UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	
MEXICO FEED & SEED COMPANY, INC.,	TSCA Docket No. VII-84-T-312
AND	AND
JACK PIERCE d/b/a	TSCA Docket No. VII-84-T-323
PIERCE WASTE OIL SERVICE, INC.,	(CONSOLIDATED)
RESPONDENTS	

TOXIC SUBSTANCES CONTROL ACT (TSCA) - PARTIES

1. Motion to make an individual shareholder and officer of a corporation a Party-Respondent will be granted on the showing that said individual actively defended the subject Complaint, after receiving notice of the alleged violation and institution of the action, hired counsel, participated in preparation of the defense, attended the hearing and testified concerning the violations alleged in said Complaint. Under said facts, the individual has entered his appearance by actively preparing the defense and no other service or formal amendment of the pleadings is necessary.

TOXIC SUBSTANCES CONTROL ACT (TSCA) - CONTRACTS

2. Where essential elements of an alleged attempted sale were left to be negotiated, there was no agreement or meeting of the minds of the parties to such negotiations and no sale resulted.

TOXIC SUBSTANCES CONTROL ACT (TSCA) - CORPORATIONS

3. Respondent was not released of his personal liability by simply showing the organizing of a corporation in the State of Delaware when it further appeared that the Delaware corporation wholly failed to comply with the laws of the State of Missouri and had no authority to make a contract or transact business in Missouri.

TOXIC SUBSTANCES CONTROL ACT (TSCA) - CORPORATIONS

4. The corporate laws of the States of Delaware, Illinois and Missouri have a common intent and objective, that is, to make available corporate assets to bona fide creditors and provide for following said assets, or the proceeds thereof, and to thus place liability, to such extent, on the person or persons into whose hands the assets, or proceeds, have fallen.

APPEARANCES

For Complainant:	Henry F. Rompage, Attorney Office of Regional Counsel U.S. Environmental Protection Agency Region VII 726 Minnesota Avenue Kansas City, Kansas 66101
For Respondent JACK PIERCE:	G. Edwin Proctor, Esquire HEAVNER, JARRETT & KIMBALL, P.C. Suite 900, Bryant Building 1102 Grand Avenue Kansas City, Missouri 64108
For Respondent MEXICO FEED AND SEED CO., INC.:	Arthur A. Benson II, Esquire BENSON & McKAY 911 Main Street, Suite 1430 Kansas City, Missouri 64105

INITIAL DECISION

On July 20, 1984, separate Complaints were filed by the Regional Administrator of the United States Environmental Protection Agency (hereinafter "EPA", "the Agency" or "Complainant"), Region VII, against Mexico Feed & Seed Company, Inc., North Jefferson Street, Mexico, Missouri (hereinafter "Respondent Mexico" or "Mexico"), Jack Pierce, an individual formerly doing business as Pierce Waste Oil Service, Inc. (hereinafter "Respondent Pierce" or "Pierce" or "PWO") and Moreco Energy, Inc. (hereinafter "Moreco"). The allegations of each Complaint charge identical violations of the Toxic Substances Control Act ("TSCA") as shown by an investigation made by an authorized representative of Complainant on June 27, 1984, and July 5, 1984. On April 4, 1985, the Complaint against Moreco was dismissed without prejudice as requested by Complainant in its Motion to Withdraw Complaint, dated March 28, 1985, after said Complaints had been consolidated for hearing. The Consolidated Complaints against Respondents Mexico and Pierce charge that samples taken from four waste oil tanks located on a site which is part of a three-acre tract leased and controlled by Mexico and owned by one J. F. Covington, 1/ contained significant amounts of PCB; that said site was leased by Covington to Pierce, around 1964, allowing Pierce to place one and, thereafter, three additional, oil tanks thereon, which were owned by Pierce. Count One charges that the four tanks are PCB containers (40 C.F.R. 761.3[v]) and contained PCB on the date of said inspection; that Respondents failed to maintain said PCB containers in a facility meeting the requirements of 40 C.F.R. 761.65(b)(1); that there was no Spill Prevention and Countermeasure Plan as required

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1/ The record shows that, since around 1959, Mexico Feed & Seed, including the business and real estate, was the sole property of said J.F. Covington and wife (Transcript [hereinafter "TR"] T-239) until said business was incorporated January 1, 1980 (TR 238). The corporation has leased the real estate and equipment from Covington since its formation January 1, 1980.

by 40 C.F.R. 761.65(c)(7)(ii) or documentation that the design, construction and operation of the tanks conformed to the requirements of 761.65(c)(7)(i); and that said PCB containers were not dated when placed in storage and that said failures violated Sec. 15(1) of TSCA, 15 U.S.C. 2614(1).

Count Two charges that said PCB containers were not marked, in violation of 40 C.F.R. 761.40(a)(1), which requires that, as of July 1, 1978, PCB containers shall be marked as provided by Section 761.45(a), and that such failure violates said Section 15(1) of TSCA.

Count Three charges Respondents with failure to develop and maintain records, beginning July 2, 1978, on the disposition of PCBs and PCB items and to prepare and maintain an annual document each July 1, covering the calendar years 1978 through 1983, and to include information specified at Section 761.180(a)(1) through (3) in violation of said Section 15(1) of TSCA.

