4/27/84

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
FAIR HAVEN PLASTICS, INC. AND FAIR HAVEN INVESTMENT ASSOCIATES,	)	Docket No. V-W-88-R-005
	)	
Respondent	)	

1. RCRA - Storage of Hazardous Waste: The retention of hazardous waste for five and one-half months at the facility, which waste was intended for disposal, constitutes storage of hazardous waste within the terms of the Michigan Hazardous Waste Management Act and the Michigan Hazardous Waste Management Rules.

2. RCRA - Liability of Owner and Operator: Neither the owner nor the operator of the facility can be relieved of responsibilities under RCRA where the hazardous waste was left on the premises of the facility by a previous corporate tenant that went out of business.

3. RCRA - Civil Penalty Policy: A Presiding Officer may consider the Final RCRA Civil Penalty Policy as a matter within his discretion.

4. RCRA - Civil Penalty Policy: When the Presiding Officer considers the RCRA Civil Penalty Policy, the Presiding Officer must assess a separate penalty for each violation that is independent of, and substantially distinguishable from, other violations. A violation is independent of, and substantially distinguishable from, any other violation when it requires an element of proof not needed by the others.

5. RCRA - Civil Penalty Policy: The RCRA Civil Penalty Policy provides certain adjustment factors designed to take into consideration the reasons the violation was committed, the intent of the violator and other factors related to the violator which are not considered in calculating the initial amount of the gravity-based penalty.

APPEARANCES:

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BEFORE: Henry B. Frazier, III
Administrative Law Judge

INITIAL DECISION

I. Background - Violations Alleged:

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6901 et seq. ("RCRA"). An administrative complaint was issued on November 9, 1987 by the United States Environmental Protection Agency ("EPA" or "Complainant" or "Agency") under Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1).[1/] The complaint alleged that Fair Haven Plastics, Inc. and Fair Haven Investment Associates ("Respondents") had violated Sections 3002, 3005 and 3010 of RCRA, 42 U.S.C. §§ 6922, 6925 and 6930, as well as the Michigan Hazardous Waste Management Act, 1979 PA 64, MCL 299.501 et seq., MSA 13.30(1) et seq. and Michigan hazardous waste management regulations, specifically Michigan Administrative Code 1985 AACS, R299.9302, R299.9303 and R299.9306.

1/ 42 U.S.C. § 6928(a)(1) provides, in pertinent part: "Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both...."

Paragraph (2) provides: "In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section."

On April 13, 1988, the Complainant filed a motion for leave to amend the complaint which motion was granted on April 28, 1988. The amended complaint alleged that Respondents had violated Sections 3004, 3005 and 3010 of RCRA, 42 U.S.C. §§ 6924, 6925 and 6930, as well as the Michigan Hazardous Waste Management Act, 1979 PA 64, MCL 299.501 et seq.; MSA 13.30(1) et seq.; and Michigan hazardous waste management regulations, specifically Michigan Administrative Code 1985 AACS, R299.9303(1) and R299.9601 et seq.

More specifically, the amended complaint alleged that the Respondents had committed the following violations of RCRA, the Michigan Hazardous Waste Management Act, the Michigan Administrative Code and EPA regulations:

(1) Failure to have acquired interim status or a permit while storing or allowing the storage of hazardous waste at a facility owned by Fair Haven Investment Associates and operated by Fair Haven Plastics, Inc., thereby violating Section 3005 of RCRA, 42 U.S.C. § 6925[2/] and Section 522 of the Michigan Hazardous Waste

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[2/] 42 U.S.C. § 6925 provides, in pertinent part:

"(a) Permit requirements

Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating an existing facility...for the...storage... of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 6930 of this title and upon and after such date the...storage...of any such hazardous waste...is prohibited except in accordance with such a permit. (Continued on page 5.)

Management Act, MCL 299.522;[3]

(2) Failure to obtain an EPA identification number in violation of 40 C.F.R. § 264.11, as adopted at MAC R299.9605;

(3) Failure to perform a waste analysis in violation of 40 C.F.R. § 264.13, as adopted at MAC R299.9605;

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[2] (Contination of footnote #2 from page 4.)

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(e) Interim status

(1) Any person who--

(A) owns or operates a facility required to have a permit under this section which facility--

(i) was in existence on November 19, 1980, or

(ii) is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section,

(B) has complied with the requirements of section 6930(a) of this title, and

(C) has made an application for a permit under this section

shall be treated as having been issued such permit until such time as final administrative disposition of such application is made, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application."

[3] MCL 299.522 provides, in pertinent part:

(1) Unless a person is complying with subsections (4), (5), and (6) or a rule promulgated under section 26(4) a person shall not conduct, manage, maintain, or operate a treatment, storage, or disposal facility within this state without an operating license from the director.

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(Continued on page 6.)

(4) Failure to properly label stored containers of hazardous wastes in violation of MAC R299.9614(1)(b);

(5) Failure to prevent leakage of drums containing hazardous wastes in violation of 40 C.F.R. § 264.171 and 40 C.F.R. § 264.173, as adopted at MAC R299.9614(1)(a);

(6) Failure to develop a personnel training program, job titles and job descriptions for employees managing hazardous waste at the facility and failure to develop records therefor in violation of 40 C.F.R. § 264.16, as adopted at MAC R299.9685;

3/ (Continuation of footnote #3 from page 5.)

(4) A person owning or operating a storage facility which is in existence on the effective date of the 1982 amendatory act which added this subsection and at which managed hazardous wastes, as defined by rule, are stored, who becomes subject to the operating license requirements of this section as a result of the changes effected by the 1952 [sic] amendatory act which added this subsection, shall have 90 days from the effective date of the 1982 amendatory act which added this subsection to provide the director with a detailed written description of the hazardous waste activities earned [sic] on at the storage facility.

(5) The director shall establish a schedule for requiring each person subject to subsection (4) to submit an operating cense application. The director may adjust this schedule as necessary. Each person subject to subsection (4) shall submit a complete operating license application within 120 days of the date requested to do so by the director.

(6) Any person described in subsection (4) may continue to operate a storage facility until an operating license application is approved or denied if all of the following conditions have been met:

(a) The person has met the requirements of subsections (4) and (5).

(b) The person is in compliance with all rules regarding storage facilities promulgated under this act and with all other state laws.

(c) The person is in compliance with interim status standards established by federal regulation under title II of the solid waste disposal act.

(7) Failure to develop a contingency plan and emergency procedures in violation of 40 C.F.R. Part 264, Subpart D, as adopted at MAC R299.9607; and

(8) Offering hazardous waste for transportation without an EPA ID number on September 29, 1987, thereby violating the requirements of MAC R299.9303(1).

II. Background - Penalties Proposed:

The amended complaint proposed, pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928,[4/] that a civil penalty be assessed against

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[4/] 42 U.S.C. § 6928 provides, as to penalties:

"(a) Compliance orders

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(3) Any order issued pursuant to this subsection...shall state with reasonable specificity the nature of the violation. 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 shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

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(c) Violation of compliance orders

If a violator fails to take corrective action within the time specified in a compliance order, the Administrator may assess a civil penalty of not more than $25,000 for each day of continued noncompliance with the order and the Administrator may suspend or revoke any permit issued to the violator (whether issued by the Administrator or the State).

* * * * * * *

(g) Civil penalty

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 Respondents in the following amounts:

1.	Storage of hazardous waste without interim status or permit:	$ 2,250.00
2.	Failure to: (a) have EPA ID number; (b) perform waste analysis; (c) properly label; (d) prevent leakage; (e) develop personnel training program; and (f) develop contingency plan and emergency procedures and shipment of hazardous waste without an EPA ID number:	$ 9,500.00
	Total Proposed Penalty	$11,750.00

III. Background - Processing of the Case:

Respondents replied to the amended complaint, contesting both the alleged violations and the appropriateness of the proposed penalty, and requested a hearing. The Respondents admitted the presence of the hazardous waste at the facility, but denied responsibility for its presence and denied any intention to store the waste at the facility. Respondents contended that the waste was left by a previous tenant and at the time they were not aware of the nature of the obligations "foisted" upon them by the prior tenants of the facility. Respondents further alleged that they believed the waste was subject to a seizure order of the Internal Revenue Service (IRS) in order to preclude removal by the Respondents.

A hearing was held in Detroit, Michigan, on December 6, 1988. Thereafter, EPA filed timely proposed findings of fact and conclusions of law, together with a supporting brief on February 1, 1989.5/

On February 22, 1989, Respondents filed untimely proposed findings of fact and an untimely response to the Complainant's brief. Respondents did not file a motion for an extension of time for these filings in advance of the dates on which they were due, nor have the Respondents filed a motion subsequent to their due dates with the necessary showing of excusable neglect (see 40 C.F.R. § 22.07(b)). Therefore, Respondents' untimely submissions have not been considered in the preparation of this decision. Subsequently, EPA filed a reply to Respondent's untimely submission which reply has likewise not been considered in the preparation of this decision.

On the basis of the entire record, including the testimony elicited at the hearing, the stipulation of facts, the exhibits received in evidence and the submissions of the parties, and giving

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5/ At the close of the hearing, the parties jointly moved on the record that they be granted an extension of the usual time provided for these submissions in 40 C.F.R. § 22.26, which motion was granted. As a result, proposed findings of fact, conclusions of law and a proposed order, together with briefs in support thereof were required to be filed no later than February 1, 1989 and reply briefs were required to be filed no later than February 15, 1989.

such weight as may be appropriate to all relevant and material evidence which is not otherwise unreliable, I make the findings of fact which follow. Each matter of controversy has been determined upon a preponderance of the evidence. All contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision are rejected.

