of the raw material receiving area that is fairly close to the temporary compaction area.").

[200] *See* RX-10, p. 4: "[Sample] S-JL-003 was collected from the eastern edge of the [southern deteriorated asphalt area] from an approximate depth of 1 foot [below ground surface ("bgs")] and ... lead was detected at 4,040 mg/kg, above the Residential DCC [("Direct Contact Criteria")] of 400 mg/kg and the Industrial DCC of 900 mg/kg." *See also*, RX-10, Table 2, p. 1; CX-101, Bates 1723.

were to either deliver automobiles empty of fluids or to remove the gas tanks; 2) Strong Steel's "inspection" of the vehicles to ensure that the gas tanks were removed; and 3) Strong Steel's maintenance of "Oil-Dry spill kits" at various locations on the site. First, the shifting policies and signage were routinely ignored by the suppliers, and were, in any event, immaterial to the fact that *Strong Steel* ultimately bore the responsibility to ensure that *its* activities in *processing* the "junked" vehicles did not result in the release of hazardous waste.[201] Second, Strong Steel's "inspection" of the vehicles to "ensure" that the gas tanks had been removed was cursory at best and did not even attempt to determine the presence or absence of any other automotive fluid, such as used oil.[202] Third, the "Oil-Dry spill kits" were simply not designed to deal with the large amounts of spillage which routinely occurred at the Strong Steel site.[203] Finally, as noted above, nothing at all prevented the spilled automotive fluid from being rain-washed directly into the public sewer and thus into the Detroit River.

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[201]From March 1997 through July 1999, it was the policy of Strong Steel to accept "whole" uncrushed automobiles with the gas tanks intact. Strong Steel would *assume* that the gas tanks were empty, and would either tear them off with a front-end loader or simply send them through the shredder. Tr. 11/19/03, p. 347; CX-91, Bates 1500. Sometime after July, 1999, Strong Steel changed its policy so that it would *not* accept cars with gas tanks in order to address citizen complaints about explosions in the shredder. Tr. 11/19/03, pp. 303-305. This change in policy lead to the littering of the surrounding community with torn-off gas tanks. *See, e.g.*, Tr. 12/10/03, pp. 93-94; RX-28, App. A, photographs 13 and 14. However, as Judge McGuire observed in his Order on Accelerated Decision in this case: "Respondent contends that '[i]t has always been [its] policy that its suppliers remove gasoline tanks and batteries from automobiles before bringing them to the site.' This statement is seemingly contradicted by Respondent's September 13, 1999 letter to MDEQ stating that 'the facility *will now only accept* pre-processed vehicles or vehicles which have previously had the tank removed.' ... (emphasis added). Yet regardless of when this policy was implemented, Respondent admitted that suppliers 'violate this policy' thereby establishing that automobiles that Respondent accepts at its site are not always free of hazardous constituents." Order on Accelerated Decision at 25-26 (citations omitted).

[202]Again, from March 1997 through July 1999, it was Strong Steel's policy to accept "whole" uncrushed automobiles with the gas tanks intact, simply *assuming* that the gas tanks were empty and sending them through the shredder. Tr. 11/19/03, p. 347; CX-91, Bates 1500. Sometime after July, 1999, Strong Steel changed its policy so that it would *not* accept cars with gas tanks. Tr. 11/19/03, pp. 303-305. Under this policy, Steven Benacquisto testified that loads of crushed cars are "directly loaded onto ... the infeed belt" to the shredder by crane operators who "inspect [the cars] as they take them," (*Id.* at 330), but who do not reject vehicles with "automotive liquids" dripping from them. *Id.* at 331. This Tribunal finds that any "inspection" by a crane operator as that operator is otherwise engaged in loading the cars onto a conveyor belt is grossly insufficient to determine whether gas tanks are intact (or empty) or whether any other hazardous substances are still in the car.

[203]*See, e.g.*, Tr. 11/18/03, p. 215, ln. 22-24.

Therefore, this Tribunal finds that the "probability of exposure" of humans or other environmental receptors to hazardous wastes or constituents due to Respondent's failure to properly respond to releases of hazardous waste under Count III is substantial.

(b.) Potential Seriousness of Contamination

The Penalty Policy lists three non-exclusive factors to be considered in determining the "potential seriousness of contamination:" 1) quantity and toxicity of wastes released; 2) likelihood or fact of transport by way of environmental media such as air or groundwater; and 3) existence, size, and proximity of receptor populations such as local residents, fish, or wildlife. *Id.* at Bates 1027-1028.

i.) Quantity and Toxicity of Wastes Released

First, regarding "quantity and toxicity of wastes released," the evidence in the record demonstrates that both the "quantity" and the "toxicity" of wastes released as a result of Respondent's failure to properly respond to the releases were substantial. As discussed in detail, *supra*, the evidence demonstrates that, by a conservative estimate, Strong Steel processed approximately 4,117 "whole cars" (10% of the "uncrushed cars," which were 10% of all cars) between March 1997 and July 1999, thereby releasing approximately 8,234 gallons of gasoline and used oil on and into the ground during this period. This is a substantial quantity. Regarding "toxicity," Strong Steel employees were routinely exposed to explosions and fire due to the release of gasoline (ignitability characteristic hazardous waste);[204] Benzene and Lead were found in concentrations significantly above the TCLP limits in the samples collected on August 2, 1999,[205] and Lead was also found to be significantly above both the MDEQ Residential and Industrial Direct Contact Criteria in the "verification samples" collected on April 11, 2000.[206] Ms. Brauer testified that "Lead is a potent neurotoxin" and explained that releases of used oil can poison wildlife, disrupt birds' egg development, and pose a threat to human health via ground water contamination. Tr. 11/18/03, pp. 95-96. *See also*, 45 Fed. Reg. 33084, 33084-33085 (May 19, 1980). Therefore, the "toxicity" of the hazardous wastes released is also substantial.

ii.) Likelihood or Fact of Transport

Second, regarding the "likelihood or fact of transport by way of environmental media such as air or groundwater," the evidence demonstrates that such "likelihood or fact" due to

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[204]*See, e.g.*, Tr. 11/19/03, pp. 97-98, 132; CX-82, Bates 1135-1136; CX-91, Bates 1500.

[205]Regarding the CRA/Novi analysis of SS2, *see*: RX-10, Att. A, pp. 1-2; CX-18, Bates 174-175; CX-101, Bates 1726-1727. Regarding the CRA/Novi analyses of samples SS1 and SS3, *see*: RX-10, Att. B, pp. 2, 4; CX-18, Bates 178, 180; CX-101, Bates 1730, 1732. Regarding the E&E/ASI analysis of SS2, *see*: CX-16, Bates 114-115.

[206]RX-10, p. 4 and Table 2, p. 1; CX-101, Bates 1723.

Respondent's "failure to respond" is substantial. Again, the evidence demonstrates that the gasoline, used oil, and/or other automotive fluids were simply "rain-washed" into the open public sewer and thus possibly into the Detroit River. Further, the "verification samples" collected during the April 11, 2000 and March 1, 2001 Inland Waters excavations indicated *significantly* elevated levels of lead at depths of one to three feet "below ground surface." This lead was substantially likely to reach groundwater.[207]

iii.) Existence, Size, and Proximity of Receptor Populations

Third, regarding the "existence, size, and proximity of receptor populations," the evidence demonstrates that such "existence, size, and proximity" affected by Respondent's "failure to respond" is substantial. As previously discussed, Strong Steel employees and suppliers had access to the site and came into direct contact with the hazardous wastes on the ground and the fumes in the air. The Strong Steel site is directly adjacent to and surrounded by a residential community. Further, the biota of the Detroit River could well have come into contact with Respondent's hazardous wastes via the combined sewer overflow ("CSO") system.

Therefore, this Tribunal finds that the "potential seriousness of contamination" due to Respondent's failure to properly respond to releases of hazardous waste under Count III is substantial.

(2) Adverse Effect of Noncompliance on the RCRA Program

The Penalty Policy is not overly helpful in interpreting and applying the "adverse effect" factor, as the Penalty Policy states that: "... *all* regulatory requirements are *fundamental* to the continued integrity of the RCRA program." CX-77, Bates 1028 (emphasis added). However, the Penalty Policy goes on to explain, at least, that violations of "[the] types of requirements [which] are based squarely on protection concerns and are fundamental to the overall goals of RCRA to

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[207]The evidence need not show that hazardous waste actually *did* reach groundwater in order to support a finding that the "likelihood" of such transport was substantial. Mr. Ring testified that, although the Inland Waters excavations to depths of one to three feet did not reach groundwater, it was possible that groundwater was present at greater depths, and that no investigation was done to determine whether that was the case. Tr. 12/10/03, pp. 37-38. However, Respondent *did* conduct a "groundwater investigation" in conjunction with the construction of the Automobile Dismantling & Resource Recovery Facility ("ADRRF") *immediately adjacent* to the Strong Steel facility and *did find* groundwater "perched" at a depth of approximately six feet. *Id.* at 38. Mr. Beaudoin's suggestion that "[t]he natural geology of Detroit" provides a "natural geologic containment" (Tr. 12/10/03, p. 60) is pure speculation. The record contains no evidence of "geological investigations" or a "natural geologic containment," (*See* Tr. 12/9/03, pp. 73-74), and Mr. Beaudoin was not offered as an "expert" witness. *See* Tr. 12/9/03, p. 68. Therefore, the evidence demonstrates that the contamination at the Strong Steel site was substantially *likely* to reach groundwater.

handle wastes in a safe and responsible manner..." "...may have serious implications and merit substantial penalties..." *Id.*

> Here, Complainant argues:
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> Instead of limiting exposure ..., Strong's routine practice of spill response was to allow the spills to migrate to the land, the air and the subsurface soils... When it did respond to the spills it swept them into an un-permitted unit [the shredder]. Strong could not have violated a more fundamental requirement of RCRA in a more thorough manner.

CPHB at 49. Complainant continues: "Strong's actions [in failing to properly respond to releases of hazardous waste] defeat a central principle of RCRA – the hazardous waste handler is responsible for compliance. If a facility does not take action until it is under federal scrutiny, it encourages others to evade the regulations..." *Id.* at 50.

Complainant's points are well taken, especially where, as here, Respondent is one of the (if not *the*), largest automobile recycling facilities in the State of Michigan.[208] As the EPA has observed:

> Although [RCRA] has several objectives ..., Congress' "overriding concern" (H.R. Rep. No. 96-1461, 96th Cong., 1st Sess. 3 (1976) ("H.R. Rep.")) in enacting RCRA was to establish the statutory framework for a national system which would *insure the proper management of hazardous waste*.

45 Fed. Reg. 33084, 33085 (May 19, 1980) (emphasis added). Section 1003(a) of RCRA, 42 U.S.C. §6902(a), similarly explains:

> The objectives of this chapter are to promote the protection of health and the environment ... by ...
> (4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;
> (5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date...

Here, Respondent's failure to respond to continuous and routine releases of hazardous waste, allowing such hazardous waste to enter the soils, air, and water and to come into contact with human beings and possibly fish and wildlife, directly undermines the bedrock purpose of

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[208] *See, e.g.*, Tr. 11/20/03, pp. 98-99 (Anthony Benacquisto): "When [Strong Steel] built the facility ... [t]hey bought the ... largest shredder in the Midwest. There are only 10 of them in the United States. And again, it's the largest in the Midwest, and there's nothing like that type of facility in our area. In fact, ... I'd venture to guess ... there's not many in the Midwest that are like Strong Steel..."

RCRA to protect human health and the environment by assuring that hazardous wastes are properly managed. Therefore, this Tribunal finds that the "adverse effect" of Respondent's noncompliance, as alleged in Count III, on the RCRA regulatory program is substantial.

b. Extent of Deviation from Statutory or Regulatory Requirements

The Penalty Policy states:

> The "extent of deviation" ... relates to the degree to which the violation renders inoperative the requirement violated. In any violative situation, a range of potential noncompliance ... exists... [A] violator may be substantially in compliance ... or it may have totally disregarded the requirement (or a point in between).

CX-77, Bates 1030-1031. Specifically, the Penalty Policy sets forth the following definitions applicable to the "extent of deviation" factor:

MAJOR:	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.
MODERATE:	The violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended.
MINOR:	The violator deviates somewhat from the requirements but most (or all important aspects) of the requirements are met.

Id. at Bates 1031.

In the present case, as discussed in detail *supra*, Respondent failed to respond to releases of hazardous waste in violation of MAC §§ 299.9601(1) and (2), MAC § 299.9607, and 40 C.F.R. §§ 264.56(b), (e) and (g). Those provisions require that owners and operators of TSD facilities "immediately identify the character, exact source, amount, and areal extent of any released materials," "take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread," and "provide for treating, storing, or disposing of recovered waste, contaminated soil or surface water, or any other material that results from a release, fire, or explosion at the facility." 40 C.F.R. § 264.56 (b), (e), and (g), applicable to TSD facilities via MAC §§ 299.9601(1) and (2), and MAC § 299.9607(1). The evidence in the record demonstrates that hazardous waste was present in and on the ground at least as of August 2, 1999, and that Respondent did not "immediately identify the character, exact source, amount, and areal extent of any released materials," as required by 40 C.F.R. § 264.56(b). Indeed, Respondent did not attempt to identify the full extent of the releases until the second Inland Waters excavation on March 1, 2001 – *over one and a half years* after the EPA inspection on July 22, 1999. Similarly,

Respondent did not attempt to "take all reasonable measures necessary to ensure that ... releases do not ... spread" or "provide for ... disposing of ... contaminated soil ...," as required by 40 C.F.R. § 264.56(e) and (g), until the second Inland Waters excavation on March 1, 2001.

Applying these facts to the above-quoted definitions from the Penalty Policy, this Tribunal finds that Respondent's actions under Count III constitute a "major" "extent of deviation" from the relevant provisions.

c. Gravity Matrix Penalty Range

Thus, because Respondent's violation as alleged in Count III constitutes a "major potential for harm" and a "major extent of deviation" (*i.e.*, the violation is a "major/major"), the Penalty Policy's "Gravity Matrix" (CX-77, Bates 1032) suggests a penalty range of $22,000 to $27,500. Mr. Beedle explained that he selected a proposed "gravity penalty" of $22,000 by choosing the lowest possible penalty within the "major/major cell." Tr. 11/19/03, pp. 228, 232. This Tribunal agrees that the violation found under Count III of the Amended Complaint warrants a "gravity-based penalty" of $22,000.

2. The Multi-Day Penalty

This Tribunal has already found that the violation as alleged in Count III of the Amended Complaint continued for at least 179 days.

a. Appropriateness ("Mandatory," "Presumed," or "Discretionary")

According to the 2003 Penalty Policy, "[m]ulti-day penalties are considered mandatory for days 2-180 of all violations with ... gravity-based designations ... of major-major..." CX-77, Bates 1039. Therefore, under the Penalty Policy, such a multi-day penalty is "mandatory" for Count III in the present case. *See also*, Tr. 11/19/03, p. 233. This Tribunal agrees that a multi-day penalty for 179 days of violation under Count III is appropriate in this case.

b. Multi-Day Matrix Penalty Range

Thus, because Respondent's violation found under Count III is a "major/major" violation, the Penalty Policy's "Multi-Day Matrix" (CX-77, Bates 1040) suggests a penalty range of $5,500 to $1,100 per day. Mr. Beedle explained that he proposed a "multi-day" penalty amount of $196,900 by selecting the lowest possible penalty amount within the "major/major cell" of the "multi-day matrix" ($1,100), and multiplying that number by 179 days. Tr. 11/19/03, pp. 233-235. This Tribunal agrees that the violation found under Count III of the Amended Complaint warrants a "multi-day penalty" of $196,900.

3. Adjustments for Case-Specific Circumstances ("Good Faith Efforts to Comply")

Complainant does not propose any upward or downward "adjustments" for case-specific circumstances, such as the statutory "good faith efforts to comply" criteria. Mr. Beedle explained that he did not consider to be warranted any "adjustments" for good faith efforts to comply, lack of good faith, history of noncompliance, environmental projects, economic benefit of noncompliance, or any other "adjustment factor." Tr. 11/19/03, pp. 238-242. While this Tribunal chooses not to apply any "adjustment factors" *specifically* to Count III, this Tribunal does exercise its discretion, as discussed *infra*, to apply a downward adjustment to the *total* proposed penalty of $307,450 in light of Respondent's construction of the "ADRRF."

4. Summary and Conclusion as to the Penalty under Count III

The "probability of exposure" and the "potential seriousness of contamination" are both "substantial." Because the "probability of exposure" and the "potential seriousness of contamination" are both "substantial," the "risk of exposure" is "substantial." The "adverse effect of noncompliance" is also "substantial." Because the "risk of exposure" and the "adverse effect of noncompliance" are both "substantial," the "potential for harm" is "major." The "extent of deviation" is also "major." Because the "potential for harm" and the "extent of deviation" are both "major," the "gravity-based penalty" suggested by the 2003 Penalty Policy is $22,000 to $27,500. This Tribunal finds that a "gravity-based penalty" of $22,000 is appropriate under Count III in this case.

Because the "potential for harm" and the "extent of deviation" are both "major," the 2003 Penalty Policy suggests that a "multi-day penalty" is "mandatory" for days 2-180, and suggests a daily penalty of $1,100 to $5,500. This Tribunal finds that a daily "multi-day" penalty of $1,100 for 179 days is appropriate, such that the violation found under Count III of the Amended Complaint warrants a "multi-day penalty" of $196,900.

This Tribunal chooses not to apply any case-specific "adjustment factors" *specifically* to Count III.

Therefore, the total penalty imposed for the violation found under Count III of the Amended Complaint shall be $218,900.

D. Count IV – Illegal Storage or Disposal of Used Oil on the Ground

Count IV of the Amended Complaint has been dismissed, and no penalty may be assessed therefor.

E. Count V – Failure to Label Used Oil Containers

Count V of the Amended Complaint has been dismissed, and no penalty may be assessed

therefor.

F. Count VI – Failure to Properly Notify of Hazardous Waste Generation, Storage, and Disposal

This Tribunal has already found that, on and prior to at least July 22, 1999, Respondent had not notified the U.S. EPA or the State of Michigan of all of the hazardous wastes that it *generated*, or that it was *storing* and *disposing* of hazardous waste on its property, constituting one violation of RCRA Section 3010, 42 U.S.C. § 6930; 40 C.F.R. § 262.12; and MAC §§ 299.9301 and .9303, as alleged in Count VI of the Amended Complaint.

Mr. Beedle considered the "potential for harm" and the "extent of deviation," in accordance with the 2003 Penalty Policy, in determining that both "gravity factors" were "moderate," such that Count VI constituted a "moderate/moderate" violation. Tr. 11/19/03, p. 262. Applying the "gravity matrix," Mr. Beedle selected a "gravity penalty" of $7,150 by choosing the mid-point within the "moderate/moderate cell," which suggests a range of $5,500 to $8,799. *Id.* at 255.[209] Mr. Beedle explained that he chose a "moderate/moderate" designation because Respondent did not notify as a "disposal facility" or a "storage facility," but Respondent did notify as a "generator;" that is, "... they met ... some of the requirements..." *Id.* at 262. Mr. Beedle stated that he did not consider Respondent's "generation of hazardous waste" in calculating the proposed penalty under Count VI. *Id.* Mr. Beedle further testified that: "I think they [Strong Steel] had knowledge of their storage." *Id.* Finally, Mr. Beedle clarified that the fact that the proposed penalty includes neither a "multi-day" component nor any "adjustments" does not reflect his judgement that the proposed penalty should not include such components, but rather the fact that those components "just weren't considered..." *Id.* at 263. Thus, Complainant's total proposed penalty for Count VI is $7,150.