Count Four charges that a composite soil sample taken from a spill (see 40 C.F.R. 761.60[d][1]) between the above tanks was analyzed and found to contain 330 parts per million (hereinafter "ppm") PCB, and that Respondents have thus violated TSCA by disposing of PCBs while not following the requirements of 40 C.F.R. 761.60(a). For said alleged violations, said Complaint proposes the assessment of civil penalties totaling $65,000: $15,000 on each of Counts One and Two, $10,000 on Count Three and $25,000 on Count Four. At the hearing, held herein on June 11, 1985, the parties stipulated on the record (TR 5) prior to the taking of evidence, that Complainant "would make a prima facie case for a civil penalty of $29,000" and that the Complaint is by Complainant amended to propose penalties totaling $29,000 instead of $65,000, and that EPA agrees not to seek penalties exceeding $29,000. In addition, the parties stipulated (Complainant [hereinafter "C"] Exhibit [hereinafter "EX"] 1) as follows:

1. That on or about June 27, 1984, and July 5, 1984, David Ramsey, EPA Region VII Consumer Safety Officer, conducted an investigation at Mexico Feed & Seed Company, Inc., at Mexico, Missouri.

2. That during the inspection referred to in Stipulation No. 1, Mr. Ramsey found on the premises four waste oil tanks.

3. In approximately 1967, the principals of Pierce Waste Oil Service, Inc. and Mexico Feed and Seed Company, Inc. entered into a verbal lease agreement for the placement by Pierce Waste Oil Service, Inc. of waste oil tanks on the premises of Mexico Feed & Seed Company, Inc.

4. That during the inspection referred to in Stipulation No. 1, Mr. Ramsey properly sampled, sealed, identified and shipped to the EPA NEIC Laboratory, Denver, Colorado, oil from the four tanks referred to in Stipulations No. 2 and 3.

5. That EPA NEIC Laboratory personnel properly conducted analysis of the four oil samples referred to in Stipulation No. 4 and said analysis of the four oil samples referred to in Stipulation No. 4 established the east-central tank contained oil of 80% PCB content; the west-central tank contained oil of 74% PCB content; the north tank contained oil of 730 ppm PCB content, and the south tank contained oil of 160 ppm PCB content.

6. That the four tanks referred to in Stipulations No. 2, 3, 4 and 5 are "PCB containers" as defined at 40 C.F.R. §761.3(v).

7. That two of the four tanks referred to above, specifically the east-central and west-central tanks, are subject to the regulations of April 18, 1978; and two of the tanks, specifically the north and south tanks, are subject to the regulations of July 1, 1979.

8. That the four tanks referred to above were not stored in a facility meeting the requirements of 40 C.F.R. §761.65(b)(1), as required by 40 C.F.R. 761.60(c)(3).

9. That prior to July 1, 1979, said tanks were not subject to the storage regulations at 40 C.F.R. 761.60(c)(3).

10. That, in regard to the four tanks referred to above, there was no Spill Prevention Control and Countermeasure Plan prepared or implemented, as required by 40 C.F.R. 761.65(c)(7)(ii).

11. That prior to July 1, 1979, said tanks were not subject to a requirement for a Spill Prevention Control and Countermeasure Plan pursuant to the requirements of 40 C.F.R. 761.65(c)(7)(ii).

12. That in regard to the four tanks above, there was no documentation that the tanks were designed, constructed and operated in compliance with 29 C.F.R. 1910.106, as required by 40 C.F.R. 761.65(c)(7)(i).

13. That prior to July 1, 1979, said tanks were not subject to the design, construction and operation requirements at 29 C.F.R. 1910.106, as required by 40 C.F.R. 761.65(c))7)(i).

14. That the four tanks referred to above were not dated when placed in storage as required by 40 C.F.R. 761.65(c)(8).

15. That prior to July 1, 1979, said tanks were not required to be dated when placed in storage as required by 40 C.F.R. 761.65(c)(8).

16. That the four tanks referred to above were not marked with the mark M_L as described at 40 C.F.R. 761.45(a) and required by 40 C.F.R. 761.40(a)(1).

17. That prior to July 1, 1979, said tanks were not required to be marked with the mark M_L as required by 40 C.F.R. 761.40(a)(1).

18. That, in regard to the four tanks above, there were no records developed or maintained or annual report prepared as required by 40 C.F.R. 761.180(a), for the years 1979, 1980, 1981, 1982 and 1983.

19. That prior to April 18, 1978, there were no requirements to develop and maintain records or annual reports.

20. That during the inspection referred to in Stipulation No. 1, Mr. Ramsey properly collected a composite soil sample from an oil spill between the tanks referred to above, and properly sealed, identified and shipped said soil sample to the EPA NEIC Laboratory, Denver, Colorado.

21. That EPA NEIC Laboratory personnel properly conducted analysis of the soil sample above, and said analysis of the soil sample referred to in Stipulation No. 20 established the presence of 330 ppm PCB.

22. That pursuant to 40 C.F.R. 761.60(d)(1) and 761.60(a), there was a disposal of PCBs not in accordance with 40 C.F.R. 761.60(a).