FINDINGS OF FACT

1. Respondent Fair Haven Investment Associates owns the property at 7445 Mayer Road, Fair Haven, Michigan 48023, where fifty-eight (58) drums were located before their removal on September 29, 1987. Transcript ("Tr.") 4, 217, 241-242.
2. Fair Haven Investment Associates leases property at 7445 Mayer Road, Fair Haven, Michigan 48023, to Fair Haven Industries which in turn leases the property to tenants. Tr. 217-218, 214-242.
3. On April 15, 1987, Respondent Fair Haven Plastics, Inc. was a tenant at 7445 Mayer Road, Fair Haven, Michigan 48023. Tr. 25.
4. Fair Haven Plastics, Inc. was a corporation originally formed as Bayview Plastics, Inc. in November 1986. The corporate name was changed to Fair Haven Plastics, Inc. in February 1987. Tr. 221, 247-248; Respondents' Additional Prehearing Statement, pp. 1-2.

5. Mr. Robert Michelini has been a partner in Fair Haven Investment Associates since 1983 and is Vice-President of Fair Haven Industries. Mr. Michelini was part owner and director of Fair Haven Plastics, Inc. Mr. Michelini has an office at 7445 Mayer Road, Fair Haven, Michigan. Tr. 217-218, 241, 248-249, 258.

6. Fair Haven Plastics, Inc. acquired some fifty (50) employees and several production contracts from Bayview Products, Inc. From McDonald Company, it also purchased machinery, which Bayview Products, Inc. had leased from McDonald and which was in place at the facility previously leased by Bayview Products, Inc., with the intention of producing products for sale to the previous customers of Bayview Products, Inc. Tr. 220-222, 255-257.

7. Bayview Products, Inc. was a tenant at 7445 Mayer Road, Fair Haven, Michigan, from sometime in late 1985 or early 1986 until October 1986, at which time Bayview Products, Inc. went out of business. Mr. John Hurlburt had served as President of Bayview Products, Inc. Complainant's Exh. 5; Respondents' Exh. 6.; Tr. 217-218, 221.

8. On December 15, 1986, Mr. Bradley D. Osgood, II, Chairman and President of Bayview Plastics, Inc., consented to entry by employees of the IRS into the premises located at 7445 Mayer Road, Fair Haven, Michigan 48023 for purposes of seizure of property belonging to Bayview Products, Inc. In signing the

consent to enter, Mr. Osgood inserted the following: "I understand that all Bayview Products, Incorporated's inventory and machinery will be removed." Respondents' Exh. 1; Tr. 7.

9. On March 30, 1987, Mr. Robert L. Michelini wrote to the IRS requesting the removal of some remaining "assets" or "inventory" of Bayview Products, Inc. which had not been removed during the seizure on December 15, 1986. The letter threatened to charge the IRS rent if the material was not removed. Mr. Michelini sent the letter in hopes of resolving a problem pertaining to a truckload of drums which had belonged to Bayview Products, Inc. and which he understood to contain some good, and some bad, paint and paint thinner. Respondents' Exh. 2; Tr. 225-226, 249-251.

10. On April 16, 1987, the IRS wrote to Mr. Robert L. Michelini, Vice-President of Fair Haven Plastics, Inc., in response to his letter of March 30, 1987, that all items determined to have value as a consequence of the seizure of the assets of Bayview Products, Inc. had been removed from the premises, that the assets that remained were determined to have no value and were released to Mr. John E. Hurlburt, President of Bayview Products, Inc. and that the government was not liable for any remaining waste belonging to Bayview Products, Inc. Complainant's Exh. 2; Respondents' Exh. 4; Respondents' Exh. 2; Tr. 52.

11. On April 15, 1987, Ms. Daria Devantier, an Environmental Quality Analyst with the Michigan Department of Natural Resources (MDNR), conducted, in the course of her assigned duties, a hazardous waste inspection of the facility located at 7445 Mayer Road, Fair Haven, Michigan 48023. During the course of the inspection, Ms. Devantier met with and interviewed Mr. John Hurlburt, President, and Mr. Steve Shumaker, the Decorating Manager, of Fair Haven Plastics, Inc. Complainant's Exh. 1; Tr. 18-21, 25, 81.

12. During the inspection, Ms. Devantier observed fifty-seven (57) 55-gallon drums (as well as some small containers) of hazardous waste, in a large trailer on the premises at 7445 Mayer Road. Complainant's Exh. 1; Respondents' Answer to the Amended Complaint, p. 2; Tr. 31, 38.

13. Prior to Ms. Devantier's inspection, Messrs. Hurlburt and Shumaker had pulled samples of the waste stored in the drums and sent them to Petro-Chem Processing, Inc. for analysis. Tr. 35-36; Complainant's Exh. 14.

14. On February 3, 1987, a check in the amount of $125.00 had been drawn on the account of Bayview Plastics, Inc. payable to Petro-Chemical Processing. Complainant's Exh. 17; Tr. 58.

15. On February 25, 1987, Petro-Chem Processing, Inc. had completed an analysis for Fair Haven Plastics, Inc., Sample # U6193, which identified the physical properties of the waste

as: F003; BTU: 19800; WT/GAL: 7.03; % CL: 0.338; % H_2O: 0.503; Specific Gravity: .844; and pH: 5.57. Complainant's Exh. 14; Tr. 32-38.

16. The drums contained spent solvents, classified as F003 and F005 wastes. Complainant's Exh. 12; Tr. 32-38.

17. The spent solvents in the drums were wastes in storage which were intended for disposal. Tr. 86-87, 130-131.

18. The wastes in the drums had been accumulated over a period of time beginning in 1978 and had been left on the premises at 7445 Mayer Road after the prior tenant, Bayview Products, Inc., went out of business. Tr. 29, 42, 80, 86, 128-129, 233-235, 250.

19. The weight of the material in the drums was in excess of a thousand kilograms. Tr. 32, 39; Complainant's Exh. 8; Complainant's Exh. 14.

20. Messrs. Hurlburt and Shumaker did not have a written analysis of the waste available at Fair Haven Plastics, Inc. at the time of the MDNR inspection. Tr. 39-40; Complainant's Exh. 1.

21. The drums had not been marked with the words "Hazardous Waste," with the accumulation date or with the hazardous waste number. Tr. 41-43; Complainant's Exh. 1.

22. According to Mr. Shumaker, the drums were not inspected weekly for leaks and defects. Tr. 47.

23. There were no personnel training records on file at the facility which would provide documentation (including job titles

and training records) of training for hazardous waste management. Tr. 49; Complainant's Exh. 1.

24. A contingency plan and emergency procedures established for hazardous waste were not available at the facility. Tr. 49-50; Complainant's Exh. 1.

25. Some of the floorboards in the vicinity of a couple of the drums inside the trailer had an oily sheen to them. Tr. 43-44, 111-113.

26. There was no sign of leakage on the ground beneath the trailer. Tr. 113.

27. Fair Haven Plastics, Inc. had not obtained an EPA MID number or a Michigan MIG number at the time of the inspection. However, Bayview Products, Inc. had an MIG number, namely MIG 0000003938. Tr. 26-27.

28. Fair Haven Plastics, Inc. had not made any shipments of manifested wastes from the facility as of April 15, 1987. Tr. 40-41; Complainant's Exh. 1.

29. On April 21, 1987, MDNR sent a letter of warning to Mr. John Hurlburt, President of Fair Haven Plastics, Inc., informing him that as a result of the inspection the facility was found to be in violation of several specific requirements of the MDNR and of EPA. The notification included the requirements which Fair Haven Plastics, Inc. would have to meet to be in compliance as a full quantity generator, i.e., if Fair Haven Plastics, Inc. planned to accumulate wastes in the future in

the quantities found at the time of the inspection. The notification also included, in the alternative, conditions which it would have to meet to be in compliance as a small quantity generator, i.e., if Fair Haven Plastics, Inc., in the future, generated below 1000K per month of hazardous waste. Complainant's Exh. 3; Respondents' Exh. 5; Tr. 69-73, 121-122.

30. The MDNR letter requested a response from Fair Haven Plastics, Inc. by May 18, 1987, documenting their corrective actions to the violations described in the letter. It explained that for Fair Haven Plastics, Inc. to be in compliance with small quantity generator requirements it must, among other things, properly dispose of wastes on-site, showing documentation (i.e., the manifest) that wastes were sent to a licensed facility. The letter also advised that Ms. Devantier could be called if Fair Haven Plastics, Inc. had any questions and included her phone number. Complainant's Exh. 3; Respondents' Exh. 5; Tr. 65-69.

31. On May 8, 1987, Mr. John Hurlburt resigned his position as President of Fair Haven Plastics, Inc. Respondents' Exh. 9.

32. Approximately one week before the reply to the MDNR letter was due on May 18, 1987, Ms. Devantier telephoned Fair Haven Plastics, Inc. to ascertain their progress in complying with the MDNR letter. Ms. Devantier spoke with Mr. Michelini, Vice-President of Fair Haven Plastics, Inc., who asked no questions regarding the requirements of the letter. Mr.

Michelini expressed the view that the drums and their contents were owned by or in the control of the IRS or Bayview Products, Inc. and the removal of the drums should be their responsibility. Ms. Devantier advised that the landlord would be ultimately responsible. Tr. 51, 63, 73-75, 127, 141, 233-237, 251, 265.

33. On May 27, 1987, MDNR wrote Mr. Robert Michelini of Fair Haven Plastics, Inc. informing him that no response had been received to the April 21, 1987, letter and requesting a response by June 5, 1987. The letter advised that failure to so respond "may result in escalated enforcement." Again Ms. Devantier included her telephone number and requested that she be contacted if there were any questions regarding the matter. Complainant's Exh. 4; Tr. 52-53.

34. Respondents did not submit the requested answer by June 5, 1987. Tr. 53.

35. On July 8, 1987, attorneys for Fair Haven Plastics, Inc. advised the MDNR by letter that the waste was created by and is the property of Bayview Products, Inc. and that it was the responsibility of Bayview Products, Inc. or the IRS, but not Fair Haven Plastics, Inc. The letter went on to say that their client would like the waste removed and requested the advice and assistance of the MDNR, based on an understanding that the MDNR had a program established for the removal of

hazardous waste. Complainant's Exh. 5; Respondents' Exh. 6; Tr. 53, 76-77.