As discussed below, this Tribunal disagrees to some extent with Mr. Beedle's analysis and proposed penalty regarding Count VI. First, Mr. Beedle *should* have taken into consideration Respondent's failure to notify the U.S. EPA or the State of Michigan of *all* of the hazardous wastes that it *generated*. Second, this Tribunal finds that Respondent's on-going storage of the two 55-gallon drums of contaminated soil from April 11, 2000 to April 18, 2001 was inadvertent, and that Mr. Beedle's belief that Respondent "had knowledge of their storage" was therefore mistaken.[210] Third, this Tribunal finds that Mr. Beedle failed to adequately consider the "potential

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[209]Mr. Beedle explained: "... on a routine business practice, we select the mid-point of the matrix cell." Tr. 11/19/03, p. 255. Although Mr. Beedle was there testifying in regard to Count VII, this Tribunal understands his testimony to speak to all of the "cells" in which he chose the mid-point for the proposed penalty, unless Mr. Beedle explained otherwise.

[210]Unlike the definition of "disposal facility" at MAC § 299.9102(cc) and 40 C.F.R. § 260.10, neither the definition of "storage" at MAC § 299.9107(dd) and 40 C.F.R. § 260.10 nor the definition of "facility" at MAC § 299.9103(r) and 40 C.F.R. § 260.10 contain any concept of "intent." The term "storage" is defined by MAC § 299.9107(dd) as follows: "'Storage' means

for harm" factor, merely – and mistakenly – extending his "extent of deviation" rationale to his "potential for harm" analysis. In this regard, this Tribunal finds that the "potential for harm," properly analyzed, is "major" rather than "moderate." Fourth, because the statutorily mandated consideration of "any good faith efforts to comply" is addressed by the Penalty Policy in the "adjustment" factors, Complainant was required to *consider* such an "adjustment." However, upon consideration, this Tribunal finds that no "multi-day" or "adjustment" components are warranted specifically under Count VI. Finally, finding that the violation under Count VI is a "major/moderate" violation, this Tribunal finds that the lowest possible penalty within that matrix cell is warranted, so that a penalty of $16,500 shall be imposed under Count VI.

1. The Gravity-Based Penalty ("Seriousness of the Violation")

Again, the "gravity-based penalty" is determined by considering two factors – the "potential for harm" and the "extent of deviation" – and applying those factors to the "gravity matrix." CX-77, Bates 1026.

a. Potential for Harm

The "potential for harm" assessment is based, in turn, on consideration of two factors – "risk of exposure" and "adverse impact" on the RCRA program. *Id.* Because, as discussed below, this Tribunal finds that the "risk of exposure" and "adverse impact" are "substantial," this Tribunal finds that the "potential for harm" resulting from Respondent's failure to properly notify the U.S. EPA or the State of Michigan of all of the hazardous wastes that it generated, stored, and disposed of on its property, as found under Count VI, is "major."[211]

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the holding of hazardous waste for a temporary period at the end of which the hazardous waste is treated, disposed of, or stored elsewhere." The federal regulations at 40 C.F.R. § 260.10 contain parallel language. Neither the Code of Federal Regulations nor the Michigan Administrative Code define the term "storage facility."

[211]Regarding his finding that the "potential for harm" under Count VI was "moderate," Mr. Beedle explained: "Q: ... Can you describe for us what you considered when you characterized it as moderate/moderate? A: Sure. Well, Strong Steel did notify as a generator but they didn't notify of these other activities. The moderate determined that they met the *extent of deviation, they met, you know, some of the requirements for assessing a moderate deviation* from the requirement, and *then a moderate potential to harm* from the program requirements to properly notify you of your activities." Tr. 11/19/03, p. 262 (emphases added). The Penalty Policy defines a "moderate" "extent of deviation" as: "The violator significantly deviates from the requirements of the regulation or statute but *some of the requirements are implemented* as intended." CX-77, Bates 1031 (emphasis added). However, the Penalty Policy defines a "moderate" "potential for harm" as: "(1) The violation poses or may pose a significant *risk of exposure* of humans or other environmental receptors to hazardous waste or constituents; *and/or* (2) the actions have or may have a significant *adverse effect on statutory or regulatory purposes*

(1) Risk of Exposure of Humans or the Environment

The "risk of exposure" assessment is based on consideration of two factors – "probability of exposure" and "potential seriousness of contamination." *Id.* at Bates 1027-1028. Because, as discussed below, this Tribunal finds the "probability of exposure" and "potential seriousness of contamination" to be substantial, this Tribunal finds that the "risk of exposure" is substantial.

(a.) Probability of Exposure

The Penalty Policy suggests three non-exclusive factors to be considered in determining "probability of exposure:" 1) evidence of release; 2) evidence of waste mismanagement; and 3) adequacy of provisions for detecting and preventing a release. *Id.* at Bates 1027.

First, regarding "evidence of release," the record contains evidence that releases of hazardous waste occurred due to Respondent's "failure to notify" as a *generator* of some hazardous wastes, and as a *disposal facility*.[212] On November 25, 1997, Respondent filed a Notification of Hazardous Waste Activity ("1997 Notification") with the MDEQ. RX-5, pp. 2-3; CX-30, Bates 414-415; Tr. 12/9/03, p. 45. This 1997 Notification, which Respondent submitted to cover the "fluff" from the shredder,[213] identified Respondent as a Large Quantity Generator ("LQG") of Cadmium (D006) and Lead (D008). *Id.* On April 18, 2001, Respondent filed a second Notification of Hazardous Waste Activity ("2001 Notification") with the MDEQ. CX-41, Bates 752-755. This 2001 Notification, which Respondent submitted to cover the two 55-gallon drums of contaminated soil which had been excavated by Inland Waters on April 11, 2000,[214] identified Respondent as a LQG of Benzene (D018), Chlorobenzene (D021), 1,2-Dichloroethane (D028), Tetrachloroethylene (D039), Trichloroethylene (D040), and Lead (D008). CX-41, Bates 753. Thus, the 2001 Notification identified Respondent as a LQG of the following hazardous wastes, which the 1997 Notification had not identified: Benzene (D018), Chlorobenzene (D021), 1,2-Dichloroethane (D028), Tetrachloroethylene (D039), and Trichloroethylene (D040). All of the hazardous wastes listed on the 2001 Notification were generated by Respondent's processing of "junked" automobiles. Therefore, Respondent failed to properly notify the U.S. EPA or the

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or procedures for implementing the RCRA program." CX-77, Bates 1029 (emphasis added). Thus, Mr. Beedle's testimony inescapably demonstrates that he improperly applied the "extent of deviation" analysis to *both* the "extent of deviation" *and* the "potential for harm" factors, completely ignoring the proper "potential for harm" analysis.

[212]The record does not indicate that any actual (as opposed to "potential") "release" of hazardous waste occurred as a result of Respondent's "failure to notify" of its *storage* of the two 55-gallon drums of contaminated soil from April 11, 2000 to April 18, 2001.

[213]*See* Tr. 12/9/03, p. 45 (Mr. Beaudoin); CX-105, Bates 1826, ¶ 10.

[214]This Tribunal's finding that the 2001 Notification was submitted in order to cover the two 55-gallon drums of contaminated soil is explained in detail, *supra*.

State of Michigan as a generator of Benzene (D018), Chlorobenzene (D021), 1,2-Dichloroethane (D028), Tetrachloroethylene (D039), and Trichloroethylene (D040) for over four years from approximately March, 1997 (when Strong Steel began operations) until April 18, 2001.

As discussed above, the fundamental purpose of RCRA is to protect human health and the environment by ensuring proper hazardous waste management from "cradle-to-grave" – that is, from *generation* to *disposal* – and the Act relies heavily on *self-reporting* in order to achieve this goal. By failing to notify of *all* of the hazardous wastes it *generated*, Respondent avoided regulation of those hazardous wastes, which avoidance led to those wastes being released onto and into the ground, from whence they had to be subsequently excavated.

Similarly, Respondent's failure to notify of its *disposal* of hazardous wastes onto and into the ground allowed Respondent to escape *any* regulation of its "disposal" activities, which directly lead to the "release" of hazardous wastes onto and into the ground, as discussed in detail, *supra*.

Second, regarding "evidence of waste mismanagement," the record cited immediately above also constitutes significant "evidence of waste mismanagement" due to Respondent's failure to notify of *all* of its hazardous waste "generation" or *any* of its hazardous waste "disposal."

Third, regarding "adequacy of provisions for detecting and preventing a release," the record demonstrates that Respondent escaped regulatory scrutiny by failing to notify of hazardous waste generation and disposal. Had Respondent been subject to such regulatory scrutiny, adequate provisions for detecting and preventing the releases which did occur, as described above, would have been required. However, because Respondent failed to notify, the requirements for such provisions were not enforced, and Respondent therefore failed to make such provisions.

Therefore, this Tribunal finds that the "probability of exposure" of humans or other environmental receptors to hazardous wastes or constituents due to Respondent's "failure to notify" under Count VI is substantial.

(b.) Potential Seriousness of Contamination

The Penalty Policy lists three non-exclusive factors to be considered in determining the "potential seriousness of contamination:" 1) quantity and toxicity of wastes released; 2) likelihood or fact of transport by way of environmental media such as air or groundwater; and 3) existence, size, and proximity of receptor populations such as local residents, fish, or wildlife. *Id.* at Bates 1027-1028.

The evidence demonstrates that all three of these factors are substantial, as discussed in detail, *supra*, regarding the penalty calculation for Count III. That discussion need not be repeated here. Not only was Respondent's "failure to properly respond to releases" (Count III) a

substantial contributor to the "potential seriousness of the contamination" in light of these factors, but Respondent's "failure to properly notify" of its "generation" and "disposal" activities was also a substantial contributor to the "potential seriousness of the contamination" in light of these same factors, for the reasons discussed immediately above regarding "probability of exposure." That is, the releases occurred in the first instance because Respondent escaped regulation by failing to notify. Therefore, the "potential seriousness of the contamination" was equally the result of Respondent's "failure to notify" as it was a result of Respondent's "failure to respond."

Therefore, this Tribunal finds that the "potential seriousness of contamination" due to Respondent's "failure to notify" under Count VI is substantial.

(2) Adverse Effect of Noncompliance on the RCRA Program

Again, the Penalty Policy's slim guidance on applying the "adverse effect" factor states that: "... *all* regulatory requirements are *fundamental* to the continued integrity of the RCRA program," but that violations of "[the] types of requirements [which] are based squarely on protection concerns and are fundamental to the overall goals of RCRA to handle wastes in a safe and responsible manner..." "...may have serious implications and merit substantial penalties..." CX-77, Bates 1028 (emphasis added).

Here, Complainant argues:

> Notifications serve the purpose of advising the regulatory agency's [sic] of the type of operations a company is conducting and their regulatory status. Companies that operate as [*storage* or *disposal*] facilities are regulated more closely. By failing to properly notify as a storage or disposal facility the Respondent evaded closer scrutiny at an earlier time by EPA. It avoided compliance with more stringent permitting requirements. This ... is a substantial adverse impact on the regulatory purpose and scheme.

CPHB at 63 (emphasis added).

Again, Complainant's point is well taken. This Tribunal further finds that Respondent's failure to notify of all of its hazardous waste *generation* similarly impacted the RCRA regulatory purpose and scheme for the same reasons. As discussed *supra*, the fundamental purpose of RCRA is to protect human health and the environment by ensuring proper hazardous waste management from "cradle-to-grave,"[215] and the Act relies heavily on self-reporting in order to

[215] *See, e.g.*, 45 Fed.Reg. 33084, 33085 (May 19, 1980) (*citing* H.R. Rep. No. 96-1461, 96th Cong., 1st Sess. 3 (1976)); and RCRA §§ 1003(a)(4) and (5), 42 U.S.C. §§ 6902(a)(4) and (5), quoted *supra*.

achieve this goal.[216] Thus, Respondent's failure to properly notify of all of its hazardous waste generation, storage, and disposal activities directly undermined the fundamental purposes of RCRA.[217] As the EAB explained in *A.Y. McDonald Industries, Inc.*, 2 E.A.D. 402 (EAB 1987):

> [T]he Presiding Officer's excellent discussion of the *notification* and permit requirements deserves to be quoted at length:
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> > The notification and permitting requirements are crucial to the effective enforcement of RCRA. The law is not designed to allow hazardous waste facilities to operate until they are discovered by the EPA. Instead, the burden is placed on the facility owners and operators to analyze and report their operations to the EPA (or the state if there is an approved state program in effect). The permit, or in lieu thereof qualifying for interim status by filing a notification and Part A permit application, sets the conditions for continued operation of the facility in a manner that will be environmentally safe. The failure to file the notification and to apply for a permit or qualify for interim status had the effect of concealing from the EPA Respondent's existence and the nature of its hazardous waste operations...
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> Initial Decision at 12-13 (footnote omitted). In other words, *the notification and permit requirements go to the very heart of the RCRA program. If they are disregarded, intentionally or inadvertently, the program cannot function*.

A.Y. McDonald Industries, Inc., 2 E.A.D. 402, 417-418 (EAB 1987) (emphases added).[218] *See*

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[216]*See, e.g.*, U.S. v. JG-24, Inc., 331 F. Supp. 2d 14, 57 (D. P.R. 2004) ("EPA relies to a substantial extent on accurate self-reporting.")

[217]The 2003 Penalty Policy lists "failure to notify ... pursuant to section 3010" as one example of "[the] types of requirements [which] are based squarely on protection concerns and are fundamental to the overall goals of RCRA to handle wastes in a safe and responsible manner...," and which therefore "...may have serious implications and merit substantial penalties..." CX-77, Bates 1028.

[218]In *A.Y. McDonald*, the Board went beyond the "moderate potential for harm" finding of the ALJ, stating: "The Region argued, and the Presiding Officer concluded, that McDonald's notification and permit violations had 'significant' adverse effect on the statutory or regulatory purposes..., thereby resulting in a overall 'moderate' potential for harm. Ordinarily, I am reluctant to reject a Presiding Officer's penalty assessment analysis ... [and] I am even more reluctant to characterize a violation more harshly than the Complainant... I feel compelled, however, to do so here." *A.Y. McDonald*, 2 E.A.D. at 417 (citations omitted). The Board concluded: "In view of the crucial nature of the notification requirement, I conclude that McDonald's failure to file a notification had a 'substantial' adverse impact on the regulatory program, resulting in a 'major' potential for harm." *Id.* at 418.

also, 2003 Penalty Policy, p. 14 (CX-77, Bates 1028).

This Tribunal similarly finds that the "adverse effect" of Respondent's noncompliance on the RCRA regulatory program, as found under Count VI, is substantial.

b. Extent of Deviation from Statutory or Regulatory Requirements

Again, the Penalty Policy suggests definitions applicable to the "extent of deviation" factor, such that the deviation is "major" (most requirements are not met), "moderate" (some of the requirements are implemented), or "minor" (most of the requirements are met). CX-77, Bates 1031.

In the present case, as discussed *supra*, because Respondent *did* "notify" as a "generator" of hazardous waste (although Respondent failed to notify of *all* of the hazardous wastes it generated), but failed to notify of its "storage" and "disposal" activities, Mr. Beedle found that Respondent's actions as alleged in Count VI constitute a "moderate" "extent of deviation" under the quoted definitions. Tr. 11/19/03, p. 262. This Tribunal finds Mr. Beedle's determination on this point to be reasonable.

c. Gravity Matrix Penalty Range

Thus, because Respondent's violation under Count VI constitutes a "major potential for harm" and a "moderate extent of deviation" (*i.e.*, the violation is a "major/moderate"), the Penalty Policy's "Gravity Matrix" suggests a penalty range of $16,500 to $21,999. CX-77, Bates 1032. In light of the fact that, contrary to Mr. Beedle's opinion, this Tribunal finds that Respondent inadvertently, rather than "knowingly,"[219] stored the two 55-gallon drums of contaminated soil

[219]Mr. Beedle testified: "I think they had knowledge of their storage. If you look at the ... April 18th of 2001 ... notification, that's the exact same day that they ... sent off a manifest of waste that they were storing for more than 90 days. The notification is signed by Ms. Susan Johnson. The manifest is signed by Ms. Susan Johnson so I take it that the person would have knowledge that they ... have been storing hazardous waste..." Tr. 11/19/03, pp. 262-263. However, while this Tribunal has found, *supra*, that the circumstances cited by Mr. Beedle suggest that Respondent filed the 2001 notification in order to cover the two 55-gallon drums, that does not mean that Respondent had actual knowledge of such storage 90 days or more before April 18, 2001. To the contrary, the evidence suggests that such storage was inadvertent, and that Ms. Johnson "manifested off" the drums shortly after discovering their existence. Mr. Ring explained: "[W]e ... assumed that the contractor [Inland Waters] was going to handle the disposal of these drums... [But] in 2001 ... we did the second remediation, where we located those drums and actually sent them off site for disposal..." Tr. 12/9/03, p. 274. Mr. Ring elaborated: "A: ... CRA did not contract with Inland Waters directly, so I believe their role was to do the excavation work and possibly dispose of the material. Q: And who was to oversee the disposal of the material? A: Well, that's where we ran into a little problem I think... Normally,

from April 11, 2000 to April 18, 2001, this Tribunal finds that the lowest penalty in the applicable matrix-cell (rather than the mid-point, as determined by Mr. Beedle) is appropriate. Therefore, the violation found under Count VI of the Amended Complaint warrants a "gravity-based penalty" of $16,500.

2. The Multi-Day Penalty

According to the 2003 Penalty Policy: "Multi-day penalties are considered mandatory for days 2-180 of all violations with ... gravity-based designations ... [of] major-moderate. The only exception is when they have been waived or reduced..." CX-77, Bates 1039.

In the present case, Complainant does not seek a multi-day penalty for Count VI, and such a penalty has therefore been waived or "reduced" to zero. This Tribunal agrees that the violation found under Count VI of the Amended Complaint does not warrant a "multi-day" penalty.

3. Adjustments for Case-Specific Circumstances ("Good Faith Efforts to Comply")

Complainant does not seek to "adjust" the gravity-based penalty under Count VI. Mr. Beedle testified that the fact that the proposed penalty does not include any "adjustments" reflects the fact that "adjustment factors" "just weren't considered..." Tr. 11/19/03, p. 263. Because the statutorily mandated consideration of "any good faith efforts to comply" is addressed by the Penalty Policy in the "adjustment" factors, Complainant was required to *consider* such an "adjustment." Upon consideration, this Tribunal finds that no "adjustment" factors are warranted specifically under Count VI.

4. Summary and Conclusion as to the Penalty under Count VI

The "probability of exposure" and the "potential seriousness of contamination" are both substantial. Because the "probability of exposure" and the "potential seriousness of contamination" are both substantial, the "risk of exposure" is "substantial." The "adverse effect of noncompliance" is also "substantial." Because the "risk of exposure" and the "adverse effect of noncompliance" are both "substantial," the "potential for harm" is "major." The "extent of deviation" is "moderate." Because the "potential for harm" is "major" and the "extent of deviation" is "moderate," the "gravity-based penalty" suggested by the 2003 Penalty Policy is $16,500 to $21,999. This Tribunal finds that a "gravity-based penalty" of $16,500 is appropriate for Count VI.

A "multi-day" penalty for Count VI has been waived or "reduced" to zero, and this

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it would be CRA's responsibility, and that's why I was saying I believe that we have a little issue, something fell through the cracks. I didn't know if Mike Beaudoin was going to oversee that and handle that or if CRA was supposed to." Tr. 12/10/03, pp. 20-21.

Tribunal agrees that such a penalty is not warranted under Count VI.

Complainant does not seek, and this Tribunal chooses not to apply, any case-specific "adjustment factors" specifically to Count VI.

Therefore, the total penalty imposed for the violation found under Count VI of the Amended Complaint shall be $16,500.