23. That prior to April 18, 1978, the disposal of PCBs which occurred prior to said date were not regulated.

I find that by said Stipulations the charges in the Complaint are by the Respondents admitted and the determination shall be made herein whether all or any one or more of the parties are responsible for the said violations and the payment of $29,000 total penalty agreed upon as an appropriate penalty for said violations. On the basis of the evidence educed at the hearing, the exhibits received in evidence and upon consideration of the post-hearing submissions of the parties, I hereby make the following

FINDINGS OF FACTS

1. Mexico Feed & Seed Co., Inc. (hereinafter "Mexico") is a Missouri Corporation authorized to do business from and after January 1, 1980 (Transcript [hereinafter "TR"] 238). Prior to 1980, said business was a sole proprietorship (TR 239) owned by James F. Covington.

2. Mexico was and is located at the north city limits of Mexico, Missouri, on three acres (TR 237) which is the corner portion of a 55-acre tract (TR 237) acquired by Covington in 1959 (TR 238).

3. Covington has been in the feed and seed business for 36 years, has operated a farm for 50 years and has never been in the waste oil disposal, or any other, business (TR 236).

4. Mexico has at all times since its incorporation leased said three acres from Covington and wife (Respondent [hereinafter "R"] Mexico [hereinafter "M"] Exhibit [hereinafter "EX"] 5; TR 255). The tract so leased includes the area of land on which subject four oil tanks were placed by Respondent Pierce (TR 257); said tanks are located on an area off the side entrance where ingress and egress is afforded without interfering with the Mexico operation (TR 240).

5. Covington's first contact with Respondent Pierce was circa 1964 after Covington was contacted by Eugene Affloter, a Pierce employee (TR 258, 264), who inquired about the availability of an area of land for the placement of one tank (TR 258).

6. Respondent Jack Pierce verbally made a deal with Covington, circa 1967, to place storage tanks on subject Mexico tract for an agreed rental charge of $150 per year, as a result of his trip to Mexico, Missouri, for that purpose (TR 32).

7. Pierce is retired from Pierce Waste Oil Service, Inc. (hereinafter "PWO"] of Springfield, Illinois, whose business was picking up waste oil, i.e., its truck drivers picked up waste oil from service stations and factories and transported it to places where it was sold (TR 31).

8. Jack Pierce operated said business for 30 years (TR 31) until sale of the assets used in said business to Motor Oils Refining Technology Co ("MORECO") on or about March 5, 1983 (R Pierce [hereinafter "P"] EX 2; TR 51).

9. PWO is a Delaware Corporation formed by Respondent Jack Pierce sometime in 1964 (R-P EX 9; TR 44), which continued up until the retirement of Jack Pierce

(TR 44), after which it was dissolved (TR 72) in 1983 or 1984 (TR 58) following the sale of the assets of PWO and the assets of the other Pierce companies (TR 52).

10. Other Pierce companies in which Respondent Pierce held ownership were Industrial Fuels, Inc., Central Refining Co., Inc. and Tri-State Oil, Inc. (TR 52).

11. The assets sold were identified in said Asset Purchase Agreement (R-P EX 2 [see document referred to as R-P "Exhibit A"]; TR 54). The subject tanks and ground lease in Mexico were not there listed (TR 55); contents of the tanks were not there listed (TR 174).

12. At all pertinent times, Jack Pierce was Chief Executive Officer and President of PWO (TR 50); Pierce testified he was authorized to generally conduct business for PWO which included entering into lease agreements (TR 50), and that he could make all decisions for PWO if he wanted to, although he does not remember any express authority, from PWO's Board of Directors, or resulting from a corporate meeting, to enter into a lease for the corporation (TR 48).

13. Upon formation of said PWO, Inc., in 1964, Jack Pierce's brother, Perry Pierce, and Perry's wife, served as officers and on the Board of Directors; later, Jack Pierce's son, Martin Pierce, served on the Board (TR 46). At that time, Jack Pierce owned 49 shares, his wife one share; Perry Pierce then owned 49 shares and Perry's wife, one share (TR 47).

14. Jack Pierce was paid a salary by said corporation, but no other person was paid a salary. No dividends were paid by the corporation. Perry Pierce, although a holder of one-half of the corporate stock, received no salary, dividends or other pecuniary benefit (TR 48).

15. Jack Pierce acquired all of the equipment and assets of PWO (TR 50).

16. Pierce testified that in 1973 or 1974, Covington asked Pierce what he would take for the 10,000-gallon tank; Pierce did not give Covington an answer (TR 37);

that later, Pierce asked Covington if he would give up three years' rent for all the tanks, and that Covington agreed to the deal proffered (TR 38).

17. Pierce testified that his reason for the aforesaid agreement was that "we were going to pull out of there" as soon as "we got to the point where we could put on bigger trucks" (TR 38-39).

18. Pierce continued in operation at the Mexico site until August or September, 1976, when a final pull-out was made (TR 39).

19. The last rental check paid by Pierce was in the amount of $400 (two years' rent at the increased rental rate of $200 per year) and dated 1-11-73 (although it was meant to be correctly dated 1-11-74), payable to Mexico Feed and Seed Co., purportedly drawn on the account of Waste Oil Service and purportedly signed by Jack Pierce, an individual. There was no indication on the check of the purpose for which said payment was made, but Pierce testified that he anticipated free rent for the years 1975, 1976 and 1977, and that his pull-out in September, 1976, was before the end of his "free rent" period (TR 41), because "we had a big truck at that time" (TR 42).

20. Pierce testified that said check was actually drawn on the corporation's account; that the Waste Oil Service checks were used to avoid a mix-up with Pierce Oil and Refining Company account (TR 42).