36. On July 15, 1987, MDNR wrote Mr. Robert Michelini to acknowledge receipt of the July 8, 1987 letter from his attorneys and to inform him that he was responsible for wastes in his possession, that he was required to come into immediate compliance with applicable federal and state laws and that the case was being referred to EPA for escalated enforcement. Complainant's Exh. 6; Respondents' Exh. 7; Tr. 53.

37. On September 29, 1987, PCPI Transport, Inc. transported fifty-eight (58) drums of F003 (flammable liquid) waste paint from Fair Haven Plastics, Inc., 7445 Mayer Road, Fair Haven, Michigan 48023, to Petro-Chem Processing, Inc., 515 Lycaste, Detroit, Michigan, for disposal. The cost of the disposal of the waste material was approximately $14,000.00. Complainant's Exh. 8; Respondents' Exh. 8; Tr. 54, 237, 240.

38. The generator's USEPA ID No. used by Fair Haven Plastics, Inc. on the Hazardous Waste Manifest on September 29, 1987 was MID 0000003938. Complainant's Exh. 8; Respondents' Exh. 8; Tr. 54-55.

39. In the letter dated April 21, 1987, MDNR had informed Mr. John Hurlburt, President of Fair Haven Plastics, Inc., that the number MIG 0000003938 could not be used by Fair Haven Plastics, Inc. The MIG number was a State of Michigan number assigned to the address for Bayview Products, Inc. which address was

different from that of Fair Haven Plastics, Inc. The letter advised that Fair Haven Plastics, Inc. needed an EPA assigned number which begins with MID. Complainant's Exh. 3; Respondents' Exh. 5; Tr. 50-51.

40. On October 2, 1987, Fair Haven Plastics, Inc. sent a notification to MDNR that the waste material had been removed at Fair Haven Plastics, Inc.'s expense. Complainant's Exh. 7; Tr. 54.

41. On November 18, 1987, Fair Haven Plastics, Inc. submitted a Notification of Hazardous Waste to EPA and requested an EPA ID number for the installation located at 7445 Mayer Road, Fair Haven, Michigan 48023. On December 10, 1987, EPA assigned ID number MID 982222291 to the installation. Complainant's Exh. 12; Respondents' Exh. 10; Tr. 59-60.

DISCUSSION AND CONCLUSIONS

RCRA governs the treatment, storage and disposal of solid waste in the United States. More particularly, Sections 3001 through 3013 of RCRA regulate the treatment, storage and disposal of hazardous waste. Under Section 3005 of RCRA, 42 U.S.C. § 6925,6/ "the Administrator shall promulgate regulations requiring each person owning or operating an existing facility...for the storage of hazardous waste...to have a permit issued pursuant to this section." Section 3010 of RCRA, 42 U.S.C § 6930,7/ requires an owner or operator of a storage facility to notify EPA of any hazardous waste activity within ninety days after the promulgation of regulations by EPA identifying as hazardous waste any substance

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6/ See supra note 2.

7/ 42 U.S.C. § 6930 provides, in relevant part:

"(a) Preliminary notification
Not later than ninety days after promulgation of regulations under section 6921 of this title identifying by its characteristics or listing any substance as hazardous waste subject to this subchapter, any person generating or transporting such substance 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."

being stored. Section 3004 of RCRA, 42 U.S.C. § 6924,8/ provides

8 / 42 U.S.C. § 6924 provides, in pertinent part:

"(a) In general

Not later than eighteen months after October 21, 1976, and after opportunity for public hearings and after consultation with appropriate Federal and State agencies, the Administrator shall promulgate regulations establishing such performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter, as may be necessary to protect human health and the environment. In establishing such standards the Administrator shall, where appropriate, distinguish in such standards between requirements appropriate for new facilities and for facilities in existence on the date of promulgation of such regulations. Such standards shall include, but need not be limited to, requirements respecting--

(1) maintaining records of all hazardous wastes identified or listed under this chapter which is treated, stored, or disposed of, as the case may be, and the manner in which such wastes were treated, stored, or disposed of;

(2) satisfactory reporting, monitoring, and inspection and compliance with the manifest system referred to in section 6922(5) of this title;

(3) treatment, storage, or disposal of all such waste received by the facility pursuant to such operating methods, techniques, and practices as may be satisfactory to the Administrator;

(4) the location, design, and construction of such hazardous waste treatment, disposal, or storage facilities;

(5) contingency plans for effective action to minimize unanticipated damage from any treatment, storage, or disposal of any such hazardous waste;

(6) the maintenance of operation of such facilities and requiring such additional qualifications as to ownership, continuity of operation, training for personnel, and financial responsibility (including financial responsibility for corrective action) as may be necessary or desirable; and

(Continued on page 22.)

that "the Administrator shall promulgate regulations establishing such performance standards, applicable to owners and operators of facilities for the...storage...of hazardous wastes...as may be necessary to protect human health and the environment."

Section 3006 of RCRA, 42 U.S.C. § 6926, allows EPA to authorize a state hazardous waste management program to operate in a state in lieu of the federal hazardous waste management program. EPA has granted Michigan final authorization to operate a hazardous waste management program, subject to the limitations on its authority imposed by the Hazardous and Solid Waste Amendments of 1984.9/ EPA's authority to bring enforcement actions under Section 3008(a), 42 U.S.C. § 6928(a),10/ extends to states like Michigan which have

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8/ (Continuation of footnote #8 from page 21.)

(7) compliance with the requirements of section 6925 of this title respecting permits for treatment, storage, or disposal.

No private entity shall be precluded by reason of criteria established under paragraph (6) from the ownership or operation of facilities providing hazardous waste treatment, storage, or disposal services where such entity can provide assurances of financial responsibility and continuity of operation consistent with the degree and duration of risks associated with the treatment, storage, or disposal of specified hazardous waste."

9/ 51 Fed. Reg. 36804.

10/ See supra note 1.

been authorized by the EPA to administer its own hazardous waste program.[11/] In bringing an enforcement action in a RCRA-authorized state, EPA must first provide notice to that state. The instant matter was referred by MDNR to EPA for escalated enforcement and EPA provided notice to MDNR of this enforcement action.[12/] In bringing an enforcement action, EPA may enforce the requirements and regulations not only of the federal program to regulate hazardous waste activity, but also the requirements and regulations of the state approved program.[13/]

Under Section 522 of the Michigan Hazardous Waste Management Act, MCL 299.522, a person is prohibited from maintaining or operating a storage facility without having first obtained an operating license. If an application for an operating license has been submitted pursuant to the 1982 amendments to the act, the person submitting the application may continue to operate a storage facility provided the person is in compliance with all Michigan rules regarding storage facilities and with the federal interim status regulations established under RCRA.[14/]

[11/] U.S. v. Conservation Chemical Company of Illinois and Norman B. Hjersted, 660 F. Supp. 1236, 1244 (N.D. Ind. 1987); Wyckoff Co. v. EPA, 796 F. 2d 1197, 1201 (9th Cir. 1986).

[12/] Tr. 53; Respondents' Exh. 7; Complaint; Amended Complaint.

[13/] In re CID - Chemical Waste Management of Illinois, Inc., RCRA Appeal No. 87-11 (CJO, August 18, 1988).

[14/] See supra note 3.

Respondents, Fair Haven Plastics, Inc. and Fair Haven Investment Associates, are persons as defined by Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and the Michigan Hazardous Waste Management Act, 1979 PA 64, MCL 299.505(2), MSA 13.30(5)(2).15/

Fifty-seven (57) 55-gallon drums of hazardous waste (plus some smaller containers of waste) were located at 7445 Mayer Road, Fair Haven, Michigan from at least April 15, 1987 through September 29, 1987. Although Respondents admitted the presence of the hazardous waste,16/ they denied responsibility for it because:

(a) the waste was not being stored as the term "store" is used in applicable statutes and regulations and hence, Respondents were not storers of hazardous waste;

(b) the waste was left by a previous tenant of the facility and at the time Respondents were not aware of the nature of the obligations "foisted" upon them by the prior tenants of the facility; and

(c) the waste was believed by Respondents to be subject to a seizure order of the IRS so as to preclude removal by Respondents.

I will consider each of these contentions in order.

(a) The Storage of Hazardous Waste: The Michigan Hazardous Waste Management Act defines storage as "the containment of hazardous

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15/ Amended Complaint, pp. 2-3; Answer of Respondents to the Amended Complaint, p.1.

16/ Answer of Respondents to the Amended Complaint, p.2.

waste, either on a temporary basis or for a period of years, in a manner so as not to constitute disposal of the hazardous waste."17/ The hazardous waste here was contained in the 55-gallon drums and several small containers wherein it had been accumulated over a period of time beginning in 1978. It was on the premises at the time of the inspection on April 15, 1987 and remained there until September 29, 1987. While the waste in the drums was intended for disposal and was ultimately disposed of, none was disposed of during its presence on the property for five and one-half months. At the very least, this would constitute "containment...on a temporary basis...in a manner so as not to constitute disposal." Likewise, the presence of the hazardous waste would constitute "storage" as that term is defined in the Hazardous Waste Management Rules of the MDNR: "the holding of hazardous waste for a temporary period at the end of which the hazardous waste is...disposed...elsewhere."18/

A "storage facility" is defined by the Michigan Hazardous Waste Management Act as "a facility or part of a facility at which managed hazardous waste, as defined by rule, is subject to storage."19/ A "facility" has been defined in the Michigan regulations as "all contiguous land and structures, other appurtenances, and

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17/ Section 505(5) of the Michigan Hazardous Waste Management Act, MCL 299.505(5).

18/ Michigan Administrative Code, 1985 AACS, R299.9107(v).

19/ Section 505(6) of the Michigan Hazardous Waste Management Act, MCL 299.505(6).

improvements on the land used for...storing...hazardous waste."[20] The waste contained in the drums has been defined by rule as hazardous waste.[21] Therefore, the premises owned by Respondent Fair Haven Investment Associates and leased by Respondent Fair Haven Plastics, Inc. whereon hazardous waste was subject to storage constituted a storage facility within the meaning of the Michigan Hazardous Waste Management Act. Respondents' contentions to the contrary must be rejected.