G. Count VII – Disposal and Storage of Hazardous Waste Without a Permit

This Tribunal has already found that Respondent "stored" and "disposed" of hazardous waste without a permit in violation of Section 3005 of RCRA, 42 U.S.C. § 6925; 40 C.F.R. § 270.10(f); and MAC § 299.9502(1), as alleged in Count VII of the Amended Complaint. Specifically, regarding "disposal," Judge McGuire granted Complainant's Motion for Accelerated Decision on that part of Count VII which alleges that: "On and prior to at least July 22, 1999, Strong did not have an operating license for the disposal of hazardous waste at its facility." Amended Complaint at ¶ 135.[220] Regarding "storage," this Tribunal has found that Respondent's actions in keeping the two 55-gallon drums of contaminated soil at the Strong Steel facility from April 11, 2000 until April 18, 2001 constituted "storage" of hazardous waste without a permit.[221]

Mr. Beedle considered the "potential for harm" and the "extent of deviation," in accordance with the 2003 Penalty Policy, in determining that both "gravity factors" were "major," such that Count VII constituted a "major/major" violation. Tr. 11/19/03, pp. 254-256. Applying the "gravity matrix," Mr. Beedle selected a "gravity penalty" of $24,750 by choosing the mid-point within the "major/major" cell. *Id.* at 255-256.[222] Mr. Beedle explained that he chose a "major/major" designation because: 1) the "storage" had a major adverse effect on the RCRA program ("potential for harm") and was a major "extent of deviation" from the requirements, and 2) the "disposal" posed a major potential for harm to both the environment and to the RCRA program ("potential for harm") and was a major "extent of deviation" from the requirements. *Id.* at 254-256. Mr. Beedle further stated that he did not consider to be warranted any "adjustments" (*e.g.*, for good faith efforts to comply) or a "multi-day" component. *Id.* at 257. Finally, Mr.

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[220]The quoted portion of Count VII of the Amended Complaint was unchanged from the original Complaint to which Judge McGuire's Order pertained.

[221]Again, unlike the definition of "disposal facility" at MAC § 299.9102(cc), neither the definition of "storage" at MAC § 299.9107(dd) nor the definition of "facility" at MAC § 299.9103(r) contain any concept of "intent," and neither the Code of Federal Regulations nor the Michigan Administrative Code define the term "storage facility." Thus, although this Tribunal has found Respondent's "storage" of the two 55-gallon drums to have been inadvertent, Respondent has nevertheless "stored" hazardous wastes under the applicable regulations.

[222]Mr. Beedle explained: "What we typically do is select a mid-point and then ... we make any adjustments... if there's any reason to alter from the mid-point." Tr. 11/19/03, p. 256.

Beedle explained that the proposed penalty for Count IV of the Amended Complaint is "compressed" into the proposed penalty for Count VII. *Id.* at 249. Thus, Complainant's total proposed penalty for Count VII is $24,750.

While this Tribunal agrees that the violations found under Count VII fall into the "major/major" category, this Tribunal finds that the lowest possible penalty amount within the "major/major" cell is warranted in order to reflect the fact that Count IV (the proposed penalty for which is "compressed" into that for Count VII) has been dismissed, and the fact that, contrary to Mr. Beedle's opinion, the "storage" aspect of the violation under Count VII constitutes only a "moderate" deviation from the permitting requirements (however, because the "disposal" aspect of the violation does constitute a "major" deviation, the violation found under Count VII remains a "major" deviation). Therefore, a penalty of $22,000 shall be imposed under Count VII of the Amended Complaint.

1. The Gravity-Based Penalty ("Seriousness of the Violation")

The "gravity-based penalty" is determined by considering the "potential for harm" and the "extent of deviation" and applying those factors to the "gravity matrix." CX-77, Bates 1026.

a. Potential for Harm

The "potential for harm" is based on the "risk of exposure" and the "adverse impact" on the RCRA program. *Id.* Because the "risk of exposure" and "adverse impact" are "substantial," the "potential for harm" resulting from Respondent's unpermitted storage and disposal of hazardous waste, as found under Count VII, is "major."

(1) Risk of Exposure of Humans or the Environment

Mr. Beedle stated that he considered the "risk of exposure" occasioned by Respondent's unpermitted disposal to be substantial, testifying that the unpermitted disposal is a "major potential for harm to the environment and human health ... [because] there's workers on-site, this material could be tracked out by vehicle traffic." Tr. 11/19/03, p. 255. This Tribunal agrees that the record of this case, thoroughly discussed above, demonstrates that Respondent's disposal of hazardous wastes, upon consideration of the "probability of exposure" and the "potential seriousness of the contamination," posed a "substantial" risk of exposure to humans and the environment. This risk of exposure flows in large part from Respondent's failure to obtain a permit for such disposal, as such a permit would have required measures which would have significantly reduced the risk of exposure.

(2) Adverse Effect of Noncompliance on the RCRA Program

Mr. Beedle also stated that he considered the "adverse impact" on the RCRA program occasioned by Respondent's unpermitted storage and disposal to be substantial. Regarding

unpermitted storage, Mr. Beedle stated that "... the requirement is if you're going to operate as a storage facility, you need to get a permit, so if a facility is storing for approximately a year's time or more, they're really not meeting the intention of RCRA, so it's a major harm to the program." *Id.* at 254. Regarding unpermitted disposal, Mr. Beedle stated that the violation posed a "major potential of harm to the program ... [because] one of the major portions of RCRA is to have facilities get a permit if they're going to dispose of waste on-site." *Id.* at 255.

Again, this Tribunal agrees that the record of this case, thoroughly discussed above, demonstrates that Respondent's unpermitted storage and disposal of hazardous wastes had a "substantial" adverse impact on the RCRA program. Again, as the EAB observed in *A.Y. McDonald*: "the notification and *permit* requirements go to the very heart of the RCRA program. If they are disregarded, intentionally or inadvertently, the program cannot function." *A.Y. McDonald Industries, Inc.*, 2 E.A.D. 402, 417-418 (EAB, 1987) (emphasis added). *See also, Everwood*, 6 E.A.D. 589, 604 (EAB, 1996);[223] 2003 Penalty Policy, p. 14 (CX-77, Bates 1028).[224] Therefore, this Tribunal finds that the "adverse effect" of Respondent's noncompliance on the RCRA regulatory program, as found under Count VII, is substantial.

b. Extent of Deviation from Statutory or Regulatory Requirements

Mr. Beedle testified that he considered the "extent of deviation" to be "major" in regard to both the unpermitted storage and disposal. Regarding "storage," Mr. Beedle stated: "[T]he requirement is you need to ship out the waste in 90 days. A year later, ... you've stored it nine months more than you should have. That's a pretty major deviation from the requirement." Tr. 11/19/03, p. 254. Regarding "disposal," Mr. Beedle explained: "Well, they didn't meet the requirement to get a permit if they're going to dispose on-site so it's a major deviation from the requirement." *Id.* at 255.

Applying the definitions of "major," "moderate," and "minor" applicable to the "extent of deviation" found on page 17 of the 2003 Penalty Policy (CX-77, Bates 1031), this Tribunal agrees that Respondent's complete failure to obtain required permits for its ongoing disposal of hazardous wastes constituted a "major" deviation from the statutory and regulatory requirements. In light of the relatively small amount of contaminated soil which was stored at the site (two 55-

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[223]The EAB in *Everwood* observed: "Through this unpermitted burial of hazardous waste in a concealed location at the facility, Everwood engaged in precisely the type of activity that RCRA was enacted to prevent... Such violations go to the heart of the RCRA program." *Everwood*, 6 E.A.D. 589, 604 (EAB, 1996).

[224]The 2003 Penalty Policy lists "operating without a permit or interim status" as one example of "[the] types of requirements [which] are based squarely on protection concerns and are fundamental to the overall goals of RCRA to handle wastes in a safe and responsible manner...," and which therefore "...may have serious implications and merit substantial penalties..." CX-77, Bates 1028.

gallon drums), and the inadvertent nature of that storage, this Tribunal finds that the "storage" aspect of the violation under Count VII constitutes only a "moderate" deviation from the permit requirements. However, the "extent of deviation" under Count VII nonetheless remains "major" due to the "disposal" aspect of the violation under Count VII.

c. Gravity Matrix Penalty Range

Thus, because Respondent's violation found under Count VII constitutes a "major potential for harm" and a "major extent of deviation" (*i.e.*, the violation is a "major/major"), the Penalty Policy's "Gravity Matrix" suggests a penalty range of $22,000 to $27,500. CX-77, Bates 1032. Mr. Beedle proposes a "gravity penalty" of $24,750 by selecting the mid-point within the "major/major" cell. *Id.* at 255-256. However, in light of the fact that Count IV (the proposed penalty for which is "compressed" into that for Count VII) has been dismissed,[225] and the fact that the "storage" aspect of the violation under Count VII constitutes only a "moderate" deviation from the permitting requirements (although the "disposal" aspect remains a "major" deviation), this Tribunal finds that the lowest penalty in the applicable matrix-cell is appropriate. Therefore, the violations found under Count VII of the Amended Complaint warrant a "gravity-based penalty" of $22,000.

2. The Multi-Day Penalty

According to the 2003 Penalty Policy: "Multi-day penalties are considered mandatory for days 2-180 of all violations with ... gravity-based designations ... [of] major-major... The only exception is when they have been waived or reduced..." CX-77, Bates 1039.

In the present case, Complainant does not seek a multi-day penalty for Count VII, and such a penalty has therefore been waived or "reduced" to zero. This Tribunal agrees that the violation found under Count VII of the Amended Complaint does not warrant a "multi-day" penalty.

3. Adjustments for Case-Specific Circumstances ("Good Faith Efforts to Comply")

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[225]While Count IV of the Amended Complaint alleges illegal "storage" and "disposal" of "*used oil*," Count VII alleges illegal "storage" and "disposal" of "*hazardous waste*." Mr. Beedle stated that the penalty proposed for Count IV is "compressed" into Count VII because: "... since Count IV dealt with disposal, in part, and then Count VII dealt with disposal, in part again, disposal and storage of hazardous waste on the ground, I felt that it would be appropriate to seek one penalty for these violations." Tr. 11/19/03, p. 249. The material of which samples SS1, SS2, and SS3 is representative is a mixture of "used oil" and "hazardous waste." Therefore, pursuant to MAC § 299.9809(2)(a) and 40 C.F.R. § 279.10(b), it is subject to regulation as "hazardous waste" as alleged in Count VII of the Amended Complaint, but it is *not* also subject to regulation as "used oil" as alleged in Count IV of the Amended Complaint. Count IV of the Amended Complaint has therefore been dismissed, and no penalty may be assessed therefor.

Complainant does not seek to "adjust" the gravity-based penalty under Count VII. Mr. Beedle testified that he did not consider any "adjustments" (*e.g.*, for good faith efforts to comply) to be warranted. Tr. 11/19/03, p. 257. This Tribunal agrees that no "adjustment" factors are warranted specifically under Count VII.

4. Summary and Conclusion as to the Penalty under Count VII

The "probability of exposure" and the "potential seriousness of contamination" are both substantial. Because the "probability of exposure" and the "potential seriousness of contamination" are both substantial, the "risk of exposure" is "substantial." The "adverse effect of noncompliance" is also "substantial." Because the "risk of exposure" and the "adverse effect of noncompliance" are both "substantial," the "potential for harm" is "major." The "extent of deviation" is also "major." Because both the "potential for harm" and the "extent of deviation" are "major," the "gravity-based penalty" suggested by the 2003 Penalty Policy is $22,000 to $27,500. This Tribunal finds that a "gravity-based penalty" of $22,000 is appropriate for Count VII.

A "multi-day" penalty for Count VII has been waived or "reduced" to zero, and this Tribunal agrees that such a penalty is not warranted under Count VII.

Complainant does not seek, and this Tribunal chooses not to apply, any case-specific "adjustment factors" specifically to Count VII.

Therefore, the total penalty imposed for the violation found under Count VII of the Amended Complaint shall be $22,000.

H. Count VIII – Land Disposal of Hazardous Waste Without Treatment

As discussed above, this Tribunal has found no reason to depart from Judge McGuire's Order on Accelerated Decision regarding liability on Count VIII of the original Complaint, and finds that on and prior to at least July 22, 1999, Respondent "land disposed" of hazardous wastes without meeting the treatment standards set forth in 40 C.F.R. Part 268, Subpart D (§§ 268.40 - 268.49), constituting one violation of MAC § 299.9311 and 40 C.F.R. § 268.9(c), as alleged in Count VIII of the Amended Complaint.

Mr. Beedle considered the "potential for harm" and the "extent of deviation," in accordance with the 2003 Penalty Policy, in determining that both "gravity factors" were "major," such that Count VIII constituted a "major/major" violation. Tr. 11/19/03, pp. 263-265. Applying the "gravity matrix," Mr. Beedle selected a "gravity penalty" of $24,750 by choosing the mid-point within the "major/major" cell. *Id.* at 255-256.[226] Mr. Beedle explained that he chose a

[226]Although Mr. Beedle was there testifying in regard to Count VII, this Tribunal understands his testimony to speak to all of the "cells" in which he chose the mid-point for the proposed penalty, unless Mr. Beedle explained otherwise.

"major potential for harm" designation because "disposing of hazardous waste without treating it" posed a "major risk of exposure and also a major ... harm to the program." *Id.* at 264. Mr. Beedle further explained that he chose a "major extent of deviation" designation because "[t]here didn't appear to be any efforts to treat the waste or make it less hazardous before disposal." *Id.* Finally, Mr. Beedle clarified that the fact that the proposed penalty includes neither a "multi-day" component nor any "adjustments" does not reflect his judgement that the proposed penalty should not include such components, but rather the fact that those components were not considered. *Id.* at 264-265.[227] Thus, Complainant's total proposed penalty for Count VIII is $24,750.

This Tribunal agrees that the violations found under Count VIII fall into the "major/major" category and that the "mid-point" penalty amount within the "major/major cell" is appropriate for Count VIII *alone*. However, because the statutorily mandated consideration of "any good faith efforts to comply" is addressed by the Penalty Policy in the "adjustment" factors, Complainant was required to *consider* such an "adjustment." Nonetheless, upon consideration, this Tribunal finds that no "multi-day" or "adjustment" components are warranted specifically under Count VIII. Further, because (as explained *infra*) the penalty for Count IX shall be "compressed" with the penalty for Count VIII, it is appropriate to assess the maximum penalty amount within the "major/major gravity cell" under Count VIII. Therefore, a penalty of $27,500 shall be imposed under Count VIII of the Amended Complaint.

1. The Gravity-Based Penalty ("Seriousness of the Violation")

The "gravity-based penalty" is determined by considering the "potential for harm" and the "extent of deviation" and applying those factors to the "gravity matrix." CX-77, Bates 1026.

a. Potential for Harm

The "potential for harm" is based on the "risk of exposure" and the "adverse impact" on the RCRA program. *Id.* Because the "risk of exposure" and "adverse impact" are "substantial," the "potential for harm" resulting from Respondent's land disposal without meeting treatment standards, as found under Count VIII, is "major."

(1) Risk of Exposure of Humans or the Environment

Mr. Beedle stated that he considered the "risk of exposure" occasioned by Respondent's

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[227]Mr. Beedle testified as follows: "Q: ...[T]he next two columns under multi-day penalty amount and adjustments ... there's zeros there. Does that mean that it's not appropriate to penalize for them or that that just was not done there? A: It just wasn't done there." Tr. 11/19/03, pp. 264-265. This testimony is somewhat ambiguous regarding whether Mr. Beedle considered the factors and did not apply them, or rather simply did not consider the factors. However, in light of Mr. Beedle's previous testimony that the same factors "just weren't considered..." regarding Count VI (*Id.* at 263), this Tribunal understands Mr. Beedle's testimony to be that the factors similarly were not considered with regard to Count VIII.

"land disposal" of untreated gasoline to be substantial because gasoline is ignitable and "people walk through [it]." Tr. 11/19/03, p. 264. This Tribunal agrees that the record of this case, thoroughly discussed above, demonstrates that Respondent's untreated "land disposal" of hazardous wastes such as gasoline, upon consideration of the "probability of exposure" and the "potential seriousness of the contamination," posed a "substantial" risk of exposure to humans and the environment. This exposure could take the form of hazardous constituents migrating to soils and groundwater, inhalation by people, and the high risk of ignition.

(2) Adverse Effect of Noncompliance on the RCRA Program

Mr. Beedle also stated that he considered the "adverse impact" on the RCRA program occasioned by Respondent's untreated "land disposal" of hazardous wastes to be substantial. Tr. 11/19/03, p. 264. Again, this Tribunal agrees that the record of this case, thoroughly discussed above, demonstrates that Respondent's untreated "land disposal" had a "substantial" adverse impact on the RCRA program. *See Everwood*, 6 E.A.D. 589, 606-607 (EAB, 1996) (holding that, even where the risks posed by a "land disposal violation" did not differ from the "permit violation," and where "no actual environmental damage has resulted," the adverse impact on the RCRA program caused by violation of applicable land disposal restrictions is substantial).

b. Extent of Deviation from Statutory or Regulatory Requirements

Mr. Beedle testified that he considered the "extent of deviation" to be "major" under Count VIII because "[t]here didn't appear to be any efforts to treat the waste or make it less hazardous before disposal." Tr. 11/19/03, p. 264.

Applying the definitions of "major," "moderate," and "minor" applicable to the "extent of deviation" found on page 17 of the 2003 Penalty Policy (CX-77, Bates 1031), this Tribunal agrees that Respondent's complete failure to meet any applicable land disposal treatment standards constitutes a "major" deviation from the statutory and regulatory requirements. *See Everwood*, 6 E.A.D. at 607.

c. Gravity Matrix Penalty Range

Thus, because Respondent's violation as alleged in Count VII constitutes a "major potential for harm" and a "major extent of deviation," the Penalty Policy's "Gravity Matrix" suggests a penalty range of $22,000 to $27,500. CX-77, Bates 1032. Complainant proposes a "gravity penalty" of $24,750 by selecting the mid-point within the "major/major" cell. However, because (as explained *infra*) the penalty for Count IX shall be "compressed" with the penalty for Count VIII, it is appropriate to assess the maximum penalty amount within the "major/major gravity cell" under Count VIII. Therefore, the violations found under Count VIII of the Amended Complaint warrant a "gravity-based penalty" of $27,500.

2. The Multi-Day Penalty

According to the 2003 Penalty Policy: "Multi-day penalties are considered mandatory for days 2-180 of all violations with ... gravity-based designations ... [of] major-major... The only exception is when they have been waived or reduced..." CX-77, Bates 1039.

In the present case, Complainant does not seek a multi-day penalty for Count VIII, and such a penalty has therefore been waived or "reduced" to zero. This Tribunal agrees that the violation found under Count VIII of the Amended Complaint does not warrant a "multi-day" penalty.

3. Adjustments for Case-Specific Circumstances ("Good Faith Efforts to Comply")

Complainant does not seek to "adjust" the gravity-based penalty under Count VIII. Mr. Beedle testified that the fact that the proposed penalty does not include any "adjustments" reflects the fact that "adjustment factors" were not considered. Tr. 11/19/03, pp. 264-265. Because the statutorily mandated consideration of "any good faith efforts to comply" is addressed by the Penalty Policy in the "adjustment" factors, Complainant was required to *consider* such an "adjustment." Upon consideration, this Tribunal finds that no "adjustment" factors are warranted specifically under Count VIII.

4. Summary and Conclusion as to the Penalty under Count VIII

The "probability of exposure" and the "potential seriousness of contamination" are both substantial. Because the "probability of exposure" and the "potential seriousness of contamination" are both substantial, the "risk of exposure" is "substantial." The "adverse effect of noncompliance" is also "substantial." Because the "risk of exposure" and the "adverse effect of noncompliance" are both "substantial," the "potential for harm" is "major." The "extent of deviation" is also "major." Because both the "potential for harm" and the "extent of deviation" are "major," the "gravity-based penalty" suggested by the 2003 Penalty Policy is $22,000 to $27,500. Because (as explained *infra*) the penalty for Count IX shall be "compressed" with the penalty for Count VIII, a maximum "gravity-based penalty" of $27,500 is appropriate for Count VIII.

A "multi-day" penalty for Count VIII has been waived or "reduced" to zero, and this Tribunal agrees that such a penalty is not warranted under Count VIII.

Complainant does not seek, and this Tribunal chooses not to apply, any case-specific "adjustment factors" specifically to Count VIII.

Therefore, the total penalty imposed for the violation found under Count VIII of the Amended Complaint shall be $27,500.