21. Pierce testified that he met with Covington in August or September, 1976, "out at the tanks where we loaded and unloaded oil", where he told Covington "we (have) a bigger truck . . . "; that the tanks would not be used and they were his (Covington's) and that Covington said "Okay" (TR 43) in acknowledging the tender of said tanks by Pierce. One of Pierce's drivers, Paul Sailer, was present at the meeting (TR 43). At said time, there was oil in the tanks (TR 55).

22. Paul Sailer testified he worked for Pierce for about eight or nine months - less than a year - picking up oil, and then until October 1977 as a semi-driver (TR 123); that he was present, and participated in conversation, at the meeting between Covington and Pierce about August 1976 - "standing right there" (TR 116); that he was (there) to clean out the (four) tanks (TR 118); that Covington was heard by him to say he would accept the tanks in exchange for the term of the lease (TR 121).

23. Pierce had gone to Mexico "to make sure (Sailer) pumped all the oil out" and he pumped over the top. "The valves stuck up a little bit and you don't get it out that way, so we had to fill your hose inside and pump it out." "Over the top" means going in the manhole over the top, clear to the bottom of the tank and "that is the way Sailer pumped (the) oil out" of all four tanks (TR 56). Sailer testified that a gear-type positive-displacement pump (on the same tractor) was used with two-inch suction hoses (TR 118).

24. Pierce testified (TR-57) that all the oil was pumped from the tanks and they were turned over to Covington (TR 57).

25. Pierce looked inside the tanks after Sailer pumped out the oil and "there was just a kind of film on the bottom of the tanks" (TR 59). Sailer testified (TR 119) that after he pumped out the oil, only the normal oil residue remained.

26. Pierce testified that the tank which Covington allegedly was interested in was the southern-most tank, a vertical tank of approximately 10,000 gallon capacity; on the east side was a 1,000-gallon tank; a 700-gallon tank was in the west-central location; another tank at the north end was 15,000 to 17,000 gallon capacity (TR 61).

27. Pierce testified that "after we decided to pull out of there . . . I agreed to give (Covington) all of (the tanks) for three years' rent" (TR 61).

28. Pierce Waste Oil Service (PWO) was started in 1952 and Jack Pierce and his brother, Perry Pierce, ran it as a partnership until its incorporation in 1964 (TR 63).

29. Perry Pierce, in 1952, owned Springfield Refined Oil Company which he sold around 1970 (TR 65).

30. Besides from garages and service stations, oil was picked up from a factory in Shelbina, Missouri, and Eugene Affloter picked up oil at the Mid-Mo Electric Company in Sedalia, Missouri (TR 81).

31. No special instructions were given to drivers except they were to bring the oil in and dump it in the tanks (TR 82).

32. In 1976, Covington came by his premises late at night and discovered someone stealing oil from said tanks; Covington called Pierce who came to Mexico and signed a complaint at the Prosecutor's office, charging J. Edward Covert with attempted stealing of oil in excess of $50 from Pierce Waste Oil Service, Inc. (R-M EX 8; TR 84).

33. Pierce testified that he doubted whether the alleged trade of the tanks to Covington (for three years' land rent) was recorded in the corporate minutes (because) it was such a small deal (TR 91).

34. No tax returns were produced by Pierce to show whether or not said tanks were depreciated or whether a sale of said tanks was reported (TR 92).

35. Either Jack Pierce or his son, Martin Pierce, sent Rod Waller, their driver, to Mexico Feed & Seed in 1978 to pump oil from subject tanks (TR 94-96) and haul it back to Springfield, Illinois. Jack Pierce testified that Mexico Feed & Seed was not paid anything for the oil (TR 101).

36. The first formal action by the Board of Directors of PWO, Inc., to dissolve the corporation was taken (without a meeting) March 4, 1983 (TR 105), and a Certificate of Dissolution of said corporation by the State of Delaware is dated February 29, 1984 (R-P EX 3; TR 104).

37. Rod Waller testified that he went to Mexico in 1978 and emptied the tanks except for some residue (TR 155); he pumped out two tanks and checked the screen on the truck tank (TR 157) and that he did not see any sludge when he looked in the tanks (TR 160) during daylight hours (TR 157); that there might have been a little sludge in the bottom of the tanks; and that he cannot remember if sludge clogged the "screen" TR 156, 157).

38. Martin Pierce testified he is the son of Jack Pierce; that PWO was a corporation in good standing from 1964 to 1983 (TR 164) and that for a time he was Vice President of PWO; that PWO "pulled out of operation in Mexico, Missouri" in August, 1976 (TR 165); that he dispatched Paul Sailer to Mexico (in 1976) "for a final pump-out of the site"; that Jack Pierce, his father, went over to make sure all the tanks were cleaned out; that his father "gave the tanks to some guy on a deal" of which he did not know the particulars until (recently) (TR 167)"; that Paul Sailer returned from the site and reported that the tanks were drained dry (TR 168), and that he remembers getting a call, and then a second call, from Mexico Feed and Seed in early 1978, asking that oil be picked up at subject site (TR 169).

39. Five years or more after PWO was incorporated (about 1969), Jack Pierce and his wife owned all of the stock of PWO, buying out Perry Pierce, Jack's brother (TR 187).