As owner of the property at 7445 Mayer Road, Fair Haven, Michigan, Respondent Fair Haven Investment Associates was the "owner" of the storage facility as that term is defined in the Michigan Hazardous Waste Management Rules.[22] As lessee/tenant of of the storage facility at that address. Respondent Fair Haven Plastics, Inc. was, at all times relevant to the complaint herein, the "operator" of the storage facility as that term is defined in the Michigan Hazardous Waste Management Rules.[23] Therefore, I must reject Respondents' contention that they were not storers of hazardous waste.

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[20] Michigan Administrative Code, 1985 AACS, R299.9103(h).

[21] Michigan Administrative Codes, 1985 AACS, R299.9212(1) and (6)(b); R299.9213(1)(a); and R299.11003(1).

[22] Michigan Administrative Code, 1985 AACS, R299.9106(e).

[23] Michigan Administrative Code, 1985 AACS, R299.9106(d).

(b) Waste Left by Prior Tenant: Although Ms. Devantier testified that during the inspection Messrs. Hurlburt and Shumaker of Fair Haven Plastics, Inc. told her that they had contributed in some small part to the drums of waste,[24/] Mr. Michelini testified that Fair Haven Plastics, Inc. never started production and did not generate any of the waste.[25/] Moreover, in their Motion to Amend Complaint, EPA had said: "At the time the complaint in this matter was issued, U.S. EPA believed that Respondents had generated the hazardous wastes at issue. U.S. EPA has received new information and now believes that the Respondents may not have generated these wastes." Consequently, I must conclude that the waste was generated by parties other than the Respondents. The preponderance of evidence supports the finding that the waste in the drums had been accumulated over a period of time beginning in 1978 and had been left on the premises after the prior tenant, Bayview Products, Inc., went out of business.

Even though the waste was left on the premises after Bayview Products, Inc. went out of business, that does not relieve the owner or the operator of the facility of their responsibilities under RCRA. As for Respondents' contention that they were unaware of those responsibilities, they, like everyone else, are charged with knowledge of the United States Code and rules and regulations

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[24/] Tr. 27-28.

[25/] Tr. 230, 234.

duly promulgated thereunder.[26] Even though the complaint herein alleges violations of the Michigan statute and regulations, those provisions of state law and regulations are equivalent to, no less stringent than, and consistent with, the requirements of the federal program.[27] Indeed, many of the provisions of the federal RCRA regulations are incorporated by reference in the MDNR Hazardous Waste Management Rules. Moreover, everyone is charged with knowledge of the laws of the state in which they reside or do business.[28] Michigan residents and those who do business in Michigan are charged with notice of Michigan state law.[29] Therefore, the Respondents must be charged with knowledge of their responsibilities under RCRA, the Michigan Hazardous Waste Management Act and the relevant regulatory requirements which were applicable to them.

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[26] 44 U.S.C. § 1507. The Supreme Court has said: "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-385 (1947)."

[27] Section 3006 of RCRA, 42 U.S.C. § 6926.

[28] Texaco, Inc. v. Short, 454 U.S. 516, 532 (1982); International Milling Co. v. Columbia Transportation Co., 292 U.S. 511, 520-521 (1934); Loftin v. United States, 6 Cl. Ct. 596, 608, n. 8 (1984), affirmed, 765 F. 2d. 1117 (1985); 31A C.J.S. Evidence § 132(1) pp. 245-252, 255 (1955).

[29] American Way Service Corp. v. Michigan Dept. of Commerce, et al., 113 Mich. App. 423, 317 N.W. 2d 870 (1981); In re Sewart's Estate, 342 Mich. 491, 70 N.W. 2d 732 (1955); Atlantic Municipal Corp. v. Auditor General, 304 Mich. 616, 8 N.W. 2d 659 (1943).

Indeed, the letter which MDNR sent to Fair Haven Plastics, Inc. on April 21, 1987 provided specific notice of those requirements which the Respondents would have to meet to be in compliance with applicable statutory and regulatory requirements. Included were specific instructions as to the proper disposal of the waste.

Consequently, Respondents' contention that they should not be held liable because they were unaware of the legal requirements which applied to them must be rejected.

(c) The IRS Seizure of Bayview Products, Inc.'s Assets: On December 15, 1986, the IRS entered the premises at 7445 Mayer Road to seize property belonging to Bayview Products, Inc. On March 30, 1987, Mr. Michelini, of Fair Haven Plastics, Inc. and Fair Haven Investment Associates, wrote the IRS requesting the removal of the remaining "assets" or "inventory" of Bayview Products, Inc. (i.e., the trailer load of drums containing the waste). On April 16, 1987, one day after the inspection by MDNR, the IRS wrote Mr. Michelini that the assets that remained after the seizure were determined to have no value and were released to Mr. John Hurlburt of Bayview Products, Inc. and that the government was not liable for any remaining waste belonging to Bayview Products, Inc. Upon receipt of that letter from IRS, Respondents had actual notice that the waste was not subject to the IRS seizure order. Therefore, Respondents' contentions to the contrary must be rejected.

During the hearing, the Respondents' counsel also argued that EPA possessed the discretion to file a complaint or send a letter of violation to Respondents and he contended that a letter of violation should have been sent.[30/] As the Chief Judicial Officer has held, "the decision to issue a warning letter or a complaint is a matter of prosecutorial discretion."[31/] There is no evidence that this discretion was abused in this case.

Having rejected Respondents' general contentions as to why they should not be found liable for the violations alleged in the complaint, I turn now to an examination of the violations specifically alleged by EPA.

1. Storage of Hazardous Waste Without Interim Status or Permit: The amended complaint alleged that Respondents stored or allowed the storage of hazardous waste without interim status or a permit in violation of Section 3005 of RCRA, 42 U.S.C. § 6925[32/] and Section 522 of the Michigan Hazardous Waste Management Act, MCL 299.522.[33/]

30/ Tr. 280.

31/ In re Arrcom, Inc., Drexler Enterprises Inc. et al., RCRA (3008) Appeal No. 86-6, at 11 (CJO, May 30, 1986).

32/ See supra note 2.

33/ See supra note 3.

Under Section 522 of the Michigan Act, an operating license is required for a storage facility unless the owner or operator has provided MDNR with "a detailed written description of the hazardous waste activities earned [sic] on at the storage facility." Owners or operators who provide this required notice are permitted to continue to operate until the requirements of the licensing provisions are met as scheduled by MDNR, so long as the owners or operators are in compliance, inter alia, with EPA's interim status standards which include a requirement that the owners or operators apply to EPA for an Identification Number. In the absence of an operating license or interim status, an owner or operator may not engage in hazardous waste activities such as storage.

It has been established that hazardous waste was stored at the facility located at 7445 Mayer Road, Fair Haven, Michigan between April 15, 1987 and September 29, 1987. The Respondents failed, in their answer to the amended complaint, to admit, deny or explain the allegation that neither possessed interim status or a permit. Such failure constitutes an admission of this material factual allegation.[34/]

Moreover, an EPA witness testified at the hearing that at the time of the referral of the matter by MDNR, there was no record at EPA of Respondents having notified EPA of hazardous waste activity

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34/ 40 C.F.R. § 22.15(d).

which notification is a prerequisite to interim status.[35/] Respondents failed to present any evidence at the hearing that they had an operating license or interim status. Fair Haven Plastics, Inc. submitted a notification and a request for an EPA ID number on November 18, 1987, some nine days after the complaint was filed.

Thus, I must conclude that Respondents violated Section 3005 of RCRA, 42 U.S.C. § 6925, and Section 522 of the Michigan Hazardous Waste Management Act, MCL 299.522, by storing hazardous waste at their facility without interim status or an operating license.

2. Failure to Obtain EPA Identification Number: The amended complaint alleged that at the time of the MDNR inspection on April 15, 1987, the facility did not have an EPA identification number, thereby violating 40 C.F.R. § 264.11 as adopted at MAC R299.9605.

The MDNR Hazardous Waste Management Rules provide that the "owner or operator of a hazardous waste...storage...facility shall comply with all requirements of 40 C.F.R. Part 264, subpart B."[36/] The provisions of 40 C.F.R. Part 264, Subpart B, are adopted by reference in those rules.[37/] Under 40 C.F.R. § 264.11 "[e]very facility owner or operator must apply to EPA for an EPA identification number in accordance with EPA notification procedures...."

35/ Tr. 163-164.

36/ MAC R299.9605.

37/ MAC R299.11003.

Fair Haven Plastics, Inc. had not obtained an EPA MID number (or even a Michigan MIG number) at the time of the inspection. Bayview Products, Inc., which was defunct at that time, had possessed an MIG number, namely MIG 0000003938.

In their answer to the amended complaint, Respondents asserted that they have obtained an EPA ID number, the same being 982222291. As previously found, on November 18, 1987, Fair Haven Plastics, Inc. submitted a Notification of Hazardous Waste to EPA and requested an EPA ID number for the installation located at 7445 Mayer Road, Fair Haven, Michigan 48023. On December 10, 1987, EPA assigned ID number MID 982222291 to the installation. Section IX of the Notification Form is entitled "First or Subsequent Notification." The instructions in this section state: "Mark 'x' in the appropriate box to indicate whether this is your installation's first notification of hazardous waste activity or a subsequent notification. If this is not your first notification, enter your installation's EPA ID Number in the space provided below." The Notification Form submitted for for Fair Haven Plastics, Inc. has an "x" in the box marked "First Notification" and the box marked "Installation's EPA ID number" is blank. Clearly, Respondent, Fair Haven Plastics, Inc., did not receive an EPA ID number until December 10, 1987.

Thus, I must conclude that the facility did not have an EPA identification number at the time of the MDNR inspection on April 15, 1987, thereby violating 40 C.F.R. § 264.11 as adopted at MAC R299.9605.