I. Count IX – Failure to Retain Land Disposal Determination Records

As discussed above, this Tribunal has found that Respondent failed to retain records of the determination, required by MAC § 299.9311 and 40 C.F.R. § 268.7(a)(1) as to whether the hazardous wastes it generated had to be treated prior to being land disposed, in violation of MAC § 299.9311 and 40 C.F.R. § 268.7(a)(6), as alleged in Count IX of the Amended Complaint. Further, this Tribunal has found that Complainant has effectively withdrawn that portion of Count IX which alleged that Respondent failed to determine whether the wastes it generated were "hazardous wastes" in violation of MAC § 299.9302 and 40 C.F.R. § 262.11, and that Respondent failed to retain on-site records of such determination in violation of MAC § 299.9307 and 40 C.F.R. § 262.40(c).

Complainant summarizes its penalty calculation regarding Count IX as follows:

> The proposed penalty was $24,750. Mr. Beedle explained that he determined that the violations had a major potential for harm and was [sic] a major deviation from the regulations. He selected the mid-point of the major/major penalty matrix... The probability of exposure and seriousness of the exposure are the same as articulated in Count VIII above. It had a substantial negative impact on the regulations. A major reason for the *waste determination* and associated record keeping determination is to ensure that a facility properly handles its wastes. It is preventative in nature. If a company knows what its wastes are it can treat them accordingly. The records provide the regulatory agencies with an opportunity to verify that the determination was done. Respondent, however, *did not make the waste and treatment determination* and did not record it. It disposed of wastes on the ground without treatment and present [sic] a substantial risk of exposure. This has an adverse impact on the regulations. The extent of deviation was substantial since Respondent did not have any documentation.

CPHB at 72 (emphasis added). Specifically, Mr. Beedle testified as follows:

> A: The records that weren't available were ... the waste determination records ... and also, the records for the land disposal to determine if the waste needs to be treated before land disposal.
> Q: And Mr. Beedle, you characterize it as major/major. What was major in terms of that penalty?
> A: ... [A] very significant or substantial part of the program is this maintaining of records and *making the proper waste determinations*, and then, also *making the determination* if this material needs to be treated, so there's a major potential for harm by not keeping these documents from the RCRA program. Since this waste was disposed on the ground, there also is a major risk of exposure for them *not actually characterizing* their waste and *not making these determinations*, whether the material would need to be treated before land disposal.
> Q: ... [What would be the extent of deviation component?
> A: Since these records were unavailable, ... it deviated from the record

> keeping requirements. They just didn't have them available. It really interferes with our analysis of any compliance with the RCRA Regulatory Program.

Tr. 11/19/03, pp. 266-267 (emphasis added).

Thus, a significant component of Complainant's proposed penalty calculation under Count IX is a consideration of Respondent's failure to ***make*** the land disposal determinations, as opposed to Respondent's failure to ***retain records*** of those determinations. However, the Amended Complaint specifically alleges:

> On and prior to at least July 22, 1999, Strong failed ... to have records of its determination that its hazardous wastes were restricted from land disposal pursuant to 40 C.F.R. 268.7(a)(6). Consequently, this constitutes one violation of MAC § ... 299.9311 [40 C.F.R. 268.7(a)(6)].

Amended Complaint at 34, ¶ 157. Although paragraph 151 of the Amended Complaint states that "40 C.F.R. 268.7(a)(1) requires a generator of hazardous waste to determine if its waste has to be treated prior to being land disposed," the Amended Complaint does not directly allege that Respondent failed to ***make*** the "land disposal determination" required by 40 C.F.R. § 268.7(a)(*1*), but only that Respondent failed to ***retain records*** of the determination in violation of 40 C.F.R. § 268.7(a)(6). Amended Complaint, ¶ 157.

As discussed above regarding "liability" under Count IX, the totality of the evidence in the record strongly suggests that Respondent did not, in fact, make any "land disposal determinations" regarding the "disposal" of automotive fluids onto the ground at the Strong Steel site, nor did Respondent understand such determinations to be necessary (that is, Respondent's failure was the result of ignorance of the law). Having failed to make such determinations, Respondent failed to create and/or retain records of such determinations (Count IX), and failed to meet the applicable land disposal treatment standards (Count VIII). Thus, the violations found under both Count VIII and Count IX result from the single initial transgression of failure to make the land disposal determination.

Regarding "compression of penalties for related violations," the 2003 RCRA Penalty Policy explains:

> There are instances where a company's failure to satisfy one statutory or regulatory requirement either necessarily or generally leads to the violations of numerous other independent regulatory requirements. Examples are the case where: (1) a company *through ignorance of the law* fails to obtain a permit ... and as a consequence runs afoul of ... numerous other (regulatory) requirements ..., or (2) a company fails to install groundwater monitoring equipment ... and is thus unable to comply with other requirements ... (*e.g.*, requirements that it develop a

> sampling plan, *keep the plan at the facility*, ... etc.). In cases such as these where multiple violations result from a *single initial transgression*, assessment of a separate penalty for each distinguishable violation may produce a total penalty which is disproportionately high.

CX-77, Bates 1036 (emphasis added).

In the present case, it is appropriate to "compress" the penalty for Count IX of the Amended Complaint into that for Count VIII. Respondent's failure to "retain records" of non-existent "land disposal determinations" is analogous to the Penalty Policy's example of the failure to keep a non-existent groundwater sampling plan at the facility. In the Penalty Policy's "sampling plan" hypothetical, the violator apparently should be charged with the underlying failure to install groundwater monitoring equipment. By direct analogy, Respondent in the present case should have been charged with the underlying failure to *make* the land disposal determinations. However, as noted above, Respondent was not so charged. Rather, Respondent was charged only with the various consequences which flowed from the "single initial transgression." Had Respondent been properly charged with failure to make the land disposal determinations (40 C.F.R. § 40 C.F.R. 268.7(a)(1)), then it would have been appropriate to "compress" the failure to "retain" the non-existent records (40 C.F.R. § 40 C.F.R. 268.7(a)(6)) into the failure to make the underlying determinations which would have generated the records.[228] However, because Respondent was not so charged, it is appropriate to "compress" the failure to "retain" the non-existent records into the failure to meet the land disposal treatment standards (such failure also flowing from the underlying failure to make the determinations).[229]

This Tribunal finds that Respondent's underlying failure to make the land disposal

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[228]This Tribunal recognizes that the 2003 Penalty Policy states that "a failure to make a hazardous waste determination, 40 CFR § 262.11, should not be compressed because this requirement determines which wastestreams are subject to further regulation." CX-77, Bates 1036. However, in the present case, this Tribunal has found Complainant to have effectively withdrawn that portion of Count IX which alleged that Respondent failed to make the "hazardous waste determinations" in violation of 40 C.F.R. § 262.11, and the Amended Complaint does not directly allege that Respondent failed to make the analogous "land disposal determinations" in violation of 40 C.F.R. § 268.7(a)(1). Further, despite this quoted language from the Penalty Policy, this Tribunal finds that, *in the present case*, the circumstances *would* warrant "compressing" the failure to retain non-existent "land disposal determination records" into a failure to make the underlying determinations.

[229]Because Respondent was not properly charged with the failure to make the determinations in violation of 40 C.F.R. § 268.7(a)(1), this Tribunal need not and does not decide whether it would be appropriate to "compress" the failure to meet the applicable treatment standards (Count VIII) into such a charge, had it been made.

determinations was a result of ignorance of the law.[230] Therefore, it is appropriate to "compress" the independent regulatory violations which flowed from that "single initial transgression" in order to avoid a total penalty which is disproportionately high and achieve an appropriate total penalty for the related "land disposal violations."

For all of the forgoing reasons, the penalty for Count IX of the Amended Complaint shall be "compressed" into the penalty assessed for Count VIII of the Amended Complaint, as described by the 2003 RCRA Penalty Policy at 21-22 (CX-77, Bates 1035-1036).

J. Economic Benefit

The 2003 RCRA Penalty 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." CX-77, Bates 1042.[231] The Penalty Policy states that "the BEN computer model" should be used to calculate significant EBN, explaining: "While the BEN model can be used to develop a proposed penalty for an administrative hearing, enforcement personnel must be prepared to present a financial expert witness to support the penalty calculation." *Id.* at 1045, n.31.

In the present case, Mr. Beedle testified as follows regarding Respondent's "economic benefit of noncompliance:"

> Q: Okay. And at the time that you developed this penalty calculation, there's nothing here on this chart regarding economic benefit of noncompliance. How did you treat that?
> A: I didn't have enough information to actually make a [BEN] calculation. We just – in looking over the file, I didn't have a lot of – there wasn't any information for like, for example, for disposal costs are avoided and how long it was avoided. Any construction costs, I didn't have anything like that; if there was construction, if they would have needed to build something to comply with the regulatory program.
> ...
> Q: And Mr. Beedle, you mentioned a [BEN]. What is [BEN]?

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[230]Had this Tribunal found that Respondent *did*, in fact, make the determinations but then deliberately or knowingly failed to meet the treatment standards and/or retain the records, then multiple penalties would clearly be necessary. Similarly, had this Tribunal found that Respondent failed to make the determination in a *deliberate* effort to avoid meeting the treatment standards and/or retaining the records, then multiple penalties would again be necessary. This Tribunal recognizes that Respondent's true "ignorance of the law" in this regard must be closely scrutinized in order to avoid encouraging land disposers to deliberately fail to make the determination and then falsely plead ignorance.

[231]*See generally*, 2003 RCRA Penalty Policy at 28-33 (CX-77, Bates 1042-1047).

A: Oh, that's a computer program that enforcement personnel use... I'm not an economist, but there's certain facts it asks for and then ... it will calculate what the economic benefit of the avoided costs were.

Tr. 11/19/03, pp. 241-242.

Indeed, Complainant admits that "[t]he proposed penalty does not include an amount for the economic benefit the Respondent derived from its non-compliance." CPHB at 82. However, Complainant then goes on to argue that an "economic benefit" component should be added to the $307,450 proposed penalty in the amount of $204,000. *Id.* This figure is based upon the assumption that Respondent's estimated cost of its ADRRF of $1,700,000[232] represents the cost of coming into compliance with RCRA, and is derived by estimating the interest earned on that $1.7 million over the six years between March, 1997 (the date Strong Steel began operations) and the date of the hearing (November and December, 2003).[233] *Id*. at 83.

Complainant has the burdens of presentation and persuasion that the relief sought is appropriate. 40 C.F.R. § 22.24. Complainant's argument, presented for the first time in its Post-hearing Brief, and unsupported by its "penalty witness," Mr. Beedle, or any other expert testimony or documentary evidence, fails to carry its burden regarding the suggested "economic benefit" penalty component of $204,000.[234] Complainant has proposed no other rationale for an "economic benefit" calculation. Therefore, Complainant's suggested "economic benefit" penalty is rejected and no "economic benefit" penalty shall be imposed.

K. Other Unique Factors – The Automobile Dismantling & Resource Recovery Facility ("ADRRF")

The Penalty Policy's "gravity-based penalty" takes into consideration the "seriousness of the violation," as mandated by RCRA § 3008(a)(3). As noted above, the 2003 Penalty Policy also provides for "adjustment factors" to consider, *inter alia*, the "good faith efforts to comply," as mandated by Section 3008 of the Act.[235] The Penalty Policy's "adjustment factors" reflect EPA's

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[232]*See* RX-28 at 13, ¶ 4.0.

[233](2% interest x $1,700,000) x 6 years = $204,000.

[234]Indeed, it is unclear whether Complainant truly seeks this $204,000 "economic benefit" penalty, as the "Conclusion" to Complainant's Post-hearing Brief seeks a penalty in the amount of $307,450 – the amount proposed by Mr. Beedle which does not include the "economic benefit" component. *See* CPHB at 85.

[235]As noted *supra*, the Penalty Policy's "adjustment factors" include: 1) good faith efforts to comply / lack of good faith; 2) degree of willfulness and/or negligence; 3) history of noncompliance; 4) ability to pay; 5) environmental projects; and 6) other unique factors. CX-77, Bates 1049-1055. In the present case, Respondent does not assert an "inability to pay" the

determination that "any system for calculating penalties must have enough flexibility to make adjustments that reflect legitimate differences between separate violations of the same provision," (CX-77, Bates 1047), and include factors in addition to the statutory "good faith efforts to comply," such as "other unique factors." Regarding "other unique factors," the Penalty Policy explains that "[t]his Policy allows an adjustment for factors which may arise on a case-by-case basis." *Id.* at 1054.

Respondent argues that the proposed penalty in this case should be reduced under the "other unique factors" component due to "the expenditures that Strong Steel has made to construct, and will make to operate, its Automotive Dismantling and Resource Recovery Facility ('ADRRF'), and the environmental benefits that it will achieve..." RPHB at 75.

1. *Spang* and *Catalina Yachts*

A closely analogous situation was considered by the EAB in *In re Spang & Company*, 6 E.A.D. 226 (EAB, 1995).[236] There, the Board held that, under the "such other matters as justice may require" EPCRA statutory penalty factor,[237] the proposed penalty could be adjusted downward in consideration of evidence of environmentally beneficial projects which Spang had completed, or at least commenced, at the time of the penalty assessment. First, the Board held that although the ALJ "correctly concluded that Spang's projects could be considered under the 'other factors as justice may require' adjustment factor, he nevertheless clearly erred in evaluating Spang's projects as SEPs [('Supplemental Environmental Projects')] under the SEP Policy." *Spang*, 6 E.A.D. at 245. However, the Board continued:

> That said, ... we conclude that Spang's projects, and expenditures incurred in support thereof, can be legitimately considered under the 'other factors as justice may require' penalty adjustment factor... We arrive at this conclusion ... because ... 'historically, courts have always taken past actions of violators into account for purposes of penalty mitigation.' It is therefore within the presiding officer's prerogative to consider what type of environmental citizen Spang has been in

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proposed penalty, and Complainant has considered Respondent's "ability to pay." Tr. 11/19/03, pp. 155-156; Tr. 11/20/03, p. 100.

[236]Complainant's arguments that *Spang* does not apply to the present case are addressed *infra*. As explained below, this Tribunal rejects those arguments and finds that the *Spang* analysis is instructive in the present case.

[237]Section 325(b)(1)(C) of EPCRA, 42 U.S.C. § 11045(b)(1)(C), states that: "In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and *such other matters as justice may require*." (Emphasis added).

deciding upon an appropriate penalty to assess.

Id. at 249 (citations omitted). Thus, the Board remanded to the ALJ to consider Spang's "environmentally beneficial projects" under the "other matters as justice may require" factor (*hereinafter* "justice factor"), but *not* as "SEPs." In so doing, the Board articulated "guidance" which is useful to quote at length:

> As a matter of policy, the Agency obviously looks favorably upon the undertaking of a project which benefits the environment and which goes beyond the requirements of environmental laws... Nevertheless, sight must not be lost of the fact that initial compliance with the law is the primary objective of the Agency's enforcement efforts and that penalties play an important deterrent role in those efforts. Therefore, the amount of credit which is allowable for environmentally beneficial projects must be tempered with the knowledge that a violation has taken place. Thus, to strike the proper balance between these conflicting forces, we are of the view that the evidence of environmental good deeds must be clear and unequivocal, and the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice. This formulation for giving due credit for environmental good deeds holds faith to the underlying principle of the justice factor, which is essentially to operate as a safety mechanism when necessary to prevent an injustice. It further suggests that use of the justice factor should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just. In addition, it also suggests that evidence of creditable projects should be sufficiently clear that the proceeding will not get bogged down in a time-consuming analysis of collateral matters that are, in reality, commonplace, and thus do not rise to the level where justice requires their consideration.
>
> As noted above, the past acts of violators have historically been appropriate for consideration when assessing a penalty. Accordingly, any project that has at least been commenced may be considered under this analysis. Under the justice factor in an administrative hearing promises of future acts are not relevant. What is relevant is a respondent's *past* acts and expenditures. The greatest weight should go to completed projects for which there is tangible evidence of significant environmental benefits. Nevertheless, if an incomplete project is sufficiently underway, such that its ability to produce environmental benefits is not speculative, there may be sufficient grounds for considering the expenditures made on the project **to that point**. With respect to the date a project was commenced, this information bears only on the weight a given project will be accorded. For example, a project commenced before **an enforcement action has begun** is more likely to show a greater commitment to environmental protection than one **commenced after**.
>
> Whether a project warrants a penalty adjustment, and if so, how much, will of course depend upon the evidence in the record. If a respondent claims that

> justice requires consideration of steps taken and monies spent on a project, a respondent needs to produce evidence of those steps and expenditures. The snapshot provided by the evidence in the record will provide the factual basis that will enable the presiding officer to determine whether justice warrants a penalty reduction for those steps and expenditures, and if so, how much. Absent such evidence, there is no factual basis for concluding that the calculated penalty will produce an injustice.
>
> As to the types of projects that may warrant a penalty reduction, we find the SEP Policy somewhat instructive. Although the SEP Policy is not applicable here, its requirement that SEPs have a "nexus between the nature of the violation and the environmental benefit to be derived from the project[]" translates well into an adjudicatory context, and thus may be helpful in addressing whether a project warrants consideration under the justice factor. In our view, the stronger the nexus between a project and a violation, the more likely that the project may warrant a penalty reduction under the justice factor. We reiterate, however, that no project, however close the nexus, should be credited unless the penalty which would otherwise be assessed would work an injustice.
>
> Whether a given project rises to the level of demonstrating that justice requires a lower penalty, and the related question of how much of a reduction is necessary to achieve justice, are, like any other claims under the justice factor, committed in the first instance to the discretion of the presiding officer.

Id. at 250-251 (citations and footnotes omitted) (italics in original) (underlining and bold type added).

The EAB subsequently applied *Spang* in another EPCRA case, *Catalina Yachts, Inc.*, 8 E.A.D. 199 (EAB, 1999), *aff'd*, Catalina Yachts, Inc. v. U.S. EPA, 112 F. Supp. 2d 965 (C.D.CAL. 2000). There, the Board held that the "projects" at issue should not constitute a basis for a "justice factor" reduction because reductions under other "adjustment factors" had adequately considered all of the potential reductions. *Id.* at 215-216. The Board further questioned, in *dicta*, whether a proper "nexus" could have been found between the "environmentally beneficial project" and the violations at issue, and noted that "the costs and benefits of the project are largely speculative and described as future costs and benefits," which should not be considered under *Spang*. *Catalina Yachts*, 8 E.A.D. at 216-217, n.19.

2. The Project Purposes / "Environmental Benefits"

In the present case, Respondent has produced evidence of its "steps and expenditures" in order to construct its "Automobile Dismantling & Resource Recovery Facility" ("ADRRF"), in the form of RX-28 (the ADRRF "Summary Report" prepared by Mr. Ring), the testimony of Mr. Ring, and the testimony of Anthony Benacquisto. In essence, the ADRRF is a facility which will drain gasoline tanks and all other fluids from incoming automobiles and safely dispose of the drained materials. The "Summary Report" explains:

> Automobiles will enter the Site, and move through the Pre-process, Floor Process, and Elevated Rack Process Areas, and then leave the Site for recycling by shredding. Liquid materials removed (oil, antifreeze, gasoline) will be accumulated in the three [under ground storage tanks ("USTs")]. Solid and gaseous Materials removed (mercury switches, batteries, catalytic converters, and CFCs) will be accumulated inside the building in the Material Accumulation Area.
>
> The materials removed will be accumulated, on Site, and sent off Site for reuse, recycling, or disposal on [an] as required basis.

RX-28 at 8, ¶ 3.0. Mr. Ring similarly testified:

> [The purpose of the ADRRF] is to remove items from automobiles prior to shredding the automobiles that may potentially cause environmental impact or more harm, and those items include mercury switches, batteries, CFCs, oil, motor oil, transmission oil, gasoline, anti-freeze and catalytic converters... We will re-use them, recycle them or dispose of them properly, as we have to.

Tr. 12/9/03, p. 277. *See also*, Tr. 12/10/03, pp. 56, 71-75 (Mr. Ring); Tr. 11/21/03, pp. 51-53 (Anthony Benacquisto).