40. Of the four Pierce family companies, two were incorporated in Delaware and two in Illinois (TR 188).

41. George Nelson, a filling station operator in Mexico, Missouri, sold waste oil to Pierce (or PWO) from 1971 until he sold his business in 1979. He has known Covington for 35 years, knew Pierce was storing oil on the Mexico Feed premises and never learned directly or indirectly of Covington's going into the

waste oil business and has never known Covington to have any interest in the waste disposal business (TR 191-192).

42. William B. Robnette testified he became associated with Mexico Feed & Seed Co. in August, 1979, and became a shareholder in Mexico Feed & Seed Co., Inc. when it was incorporated in December, 1979 (TR 213).

43. Robnette testified further that he recalls when trucks from Pierce Oil came to subject site after Covington called Pierce and told them a tank was leaking; that the time would have been in 1980 or 1981, as it was in the spring and subsequent to the time he came to Mexico in 1979 (TR 214); that he and Covington thought the "leaking tank" probably froze and started leaking when it thawed with warmer weather (TR 215); that Waller, the driver, hooked up to the valve at the bottom of the upright tank; that Waller was there about one and one-half hours, left and then returned in 30 minutes or an hour and told him he took some of the "stuff" out and spread it on the road to have room for more of it (TR 216-217); that Waller hooked up a second time and then left in 30 to 40 minutes (TR 217).

44. Robnette further testified that, when talking to Covington about the incorporation, Covington stated that the subject oil tanks belonged to Jack Pierce (TR 217) and that Pierce had not paid rent for several years (TR 218); that Robnette wanted to get rid of the tanks but Covington said they were Pierce's and that Covington wanted Pierce to move them (TR 218-219).

45. Robnette further testified that he noted the leaking tank and Covington acted to get hold of Pierce and have him do something about it (TR 225); that the leak was discovered in Spring, 1980, or later (TR 225).

46. James Covington testified that, in 1976, when he called Pierce and told him he caught someone stealing from his tanks, Pierce replied, they would "come

over and file charges" (TR 246); that, in February, 1980, he called Pierce telling him that one tank was leaking and that it might run down the road into the creek and cause trouble and a man was sent (by Pierce) to fix the leaking valve on the tank and the following day a truck came to pump out the tank (TR 247).

47. William B. Robnette was first paid for work on August 15, 1979, and had not worked for Mexico or Covington before August, 1979 (R-M EX 3; TR 248). Robnette and Covington formed a corporation January 1, 1980, pursuant to an agreement that Robnette would be brought into the business (TR 251).

48. James Covington testified further that he had no discussion whatever with Jack Pierce about a deal whereby Covington "could have the tanks in return for three years' free rent on the property" because he never had any interest in the tanks and did not indicate he wanted the tank or tanks because he had no business with the tanks and has had no use for a big tank such as the 10,000-gallon vertical tank (TR 250); that the only knowledge he had respecting the contents of the tanks was what Pierce or Pierce's driver told him, i.e., that the tanks contained waste oil from service stations (TR 251).

49. Effective January 1, 1980, Covington leased to the corporation the land and buildings utilized by Mexico Feed, which lease is now and at all pertinent times has been in effect. Exhibit A, attached to said lease agreement, is a list of all the assets of Mexico; neither subject tanks or the contents (oil) was listed by Covington as an asset (R-M EX 5; TR 252).

50. Covington further testified that when he called Pierce to report the leak, circa February, 1980, he told Pierce he wanted the rent paid and the tanks moved and Pierce said he would do so without mention that Covington might want to keep the tanks for rent; that Pierce did not pay the rent or move the tanks (TR 252-253); and that Covington did not know or learn that the tanks contained

anything except waste oil from service stations until EPA came and told him after the oil was sampled and tested by EPA for the presence of PCBs (TR 253).

51. Covington further testified that he had never known of Pierce's claim that Covington owned the tanks until the testimony heard in the subject hearing; that he cannot remember ever talking to Pierce under circumstances where one of Pierce's employees was in the process of loading oil into a truck (TR 254); that the times Covington remembers talking to Pierce were in Covington's office (TR 277) and on the telephone (TR 289).

52. Catherine Potts (TR 291) testified that she is, and has been since 1965, employed by Covington as a bookkeeper; that she was and is responsible for sending out bills and statements; that she sent bills (hand-written) to Jack Pierce every year; that her journal shows payment of $150 by Jack Pierce in May, 1967, but no copies or records were kept of bills so sent out (TR 293); that statements were sent to Pierce for several years and were unpaid; that she did not send him any more statements after 1980; that entries in her journal were made only when payment was received (TR 295); that she has seen Jack Pierce . . . at the store . . in the office once or twice, but did not talk to him (TR 298); that she remembers the instance, but not the date, when he came to town (Mexico) when people (were prosecuted for stealing oil) TR 299); that she talked to Pierce's driver when they came into the office to use the telephone (TR 300); and that she did not observe the drivers come and go unless they came in (Covington's) office (TR 301).

53. Gary Snodgrass (TR 6; 304) testified that, on August 6, 1984, he initiated a "removal or clean-up" pursuant to the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") which entailed removal of 2350 gallons of contaminated oil and 2030 cubic yards of contaminated soil from four tanks (C EX 2) on the rear or northwest side of premises of the Mexico Feed and Seed

Company in Mexico, Missouri (TR 7); that oil in a large horizontal tank "north tank" was removed, first by suction with a vacuum hose out of the top part and, when the oil would not flow, oil was removed by way of the valve on the left side of the tank (as seen in Photo 1, C EX 2); that sludge prevented removal of the oil from the valve in the right side of the tank (TR 9). The oil was above the outlet spigots on the tank by almost two feet (TR 10) and estimated at 1000 gallons (TR 10).