3. Failure to Perform Waste Analysis The amended complaint alleged that a waste analysis had not been performed in violation of 40 C.F.R. § 264.13, as adopted at MAC R299.9605. This provision of the regulation requires an owner or operator, among other things, to obtain a detailed chemical and physical analysis of a representative sample of the waste before its treatment, storage or disposal.

During the inspection, Ms. Devantier asked for an analysis or for some other information on which to base a determination as to whether the waste was hazardous.38/ Messrs. Hurlburt and Shumaker of Fair Haven Plastics, Inc. were unable to provide her with any documents which reflected such an analysis. Mr. Hurlburt explained that all of the records were at his residence.39/

However, Mr. Hurlburt told her the contents of the drums included "solid enamels, polyeurethane flushings, air dry lacquers and enamels, MIBK, MEK, toluene, [and] hydraulic oils."40/ Both Messrs. Hurlburt and Shumaker told Ms. Devantier that they had previously pulled samples for analysis by Petro-Chem Processing, Inc.41/ Ms. Devantier subsequently contacted Petro-Chem

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38/ Tr. 39-40.

39/ Tr. 26.

40/ Tr. 35.

41/ Tr. 35-36.

Processing Inc. and learned that the primary code for the waste was F003 which was consistent with Mr. Hurlburt's description of the contents of the drums.[42/] Ms. Devantier considered Mr. Hurlburt's explanation as to the contents of the drums to have been a fair and accurate account of the contents of the drums and the physical and chemical breakdown of their contents.[43/]

Several weeks prior to the inspection on February 25, 1987, Petro-Chem Processing, Inc. had completed the analysis for Fair Haven Plastics, Inc. Their report identified the physical properties of the waste (Sample # U6193) as: F003; BTU: 19800; wt/gal: 7.03; % CL: 0.338; % H_2O: 0.503; Specific Gravity: .844; and pH: 5.57. No evidence was introduced to demonstrate that this analysis fails to contain all the information which must be known to treat, store or dispose of the waste in accordance with EPA requirements. However, Messrs. Hurlburt and Shumaker did not have a copy of this analysis of the waste available at the Fair Haven Plastics, Inc. facility for the MDNR inspector and MDNR secured a copy from Petro-Chem Processing, Inc. after the inspection.

I conclude that the Respondent Fair Haven Plastics, Inc. had obtained a chemical and physical analysis of a representative sample of the waste in February 1987 reasonably soon after the corporation

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42/ Tr. 35.

43/ Tr. 36.

had been established. The fact that the records relating to the waste were at Mr. Hurlburt's residence rather than at the facility does not support a charge that a waste analysis had not been performed. I, therefore, conclude that this alleged violation should be, and it is hereby, dismissed.

(4) Failure to Properly Label Containers: The amended complaint alleged that the stored containers of hazardous waste were not properly labeled in violation of the MDNR Hazardous Waste Management Rule 614(1)(b), MAC R299.9614(1)(b). That rule requires owners or operators of all hazardous waste facilities that store containers of hazardous waste to ensure that each container is labeled or marked clearly with the words "Hazardous Waste" and the hazardous waste number. Having previously found that the drums had not been marked with the words "Hazardous Waste" or with the hazardous waste number, I must conclude that Respondents were in violation of MAC R299.9614(1)(b).

(5) Failure to Prevent Leakage: The amended complaint alleged that the drums containing hazardous waste were not in good condition and were not managed so as to prevent leaks, in violation of 40 C.F.R. § 264.171 and 40 C.F.R. § 264.173, as adopted at MAC R299.9614(1)(a).

EPA has provided at 40 C.F.R. § 264.171 that "if a container holding hazardous waste is not in good condition...or if it begins to leak, the owner or operator must transfer the hazardous waste from this container to a container that is in good condition or

manage the waste in some other way that complies with the requirements of [Part 264]." At 40 C.F.R. § 264.173(b), the EPA regulations state that a "container holding hazardous waste must not be...stored in a manner which may...cause it to leak."

Ms. Devantier testified that she indicated on her inspection report that the containers were not in good condition because she saw some signs of leakage. The only evidence of leakage that was offered by EPA was Ms. Devantier's testimony that some of the visible floorboards of the trailer near a couple of the drums had an oily sheen to them. Ms. Devantier did not see any drum actually leaking.44/ There was no sign of leakage on the ground beneath the trailer. Moreover, no evidence was introduced to show that whatever may have been on the floorboards had actually come from the drums or constituted the hazardous wastes contained in the drums, i.e., spent solvents containing paint.45/ As for the drums themselves, Ms. Devantier testified that she saw paint splattered on the outside of the drums.46/

To conclude that an oily sheen on some visible floorboards near a couple of the drums of solvents containing paint demonstrates a leakage of that waste is simply too speculative. It is possible that the oily sheen may have come from something which

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44/ Tr. 111-112.

45/ Tr. 81-82.

46/ Tr. 39.

had been in the trailer prior to the time the drums were put into it. Although the waste had been accumulated since 1978, there is nothing in the record to establish when or how recently the drums may have been put into the trailer. Since the waste consisted of solvents containing paint and paint was splattered on the outside of the drums, one might have expected that any waste leaking from the drums would have contained signs of the same paint.

In conclusion, there is not sufficient evidence from which to draw an inference that the drums were leaking. Therefore, this alleged violation must be, and it is hereby, dismissed.

(6) Failure to Develop Personnel Training Program: The amended complaint alleged that the facility had not developed a personnel training program, job titles and job descriptions for those employees managing hazardous waste at the facility and had not retained records of such a training program thereby violating 40 C.F.R. § 264.16, as adopted at MAC R299.9605. The MDNR Hazardous Waste Management Rules[47/] require the owner or operator of a hazardous waste storage facility to comply with EPA's General Facility Standards,[48/] including the requirement for a personnel training program to ensure the facility's compliance with the provisions of

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47/ MAC R299.9605.

48/ 40 C.F.R. Part 264, Subpart B.

40 C.F.R. Part 264.[49/] The training program must include instruction in hazardous waste management procedures, including contingency plan implementation and emergency procedures, emergency equipment and emergency systems. The owner or operator must maintain extensive documents and records at the facility pertaining to this training program, including lists of job titles and employee names for each position at the facility related to hazardous waste management, job descriptions for each listed position, descriptions of the training for each person in a listed position and records that document the completion of such training. As previously found, there were no personnel training records on file at the facility which would provide documentation of training for hazardous waste management at the time of the inspection. Therefore, I must conclude that Respondents were in violation of 40 C.F.R. § 264.16, as adopted at MAC R299.9605.

(7) Failure to Develop Contingency Plan and Emergency Procedures: The amended complaint alleged that the facility did not have a contingency plan and emergency procedures, thereby violating 40 C.F.R. Part 264, Subpart D as adopted at MAC R299.9607. The EPA regulations require each owner or operator to have a contingency plan for his facility which plan must be designed to minimize hazards to human health or the environment from fires, explosions or any

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[49/] 40 C.F.R. § 264.16.

sudden or nonsudden release of hazardous waste to the air, soil or surface water.50/ Having previously found that a contingency plan and emergency procedures were not available at the facility, I conclude that Respondents were in violation of 40 C.F.R. Part 264, Subpart D, as adopted at MAC R299.9607.

(8) Shipment of Hazardous Waste Without EPA ID Number: The amended complaint alleged that Fair Haven Plastics, Inc., by offering hazardous waste for transportation without an EPA ID number on September 29, 1987, violated the requirements of MAC R299.9303(1). That provision of Part 3 of the Michigan Hazardous Waste Management Rules states 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 administrator." Part 6 of the Michigan rules, which applies to "owners and operators of all facilities which...store...hazardous waste," includes a requirement that "when a shipment of hazardous waste is initiated from a facility, the owner or operator of that facility shall comply with the requirements of Part 3 of [the] rules."51/ Thus, neither the owner nor the operator of the facility where hazardous waste is stored may offer that waste for shipment without an EPA ID Number.

50/ 40 C.F.R. § Part 264, Subpart D.

51/ MAC R299.9608(3).

On September 29, 1987, PCPI Transport, Inc. transported the drums of F003 (flammable liquid) waste paint from Fair Haven Plastics, Inc., 7445 Mayer Road, to Petro-Chem Processing, Inc. for disposal. The generator's U.S. EPA ID Number used by Fair Haven Plastics, Inc. on the Hazardous Waste Manifest was MID 0000003938. In the letter dated April 21, 1987, MDNR had told Fair Haven Plastics, Inc. that it could not use the number MIG 0000003938. MDNR had explained that the MIG number was a State of Michigan number assigned to the address for Bayview Products, Inc. The letter had further advised that Fair Haven Plastics, Inc. needed an EPA assigned number which begins with MID.

Thus, it is clear that Fair Haven Plastics, Inc. not only used the MIG number assigned to Bayview Products, Inc., contrary to specific instructions from MDNR, but also modified that number so that it would appear to be an EPA MID number.

In their answer to the amended complaint, Respondents assert that "the waste was shipped under the number pursuant to recommendation of Daria W. Devantier of the Michigan Department of Natural Resources."52/ In his testimony, Respondents' witness, Mr. Michelini, testified that Mr. Steven Shumaker, Decorating Manager and Plant Manager for Fair Haven Plastics, Inc., told him that

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52/ Answer to Amended Complaint, pp. 4-5.

Ms. Devantier told Mr. Shumaker to use the number. As he so testified, Mr. Michelini himself conceded that his testimony on this point was hearsay.53/ In addition to its unreliability as hearsay, the testimony is also unreliable because of the circumstances of the alleged conversation between Mr. Michelini and Mr. Shumaker. The conversation occurred after Mr. Michelini received the EPA complaint. Mr. Michelini went to Mr. Shumaker to ask why they did not have the right number when they disposed of the waste. Mr. Shumaker had been charged by Mr. Michelini, his employer, with the responsibility of properly handling the disposal of the waste.54/ Thus, at the time Mr. Shumaker allegedly made this statement, he was being questioned by his employer as to why he had failed to carry out his assigned responsibility properly.