Regarding the "environmental benefits" of the ADRRF, Mr. Ring stated:

> ... [I]t's typical that shredders do not accept automobiles with gas tanks on them, or the gas tank must be drained. If that's the policy of the facility, you'll often see peddlers ... bringing in old vehicles that will have the gas tank on them, they'll get turned around, they'll have to leave the facility, they'll take the vehicle out onto a side street there, rip the gas tank off the car and leave the gas tank on the side of the road and drag the car back into the facility. That's very typical, and it's very typical for shredders not to accept gasoline tanks... [T]his [ADRRF] will accept automobiles with gas tanks on [the cars] so you shouldn't see that happening. People will bring ... the cars in with the gas tanks on them and they'll be able to sell them as is, so you shouldn't see gas tanks lying around on side streets.

Tr., pp. 278-279. *See also*, RX-28 at 14, ¶ 5.0.

3. The "Steps" Taken

Regarding the timing of the construction of the ADRRF (*i.e.*, the "steps" taken to complete the ADRRF), relevant inquiries are whether the project was undertaken before or after commencement of the enforcement action (going to the motivation of the project), and to what extent the project has been completed at the time of the hearing. The "Summary Report" states that:

> The site was acquired by [Strong Steel] in early 2003 for the purpose of

developing the [ADRRF]. The final engineering design ... began in February of 2003 and was completed in May 2003. Construction permits were obtained and construction began in August 2003 and is scheduled to be completed in December 2003.

RX-28 at 1, ¶ 1.2. At the hearing in this matter on November 20, 2003, Anthony Benacquisto testified that: "I bought the equipment in the last 60 days but the building – we're more than two-thirds of the way there, easily... It will be the second week into December [2003], I believe, we should be operational." Tr. 11/20/03, p. 109. At the hearing in this matter on December 9, 2003, Mr. Ring testified that he believed that the ADRRF "should be up and operating by the end of January, 2004." Tr. 12/19, p. 282. Mr. Ring further testified as follows:

Q: Okay. So, now, what is your understanding of the primary impetus for the 1.7 million dollar construction project they've undertaken?

A: ... I believe there are people in that organization that really want to do the right thing, even if it is going to cost some money. I believe also that there ... was some push with this inspection... I know we started doing – or I started working more on the conceptual design after there were discussions with the EPA in that settlement.

Tr. 12/10/03, p. 108. In addition, Mr. Ring explained that he prepared the ADRRF "Summary Report" entered as RX-28 for the first time on approximately December 5, 2003 (the week before the December 9-10, 2003 hearings) at the direction of Susan Johnson. Tr. 12/10/03, pp. 53, 55.

4. The "Expenditures" Made

Regarding Respondent's "expenditures" on the ADRRF, the "Summary Report" states:

The estimated costs to develop and construct the [ADRRF] are presented below. These estimates include engineering, design, construction, and capital equipment and real estate costs.

ESTIMATED COST

Real Estate	$550,000
Conceptual Design and Review	$100,000
Engineering and Construction	$800,000
Equipment and Miscellaneous	$250,000
Total	$1,700,000

RX-28 at 13, ¶ 4.0. Further, Anthony Benacquisto testified as follows:

Q: About what monetary investment will be required to complete this facility?

...

A: ... We bought the property. I think we spent 550 to $600,000 on the property. Then we did engineering. I think it will be somewhere in the area of $750,000 after engineering costs, and refurbishing the facility, buying the new equipment to install there and what have you.

...

Q: And how much financial investment would be involved in the buildings, construction or equipment?

A: When we're all done, it will be 1.3 to 1.5 [million dollars]. I'm sure other things will pop up between now and then.

...

Q: And about how much of that financial investment has already been made or committed?

A: Oh, we're more than two-thirds of the way there. I bought the equipment in the last 60 days but the building – we're more than two thirds of the way there, easily.

Tr. 11/20/03, pp. 107-109.

Thus, while the record gives some indication of the amount of money spent on the ADRRF *as of the date of hearing*, the evidence is not at all precise. Further, the record contains no estimate as to what portion of the expenditure (past, present, or future) relates to "mere compliance" and what portion of the expenditure goes beyond mere compliance with statutory and regulatory requirements.

On the related issue of whether any expenditures made up to the date of the hearing in this matter would be recouped – that is, whether the ADRRF was simply a profitable investment or "expenditures" for the benefit of the environment – the record is somewhat unclear.[238] Although Mr. Ring speculated on several occasions that the ADRRF may not ultimately turn a profit,[239] Mr. Ring admitted that he was not qualified to so speculate,[240] and no other evidence or testimony was offered on the point. Mr. Ring candidly summarized: "They want to make a profit, but they also want to do the right thing." Tr. 12/10/03, p. 109.

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[238]Respondent admits that: "Unfortunately, the final answer to that question will not be available for several years." RPHB at 82.

[239]*See, e.g.*, Tr. 12/9/03, p. 280; 12/10/03, p. 112.

[240]*See, e.g.*, Tr. 12/9/03, p. 280 ("I'm not on the business side of issues there so I don't know for sure actually what they're looking at."); Tr. 12/10/03, p. 114 ("I think your questions are getting way beyond my understanding of the financial situation... I just don't know how the businesses are set up. I don't know how they work together. I have an estimate of the capital cost that goes into the facility, and that's really all I know.").

5. Discussion and Application of the *Spang* "Guidance"

The *Spang* "guidance" may be summarized as follows: 1) the project must be "environmentally beneficial;" 2) the project must go beyond mere compliance; 3) the evidence must be "clear and unequivocal" and "such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice;" 4) only "past acts" are relevant, a project must have been "commenced" before the hearing, and only expenditures to that point are relevant; 5) a project must be "sufficiently underway" such that "environmental benefits" are not "speculative;" 6) there must be a "nexus" between the project and the violation; and 7) the respondent bears the burden to demonstrate its "steps and expenditures" which "provide the factual basis that will enable the presiding officer to determine whether justice warrants a penalty reduction for those steps and expenditures, and if so, how much." *Spang*, 6 E.A.D. at 250-251.

a. The Project is "Environmentally Beneficial"

While the operational concept of the ADRRF may not be entirely new under the sun,[241] its construction and operation are unquestionably "environmentally beneficial." The facility's existence ensures that hazardous waste which heretofore has been simply dumped into the environment is easily, consistently and properly collected and then disposed of, or even better, potentially recycled and reused. Even more importantly, the facility alleviates the problem of "junked car" peddlers leaving their gasoline tanks littering the surrounding neighborhood. Regarding the former benefit, it is likely that such illegal "dumping" occurred not only at the Strong Steel site, but also at the myriad locations where vehicles were drained prior to shipment to Strong Steel. Regarding the latter benefit, while it is beyond the scope of this Initial Decision to determine who might be liable for the gasoline tanks strewn about the surrounding neighborhood, it is clear that the ADRRF should all but eliminate this blight to the community. Therefore, this Tribunal finds that the ADRRF is "environmentally beneficial."

b. The Project Goes Beyond "Mere Compliance"

As discussed above, the record contains no estimate as to what portion of the expenditures relates to "mere compliance" and what portion goes beyond mere compliance with statutory and regulatory requirements. Further, the record is somewhat unclear as to whether expenditure on the ADRRF was simply a profitable investment or was for the benefit of the environment. However, Complainant implicitly acknowledges that *some* portion of the ADRRF project goes beyond "mere compliance."[242] Indeed, whatever Respondent's motivations for constructing the

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[241] *See, e.g.*, Tr. 11/21/03, p. 45 (Anthony Benacquisto); Tr. 12/10/03, pp. 71-75 (Mr. Ring); Tr. 12/10/03, pp. 134-135, 141-142 (Ms. Brauer).

[242] *See, e.g.*, RPHB at 73 ("The evidence demonstrates that a *majority* of the expenditures for the [ADRRF] were necessary to comply with the laws that Respondent has violated." (emphasis added)); *Id.* at 77 ("Further, as Mr. Ring testified, *very little* of the ADRRF goes beyond compliance..." (emphasis added)); *Id.* at 79 (Therefore, the *majority* of ... [the ADRRF]

ADRRF, it does not appear that Respondent would necessarily be required to do so in order to come into compliance with applicable law. Therefore, this Tribunal finds that a precise accounting of the specific portion of the project which goes beyond mere compliance is not necessary, and that the ADRRF in this case does go beyond "mere compliance."

c. "Clear and Unequivocal" "Manifest Injustice"

Under *Spang*, the evidence must be "clear and unequivocal" and "such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice." *Spang*, 6 E.A.D. at 250. In the present case, unlike in the case of *Catalina Yachts*, application of the other "adjustment factors" do not adequately provide for consideration of the ADRRF. The "clear and unequivocal manifest injustice" *Spang* criteria does not speak to the *amount* of adjustment under the "justice factor,"[243] but simply whether the "justice factor" should be applied at all. In the present case, because the ADRRF is an environmentally beneficial project which goes beyond mere compliance and is not taken into consideration by any other adjustment factor, the evidence is clear and unequivocal that a reasonable person would easily agree that not giving *some* form of credit would be a manifest injustice.

d. Only "Past Acts" are Relevant

Under *Spang*, only "past acts" are relevant, a project must have been "commenced" before the hearing, and only expenditures to that point are relevant. The Board stated: "[A]ny project that has at least been commenced may be considered... [A] project commenced before an *enforcement action* has begun is more likely to show a greater commitment to environmental protection that one *commenced after*." *Spang*, 6 E.A.D. at 250-251 (emphasis added). Thus, a project commenced after an enforcement action has begun, but before the hearing, may be considered. In the present case, the evidence discussed above demonstrates that Respondent acquired the site for the ADRRF in "early 2003;" that the engineering design began in February 2003; that construction began in August 2003; and that Respondent, at the time of hearing, anticipated that the ADRRF "should be up and operating by the end of January, 2004." Tr. 12/19, p. 282. *See also*, RX-28 at 1, ¶ 1.2. Thus, the ADRRF was begun well *after* the commencement of the enforcement action via the filing of the original Complaint in this case on September 28, 2001. Further, Mr. Ring testified that Respondent was motivated to undertake the project, in large measure, due to the enforcement action (Tr. 12/10/03, p. 108, ln. 19-23), and that he prepared the ADRRF "Summary Report" entered as RX-28 for the first time the week before the December 9-10, 2003 hearings at the direction of Susan Johnson. Tr. 12/10/03, pp. 53, 55. However, the evidence discussed above also demonstrates that the project was approximately two-thirds of the way to completion as of the date of the hearing on November 20, 2003. *See*,

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is already required by law..." (emphasis added)).

[243]Complainant's argument that the EPCRA "justice factor" consideration is materially different from the RCRA Penalty Policy's "other unique factors" consideration is addressed *infra*.

e.g., Tr. 11/20/03, p. 109 (Anthony Benacquisto). Therefore, under *Spang*, the ADRRF may be considered under the "justice factor," but should receive considerably less weight than would an environmentally beneficial project which was commenced prior to instigation of an enforcement action. Further, while the evidence in the record does not provide a precise accounting of the amount of expenditure *as of the date of the hearing* in this matter, this Tribunal is cognizant of the guidance articulated in *Spang* that only expenditures to that point are relevant.

e. "Sufficiently Underway" and "Non-Speculative"

Next, under *Spang*, a project must be "sufficiently underway" such that "environmental benefits" are not "speculative." Again, an "environmentally beneficial" project need not be *completed* by the time of the hearing for consideration under the "justice factor." This Tribunal has already discussed the "environmentally beneficial" nature of the ADRRF, and has already found that the record demonstrates that the project was approximately "two-thirds" of the way to completion as of the date of the November 20, 2003 hearing. Therefore, this Tribunal finds that the ADRRF was sufficiently underway such that environmental benefits were not "speculative" as of the time of the hearing in this matter.

f. Nexus Between Project and Violation

Next, under *Spang*, there must be a "nexus" between the project and the violation. The Board in *Spang* explained that:

> [T]he stronger the nexus between a project and a violation, the more likely that the project may warrant a penalty reduction ... For example, in this case, the project involving xylene, a toxic chemical for which Spang filed a late report, may be more likely to warrant a penalty reduction than Spang's other projects, which bear no relationship to the violations for which Spang has been found liable.

Spang, 6 E.A.D. at 251, *including* n.30. *See also*, *Catalina Yachts*, 8 E.A.D. at 217, n.19.

In the present case, the ADRRF directly addresses the RCRA violations found in this Initial Decision. For example, the ADRRF virtually eliminates the possibility of the type of "releases" to which Respondent failed to respond under Count III, and the type of "land disposal" which occurred without treatment under Count VIII and for which Respondent failed to retain records under Count IX. Therefore, a strong "nexus" exists between the ADRRF and the violations.

g. Respondent's Burden

Finally, Respondent bears the burden to demonstrate its "steps and expenditures" which "provide the factual basis that will enable the presiding officer to determine whether justice warrants a penalty reduction for those steps and expenditures, and if so, how much." *Spang*, 6 E.A.D. at 250-251. As discussed above, Respondent's "steps and expenditures" regarding the

ADRRF are demonstrated by the "Summary Report" prepared by Mr. Ring and entered as RX-28, the testimony of Mr. Ring, and the testimony of Anthony Benacquisto. This Tribunal finds that Respondent has met its burden to demonstrate its "steps and expenditures."

6. Complainant's Arguments

Complainant argues, primarily, that *Spang* does not apply to the present case for two reasons: 1) the EPCRA statutory penalty criteria (applied in *Spang* via the EPCRA Penalty Policy) are fundamentally different from the RCRA statutory penalty criteria and Penalty Policy; and 2) the ADRRF is not an "environmentally beneficial project" because it does not go beyond mere compliance, and because it is a "'speculative' future project." CPHB at 76-77.[244]

a. RCRA Does not Enumerate the "Other Matters as Justice May Require" Factor, and "Other Unique Factors" is More Narrow

Regarding Complainant's first argument that "*Spang* does not apply," Complainant asserts:

> *Spang* does not apply to the facts of this case ... [because] *Spang* was an EPCRA case interpreting the EPCRA penalty policy. In this RCRA case, the RCRA Penalty Policy specifically *prohibits* the consideration of an environmentally beneficial project outside of the settlement context...
>
> ... EPCRA has several statutory criteria including "other matters as justice may require." 42 U.S.C. § 11045(b)(1)(C). Conversely, under RCRA there are only two statutory criteria...: "the seriousness of the violation and any good faith efforts to comply with the applicable requirements." 42 U.S.C. § 6928(a). The RCRA Penalty Policy['s] ... "other unique factors" ... is not the same as "other factors [sic] as justice may require." ... [T]he RCRA policy ... makes it clear that the category "other unique factors" "should only be considered in settlements..."
>
> Additionally, the RCRA Penalty Policy specifically limits the use of *environmental projects* to the settlement context. The RCRA policy has a *specific category for environmentally beneficial projects* which requires that, "[a]ll proposals for such projects should be evaluated in accordance with EPA's May 1, 1998, *Supplemental Environmental Projects [("SEP"] Policy*."

CPHB at 76 (citations omitted) (emphases added). This argument fails for the following reasons:

First, Complainant correctly points out that the penalty criteria set forth in RCRA and EPCRA are not identical. Specifically, RCRA provides: "In assessing ... a penalty, the Administrator [or his delegatees] shall take into account *the seriousness of the violation and any good faith efforts to comply* with the applicable requirements." RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3) (emphases added). However, Section 325(b)(1)(C) of EPCRA, 42 U.S.C. §

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[244] *See generally*, CPHB at 73-82; CPHRB at 28-33.

11045(b)(1)(C), states that: "In determining the amount of any penalty..., the Administrator shall take into account the *nature, circumstances, extent and gravity* of the violation or violations and, with respect to the violator, *ability to pay*, any *prior history* of such violations, the degree of *culpability, economic benefit or savings* (if any) resulting from the violation, and *such other matters as justice may require*." (Emphases added). However, while the RCRA penalty statute requires that the Administrator consider *at least* the "seriousness" and "good faith efforts" factors, the Act does not limit the Administrator's consideration *solely* to those factors. *See, e.g., Carroll Oil Co.*, 10 E.A.D. 635, 663, n.26 (EAB 2002). Indeed, the RCRA Penalty Policy itself goes beyond those statutorily mandated criteria, explaining that the "gravity component" addresses the "seriousness factor," and then adding a number of "adjustment factors," including *but not limited to* "good faith efforts to comply." Such extra-statutory "adjustment factors" going neither to "seriousness" nor to "good faith efforts to comply" include "degree of willfulness and/or negligence," "history of noncompliance," "ability to pay," "environmental projects," and "other unique factors." CX-77, Bates 1050-1055. The Penalty Policy specifically explains that it goes *beyond* the explicit statutory factors because "any system for calculating penalties must have enough flexibility to make adjustments that reflect legitimate differences between separate violations of the same provision." CX-77, Bates 1047. Therefore, this Tribunal is not prohibited from considering case-specific circumstances *beyond* the criteria explicitly enumerated in RCRA § 3008(a)(3).[245]

Second, Complainant is flatly incorrect in arguing that the Penalty Policy "prohibits" this Tribunal from considering "other unique factors," as such factors may only be considered in the "settlement context." While the RCRA Penalty Policy does not appear to contemplate the consideration of "other unique factors" outside of the settlement context, Complainant's position in this regard has been squarely rejected by the EAB. In *Carroll Oil Co.*, 10 E.A.D. 635 (EAB 2002), the Board held:

> In deciding to consider Carroll's ability to pay claim, we acknowledge that the Region and ALJ appear to be correct in observing that *the [RCRA] Penalty Policy does not itself contemplate consideration of a respondent's ability to pay outside the context of settlement negotiations*. However, in considering a respondent's ability to pay in *Central Paint, supra*, the Chief Judicial Officer stated that although the relevant statutory penalty factors in RCRA only required consideration of "seriousness of the violation" and "good faith efforts," the "statute does not prohibit taking into account other criteria." *Cent. Paint*, 2 E.A.D. at 314 n.10. He concluded that the Administrator, in his or her discretion, "could consider additional factors in assessing a penalty." *Id.; see also In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 774 n.11 (EAB 1998) (stating that in assessing penalty under section of Emergency Planning and Community Right-to-Know Act that

[245]Further, this Tribunal notes that, even if it were limited to considering only the specific criteria enumerated in RCRA § 3008(a)(3) – which it is not – the penalty factor of "any good faith efforts to comply" is broad enough to encompass a consideration of Respondent's ADRRF in this case.

> lacked statutory penalty factors, Agency had the discretion to use as guidance penalty factors from other sections of the statute.) We similarly exercise our discretion in this case.

Carroll Oil Co., 10 E.A.D. at 663, n.26 (citations omitted) (emphasis added). This Tribunal similarly exercises its discretion to consider "other unique factors" in assessing a penalty in this Initial Decision. Further, in arguing that "the RCRA Penalty Policy specifically *prohibits* the consideration of an environmentally beneficial project outside of the settlement context" (CPHB at 76), Complainant fundamentally misconstrues the nature and role of agency penalty policies. Although "[a]gency-issued penalty policies provide a framework that allows a presiding officer to apply his or her discretion to statutory penalty factors...," (*In re Allegheny Power Service Corp. and Choice Insulation, Inc.*, 9 E.A.D. 636, 655 (EAB 2001) (citations omitted)), "the [EAB] has repeatedly explained that this regulatory requirement does not compel an ALJ to use a penalty policy in making his or her penalty determination. Rather, 'a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand.'" *John A. Capozzi, d/b/a/ Capozzi Custom Cabinets*, RCRA (3008) Appeal No. 02-01, slip op. at 30, 11 E.A.D. __ (EAB, Mar. 25, 2003) (citations omitted).

Third, Complainant appears to confuse the RCRA Penalty Policy's "environmental projects" adjustment factor with the "other unique factors" adjustment factor, as those factors relate to "Supplemental Environmental Projects" ("SEPs"). Complainant contends that:

> ... [T]he RCRA Penalty Policy specifically limits the use of ***environmental projects*** to the settlement context. The RCRA policy has a ***specific category for environmentally beneficial projects*** which requires that, "[all proposals for such projects should be evaluated in accordance with EPA's May 1, 1998, ***Supplemental Environmental Projects [("SEP"] Policy***."