54. Snodgrass further testified (TR 307) that the "large horizontal tank" was ten feet in diameter (TR 305) and 30 feet long (TR 306) and that, without a flashlight, he could not tell, looking down into the tank, if the tank was empty, so a pole was used to determine if the tank contained fluid; that he and the technicians with him could pump only 200 gallons from said horizontal tank with a gear pump (such as that purportedly used by Pierce employee); that a Weldon diaphragm pump was used to pump sludge, and several drums of sludge were pumped after which sludge still remained that they could not remove from said tank (TR 307); that the Pierce tanker had a screen on it "because if they pump in material that's too thick then they can't pump it back out . . . "; that no screen was used with said diaphragm pump (TR 308); that 43 drums full of oil and sludge were pumped from subject tanks; it was thick, black and viscous, not water but waste oil (TR 309); that most of the liquid and sludge was found in the south (upright) tank and the large horizontal tank; that sludge had to be shoveled from said south tank (TR 11); and that he had no knowledge of how said oil got in the tanks (TR 312).

55. Rod Waller further testified that his purpose in going to Mexico in February, 1978 (TR 319), was to empty the subject tanks and also to pick up oil from accounts (TR 320; 321); that he was sent to Mexico by Martin Pierce who

said he a got a call from a customer at Mexico Feed "and we want you to go pump out the contents of the tanks" (TR 322); that Waller had a short conversation with somebody at Mexico Feed, whose identity is unknown, concerning a leaking valve (TR 324); that no record exists of the liquid obtained from the Mexico tanks because it was "mostly water" (TR 325); that, to see what is coming from the tank, the hose is connected to the top of the tank and then pumped into the tanker (TR 327); that it is not hard to tell water (which is clear) from oil; that if the liquid were taken from the bottom of the tank "you wouldn't know what you're getting and you'd be paying for a lot of water" (TR 326); that the water removed was dumped on back roads (TR 328); that the upright tank was drained through a valve on the bottom (TR 329), which procedure is consistent to that observed by Robnette (TR 330; Finding 43, supra).

56. Respondent Pierce placed in evidence the articles of incorporation, minutes, by-laws and certificate of incorporation along with a certificate of authority for said Pierce Delaware corporation (Pierce Waste Oil Service, Inc.) to do business in Illinois (TR 336). A similar certificate to do business in Missouri was not placed in evidence, however, Jack Pierce was sure such certificate exists (TR 336). Along with its post hearing Reply Brief, Respondent Mexico Feed supplied a certificate, dated September 5, 1985, from the Missouri Secretary of State, Corporate Division, certifying that there are no records there on file which show that Pierce Waste Oil Service, Inc., and/or Pierce Waste Oil Company, Inc., is now or ever has been registered as a Foreign or Domestic corporation or under the Fictitious Name Act.

57. James R. Gipson worked for Jack Pierce picking up waste oil for about two months beginning in late 1973. He testified that he picked up oil at service stations and from a plant in Shelbina, Missouri, that makes conduit pipe; that

he was told by his predecessor, McGuire, to put any oil from the Shelbina plant in a separate tank; pursuant to such instructions he put the "heavy" oil from the Shelbina conduit pipe plant in the upright tank located at Mexico Feed and Seed (TR 198199). He was given no instructions about washing out the tank in between loads and said tank was not "washed out" (TR 199). Gipson also testified that he worked for (Respondent) Mexico Feed as a laborer at different times including the 1979 to 1983 time period during which time he was supervised by Bill Robnette; that he saw Rod Waller at some time during this period drive his truck up alongside and hook up the hose from the truck to the "upright tank's" lower faucet valve (TR 201); that this observation was occasioned by Gipson's duties at Mexico Feed which required him to pass by the subject tanks in going back and forth between the seed house and feed store (TR 201). Gipson further testified that he observed, prior to seeing the Pierce truck at the tank, that the lower valve had either frozen up or broken (and) was "leaking water out on the ground" (TR 204); and that, during the time he worked for Covington, he did not see anybody other than the Pierce company use subject tanks (TR 208).

58. James F. Covington, who testified as a witness concerning the conduct, transactions and occurences set forth in subject Complaints (TR 236 et seq.), was advised by EPA when they secured a sample of subject waste oil in 1983 and, in 1984, after a test had been made of said sample showing that said waste oil contained PCBs (TR 253). He participated in the defense of Mexico Feed and Seed Co., Inc. (which, in 1980, succeeded a sole proprietorship, owned by Covington) and hired and conferred with counsel employed by him to represent said corporation (TR 259; 284). Covington was present during the entire two-day hearing held herein (TR 256) and testified concerning the issues which the hearing addressed.

CONCLUSIONS OF LAW

The Conclusions of Law reached herein are set forth and discussed hereinbelow.