In contrast to this unreliable testimony on behalf of the Respondents, Ms. Devantier testified that she had never offered any advice different from that contained in the MDNR letter,55/ namely that Fair Haven Plastics, Inc. could not use the MIG number which had been issued to the address for Bayview Products, Inc. and that Fair Haven must obtain an EPA MID identification number. I credit this testimony by Ms. Devantier and find that Fair Haven Plastics,

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53/ Tr. 238.

54/ Tr. 237.

55/ Tr. 50-51.

Inc., by offering hazardous waste for transportation without an EPA ID Number on September 29, 1987, violated the requirements of MAC R299.9303(1).

CIVIL PENALTY

Having found violations of RCRA, I must now determine the amount of the recommended civil penalty to be assessed for those violations:

I. Obligations of the Presiding Officer in Assessing a Penalty.

Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), provides, in pertinent part:

> "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 shall take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements."

My discretion, as Presiding Officer, to calculate recommended civil penalties is described in 40 C.F.R. § 22.27(b), in pertinent part, as follows:

> "Amount of Civil Penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease."

The Chief Judicial Officer has held that "[a]s a matter of law, therefore, the Presiding Officer has properly assessed a penalty if it is not more than $25,000.00 per violation per day, if he takes into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements, and if he considers any civil penalty guidelines 'issued' under the Act."56/

The Chief Judicial Officer has also held that "it is unclear whether the Presiding Officer 'must' consider the Penalty Policy before assessing a civil penalty for a RCRA violation. Nevertheless, a Presiding Officer may consider the Policy guidelines as a matter within his discretion. By conforming to the guidelines, a Presiding Officer provides a clear, reviewable explanation of the rationale for his penalty assessment. However, if a Presiding Officer adopts the Policy guidelines, and therefore its underlying rationale, he must thoroughly explain any divergences from the guidelines so that his penalty rationale is clear upon review."57/

56/ In re Sandoz, Inc., RCRA (3008) Appeal No. 85-7, at 7-8 (CJO, Feb. 27, 1987).

57/ In re National Coatings, Inc., RCRA (3008) Appeal No. 86-5, at 6-7 (CJO, Jan. 22, 1988 (footnote omitted)).

However, if an Administrative Law Judge considers the RCRA Penalty Policy, the Chief Judicial Officer has held that the Policy is not binding on the Judge.[58/] Even "[a]ssuming arguendo that the RCRA Penalty Policy was 'issued under the Act'...the Presiding Officer was obliged only to 'consider it'....An ALJ's discretion in assessing a penalty is in no way curtailed by the Penalty Policy so long as he considers it and adequately explains his reasons for departing from it."[59/]

In the instant case, I will, in the exercise of my discretion, consider and apply the RCRA Penalty Policy in assessing the recommended civil penalty.

II. The RCRA Civil Penalty Policy.

The Final RCRA Civil Penalty Policy (May 4, 1984) provides a penalty calculation system consisting of three steps: (1) determining a gravity-based penalty (GBP) for a particular violation; (2) considering the ecomonic benefit of noncompliance where appropriate; and (3) adjusting the penalty for special circumstances.

In the initial step of calculating the GBP, two factors are considered: "potential for harm" and "extent of deviation" from RCRA or its regulatory requirements. These two factors comprise

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58/ In re A.Y. McDonald Industries, Inc., RCRA (3008) Appeal No. 86-2, at 18 (CJO, July 23, 1987).

59/ Id., footnote omitted, citing Sandoz, supra note 54, at 8 n. 11.

the seriousness of the violation which must be taken into account in assessing a penalty under Section 3008(a)(3) of RCRA. They have been incorporated into a matrix from which the amount of the GBP is calculated. The "potential for harm" resulting from a violation may be determined by the likelihood of exposure to hazardous waste posed by noncompliance or the adverse effect which noncompliance has on the purposes for the RCRA program. The "extent of deviation" measures the degree to which the violation renders inoperative the requirement violated, i.e., the degree to which the violator is in compliance or not in compliance with the requirement.

Step two of the penalty calculation calls for a determination of the amount of economic benefit from noncompliance where the violator has derived significant savings. This gain is then added to the GBP. A formula for computing economic benefit is included in the policy.

After determining the appropriate GBP and, where appropriate, economic benefit, the penalty may be adjusted upwards or downwards to reflect particular circumstances surrounding the violation, including, but not limited to: good faith efforts to comply/lack of good faith; degree of willfulness and/or negligence; history of noncompliance; and ability to pay.

III. Application of the Civil Penalty Policy.

Under the RCRA Civil Penalty Policy, a separate penalty should be assessed for each violation that results from an independent act (or failure to act) by the violator and that is substantially

distinguishable from any other charge in the complaint for which a penalty is to be assessed. On the other hand, multiple penalties are not appropriate where violations are not independent or substantially distinguishable. In this case, EPA has proposed a penalty for a failure to notify EPA of hazardous waste activity[60/] and a single separate penalty for the remaining violations which were described in the penalty calculation as "[storage of] waste on-site without interim status or a license and without complying with the applicable requirements of Part 6 of the Michigan Administrative Code."[61/]

In his testimony, Mr. Glenn Sternard, an Environmental Scientist with EPA who performed the penalty assessment,[62/] acknowledged that the RCRA Civil Penalty Policy permits enforcement personnel to group violations together if they are related, but calls for separate calculations if the violations are discreetly different.[63/] He, nevertheless, testified that the several separate violations

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60/ The amended complaint did not allege as a specific separate violation the failure to notify EPA of hazardous waste activity. Based upon the written justification for this penalty calculation, I concluded that two violations had been grouped under this heading, namely, the failure to obtain an EPA ID Number and offering hazardous waste for transportation without an EPA ID Number. Thus, it reads, in part: "No notification of hazardous waste activity has been filed with U.S. EPA....In addition, these wastes were offered and accepted for transportation without the id number." Complainant's Exh. 11.

61/ Complainant's Exh. 11.

62/ Tr. 152, 154.

63/ Tr. 155.

grouped together as one also could have been treated as separate violations for penalty calculation purposes.64/ As I read the Penalty Policy, I do not believe that it confers such a high degree of flexibility or discretion as Mr. Sternard's testimony implied. He apparently viewed the several separate violations as not being independent or substantially distinguishable (which would call for a single penalty), but at the same time considered them independent or substantially distinguishable (which would call for multiple penalties). Ergo, he had the discretion to calculate a single penalty or multiple penalties. I do not believe I possess such broad discretion.

In applying the RCRA Civil Penalty Policy to the violations found herein, I must make a judgment as to which violations are independent of or substantially distinguishable from the others and which are not. The Penalty Policy says that a "charge is independent of, and substantially distinguishable from, any other charge when it requires an element of proof not needed by the others." Applying this test to the violations found, I conclude that the violation of having shipped hazardous waste without an EPA ID Number subsumes the violation of having failed to obtain an EPA ID Number. To prove the latter, an element of proof required by the former is needed; that element of proof is the failure to have obtained an EPA ID Number.

64/ Tr. 156.

As for the remaining violations which I have found, I conclude that each requires an element of proof not needed by the others and hence each is independent of and substantially distinguishable from the others. Therefore, I will make separate penalty calculations for each of the following remaining violations: storage of hazardous waste without interim status or an operating license/permit; failure to properly label the containers; failure to develop a personnel training program; and failure to develop a contingency plan and emergency procedures.

IV. Calculation of the GBP.

For each of the violations found, the GBP calculations follow.

A. Storage of Hazardous Waste Without Interim Status or Permit

In a hypothetical example, the Penalty Policy[65/] classifies a company's failure to acquire interim status or a permit as having a moderate potential for harm and as representing a major deviation from regulatory requirements because the company, like the Respondent here, failed to file a Part A application altogether. Such a classification of the permitting violation is appropriate in this

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65/ RCRA Civil Penalty Policy (May 8, 1984), p. 24.

case. This conclusion is supported by the Chief Judicial Officer's application of the Penalty Policy in Martin Electronics [66/] and in McDonald Industries.[67/]

In Martin Electronics, the respondent had failed to file a proper Part A application by not including certain hazardous waste activity in the application. The Chief Judicial Officer followed the Penalty Policy in classifying the respondent's failure to submit a proper Part A application as having a moderate potential for harm as I have in this case; however, since Martin had addressed its other wastes in a Part A application, he assigned a moderate extent of deviation to the violation. The present case may be distinguished from Martin Electronics because no application at all was filed here and hence, like the hypothetical in the Penalty Policy, the extent of deviation here would be classified as major.

In McDonald Industries, the extent of deviation was also classified as major. Like the present case and the hypothetical, no application had been filed. Indeed, in the present case, there had been no notification to EPA by Respondents.

66/ In re Martin Electronics, Inc., RCRA Appeal No. 86-1, (CJO, June 22, 1987).

67/ In re A.Y. McDonald Industries, Inc., RCRA (3008) Appeal No. 86-2, (CJO, July 23, 1987).

However, as for the potential for harm, the present case may be distinguished from McDonald Industries. In McDonald Industries, the potential for harm was deemed to be major because: McDonald had dumped more than one million pounds of waste at the site over approximately a five-year period; the site was unfenced; and access to the site appeared to have been extremely loose, if not virtually unlimited. Such a potential for actual harm to humans through physical contact with the waste did not exist in the present case. The circumstances pertaining to the potential for harm in this case are more closely analogous to those in Martin Electronics and in the hypothetical where they are classified as moderate than to those in McDonald Industries.