CPHB at 76 (emphases added). Under the heading of "Environmental Projects," the RCRA Penalty Policy states: "All proposals for such projects should be evaluated in accordance with EPA's May 1, 1998, Supplemental Environmental Projects Policy and any subsequent amendments to the SEP Policy." CX-77, Bates 1054 (footnote omitted).[246] However, the RCRA Penalty Policy contains no such "SEP" language under the heading of "Other Unique Factors," which is a wholly separate "adjustment factor." *See* CX-77, Bates 1054-1055. Indeed, quite

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[246]Further, the EAB in *Spang* held that "the projects are not in fact SEPs ..., and therefore the SEP Policy does not provide an appropriate ... basis for adjusting the penalty downward." *Spang*, 6 E.A.D. at 245. The Board reasoned that projects which were "wholly or partially completed" could not be "SEPs" because they "no longer have potential value as *quid pro quo* in settlement negotiations." *Id.* at 249, n.27. However, the Board nevertheless *remanded* the penalty assessment for consideration "without regard to the SEP Policy, and any reductions should be justified *solely on the basis of the 'other factors as justice may require' adjustment factor*." *Id.* at 245 (emphasis added).

contrary to the conclusion reached by Complainant, the fact that "environmental projects" are to be considered under the SEP Policy (*i.e.*, *future* projects), suggest that "other unique factors" contemplates projects which are *not* to be considered under the SEP Policy (*i.e.*, *wholly or partially completed* projects). In any event, this Tribunal does not consider Respondent's ADRRF project under the "Environmental Projects" adjustment factor, but rather under the "Other Unique Factors" adjustment factor.

b. The ADRRF is Not an "Environmentally Beneficial Project"

Regarding Complainant's second argument that "*Spang* does not apply," Complainant asserts that the ADRRF is not an "environmentally beneficial project" because: 1) it does not go beyond mere compliance, and 2) it is a "speculative" future project. CPHB at 77.

This Tribunal has already addressed these two considerations, *supra*, in applying the *Spang* guidance. For the reasons discussed above, this Tribunal has found that the ADRRF is an "environmentally beneficial" project, that the ADRRF in this case does go beyond "mere compliance" with applicable statutory and regulatory requirements, and that the ADRRF was sufficiently underway such that the environmental benefits were not "speculative" as of the time of the hearing in this matter. Therefore, Complainant's arguments in these respects are rejected.

7. Conclusion

For all of the reasons discussed above, this Tribunal finds that it may consider Respondent's ADRRF project in mitigation of the proposed penalty under the "other unique factors" criteria articulated in the 2003 RCRA Penalty Policy, and rejects Complainant's arguments to the contrary. This Tribunal does, therefore, so consider the ADRRF project.

Respondent argues that the proposed penalty in this case should be reduced under the "other unique factors" component due to "the expenditures that Strong Steel has made to construct, *and will make to operate*, its [ADRRF], and the environmental benefits that it will achieve..." RPHB at 75 (emphasis added). As an initial matter, this Tribunal rejects Respondent's contention that *future* expenditures may be considered in this regard, as *Spang* clearly states that only expenditures up to the time of the hearing are relevant.

However, Respondent, via RX-28 and the testimony of Mr. Ring and Mr. Benacquisto, has met its burden under *Spang* and *Catalina Yachts* to show that its "steps and expenditures" demonstrate: 1) that the ADRRF is environmentally beneficial; 2) that the ADRRF goes beyond "mere compliance;" 3) that the evidence is "clear and unequivocal" such that "a reasonable person would easily agree that not giving some form of credit would be a manifest injustice;" 4) that the ADRRF was commenced before the first day of hearing in this matter; 5) that the ADRRF was "sufficiently underway" such that its "environmental benefits" were not "speculative;" and 6) that there is a strong "nexus" between the ADRRF and the violations found in this Initial Decision.

That being said, the evidence demonstrates that the ADRRF was begun well *after* the commencement of the enforcement action, which, according to Mr. Ring, was a significant motivation for the project. Further, Mr. Ring prepared the ADRRF "Summary Report" for the first time the week before the December 9-10, 2003 hearings at the direction of Susan Johnson. However, the evidence also demonstrates that the project was approximately two-thirds of the way to completion as of the date of the hearing on November 20, 2003. Therefore, the ADRRF may be considered under the "other unique factors" adjustment factor, but should receive considerably less weight than would an environmentally beneficial project which was commenced prior to instigation of an enforcement action. Further, while the evidence provides an accounting of the relevant expenditures on the ADRRF sufficient to support a modest reduction in the proposed penalty, Respondent has failed to present a precise accounting regarding expenditures actually made as of the dates of the hearing, or regarding a precise division between expenditures which accrued to those aspects of the ADRRF which go beyond "mere compliance" and those which do not.

In light of all of the foregoing, this Tribunal finds that Respondent's ADRRF project warrants a 5% reduction from the total proposed penalty of $307,450. Therefore, under the "other unique factors" component of the 2003 RCRA Penalty Policy, the total civil penalty assessed against Respondent in this case shall be reduced by the amount of $15,373.

VI. Compliance Order ("RCRA Closure")

The EAB has observed that "[RCRA] confers *broad discretion* on the Administrator (and derivatively to his delegatees) to fashion appropriate compliance orders for RCRA violations." *Pyramid Chemical Company*, 11 E.A.D.__, RCRA-HQ-2003-0001, slip op. at 40, n.40 (EAB, Sept. 16, 2004) (emphasis in original), *quoting A.Y. McDonald Indus.*, 2 E.A.D. 402, 428 (CJO 1987) (emphasis added), and *citing Arrcom, Inc.*, 2 E.A.D. 203, 210-14 (CJO 1986). This authority flows from RCRA § 3008(a), 42 U.S.C. § 6928(a), and 40 C.F.R. § 22.37(b).

The Amended Complaint seeks a "Compliance Order" and proposes, in part, the following language:

> 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(A). Complainant's Post-Hearing Reply Brief clarifies: "... [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 (emphases added). *See also*, CPHRB at 19, 51-55. Respondent argues that "there is no need to issue a compliance order ... [because] Strong Steel has remediated the spill area on its property to levels that are safe for generic residential use, to the satisfaction of MDEQ..." RPHB at 83-84 (capitalization omitted). Following the post-hearing briefing in this case, and pursuant to this

Tribunal's Order of August 3, 2004, the parties each filed an additional post-hearing "RCRA Closure Brief."

This Tribunal has already found under Count III, *supra*, that the Strong Steel facility is a "treatment, storage, or disposal facility" ("TSD facility"), and that, under Count VII, *supra*, Respondent has disposed of hazardous waste and stored hazardous waste at its TSD facility without a permit in violation of Section 3005 of RCRA, 42 U.S.C. § 6925; 40 C.F.R. § 270.10(f); and MAC § 299.9502(1).[247] That is, Respondent operated a TSD facility without a permit. Respondent has not applied for or obtained a permit to operate a TSD facility. Therefore, Respondent is either still operating a TSD facility without a permit, or it has ceased to operate a TSD facility. If Respondent is still operating a TSD facility, then it must apply for and obtain a permit pursuant to RCRA § 3005, 40 C.F.R. Part 270, Subpart B, and MAC § 299.9502. Alternatively, if Respondent has ceased to operate a TSD facility, then it must certify to the Director of the MDEQ that the facility has been "closed" in accordance with an approved "closure plan" pursuant to MAC § 299.9613 (quoted below).

In Respondent's "Reply Memorandum in Support of Respondent's Motion to Disregard Arguments in Region 5's Post-Hearing Reply Brief Regarding RCRA Closure" ("Respondent's RCRA Argument Reply"), Respondent stated that: "... Strong Steel certainly has no desire to become a permitted TSD... The only true issue is whether ... Strong Steel should be required to undergo RCRA closure." Respondent's RCRA Argument Reply at 3, n.3. This Tribunal does not speculate as to whether Respondent may or may not choose to become a permitted TSD facility. However, in light of Respondent's stated disinterest in applying for a permit, this Initial Decision will not delve further into that process,[248] but will instead focus on the question of whether, assuming that Respondent decides *not* to "become a permitted TSD facility," Respondent must comply with the "closure and post-closure" requirements applicable to TSD facilities under RCRA and its Michigan and federal implementing regulations. For the reasons discussed below, this Tribunal finds that Respondent must so comply.

A. The Law

The Michigan Administrative Code addresses "closure and postclosure" of TSD facilities at MAC § 299.9613, which states:

> (1) The owner or operator of a hazardous waste treatment, storage, or disposal facility *shall comply with the closure and postclosure provisions of 40 C.F.R. part 264, subpart G*, except 40 C.F.R. §§ 264.112(d)(1), 264.115, and

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[247]Indeed, Judge McGuire in his Order on Accelerated Decision found Respondent to have disposed of hazardous waste without a permit as alleged in Count VII of the original Complaint.

[248]*See* Section 3005 of RCRA, 42 U.S.C. § 6925; 40 C.F.R. Part 270, Subpart B; and MAC § 299.9502.

264.120.

(2) The owner or operator shall notify the director[249], in writing, not more than 60 days before the date on which the owner or operator expects to begin partial or final closure of any or all hazardous waste management units at the treatment, storage, or disposal facility. A copy of the current or updated partial or final closure plan for the hazardous waste management unit or units that are being closed shall accompany the notification.

(3) Within 60 days of completion of closure of each hazardous waste management unit at a facility, and within 60 days of the completion of final closure, the owner or operator shall submit, to the director, by registered mail, a certification that the hazardous waste management unit or facility, as applicable, has been closed in accordance with the specifications in the approved closure plan. The certification shall be signed by the owner or operator and by an independent registered professional engineer and shall include all of the following supporting documentation:

(a) The results of all sampling and analysis.

(b) Sampling and analysis procedures.

(c) A map showing the location where samples were obtained.

(d) Any statistical evaluations of sampling data.

(e) A summary of waste types and quantities removed from the site and the destination of these wastes.

(f) If soil has been excavated, the final depth and elevation of the excavation and a description of the fill material used.

(4) Any documentation not listed in subrule (3) of this rule that supports the independent registered professional engineer's certification shall be furnished to the director upon request until the director releases the owner or operator from the financial assurance requirements for closure pursuant to the provisions of R. 299.9703.

(5) Not later than 60 days after completion of the established postclosure care period for each hazardous waste disposal unit, the owner or operator shall submit, to the director, by registered mail, a certification that the postclosure care period for the hazardous waste disposal unit was performed in accordance with the specifications in the approved postclosure plan. The certification shall be signed by the owner or operator and an independent registered professional engineer. Documentation supporting the independent registered professional engineer's certification shall be furnished to the director upon request until the director releases the owner or operator from the financial requirements for postclosure pursuant to the provisions of R. 299.9703.

(6) The environmental protection standards established pursuant to the provisions of part 201 of the act shall be used to perform closure and postclosure of a facility under part 111 of the act if the limits are not less stringent than those

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[249]The word "director" in MAC § 299.9613 refers to the Director of the MDEQ. *See* MAC § 299.9102(z).

allowed pursuant to the provisions of RCRA.

(7) The provisions of 40 C.F.R. part 264, subpart G, except 40 C.F.R. §§ 264.112(d)(1), 264.115, and 264.120, are adopted by reference in R. 299.11003. For the purposes of this adoption, the word "director" shall replace the words "regional administrator" and the words "R 299.9703(8) and R. 299.9710(17)" shall replace the word "40 C.F.R. § 265.140(d)."

MAC § 299.9613 (emphasis added).

The Federal Rules with which TSD facilities must comply pursuant to MAC § 299.9613(1), in turn, address "Closure and Post-Closure" of TSD facilities at 40 C.F.R. §§ 264.110-.120 (*i.e.*, "Subpart G"). As noted above, MAC § 299.9613(1) states that TSD facilities "shall comply with the closure and postclosure provisions of 40 C.F.R. part 264, subpart G, *except 40 C.F.R. §§ 264.112(d)(1), 264.115, and 264.120*." (Emphasis added). However, the provisions of MAC § 299.9613(2) stand in lieu of 40 C.F.R. § 264.112(d)(1) ("Notification of partial closure and final closure"); the provisions of MAC §§ 299.9613(3)-(4) stand in lieu of 40 C.F.R. § 264.112(115) ("Certification of closure"); and the provisions of MAC § 299.9613(5) stand in lieu of 40 C.F.R. § 264.120 ("Certification of completion of post-closure care"). Finally, 40 C.F.R. § 264.111(c) states that: "The owner or operator *must* close the facility in a manner that ... [c]omplies with the closure requirements of this subpart..." (Emphasis added).

While a thorough recitation of the regulatory requirements is not necessary, a brief overview, here, is useful. All hazardous waste management facilities must have a "closure plan." MAC § 299.9613(1); 40 C.F.R. §§ 264.110(a)(1), 264.112(a).[250] The TSD facility must complete closure in accordance with the approved closure plan within 180 days after receiving the final volume of hazardous waste. MAC § 299.9613(1); 40 C.F.R. § 264.113(b). The TSD facility must notify the MDEQ within 60 days of the date on which the owner or operator expects to begin closure. MAC § 299.9613(2). Within 60 days of completion of closure, the TSD owner or operator must certify to the MDEQ that the facility has been "closed" in accordance with an approved "closure plan," and such certification must be signed by the owner or operator and by an independent registered professional engineer. MAC § 299.9613(3). Similarly, within 60 days after completion of the *post*-closure care period, the owner or operator must certify to the MDEQ that the post-closure care period was performed in accordance with the approved post-closure plan, and such certification must be signed by the owner or operator and an independent registered professional engineer. MAC § 299.9613(5).

B. The Facts

Respondent argues that "no useful purpose would be served" by requiring RCRA closure because the excavations performed by Inland Waters on April 11, 2000 and March 1, 2001 were

[250]The "closure plan" (and "post-closure plan") were to have been submitted along with the "permit application" to the MDEQ for pre-approval. MAC § 299.9613(1); 40 C.F.R. §§ 264.112(a)(1), 270.14(b)(13).

"more than adequate to protect human health and the environment." Respondent's Post-Hearing Reply Brief Regarding RCRA Closure ("Respondent's Closure Brief" or "RCB") at 1 (capitalization omitted).

As previously discussed, on April 11, 2000, Inland Waters excavated contaminated soil in the three areas where Ms. Carroll and Mr. Powers had collected samples. Inland Waters performed the excavation at the direction of CRA, which provided "documentation, reporting and preparation of closure reports" and directed Inland Waters regarding "how deep to excavate." Tr. 12/9/03, p. 62; 12/10/03, p. 18. Although Mr. Ring of CRA "supervised" the project, (Tr. 12/9/03, p. 62), he only "stopped out at the site ... for a few minutes..." Tr. 12/10/03, p. 14.[251] Inland Waters also took some direction from Mr. Beaudoin regarding "where to excavate." Tr. 12/10/03, p. 18. Inland Waters determined how far to excavate based on "visual observations" and the use of a "PID meter" ("photo ionization detector," or "gas sniffer") to determine if volatiles were present, had no written plans for excavation, and had not contacted MDEQ regarding the excavation. Tr. 12/10/03, pp. 16-17. Inland Waters excavated approximately one cubic yard of soil from the "battery storage / temporary compaction area" and placed it into two 55-gallon drums, which were then "stored on [Strong Steel] property." RX-10, p.3. Inland Waters also excavated soil from the "two areas of significantly deteriorated asphalt immediately south of the Temporary Compaction Area" and placed it into two 20-cubic yard "roll-off boxes." *Id.* This material was disposed of on April 20, 2000. RX-10, Att. F; CX-101, Bates 1785-86; CX-18, Bates 219-20. All of the excavation was done to a depth of less than one foot. RX-10, p. 3. Six "verification samples" were collected from the excavated areas and sent to "Houston Laboratories" for analysis. RX-10, Table 1 and Att. C; Tr. 11/19/03, p. 45; CX-101, Bates 1733-66. Four of the samples were collected from the southern "significantly deteriorated asphalt area," none were collected from the northern "significantly deteriorated asphalt area," and two were collected from the "temporary compaction area." RX-10, Figures 2 and 3. All of the April 11, 2000 verification samples were collected from the "bottom" of the excavated sites, and no sidewall samples were collected from any of the excavated sites. RX-10, p. 3; Tr. 12/9/03, pp. 27, 270. The samples were analyzed for target compound list volatile organic compounds ("TCL VOC's"), methyl tert-butyl ether ("MTBE"), and RCRA metals (arsenic, barium, cadmium, chromium, lead, mercury, selenium, and silver), using a "totals analysis." RX-10, p. 2, Tables 1 and 2; Tr. 11/19/03, pp. 45-46; Tr. 12/10/03, pp. 27-28. The results of these analyses are set forth in RX-10, Tables 1 & 2, Att. C; CX-101, Bates 1722-1724, 1733-1766. Respondent summarizes these results, in part, by stating that: "[Sample] S-JL-003 was collected from the eastern edge of the [southern deteriorated asphalt area] from an approximate depth of 1 foot [below ground surface] and ... lead was detected at 4,040 mg/kg, above the Residential DCC [("Direct Contact Criteria")] of 400 mg/kg and the Industrial DCC of 900 mg/kg." RX-10, p. 4. *See also*, RX-10, Table 2, p. 1; CX-101, Bates 1723.

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[251]Mr. Ring clarified: "Q: How long were you at the site? A: Not long, 15, 20 minutes... Jeff Lambert [of CRA] was doing the oversight. I was the project manager. ... Q: Now, who's Jeff Lambert? A: At the time he was an engineer working under my direction." Tr. 12/10/03, p. 17. However, no testimony was offered from Mr. Lambert.

On March 1, 2001, Inland Waters returned to the Strong Steel site for a second excavation because one verification sample collected and analyzed in April, 2000 had shown significantly elevated levels of lead, as described above. RX-10, p. 4, Tr. 12/10/03, p. 29. Inland Waters, again under the supervision of Mr. Ring (although Mr. Ring was only present for "maybe half an hour" (Tr. 12/10/03, p. 26)),[252] excavated an area approximately 25 feet long, 25 feet wide, and three feet deep in the southernmost "significantly deteriorated asphalt area" and placed the material into two 20-cubic yard roll-off boxes. Tr. 12/10/03, pp. 26, 28-30; RX-10, p. 5; CX-101, Bates 1713. This material was disposed of on April 19, 2001. RX-10, Att. F; CX-101, Bates 1783-84; CX-18, Bates 217-18. Six "verification samples" were collected from the excavated area and sent to the "Houston Laboratories" for analysis. RX-10, p. 4, Table 1, Figure 3, and Att. C; CX-101, Bates 1767-75. Four sidewall and two floor samples were taken. RX-10, p. 4; CX-101, Bates 1712. The samples were analyzed for lead only. RX-10, p. 4, Tables 1 and 2, Att. C; CX-101, Bates 1712, 1722-24, 1767-1775. Respondent summarizes these results by stating that: "Analytical results indicate that all verification samples submitted for lead analysis were below applicable Michigan Act 451, Part 21 Generic Residential Soil [DCC] for lead of 400 mg/kg." RX-10, p. 4. *See also*, RX-10, Table 2, p. 2; CX-101, Bates 1724.

On April 18, 2001, Strong Steel disposed of the two 55-gallon drums of material which had been excavated on April 11, 2000 from the "battery storage / temporary compaction area," and which had been stored at the Strong Steel site from April 11, 2000 until April 18, 2001. RX-10, p. 3, Att. E; CX-101, Bates 1781.

CRA sent a letter dated June 19, 2001 to Lynn Buhl (Director, Southeast Offices, MDEQ) describing the excavation/remediation activities performed by Inland Waters. RX-10; CX-101, Bates 1709-1794. This letter was signed by "Frank W. Ring, P.E.[253]," (CX-101, Bates 1718), who testified that: "This letter was written ... and sent to the [MDEQ] in order to obtain a closure of the issues that were identified by U.S. EPA in August of '99." Tr. 12/19, p. 270.[254] However, Mr. Ring later stated that the letter does *not* speak to "RCRA closure," it was not signed by a representative of Strong Steel, and it was not "certified" by Mr. Ring as a "Professional

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[252]Again, Mr. Ring clarified: "Q: ... Who is Tom Gutpell? A: Mr. Tom Gutpell worked for CRA as a technician, and he was our field oversight during the second excavation at the site... Q: ... How long were you there at the site? A: Again, maybe half an hour. Q: And what was your role at that point in time? A: I was the project manager. Q: And was Mr. Lambert again the oversight person? A: No, Mr. Tom Gutpell was." Tr. 12/10/03, pp. 25-26. However, no testimony was offered from Mr. Gutpell.