COMPLAINANT'S MOTION TO ADD JAMES F. COVINGTON AS A PARTY RESPONDENT

At the close of the evidence, Complainant moved (TR 342) that James F. Covington, individually, be made a party Respondent herein. The Counsel for Mexico objected to the Motion on the ground that the granting of said Motion would deny Covington "due process", as he would be entitled to Notice and to his own Counsel, as there might be a conflict between him and Mexico Feed and Seed, Inc. The granting of subject Motion is clearly within the contemplation of the Federal Rules of Civil Procedure (FRCP), Rule 15. On this record, it was James F. Covington who actively defended the Complaint. He hired Counsel (TR 259; 284), received notice of the alleged violation from EPA and notice of the institution of the action against Respondent Mexico Feed (TR 253), was present during meetings with witnesses (TR 259), was in attendance during the two-day hearing (TR 256), and testified as a witness (TR 236-286) concerning the transactions constituting the violations alleged in subject Complaint. It has been stated that Rule 15 of FRCP codified the law as declared by the Courts (see matter of J.V. Peters and Co., Inc., RCRA Docket V-W-81-R-75, 1985, EPA Region V, l.c. 36-37, citing Ocean Accident and Guarantee, Ltd., et al. v. Felgemaker et al., 47 FS 661, 663[5]; 143 F.2d 950, 952 [CCA, 6th Cir. 1944]) where it was held that, while no jurisdiction was obtained by service of process, a person, not technically a party, was so directly connected with the case by his interest in the result of the litigation and by his active participation as to be bound by the judgment. The Court pointed out that it is frequently held, citing cases, that a judgment may be rendered directly against one who, although not a formal party . . . has assumed or participated in the defense (l.c. 952[2]).

On the basis of the foregoing, I find that Complainant's Motion to make James F. Covington a party should be and it is hereby granted. On this record, no service of the Complaint or formal amendment of the pleadings is necessary, as Covington entered his appearance herein by actively preparing the defense, providing counsel and by testifying concerning the facts in issue.

THERE WAS NO CONTRACT TO SELL SAID TANKS TO COVINGTON.

The law clearly requires that for a sale to occur or for a contract to be made, there must be a meeting of the minds of the contracting parties (Irvin v. Brown Paper Mills Co., 52 F.S. 43, 146 [F.2d] 232 [1943]); and such contract does not exist so long as any essential element (such as time, place, identity or amount) is open to negotiation (Harbot v. Penn. R. Co., 44 F.S. 319, 320[2] [DCWDNY, 1942]) and that here the burden is on Pierce to prove every fact essential to establish that the sale of or contract for the tanks was made (Bell v. Ralston Purina Co., 257 F.2d 31 [CA OK. 1958]).

James F. Covington (Finding 48) unequivocably denies having any discussion respecting an agreement whereby Covington would become the owner of the tanks. He further states that he was not interested in owning a tank of the size of the 10,000-gallon tank because he had no use for a tank of that volume (TR 250). The only knowledge that Covington had respecting the contents of the tanks was what he was told. He stated, "They (the driver and Mr. Pierce) told me it was waste oil from service stations" (TR 251). Further, Covington's testimony states that the only business he had ever been in was the feed and seed business (for 36 years) and farming (50 years) and that he has never been in the waste oil business (TR 236).

I have further considered that Covington would not place any value on the oil but, like service station operators, would view it as a commodity that he would be glad to dispose of. Whether the last-mentioned pick-up of oil by

Pierce was in 1978 or 1980, it is undisputed that Pierce obtained the oil from the tanks and Covington was not paid anything for the oil (Findings 35, 43 and 45).

To enter the waste oil business, it is apparent one would need more than the tanks. Either he would be required to purchase oil tanker trucks and construct facilites to "refine" the waste oil, or find a willing buyer (such as Pierce) who would willingly buy, haul and refine the oil.

Even if the testimony of Jack Pierce is believed, it is clear that no contract was made at the alleged meeting "in 1973 or 1974." During that meeting, it is claimed that Covington "asked Pierce what he would take for the 10,000-gallon tank". Pierce testified that he did not give Covington an answer (TR 37). Pierce's further testimony was that later he asked Covington if he (Covington) would give up three years' rent for all (four) of the tanks and that Covington "was agreeable" (TR 38); that the time when the deal was made was somewhere in 1973 or 1974 and that Pierce anticipated free rent for 1975, 1976 and 1977 and his "pull out", although apparently not then contemplated, was in August or September 1976, "some time in there", and that after the alleged agreement with Covington, he continued his operation, using the tanks, for "a couple of years, probably . . . a little longer, maybe" (TR 39).

On this record, I find that, in 1976, when advised that persons stealing oil from subject tanks had been apprehended, Jack Pierce came to Mexico and personally filed charges representing that the oil was the property of Pierce Waste Oil Service, Inc. (TR 246). I further find that in February, 1980, Pierce was advised that one tank was leaking and that it might pollute the creek, whereupon Pierce sent a man to fix the leaking valve on the tank and a truck to pump out the contents of the tank (TR 247). These instances are inconsistent with Pierce's claim that the tanks were not then his property.

The instant record also indicates that Pierce's contention is that Covington was "interested" in one of the tanks, and not the contents - the oil. Even under Pierce's testimony, it must be implied that the tank, when "delivered" to Covington, would be empty. Pierce at all times claimed ownership of the oil and made an effort to secure the oil from the tanks (Findings 23, 24, 25 and 46). Covington was aware that the leaking oil, discovered by him and Robnette in 1980, "might run down the road into the creek and cause trouble". In 1984, EPA employees removed 2350 gallons of contaminated oil from the tanks and over 2000 cubic yards of contaminated soil from the site (TR 7; Finding 53).