In summary, the potential for harm resulting from the storage of hazardous waste without interim status or a permit in this case is classified as moderate and the extent of deviation from the regulatory requirement as major. The GBP matrix recommends a penalty range of $8,000.00 to $10,999.00 in these circumstances. I believe that the penalty to be assessed for this violation should be at the low end of the penalty range. The quantity of waste accumulated since 1978 by the departed tenant averaged about 5.8 drums or 320 gallons per year. Using the weight (pounds) per gallon ratio computed by Petro-Chem Processing, Inc., this amounts to almost 85 kilograms a month or just over 1,000 kilograms a year. The quantity of waste involved here is not considered substantial. Thus, for example, had all of the waste involved (approximately

10,175 kilograms) been generated in one year, the generator could have qualified as a small quantity generator under the MDNR rules.[68/] The threat to human and animal life and the environment, while deemed significant, was ameliorated somewhat by the fact that the wastes were contained in drums, inside a trailer on the premises of the facility. Therefore, I select $8,000.00 as the appropriate GBP amount for this violation.

B. Failure to Acquire EPA ID Number and Shipment Without EPA ID Number

The failure of Respondents to notify EPA of the storage of the hazardous waste by requesting an EPA ID Number and the shipment of the hazardous waste by Respondents without an EPA ID Number resulted in a moderate potential for harm. It is true that EPA thereby was prevented from knowing that hazardous waste was being stored at the facility. However, Bayview Products, Inc., the defunct corporation which had abandoned the waste at the facility, had secured an MIG number as a small quantity generator from MDNR so that some notice of hazardous waste activity had been received by the state agency charged with operating the state hazardous waste management program which has been established in lieu of the federal hazardous waste management program in Michigan. When Fair

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68/ MAC R299.9205.

Haven Plastics, Inc. had the waste removed from the premises without an EPA ID Number, the removal was done by an authorized transporter and the disposal was accomplished at an authorized disposal facility. A Uniform Hazardous Waste Manifest was provided to the MDNR as notice of the shipment. Had the waste been disposed of without any notification whatsoever to MDNR and had it been transported or disposed of by an unlicensed facility, the potential for harm, in my opinion, would be major. Given the circumstances herein, however, I would classify the potential for harm as moderate.

The extent of the deviation from the requirement not to store or offer for transportation hazardous waste without having received an EPA ID Number was substantial.

Fair Haven Plastics, Inc. had not obtained an EPA MID Number at the time of the inspection. In the April 21, 1987 letter to the President of Fair Haven Plastics, Inc., MDNR explained that the MIG Number 0000003938 could not be used by Fair Haven Plastics, Inc. The letter said that the MIG Number was a State of Michigan number assigned to the address for Bayview Products, Inc. which address was different from that of Fair Haven Plastics, Inc. The letter advised that Fair Haven Plastics, Inc. needed an EPA assigned number which begins with MID. When, on September 29, 1987, PCPI Transport transported the waste to Petro-Chem Processing Inc. for disposal, the EPA ID Number used by Fair Haven Plastics, Inc. on the Hazardous Waste Manifest was MID 0000003938. On November 18, 1987, after the issuance of the complaint in this case, Fair Haven

Plastics, Inc. submitted a Notification of Hazardous Waste to EPA and requested an EPA ID Number for the installation located at 7445 Mayer Road.

Thus, from at least April 15, 1987 until November 18, 1987, Respondents failed to notify EPA of its storage of hazardous waste by applying for an EPA ID Number. Moreover, during the same period Fair Haven Plastics, Inc. offered hazardous waste for transportation without an EPA ID Number, using instead MID 0000003938 which was a combination of the EPA three-letter prefix, MID, with the ten-digit Michigan MIG number which had been assigned to Bayview Products, Inc. As noted, Fair Haven Plastics, Inc. had been instructed by MDNR not to use that Michigan number. Therefore, I conclude that the extent of deviation was major.

The GBP matrix recommends a penalty range of $8,000.00 to $10,000.00 where the potential for harm is moderate and the extent of deviation from the regulatory requirement is major. In considering the relative seriousness of this violation, I believe that the penalty to be assessed should be at the low end of the penalty range. Before offering the waste for shipment and disposal, Fair Haven Plastics, Inc. had a sample analyzed so that the transporter and disposal facility knew the nature of the waste. When Fair Haven Plastics, Inc. offered the waste for transportation, they selected an authorized transporter. The waste was sent to an authorized disposal facility. A Hazardous Waste Manifest was submitted to MDNR. These factors ameliorate the seriousness of the violation. Therefore, the GBP amount for this violation is $8,000.

C. Failure to Mark

The failure to label or mark each container with the words "Hazardous Waste" and the hazardous waste number resulted in a moderate potential for harm. Although the drums had not been properly marked by the prior tenant, Bayview Products, Inc., prior to their abandonment at the Respondent's facility, Fair Haven Plastics, Inc. took action to have the waste analyzed and learned that it was hazardous waste. While Respondents failed thereafter to mark the drums as "Hazardous Waste" or as F003, the waste remained collected and isolated in the trailer.

While it is possible that some of the unmarked containers could have been removed from the trailer, it was highly unlikely in the circumstances of this case. After the IRS seizure of Bayview Products, Inc.'s assets, Mr. Michelini wrote the IRS requesting the removal of the remaining assets in hopes of resolving the question of the ownership of the drums and their contents. As late as March 31, 1987, Mr. Michelini informed the MDNR that "[i]f there is any hazardous material here, it belongs to the IRS."69/ After the IRS informed him just after the MDNR inspection in April that the waste was not seized by IRS and instead belonged to Bayview Products, Inc., Mr. Michelini remained uncertain as to the ownership of or responsibility for the drums in the trailer and he did not

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69/ Respondent's Exh. 3.

know whether he could use it or not.[70] When Ms. Devantier spoke to him by telephone in early to mid-May. Mr. Michelini continued to express the view that the drums and contents were owned by or in the control of the IRS or Bayview Products, Inc. In July, counsel for Respondents solicited the aid of MDNR to properly dispose of the waste. Given those actions, it was highly unlikely that Respondents would have removed or authorized the removal of the wastes without MDNR's knowledge. When Respondents finally concluded, under continued pressure from MDNR, that they had no choice but to pay for the removal and disposal of the waste, those activities were performed by licensed organizations which had been provided with notice of the nature of the waste. As noted previously, a Hazardous Waste Manifest was submitted to MDNR. In these circumstances, I conclude that the potential for harm as a result of the failure to mark was moderate.

The extent of deviation from the requirement to mark was a complete deviation in that none of the drums had been marked. This clearly amounts to substantial noncompliance and warrants a classification of major for the extent of deviation.

The GBP matrix recommends a penalty range of $8,000.00 to $10,999.00 where the potential for harm is moderate and the extent

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[70] Tr. 226.

of deviation is major. Again, when gauging the seriousness of the violation against the totality of the circumstances described above, I would select the lower end of the range as an appropriate penalty. Therefore, $8,000.00 is appropriate.

D. Failure to Develop Personnel Training Program

The failure to develop a personnel training program for those employees managing hazardous waste at the facility presented a minor potential for harm. Since the waste had been abandoned by a prior tenant, since Fair Haven Plastics, Inc. had not gone into production and hence had not had an opportunity to generate waste, and since Respondents were not in the hazardous waste business as such, any employee involvement in the management of hazardous waste by employees of the Respondents was truly minimal. Therefore, there was a minor potential for harm.71/

The extent of the deviation from regulatory requirements again was complete. That is, there was no evidence presented to show that Respondents had done anything to meet, even partially, the requirements for a personnel training program. Instead, the only evidence presented showed that none had been developed. Therefore, the extent of deviation was major.

71/ See In re National Coatings, Inc., Docket No. RCRA V-W-84-R-052 (Initial Decision, June 20, 1986, at 27).

The GBP matrix recommends a penalty range of $1500.00 to $2,999.00 where the potential for harm is minor and the extent of deviation is major. Weighing the seriousness of the violation in light of all the circumstances previously described herein, I select $1500.00 as the appropriate penalty for the violation.

E. Failure to Develop Contingency Plan

The potential for harm resulting from the failure to develop a contingency plan and emergency procedures poses a significant likelihood of exposure and has a significant adverse effect on the purposes of the regulatory requirement for such plans and procedures, and hence warrants moderate classification. The Penalty Policy suggests in a hypothetical example[72/] that the failure to submit copies of a complete contingency plan to all of the local entities would present a minor potential for harm. Clearly, the failure by Respondents herein to develop such a plan is a more serious violation.

Since no plans had been developed, the extent of deviation amounts to noncompliance. Therefore, this violation warrants a major classification for extent of deviation from the regulatory requirement.

The GBP matrix recommends a penalty range of $8,000.00 to $10,999.00 where the potential for harm is moderate and the extent of deviation is major. Weighing the seriousness of the violation

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72/ Final RCRA Civil Penalty Policy (May 8, 1984) p. 8.

in light of all the circumstances previously described, including, but not limited to: the small quantity, relatively speaking, of generated waste, contained in drums, inside a trailer, inside the premises of the facility; the waste having been analyzed soon after its abandonment by the defunct corporate tenant; the transportation and disposal of the waste by licensed operators with knowledge of the nature of the waste; the submission of a hazardous waste manifest to MDNR; the failure of the operator to go into production and the resulting absence of waste generation by the operator; the absence of any evidence that the waste had been disturbed until its removal in September 1987, I select $8,000.00 as the appropriate penalty for this violation.

F. Summary of the GBP Calculations

In summary, I believe that the GBP amount for the violations herein should be as follows:

Storage of Hazardous Waste Without Interim Status or Permit:	$ 8,000.00
Failure to Acquire EPA ID Number and Shipment Without EPA ID Number:	$ 8,000.00
Failure to Mark:	$ 8,000.00
Failure to Develop Personnel Training Program:	$ 1,5D0.00
Failure to Develop Contingency Plan:	$ 8,000.00
Total GBP Amount:	$33,500.00

No evidence was introduced to show that Respondents derived any economic benefit from noncompliance with RCRA requirements and hence no calculation will be made therefor.