[253]"P.E." stands for "Professional Engineer." *See, e.g.*, Tr. 12/10/03, p. 43.

[254]Under the heading of "Background," the CRA letter states that: "Additionally, the U.S. EPA has requested [Strong Steel] to implement changes in raw material handling and to obtain an approval / *closure* of the Temporary Compaction Area and the two areas of asphalt with deterioration identified above from the MDEQ." RX-10, p. 2; CX-101, Bates 1710 (emphasis added).

Engineer." Tr. 12/10/03, pp. 47-48. Mr. Ring further clarified that the letter entered as RX-10 was not intended to be a "closure report under RCRA." *Id.* at 98.

In response to CRA's June 19, 2001 letter (RX-10), the MDEQ sent a letter dated April 15, 2002, from Ray Spalding (MDEQ, Southeast Michigan District Office, Environmental Response Division) to Ms. Susan Johnson of "Soave Enterprises." RX-11; CX-101, Bates 1795-1796. That letter states, in part:

> Based on U.S. EPA observations, the site was characterized for [VOCs] and RCRA metals. Specifically, BTEX, MTBE and RCRA metals, excluding mercury and copper, were used to drive the cleanup.
>
> We have evaluated the data and the contaminant levels were below generic residential criteria for the parameters tested at the three areas of concern. *We do not know if the entire property meets generic residential criteria. If a site closure is desired pursuant to Part 201 of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended, M.C.L. 324.20101, et seq., then the entire site would need to be addressed through a Remedial Action Plan (RAP).*
>
> Please note that our evaluation of the remedial measures *only pertains to those contaminants identified in the three areas of concern outlined in the CRA report. The MDEQ expresses no opinion as to other contaminants beyond those identified and remediated in the three areas of concern. The MDEQ also makes no warranty as to the fitness of this site for any general or specific use...*

RX-11, pp. 1-2; CX-101, Bates 1795-1796 (emphasis added).

Regarding the CRA letter to MDEQ (RX-10) and MDEQ's response to Respondent (RX-11), Mr. Ring testified as follows:

> Q: And you had indicated ... that there wasn't any requirement to submit that information. That's under *Superfund [CERCLA], right?* This is what would be considered a voluntary clean up under Superfund; is that correct?
> A: *That is the way that I looked at it, yes*.
> Q: Okay. And in terms of how [M]DEQ handles voluntary clean ups, it's sort of buyer beware; is that correct? In other words, the entity may proceed on their own and they've given them directions generally, but they don't give you any assurances that what you've done is adequate do they?
> A: They will ... give you a form of agreement similar to that letter, but *they don't give you anything that's all inclusive that says you're totally off the hook forever*.

Tr. 12/10/03, pp. 105-106 (emphasis added). Mr. Ring further explained that the MDEQ's "Environmental Response Division," from whence RX-11 came, is *not* the entity responsible for reviewing closure plans under RCRA in the State of Michigan. *Id.* at 48-49. Indeed, Respondent

explains that "Part 201 of the Natural Resources and Environmental Protection Act ... [is] Michigan's counterpart of Superfund..." (RPHB at 14), and that "MDEQ's Environmental Response Division administers Part 201 ... [while] MDEQ's Waste Management Division administers Part 111." RCB at 6, n.3. Finally, Respondent concedes that RX-11 "is not an approval of a RCRA closure." RCB at 15.

C. Respondent's Arguments

Respondent makes three arguments in support of its position that Strong Steel should not be required to perform a "RCRA closure:" 1) RCRA closure is unnecessary in light of the Inland Waters excavations (*See* RCB at 1-10); 2) the Inland Waters excavations complied with "the provisions of part 201 of the act" referenced in MAC § 299.9613(6) and therefore satisfy the "RCRA closure" provisions (*Id*. at 5-6); and 3) it would be "unfair" to require RCRA closure because Strong Steel "relied" on the direction of the U.S. EPA and MDEQ in commissioning the Inland Waters excavations (*Id.* at 10-15). For the reasons discussed below, these arguments are rejected.

1. RCRA Closure is Unnecessary

Respondent's argument that RCRA closure is unnecessary is actually composed of two closely related but distinct arguments. First, Respondent argues that RCRA closure is unnecessary because there is no "practical need" for it in light of the Inland Waters excavations. That is, the excavations already performed, while not "technically" in accord with RCRA closure "procedure," achieved the purposes of RCRA closure, so that to require "formal" RCRA closure would elevate form over substance with no benefit to human health or the environment. Second, Respondent suggests that, under applicable case law, the Inland Waters excavations renders the issue of "RCRA closure" legally moot.

a. "No Practical Need" for RCRA Closure

First, Respondent argues that "there is no practical need ... [for] Strong Steel to go through the formal RCRA closure process" (RCB at 10), because the "dig and haul" (*Id*. at 4, 7) excavations/Remediation performed by Inland Waters on April 11, 2000 and March 1, 2001 were "more than adequate to protect human health and the environment." *Id.* at 1 (capitalization omitted).

The parties argue at great length regarding the "quality" of the Inland Waters excavations. For example, Complainant contends that "[v]isual observations [are] insufficient to determine [the] extent of [the] clean-up;" that the "PID [m]eter is insufficient to determine [the] acceptability of [the] clean-up," and that "Respondent was required to test according to [the] TCLP test methods." Complainant's Post-Hearing Reply Brief Related to RCRA Closure ("Complainant's Closure Brief" or "CCB") at 8-9. Respondent contends that Complainant's criticisms "are ill-founded, unfair, and based on a poor understanding of basic environmental cleanup procedures." RCB at 2. After explaining why it believes that the Inland Waters

excavations adequately ensured removal of the hazardous waste at the Strong Steel site (*e.g.*, "generous areas" of potential contamination were removed, the visual observations and PID meter were adequate to measure the extent of the contamination, sidewall samples were or were not taken due to the relative depths of the excavations, the project was adequately supervised,[255] TCLP test methods were not necessary, et cetera (*Id*. at 2-8)), Respondent summarizes:

> The cleanup at Strong Steel was performed by an experienced remediation contractor, overseen by one of the world's leading environmental consulting firms, and samples were analyzed by independent laboratories. MDEQ was quite satisfied with the level of its involvement. The areas at Strong Steel's property on which gasoline had been spilled were remediated so that they are now safe even for residential use...

Id. at 8 (citation omitted). Respondent therefore concludes that "there is no practical need to issue a compliance order requiring Strong Steel to go through the formal RCRA closure process..." *Id.* at 10.

This Tribunal finds that it need not parse the intricate factual details of the Inland Waters "remediations" in an attempt to divine whether or not those "remediations" collectively met the intent or purpose, if not the letter, of the law. Indeed, the entire *purpose* of meeting the "letter of the law" – that is, providing the MDEQ with a "closure plan" for pre-approval along with the TSD facility permit application, notifying the MDEQ before beginning closure, completing closure in accordance with the closure plan, certifying to the MDEQ that the facility has been "closed" in accordance with the "closure plan," and certifying to the MDEQ that the post-closure care period was performed in accordance with the post-closure plan – is to allow *the MDEQ to exercise its authority*, delegated by the U.S. EPA pursuant to RCRA § 3006, to ensure that the

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[255]Complainant argues: "... no one from CRA management was supervising Inland Waters..." CCB at 7, n.6. Respondent responds: "Region 5 conveniently ignores the fact that CRA's Jeff Lambert and Tom Gutpell did the oversight work, and were present on the site for the full time. (Tr. VI at 17-18, 21-22, 25)." RCB at 4. As noted above, while Mr. Ring testified that Mr. Lambert and Mr. Gutpell performed the "oversight" for CRA under the direction of Mr. Ring as the "project manager," no testimony was offered from Mr. Lambert or Mr. Gutpell. Further, this Tribunal notes, in this regard, that Mr. Ring testified: "... Jeff Lambert was ... the field engineer ... overseeing the work at the Strong Steel site in April of 2000. *He ... arrived at the site and the contractor had already filled the drums with soil*. He saw three drums there and thought there were three drums of soil... I talked with Jeff Lambert relatively recently ... and ... he told me that *he had not seen them actually fill the drums*, he just saw three drums there..." Tr. 12/9/03, pp. 273-274 (emphasis added). Thus, while Mr. Ring, who was "supervising" Mr. Lambert, was only present at the site for "15 or 20 minutes" on April 11, 2000, Mr. Lambert *also* was clearly not present at the site until some time *after* the material had been excavated from the "battery storage / temporary compaction area." Therefore, Respondent's statement that Mr. Lambert was "present on the site for the full time" does not appear to be accurate.

"closure performance standards," set forth at 40 C.F.R. § 264.111[256] and incorporated by MAC § 299.9613(1), are met. As discussed *supra*, the record in this case is clear that Respondent did not have an approved closure plan, did not notify the MDEQ prior to beginning the Inland Waters "remediations," and did not certify to the MDEQ that the Strong Steel site had been "closed" in accordance with the Michigan or federal implementing regulations of RCRA. That is, Respondent clearly did not meet the "letter of the law," and this Tribunal will not speculate as to whether the MDEQ, had it been given a chance to do so, would have found that the "remediation" nevertheless met the purposes of the RCRA "closure" provisions and their Michigan implementing regulations.

Respondent dismisses the importance of "process," contending that "[t]he fact that MDEQ did not review the cleanup plan in advance is a criticism that is based solely on RCRA process, not on the quality of the cleanup." RCB at 7. Respondent's argument misses the point that the "RCRA process" is the very thing that ensures the "quality of the cleanup." Respondent in this case may not evade that process – a process required of every other TSD facility – and then ask this Tribunal for a *post hoc* stamp of approval. Complainant's argument in this regard is well taken that "[i]t is through the State's closure process that the State ensures a proper clean-up is conducted. It is through that process that the various arguments of 'equivalent' clean-up are vetted and resolved – not [before this Tribunal]." CCB at 15.[257]

For example, in Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371 (7th Cir. 1986), the court held that an applicant for a hazardous waste management permit did not have standing to challenge remarks made by the U.S. EPA Administrator "concerning the scope of closure of the ... facility," which remarks had been made during the permit denial public comment proceedings. Northside, 804 F.2d at 373. As explained by the court in U.S. v. Conservation Chemical Co. of Illinois, 660 F. Supp. 1236 (N.D. Ind. 1987), "Northside was not challenging the actual denial of its permit application; rather, it was only attempting to challenge the EPA's comments concerning the area where Northside allegedly disposed of hazardous waste." Conservation Chemical, 660 F. Supp. at 1243. The Seventh Circuit in Northside held:

> Northside's argument ... fails to account for the fact that the State of Indiana has received authorization, pursuant to 42 U.S.C. § 6926, to determine the closure requirements for any facility in that state whose interim status has been terminated

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[256]40 C.F.R. § 264.111(b) states that: "The owner or operator must close the facility in a manner that: ... Controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated run-off, or hazardous waste decomposition products to the ground or surface waters or to the atmosphere..."

[257]This Tribunal expresses no opinion regarding its authority in general to determine whether such an "equivalent closure" meets the RCRA closure requirements or the closure requirements of an authorized State, but finds only that, *in the present case*, the matter is more appropriately within the purview of the Michigan Department of Environmental Quality.

> by the EPA. Once the state agency has received authorization for its program, it shall "carry out such program in lieu of the Federal program." 42 U.S.C. § 6926[(b)]. The EPA simply does not have the legal authority to determine whether, for what purposes, or which areas of Northside's facility must be closed. The State of Indiana alone is responsible for these determinations... Hence, in and of itself, the fact that the EPA made comments on the scope of closure in the course of denying Northside's Part B permit application does not constitute an injury to Northside.

Northside, 804 F.2d at 381-382 (citations omitted). Thus, in an "authorized" state, the determination of the *scope* of the closure plan – that is, the *specific* closure requirements necessary in a *particular case* to protect human health and the environment – is committed in the first instance to the judgment of the authorized state. Therefore, the court in Northside declined to "determine to proper scope of closure..." Northside, 804 F.2d at 386.[258]

In the present case, pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), the Administrator of the U.S. EPA "grant[ed] final authorization to the State of Michigan for the base RCRA program ..., so that it may operate in lieu of the Federal program, subject to the limitations on its authority imposed by the Hazardous and Solid Waste Amendments of 1984." 51 Fed. Reg. 36804, 36804-36805 (Oct. 16, 1986). The Final authorization was effective October 30, 1986. *Id.* at 36805.[259] *See also*, 62 Fed. Reg. 61175 (Nov. 14, 1997) (CX-63, Bates 758). Therefore, as did the Seventh Circuit in Northside, this Tribunal declines Respondent's invitation to determine

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[258]That being said, it is important to note that Northside is a narrow decision relating to the initial determination as to the proper *scope* of closure, and it does *not* hold that the U.S. EPA lacks the authority to bring an independent action to enforce the "closure provisions" of RCRA *or* a state statutory scheme, even in an "authorized state." *See, e.g.*, U.S. v. Conservation Chemical Co. of Illinois, 660 F. Supp. 1236 (N.D. Ind. 1987) (rejecting the defendants' argument that "only Indiana can enforce the closure provisions of its state statutory scheme" (*Id*. at 1243), and holding that "[t]hat the EPA has the power to bring an independent enforcement action, even in a RCRA-authorized state like Indiana, is clear." (*Id*. at 1244)). *See also*, U.S. EPA v. Environmental Waste Control, Inc., 698 F. Supp. 1422, 1435-1438 (N.D. Ill. 1988). Under Section 3008 of RCRA, 42 U.S.C. § 6928, the EPA retains the authority to enforce regulations comprising an authorized State program.

[259]That "Notice of Final Determination" specified: "Section 3006 of the RCRA as amended, allows U.S. EPA to authorize a State hazardous waste management program to operate in a State in lieu of the Federal hazardous waste management program. To qualify for final authorization, a State's program must: (1) Be *equivalent to the Federal program*; (2) be *no less "stringent" than the Federal program*; (3) be *consistent with the Federal program* and other authorized State program [sic]; (4) provide for adequate enforcement authority; and (5) provide for public participation in the permit process. [Section 3006(b) of the RCRA, 42 U.S.C. 6926(b).]" 51 Fed. Reg. 36804, 36805 (Oct. 16, 1986) (emphasis added). *See also, Bil-Dry Corp.*, RCRA-III-264 (Initial Decision, Oct. 8, 1998) at 15, and cases cited therein.

whether there is "a practical need" for RCRA closure in light of the Inland Waters excavations (*i.e.*, to determine "the proper scope of closure"), and finds that, in the current posture of the present case, the matter is within the purview of the Michigan Department of Environmental Quality. However, this Tribunal does find that Respondent must submit a closure plan to the MDEQ in accordance with MAC § 299.9613 and 40 C.F.R. part 264, subpart G, and otherwise comply with the "closure and post-closure" requirements applicable to TSD facilities under RCRA and its Michigan and federal implementing regulations. Further, this Tribunal finds (in light of "The Facts" recited above) that CRA's letter of June 19, 2001 to MDEQ (RX-10) does not constitute a "closure plan," and that the MDEQ's April 15, 2002 letter in response thereto (RX-11) does not demonstrate that the Strong Steel site has completed "RCRA closure" to the satisfaction of the MDEQ.

b. RCRA Closure is Moot

Next, Respondent draws this Tribunal's attention to the case of *Pyramid Chemical Company*, 11 E.A.D.__, RCRA-HQ-2003-0001 (EAB, Sept. 16, 2004). *See* Respondent's Notice of Pertinent Appellate Decision, filed September 24, 2004. Respondent's Notice asserts that *Pyramid Chemical* is pertinent to the present case:

> ... because it discusses the circumstances under which a proposed RCRA Compliance Order may be made moot by factual developments, and discusses the authority of the Presiding Officer to decide whether or not the relief requested in a proposed Compliance Order should be granted.

Respondent's Notice of Pertinent Appellate Decision at 1. Although Respondent's "Notice" does not explain which "factual developments" it believes to have mooted the "RCRA closure" issue in the present case, this Tribunal understands Respondent to suggest that the fact of the Inland Waters excavations has mooted the issue.[260]

In *Pyramid Chemical*, the EPA charged the respondent with violations of RCRA and its implementing regulations in connection with the respondent's export of hazardous waste to the Netherlands. Regarding the "compliance order" sought in the complaint, the EAB explained:

> ... Complainant seeks a Compliance Order that would require Respondent to remove or dispose of the shipped materials stored in the Netherlands, but would in any event require Respondent to reimburse the Netherlands for any cleanup activities

[260]Regarding "the authority of the Presiding Officer to decide whether or not the relief requested in a proposed Compliance Order should be granted," *Pyramid Chemical* simply notes: "*See In re A.Y. McDonald Indus.*, 2 E.A.D. 402, 428 (CJO 1987) ('[RCRA] confers *broad discretion* on the Administrator (and derivatively to his delegatees) to fashion appropriate compliance orders for RCRA violations. *See* 42 U.S.C. § 6928(a).') (emphasis added); *accord In re Arrcom, Inc.*, 2 E.A.D. 203, 210-14 (CJO 1986)." *Pyramid Chemical*, slip op. at 40, n.40.

> conducted by the Netherlands... On June 1, 2004, Complainant informed the Board that the Netherlands has completed cleanup of the materials Respondent shipped. Thus, any question of Respondent's compliance with the removal or disposal aspects of the Compliance Order is now moot.

Pyramid Chemical, slip op. at 4 (citations omitted). That is, the Board viewed the compliance order as requiring either removal or reimbursement (or some combination thereof), but since the Netherlands had itself already completely "removed" the materials to its own satisfaction, the compliance order should only remain in effect as to "reimbursement." The Board concluded that "except for the terms rendered moot due to new developments, the terms of the Compliance Order remain operative and in effect." *Id.* at 36.[261]

Pyramid Chemical is inapposite to the present case. Most significantly, there was no question of "RCRA closure" at issue in *Pyramid Chemical*, and the EAB there said nothing about which "new factual developments," if any, might render otherwise applicable "RCRA closure" requirements "moot."[262] Indeed, the EAB did not at all discuss the rationale for its finding of mootness, apparently finding (as does this Tribunal) the rationale to be obvious. That is, the compliance order sought "clean up" of the Netherlands – a sovereign nation – to the satisfaction of the Netherlands and/or reimbursement for such clean up. Since the Netherlands itself had already cleaned up the material to its own satisfaction, the only aspect of the compliance order which remained relevant was that regarding "reimbursement." That rationale does not inform the analysis in the present case. Here, there *is* an issue of "RCRA closure," there is no "international" component,[263] and Respondent has not closed its *own* facility in accordance with RCRA regulations to the satisfaction of the MDEQ. Thus, *Pyramid Chemical* does not suggest that the "RCRA closure" issue in the present case is "moot."

Further, existing precedent, while not directly considering the legal conclusion of "mootness," suggests that "clean up" of hazardous waste which does not meet "RCRA closure standards" does *not* excuse a TSD facility from complying with such standards. For example, in *Everwood Treatment Co., Inc. and Cary W. Thigpen*, *supra* (ALJ, July 7, 1995) ("*Everwood I*"), a pipe burst, spilling 50 to 60 gallons of hazardous waste, which Everwood excavated and buried in a pit. Pursuant to an Alabama Department of Environmental Management ("ADEM") proposed order, Everwood hired a contractor who performed a site assessment, and Everwood subsequently received approval from ADEM to excavate the contaminated area. Everwood, through its

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[261] *See also*, *Pyramid Chemical*, slip op. at 42: "... Respondent must comply with the Compliance Order, except the terms [regarding 'removal'] which have become moot due to the Netherlands' cleanup of Respondent's materials."