From the foregoing, I find that there was no meeting of the minds as to the subject of the "sale" claimed by Pierce. There was no agreement as to the condition of the tanks, which was a concern of both the alleged contracting parties; there was no agreement as to the time of delivery. The essential elements of the alleged attempted sale were left to be negotiated and, until agreed upon, no sale or exchange resulted (Cases cited, supra.)

INDIVIDUAL LIABILITY

I find that Pierce Waste Oil Service, Inc., is a Delaware Corporation and one of four "Pierce family companies" (TR 181). Said Corporation was, until its dissolution in February, 1984, authorized to do business in Illinois but was not authorized to do business in the State of Missouri (see certificate from Missouri Secretary of State, dated September 5, 1985, which is attached to Respondent Mexico's Brief).

Delaware law provides that all corporations "shall continue for a period of three years after dissolution or for such longer period . . . necessary to resolve all claims against it." Where others are not appointed trustees, the directors of the dissolved corporation become its trustees and civil action proceeds against them and it is the duty of such trustees of the dissolved

corporation to pay all claims to the extent that funds of the Corporation are "in their hands" (8 DCA Section 279).

Illinois law provides that a foreign corporation authorized to do business in Illinois must file its notice of intent to dissolve such corporation and where said notice is not given, the directors of the corporation are liable for any unsatisfied claims against the corporation (see 32 I.A.S., Section 8.65[a] and 32 I.A.S., Section 12.80).

In Missouri, where Jack Pierce conducted business giving rise to the subject Complaint without authority being obtained by said Corporation to conduct business in Missouri, the directors and trustees are liable for the claims of the Corporation "to the extent of its property and effects that shall have come into their hands" (see MO R.S. Section 351.525).

On this record, the assets of the corporation were sold by Jack Pierce, its chief officer and stockholder (EX A to R-P EX 2; TR 54). As the assets of the corporation, Pierce Waste Oil Service, Inc., have been sold and the proceeds of the sale are in the hands of Jack Pierce, an individual, it would be a futile exercise to bring suit against the corporation (as urged by Pierce), as its assets have been liquidated. The object and intent of the laws of Delaware, Illinois and Missouri are the same, that is, to follow the corporate assets and to place liability on the person into whose hands the assets, or their proceeds, have fallen. The better view, and that which is adopted under the facts in this record, is that Jack Pierce, by carrying on business for a purported corporation which at no time had authority to do business in Missouri, is personally liable for the corporation's obligations and liabilities to the extent of the property, or proceeds thereof, that have come into his hands (Rowden v. Daniell, 132 SW 23, l.c. 27[8], [1910]; Borbein Young and Co. v. Cirese, 401 SW 2d 940 [KC App., 1966]).

In Rowden it is stated, l.c. 27:

> "When the plaintiff showed that (defendant) was engaged with others as the (WZ) Company . . . previous to the organization of the corporation by that name in Michigan, and that mining was carried on in said name . . . , and during said time (defendant) was furnishing money and was one of the managers of the business, he could not be released of his personal liability . . . by simply showing the organization of the corporation in Michigan, when it further appeared that the corporation wholly failed to comply with the laws of (Missouri) and had no right to make any contract or transact any business in (Missouri)."

I find that the civil penalty in the sum of $29,000 should be and is hereinbelow assessed against Respondent Jack Pierce, an individual.

I further find that the Act (TSCA) does not contemplate the assessment of a civil penalty against a non-participatory and non-negligent lessor and, therefore, is no logical or legal basis for holding Respondent J.F. Covington responsible for violations committed by the lessee under the theory of vicarious liability (see ARRCOM, Inc., Drexler Enterprises, Inc. et al. [Oct. 1985], Docket Nos. X-83-04-01 and 02-3008, citing Amoco Oil Co. v. EPA, 543 F.2d. 270 [1976]). ARRCOM further held, and correctly so, that "there is . . . nothing to prevent the Agency from causing the facility to be cleaned up and then attempting to obtain contribution from . . . landowners under CERCLA."

Upon consideration of the record, the submissions and stipulations of the parties and the conclusions reached herein, in accordance with the criteria set forth in the Act and pertinent regulations, I propose the following:

FINAL ORDER 2/

1. Pursuant to Section 16 of the Toxic Substances Control Act (TSCA), 15 U.S.C.A. 2615, and the stipulations of the parties herein, a civil penalty in the total sum of $29,000 is hereby assessed against Respondent Jack Pierce, an individual.

2. Payment of the full amount of the civil penalty assessed shall be made, within 60 days of the Service of the Final Order upon Respondent, by forwarding to

EPA - Region 7
(Regional Hearing Clerk)
P.O. Box 360748M
Pittsburgh, PA 15251.

3. No penalty is assessed against Mexico Feed and Seed Co., Inc., or J.F. Covington.

IT IS SO ORDERED.

DATED: October 25, 1985

Marvin E. Jones
Administrative Law Judge

2/ 40 C.F.R. 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon upon the parties unless an appeal is taken by one of the parties herein or the Administrator elects to review the Initial Decision.

Section 22.30(a) provides for appeal herefrom within 20 days.

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to the Regional Hearing Clerk of Region VII, U.S. Environmental Protection Agency, 726 Minnesota Avenue, Kansas City, Kansas 66101, the original of the foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk, EPA Headquarters, Washington, D.C., who shall forward a copy of said Initial Decision to the Administrator.

DATE: October 25, 1985

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