V. Adjustments to the GBP Amount

In determining the potential for harm and the extent of deviation from the RCRA requirements for each of the violations found, Respondents have been viewed no differently than generators or full-blown TSD facilities. However, Respondents were not alleged to be generators in the amended complaint and neither Fair Haven Plastics, Inc., as operator, nor Fair Haven Investment Associates, as owner, has operated a full-blown storage facility. Both were victims of a prior tenant, Bayview Products, Inc., a defunct corporation, which abandoned the waste on the premises and left Respondents "holding the bag" so to speak. As a result, they are liable, as owner and operator, respectively, of a "storage" facility. "RCRA is a strict liability statute...and authorizes the imposition of a penalty even if the violation is unintended."73/

During the period of time between the creation of Fair Haven Plastics, Inc. (initially known as Bayview Plastics) and the issuance of the complaint herein, Fair Haven Plastics, Inc. was unable to secure certain required operating permits from the State of

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73/ In re Humko Products, An Operation of Kraft, Inc., RCRA (3008) Appeal No. 85-2, at 10 (CJO, December 16, 1988).

Michigan,[74] allegedly, at least in part, because of the presence of the hazardous waste.[75] Whatever the reasons for the inability of Fair Haven Plastics, Inc. to acquire the necessary operating permits from the State of Michigan, the results are clear.

Fair Haven Plastics, Inc. never started production,[76] lost its contracts,[77] laid off all fifty (50) some employees,[78] lost over $200,000.00[79] and ultimately went out of business.[80]

This appears to be a classic case in which all concerned interests have lost. The protection of the environment was lost. Some fifty (50) people lost their jobs.[81] A potentially promising business[82] lost its contracts and ceased to exist.[83] Investors

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74/ Tr. 223-224; 230.

75/ Tr. 224-230.

76/ Tr. 229.

77/ Tr. 229-231.

78/ Tr. 232.

79/ Tr. 222-223; 232; 239-240.

80/ Tr. 238-239.

81/ Tr. 232.

82/ Tr. 220-221.

83/ Tr. 229-231; 238-239.

lost over $200,000.00.[84] The economy of the State of Michigan suffered as a result.[85] It appears that lack of a sense of urgency,[86] frustration,[87] failure of communications,[88] misunderstandings[89] and possibly more contributed to this unfortunate situation.

Indeed, as counsel acknowledged in EPA's closing statement, the "evidence that has been presented today gives a mixed picture. We have a picture of Mr. Michelini, who is an embattled business man who is struggling to keep his business alive. And it is a picture that elicits sympathy from government bureaucrats as well as other people....Mr. Sternard indicated that he took every action he could to minimize the penalty in this case and I think that that may have been in view of the struggling nature of Mr. Michelini's business, and in view of their ultimate compliance with the laws."[90]

The RCRA Penalty Policy points out that the "reasons the violation was committed, the intent of the violator and other factors related to the violator are not considered in choosing the appro-

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84/ Tr. 222-223; 232; 254.

85/ Tr. 220-221.

86/ Tr. 229; 235.

87/ Tr. 229-232; 254.

88/ Tr. 224-225; 230-231; 235; 254-255; 258; 262; 266.

89/ Tr. 221; 225-226; 229-230; 233; 249-250; 263-364.

90/ Tr. 271; 275.

priate penalty from the matrix.[91/] However, the Policy provides certain adjustment factors which are designed to take these matters into consideration.

The adjustment factors include:

(1) Good faith efforts to comply and degree of cooperation;

(2) Degree of willfulness or negligence;

(3) History of noncompliance;

(4) Ability to pay; and

(5) Other unique factors.

The adjustment factors are designed to provide "flexibility to make adjustments that reflect legitimate differences between similar violations." Such adjustments are clearly appropriate in the circumstances of this case.

First, when considering the degree of culpability, a downward adjustment of twenty-five (25) percent is warranted because of a lack of willfulness on Respondents' part. The presence of the fifty-seven (57) 55-gallon drums of waste which the MDNR inspector found on the premises of the facility was the sole basis for each of the violations alleged in the amended complaint and for each of the violations found herein. Had there been no hazardous waste abandoned at the facility, Respondents would not have been subject to the statutory and regulatory requirements which apply to owners and operators of a "storage" facility at the time of the inspection.

91/ Final RCRA Civil Penalty Policy (May 8, 1984) p. 16.

The Respondents had no control over the abandonment of the waste at their facility and hence could not have reasonably foreseen the problems that lay ahead for them when Bayview Products, Inc. went out of business. When the assets of Bayview Products, Inc. were seized by the IRS and the corporation became defunct, Fair Haven Plastics, Inc. proceeded to have the waste analyzed.

Prior to the inspection, Respondents strongly contended that since the IRS had seized the assets of Bayview Products, Inc., the IRS should be responsible for the disposal of the waste. Immediately after the MDNR inspection, the IRS informed Respondents that the assets which remained after the seizure had been determined to have no value and had been released to the President of Bayview Products, Inc. Thereafter, when counsel for Respondents replied to MDNR, they argued that "waste was created by and is property of Bayview Products, Inc." As staunch advocates of their clients' position, they insisted, apparently in the interest of fairness, that the disposal of the waste should be the responsibility of Bayview Products, Inc. or, in the alternative, the responsibility of the IRS. At the same time, they solicited the advice and assistance of MDNR because they understood that MDNR had a program established for the removal of hazardous waste. Thus, in the event that it was determined that the Respondents would be held fully responsible for the disposal of the waste, they were seeking some assistance from MDNR in hopes that the full financial burden of such disposal would not fall upon them.

When MDNR received this request, MDNR wrote Mr. Michelini to inform him again that Respondents were responsible for the waste in their possession, that they were required to come into immediate compliance with applicable federal and state laws and that the case was being referred to EPA for escalated enforcement. No other "advice and assistance" was forthcoming from MDNR.

Between the date of referral to EPA (July 15, 1987) and the issuance of the initial complaint by EPA (November 9, 1987), the Respondents had the waste removed from the premises by an authorized transporter and disposed of by an authorized disposal facility. The waste was removed on September 29, 1987 and MDNR was notified of its removal on October 2, 1987. Thus, some five weeks before EPA issued its complaint, MDNR was informed that Respondents had assumed full responsibility for the disposal of the waste.

These actions by Respondents were not unreasonable under the circumstances. They clearly do not demonstrate a willful intent to violate RCRA. Staunch support of Respondents' position by Respondents' counsel here warrants no such interpretation (or misinterpretation) of Respondents' intent. A twenty-five (25) percent downward adjustment is justified.

Second, giving full weight to the unique factors present in this case which have been previously described herein, (<u>supra</u> pp. 60-62) I have concluded that an additional downward adjustment is warranted. After carefully considering the reasons the violations were committed and the unanticipated factor that Respondents in

in this particular case essentially were victims of circumstances which were of someone else's making, I conclude that an additional downward adjustment of forty (40) percent is warranted.

As to the remaining factors, no adjustments are warranted. There was no lack of good faith on the part of Respondents. The Respondents, both through Mr. Michelini and through counsel, forcefully advocated their position on the liability issue to the IRS and MDNR. Such advocacy does not constitute a lack of good faith. The Respondents acted to secure an EPA ID Number some nine days after the complaint was issued. That delay is not considered to constitute a lack of good faith. To the extent that Respondents acted to come into compliance and thereby demonstrate good faith, no adjustment may be made under the Penalty Policy. No evidence of previous violations of RCRA or the Michigan Hazardous Waste Management Act was offered at the hearing. I do not consider the findings of the MDNR inspection which led to the complaint herein to constitute a "prior violation." Finally, no evidence was offered to show that the Respondents are unable to pay a penalty.

To summarize, the GBP amount of $33,500.00 should be adjusted downward by a total of sixty-five (65) percent ($21,775.00) resulting in a penalty assessment of $11,725.00.

Respondents, Fair Haven Investment Associates, as owner, and Fair Haven Plastics, Inc., as operator, should be jointly and severally liable for the recommended civil penalty of $11,725.00 to be assessed for the violations found herein.92/

92/ Owners/lessors are jointly liable with operators of hazardous waste storage facilities for violations of section 3004 and 3005 of RCRA. Hawaiian Western Steel, Limited, Inc. and James Campbell Estate, RCRA (3008) Appeal No. 88-2 (November 17, 1988); Arrcom, Inc., Drexler Enterprises, Inc., RCRA (3008) Appeal No. 86-6 (May 19, 1986).

O R D E R [93/]

Pursuant to Section 3008 of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6928, the following Order is entered against Respondents, Fair Haven Investment Associates and Fair Haven Plastics, Incorporated:

I.A. A civil penalty in the amount of $11,725.00 is assessed against Respondents for the violations of the Solid Waste Disposal Act and the Michigan Hazardous Waste Management Act found herein. Fair Haven Investment Associates and Fair Haven Plastics, Inc. shall be jointly and severally liable for the payment of said penalty.

B. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondents by forwarding a cashier's check or certified check payable to "Treasurer of the United States of America" to:

U.S. Environmental Protection Agency
Region V
Attn: Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

93/ Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Administrator within forty-five (45) days after the service upon the parties unless an appeal to the Administrator is taken by a party or the Administrator elects to review the initial decision upon his own motion. 40 C.F.R. § 22.30 sets forth the procedures for appeal from this initial decision.

II. The following Compliance Order is also entered against Respondents, Fair Haven Investment Associates and Fair Haven Plastics, Incorporated:

A. Respondents shall not treat, store, dispose of, transport or offer for transportation, hazardous waste without having received a finally effective RCRA permit.

B. Respondents shall, at such time when generation of hazardous waste is initiated, comply with the regulations for generators of hazardous waste (MAC Part 3) or small quantity generators (MAC R299.9205), as applicable.

Notwithstanding any other provision of this Order, an enforcement action may be brought pursuant to Section 7003 of RCRA or other statutory authority where the handling, storage, treatment, transportation or disposal of solid or hazardous waste at this facility may present an imminent and substantial endangerment to human health or the environment.

Henry B. Frazier III
Henry B. Frazier, III
Administrative Law Judge

DATED: April 27, 1989
Washington, D.C.