[262] Indeed, Respondent has not identified, and this Tribunal has not found, any precedent directly addressing that question.

[263] The EAB in *Pyramid Chemical* observed: "Matters such as this have the potential to create an international incident..." *Pyramid Chemical*, slip op. at 39.

contractors, performed the excavation and shipped the material to a permitted disposal facility. The U.S. EPA then tested a number of samples at the site, concluding that "concentrations [were] substantially below the regulatory levels of 5 ppm for arsenic and chromium (40 CFR § 261.24(b))." *Everwood I*, Finding of Fact # 33. As discussed *supra*, the ALJ held that the respondents' actions constituted the operation of a "hazardous waste disposal facility." Further, regarding "RCRA closure," although the site had been excavated to the satisfaction of the ADEM, the ALJ held:

> Although the evidence demonstrates *to a practical certainty* that the containment unit has had no impact on the environment, *it does not do so with the certitude demanded by the regulation (40 CFR Part 264, Subpart G)* and the compliance order will be affirmed to the extent it requires a demonstration of "clean closure."

Everwood I at 26 (emphasis added). The ALJ's affirmation of the "RCRA closure" compliance order was not altered by the EAB in *Everwood Treatment Co., Inc. and Cary W. Thigpen*, 6 E.A.D. 589 (EAB, 1996) ("*Everwood II*"), or the U.S. District Court in Everwood Treatment Co., Inc. and Cary W. Thigpen v. U.S. Environmental Protection Agency, 1998 U.S. Dist. LEXIS 927, (S.D. Ala. 1998) ("Everwood III"). *See also*, U.S. v. Production Plated Plastics, Inc., 742 F. Supp. 956, 961 (W.D. Mich. 1990) (finding that operators of a hazardous waste disposal facility were not relieved of their obligations under RCRA by their compliance with a Michigan State court ordered lagoon closure plan and timely filings with the U.S. EPA, the court held: "The Court finds no authority for the proposition that compliance with a state remedial order excuses an RCRA violation."); *Dearborn Refining Company*, RCRA (3008) Appeal No. 03-04 (EAB, Sept. 10, 2004) at 6, n.7 ("The presence of hazardous waste in 1999 thus triggered certain hazardous waste management obligations that *could only be extinguished through proper closure*.") (emphasis added).

For all of the forgoing reasons, this Tribunal rejects Respondent's suggestion that, under *Pyramid Chemical* or other applicable precedent, the Inland Waters excavations renders the issue of "RCRA closure" legally moot.

2. The Inland Waters Excavations Complied with "Part 201" Under MAC § 299.9613(6) and Therefore Satisfy "RCRA closure" Requirements

Respondent next contends that the Inland Waters excavations complied with "the provisions of part 201 of the act" referenced in MAC § 299.9613(6) and therefore satisfy the "RCRA closure" provisions of the remainder of MAC § 299.9613 and 40 C.F.R. Part 264, Subpart G. This Tribunal rejects this argument and finds that the MDEQ has specifically stated that the Inland Waters excavations do *not* meet the "closure" requirements under "Part 201," and that, in any event, a "201 cleanup" as described by Respondent would not meet the "RCRA closure" requirements pursuant to MAC § 299.9613(6).

Respondent states:

> Even for purposes of Part 111 cleanups, MDEQ's regulations allow the use of cleanup standards established under Michigan's Part 201. (See Attachment A, Michigan Administrative *Rule 299.9613(6)*.) ... Region 5 complains that ... Strong Steel's ... remediation "ignores the need for State review and approval of the closure plan." (CPHRB at 54.) *There is no such requirement for cleanups conducted under Part 201*. Further, this argument ignores the fact that CRA did submit to MDEQ a full report of its cleanup activities. (*R. Ex. 10*.) It also ignores the fact that the ... MDEQ approved the report. (*R. Ex. 11*.).

RCB at 4-5 (italics added) (underlining in original). Respondent similarly argued in its Post-hearing Brief:

> The MDEQ has accepted Strong Steel's report of its remediation *in accordance with Part 201 of the Natural Resources and Environmental Protection Act,* Michigan's counterpart of *Superfund*, and acknowledged that "we have evaluated the data and the contaminant levels were below generic residential criteria for the parameters tested at the three areas of concern." (RX 11).

RPHB at 14 (emphasis added).

As an initial matter, it is important to note that Respondent's assertion that "[t]he MDEQ has accepted Strong Steel's report of its remediation in accordance with Part 201 of the [NREPA]," citing RX-11, *grossly* mischaracterizes the substance of the MDEQ letter entered as RX-11. In fact, that letter explicitly stated that the CRA letter entered as RX-10 did *not* meet the "closure" requirements of Part 201 of the NREPA, and that the MDEQ did *not* find or acknowledge a "closure" under Part 201 of the NREPA. Specifically, the MDEQ letter stated:

> We do not know if the entire property meets generic residential criteria. ***If a site closure is desired pursuant to Part 201 of the Natural Resources and Environmental Protection Act (NREPA)***, 1994 PA 451, as amended, M.C.L. 324.20101, et seq., ***then the entire site would need to be addressed through a Remedial Action Plan (RAP)***.

RX-11 (emphases added).

Further, Respondent admits that "[t]here is no such requirement [for State review and approval of the closure plan] for cleanups conducted under Part 201." RCB at 6. Again, "Part 201" is "Michigan's counterpart of [CERCLA]" (RPHB at 14), *not* RCRA, and RCRA – as implemented through MAC § 299.9613 and 40 C.F.R. Part 264, Subpart G – clearly *does* require State review, as discussed *supra*. MAC § 299.9613(6) states that:

> The environmental protection standards established pursuant to the provisions of part 201 of the act shall be used to perform closure and postclosure of a facility under part 111 of the act *if the limits are not less stringent than those allowed*

pursuant to the provisions of RCRA.

(Emphasis added). Indeed, as discussed *supra*, any authorized State implementation of RCRA *must* be no less stringent than the federal RCRA requirements.[264] Therefore, *at least* to the extent that "cleanups conducted under Part 201" do not require State review and approval of a closure plan, the standards applicable to "Part 201 closures" are "less stringent than those allowed pursuant to the provisions of RCRA." Thus, *even if* the MDEQ had approved a "201 closure" *vis-a-vis* RX-10 and RX-11 (which it did not), a "Part 201 closure" which does not require State approval of a closure plan may not stand in lieu of a required "RCRA closure" under the explicit language of MAC § 299.9613(6).

Finally, as discussed *supra*, in the current posture of the present case, the matter is, in any event, within the purview of the Michigan Department of Environmental Quality. The MDEQ, as explicitly stated in RX-11, has clearly *not* approved a "closure ... pursuant to Part 201 of the [NREPA]," let alone a RCRA closure in compliance with MAC § 299.9613 and 40 C.F.R. Part 264, Subpart G.

For all of the forgoing reasons, this Tribunal rejects Respondent's contention that the Inland Waters excavations complied with "the provisions of part 201 of the act" referenced in MAC § 299.9613(6), thereby satisfying the applicable "RCRA closure" requirements.

3. Estoppel

Finally, Respondent argues that it would be "unfair" to require RCRA closure because Strong Steel "relied" on the direction of the U.S. EPA and MDEQ in commissioning the Inland Waters excavations. RCB at 10-15. The essence of Respondent's argument in this regard is that "none of the MDEQ and EPA personnel ... ever said that Strong Steel's plant was a TSD facility, or that Strong Steel should cleanup spilled gasoline under the RCRA TSD closure procedures." RCB at 10. Respondent further states:

> If anyone at MDEQ or EPA ever thought that Strong Steel ... should have been conducting its cleanup as a formal RCRA TSD closure, they should have informed Strong Steel early in the process, not now, more than three years after the cleanups were completed. In *choosing to perform its cleanup under Michigan's flexible Part 201 program* rather than the ... formal RCRA TSD closure process, *Strong Steel relied on what Ms. Vogen, Mr. Opek, and Mr. Powers said*.

RCB at 15 (emphasis added). Also, Respondent again points out, citing RX-11, that "MDEQ responded [to RX-10] by saying that 'we have evaluated the data and the contaminant levels were below generic residential criteria for the parameters tested at the three areas of concern." RCB at 14.

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[264] *See, e.g.*, 51 Fed. Reg. 36804, 36804-36805 (Oct. 16, 1986); *Bil-Dry Corp.*, RCRA-III-264 (Initial Decision, Oct. 8, 1998) at 15, and cases cited therein.

In asserting that "Strong Steel relied on what Ms. Vogen, Mr. Opek, and Mr. Powers said," and suggesting that Strong Steel relied on the MDEQ letter entered as RX-11 as a "201 closure" approval, Respondent's essential argument is one of "estoppel."[265] This Tribunal is unpersuaded by Respondent's argument.

First, to the extent that Respondent may have "relied" on the MDEQ letter entered as RX-11, such reliance was wholly misplaced. As noted *supra*, that letter states, in part:

> We do not know if the entire property meets generic residential criteria. *If a site closure is desired pursuant to Part 201 of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended, M.C.L. 324.20101, et seq., then the entire site would need to be addressed through a Remedial Action Plan (RAP).* Please note that our evaluation of the remedial measures only pertains to those contaminants identified in the three areas of concern outlined in the CRA report. The MDEQ expresses no opinion as to other contaminants beyond those identified and remediated in the three areas of concern. The MDEQ also makes no warranty as to the fitness of this site for any general or specific use..."

RX-11, pp. 1-2 (emphasis added). Thus, even if Respondent "[chose] to perform its cleanup under Michigan's ... Part 201 program rather than the ... RCRA TSD closure process," (RCB at 15), the MDEQ letter at RX-11 does not at all suggest that Respondent had complied with "Part 201," but quite to the contrary explicitly states that Respondent had *not* completed a "site closure ... pursuant to Part 201."

Second, to the extent that Respondent may have "relied" on the fact that neither the U.S. EPA nor the MDEQ informed Respondent that the Strong Steel facility was a TSD facility (and would therefore need to either be permitted or closed as a TSD facility), such reliance is, again, wholly misplaced. This Tribunal has already found that Respondent failed to notify the U.S. EPA or the State of Michigan of all of the hazardous wastes that it generated, or that it was storing and disposing of hazardous waste on its property, in violation of RCRA Section 3010, 42 U.S.C. § 6930; 40 C.F.R. § 262.12; and MAC §§ 299.9301 and .9303, as alleged in Count VI of the Amended Complaint. The RCRA regulatory scheme is one of "cradle-to-grave" oversight (45 Fed. Reg. 33066, 33066 (May 19, 1980)) which "relies to a substantial extent on accurate self-reporting." U.S. v. JG-24, Inc., 331 F. Supp.2d 14, 57 (D. P.R. 2004).[266] It is *Respondent's* responsibility to know which hazardous wastes it is disposing of or storing, and to tell the MDEQ and U.S. EPA that it is a TSD facility – not the other way around. In the words of ALJ Vanderheyden in *Harmon Electronics*:

> Respondent ... seeks an interpretation that vitiates the public interest and goes

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[265]Respondent does not use the term "estoppel," however.

[266]*See also, A.Y. McDonald Industries, Inc.*, 2 E.A.D. 402, 418 (EAB 1987).

> against the stated purpose of RCRA... If this view were adopted, the regulatory framework of RCRA would be futile, as an offender could disregard these fundamental conditions without penalty simply by not complying..., while the consequences of hazardous waste disposal continued unabated.

Harmon Electronics, Inc., 1994 EPA ALJ LEXIS 35, EPA Docket No. RCRA-VII-91-H-0037 (ALJ, Dec. 12, 1994) slip op. at 27, *aff'd*, 7 E.A.D. 1 (1997), *rev'd sub nom. on other grounds*, Harmon Industries, Inc. v. Browner, 19 F. Supp.2d 988 (W.D. Mo. 1998), *aff'd*, 191 F.3d 894 (8th Cir. 1999).

The EAB in *B.J. Carey Industries, Inc.*, 7 E.A.D. 171 (EAB 1997), provided a useful statement of the law of estoppel. There, the EAB explained:

> "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60 (1984). For that reason, "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Id.* A party seeking to estop the government bears a heavy burden of demonstrating the traditional elements of estoppel and some "affirmative misconduct" on the part of the government. United States v. Hemmen, 51 F.3d 883, 892 (9th Cir. 1995). This means that "a party asserting equitable estoppel against the United States must demonstrate that there was affirmative misconduct upon which the party reasonably relied to its detriment." *In re Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 522 (EAB 1993).

B.J. Carney Industries, 7 E.A.D. at 196. *See also*, U.S. v. Production Plated Plastics, Inc., 742 F. Supp. 956 (W.D. Mich. 1990), noting that:

> ... [A]s a general rule equitable defenses such as estoppel are not available against the sovereign when it is asserting public rights. *See, e.g.*, Costello v. United States, 365 U.S. 265, 281, 81 S.Ct. 534, 542-43, 5 L.Ed.2d 551 (1961); Pan American Petroleum & Transport Co. v. United States, 273 U.S. 456, 506, 47 S.Ct. 416, 424, 71 L.Ed.2d 734 (1927); Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 125, 39 S.Ct. 407, 407-08, 63 L.Ed. 889 (1919). "Where the defenses of unclean hands or laches have been used against the government when it is asserting public rights, courts have repeatedly held that equitable principles will not be applied to thwart public policy or the purpose of federal laws." Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1451 (W.D. Mich. 1989).

U.S. v. Production Plated Plastics, 742 F. Supp. at 961, n.4.

Respondent in the present case has failed to demonstrate that Complainant's conduct (or that of any other State or Federal entity) rises to the level of "affirmative misconduct" necessary

to meet the heavy burden of estopping the government. Therefore, Respondent's "estoppel" argument is rejected and Complainant is not estopped from seeking, nor is this Tribunal estopped from imposing, a "RCRA closure" compliance order.

D. Conclusion

For all of the forgoing reasons, this Tribunal finds that a Compliance Order is warranted in this case, such that Respondent must comply with the "closure and post-closure" requirements applicable to TSD facilities under RCRA and its Michigan and federal implementing regulations, as set forth *infra* in the "Conclusion and Order" section of this Initial Decision. Specifically, Respondent must *either* apply for and obtain a hazardous waste permit pursuant to RCRA § 3005; 40 C.F.R. Part 270, Subpart B; and MAC § 299.9502; *or alternatively*, Respondent must certify to the MDEQ that the Strong Steel facility has been "closed" pursuant to MAC § 299.9613 and 40 C.F.R. Part 264, Subpart G.

Again, in the current posture of the present case, the determination as to whether the Strong Steel facility has been adequately "closed" is within the purview of the MDEQ. If, as Respondent asserts, "Strong Steel has [already] remediated the spill areas on its property ... to the satisfaction of the MDEQ" (RPHB at 84), then this Compliance Order will impose little or no burden on Respondent. This situation is parallel to that in *John A. Capozzi, d/b/a/ Capozzi Custom Cabinets*, RCRA (3008) Appeal No. 02-01, slip op., 11 E.A.D. __ (EAB, Mar. 25, 2003), where the EAB stated:

> Capozzi argues that, based on the ALJ's findings that Capozzi was in compliance with the hazardous waste laws embodied in RCRA and the [Ohio Administrative Code ("OAC")], it was clear error to issue a compliance order in the Initial Decision.
>
> The ALJ's compliance order directs Capozzi to:
>
> [C]ease all treatment, storage, or disposal of any hazardous waste, except such treatment, storage, or disposal as is in compliance with the standards applicable to Generators of hazardous waste as set forth at OAC (Section) 3745-52.
>
> As can be seen, the ALJ's compliance order merely directs Capozzi to comply with existing hazardous waste regulations set forth in OAC section 3745-52; it does not require Capozzi to take any action not already required by law. Assuming the veracity of Capozzi's statement that it is currently in compliance with the RCRA and OAC permitting requirements, the compliance order actually requires nothing of the facility. Thus, ... we reject the company's argument that the ALJ's compliance order should be reversed.

Capozzi, slip op. at 23-24 (citations omitted).

CONCLUSION AND ORDER

1. Counts IV and V of the Amended Complaint are **Dismissed**.

2. A civil penalty in the amount of $269,527 is assessed against Respondent Strong Steel Products, LLC. This total penalty amount consists of $218,900 for Count III; $16,500 for Count VI; $22,000 for Count VII; and $27,500 for Count VIII ("compressed" with Count IX); with a reduction of $15,373 (5% of Complainant's total proposed penalty of $307,450) for the ADRRF under the 2003 RCRA Penalty Policy's "other unique factors" consideration.

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $269,527, payable to the Treasurer, United States of America, and mailed to:

U.S. Environmental Protection Agency, Region 5
P.O. Box 70753
Chicago, Illinois 60673

4. A transmittal letter identifying the subject case and the EPA docket number, as well as Respondent's name and address, must accompany the check.

5. A copy of the check and transmittal letter shall be sent to:

Richard Clarizio
Office of Regional Counsel (C-14J)
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

and

Michael Beedle
Waste, Pesticides & Toxics Division (DE-9J)
Enforcement and Compliance Assurance Branch
United States Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

6. If Strong Steel Products, LLC fails to pay the penalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

7. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: 1) a

party moves to reopen the hearing withing twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); 2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; or 3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

8. Respondent Strong Steel Products, LLC is hereby ORDERED to comply with the following Compliance Order pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a):

Compliance Order

I. Within sixty (60) days of the effective date of this Initial Decision:

A. Respondent shall achieve and maintain compliance with all applicable requirements and prohibitions governing the generation, treatment, storage and/or disposal of used oil and/or hazardous waste as codified at or incorporated by the Resource Conservation and Recovery Act ("RCRA"), as amended, 42 U.S.C. §§ 6901 *et seq.*; the Michigan Administrative Code ("MAC") Part 299; and/or the Code of Federal Regulations ("C.F.R."), Title 40, Parts 260-268 and 279, at the Strong Steel facility.

B. In particular, Respondent shall *either* apply for and obtain a permit for the treatment, storage, or disposal of hazardous waste pursuant to RCRA § 3005; 40 C.F.R. Part 270, Subpart B; and MAC § 299.9502; *or alternatively*, Respondent shall submit to the Michigan Department of Environmental Quality ("MDEQ") a "closure plan," pursuant to MAC § 299.9613 and 40 C.F.R. part 264, subpart G.

II. If Respondent submits a "closure plan" to the MDEQ as described in paragraph I.B, above, then within thirty (30) days of approval of the closure plan by the MDEQ, Respondent shall certify to the MDEQ that the Strong Steel facility has been "closed" pursuant to MAC § 299.9613 and 40 C.F.R. part 264, subpart G.

III. Respondent shall notify the U.S. EPA in writing of its achievement of compliance with this Order within fifteen (15) days of such achievement. If Respondent fails to achieve compliance with this Order within the required time frame, then Respondent shall notify the U.S. EPA in writing of such failure. Such notice shall include a detailed explanation of the reasons for Respondent's failure to achieve compliance and a proposed date of compliance. Such proposed date of compliance shall be no more than thirty (30) days from the date of compliance set forth in this Order.

IV. All submissions and notifications which Respondent is directed to provide in this Compliance Order must be furnished to the following U.S. EPA contact:

Michael Beedle
Waste, Pesticides & Toxics Division (DE-9J)
Enforcement and Compliance Assurance Branch
United States Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

V. If Respondent fails to comply with any requirement of this Compliance Order, Section 9006(a) of RCRA, 42 U.S.C. § 6991e(a), and 40 C.F.R. Part 19 provide that Respondent shall be liable for a civil penalty of not more than $27,500 for each day of continued noncompliance.

_____
Susan L. Biro
Chief Administrative Law Judge

Date: April 7, 2005
Washington, D.C.

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

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated April 7, 2005, was sent this day in the following manner to the addressees listed below:

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: April 7, 2005

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 Certified Mail Return Receipt to:

Christopher J. Dunsky, Esquire
Honigman Miller Schwartz & Cohn, LLP
2290 First National Building
660 Woodward Avenue
Detroit, MI 48226-3506

Susan L. Johnson, Esquire
Strong Steel Products, LLC
2021 South Schaefer Highway
Detroit, MI 48217