UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	Docket ## X-83-04-01 & 02-3008
ARRCOM, INC.,	)	
DREXLER ENTERPRISES, INC., et. al.	)	
	)	
Respondents	)	

1. Resource Conservation and Recovery Act - A facility eligible for interim status and which manages hazardous wastes, must operate said facility in accordance with the provisions of 40 C.F.R. Part 265 whether or not it has notified under § 3010 of the Act or filed a Part A application.

2. Resource Conservation and Recovery Act - Lessors of land upon which a RCRA governed facility is located, who have no association with management, operator or other interest in such facility held not liable for civil penalties.

3. Resource Conservation and Recovery Act - Penalty Assessment - Although the old draft penalty policy severely limited any down ward adjustment of the proposed penalty based on "ability to pay" substantial reduction in proposed penalty made here using philosophy of later final penalty policy, even though such final policy was technically not applicable.

4. Resource Conversation and Recovery Act - Interim Status - A facility which was initially granted interim status may lose such status, if the Agency, upon re-examination of the Part A application, determines that such application is deficient and the facility fails to correct such deficiencies in the time allowed therefore.

Appearances:

D. Henry Elsen, Esquire
U.S. Environmental Protection Agency
Seattle, Washington
For the Complainant

A. N. Foss
Accountant for Arrcom, Inc.,
and George Drexler, Respondents

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INITIAL DECISION

This is a consolidated proceeding under Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation Recovery Act (42 U.S.C. 6928).[1] These proceedings were commenced by the Acting Regional Administrator, Region X, with the filing of a Complaint and Compliance Order and Notice of Right to Request a Hearing on April 27, 1983 as to the Rathdrum facility and May 10, 1983 as to the Tacoma facility. The Complaint and Compliance Order as to the Rathdrum, Idaho facility alleged, inter alia, that the facility disposed of hazardous wastes without submitting proper notification or a Part A permit application, submitting a Part A application for a storage facility without obtaining the owner's signature, and violating several facility standards applicable to hazardous waste management facilities eligible for interim status. As to the Tacoma, Washington site, the Complaint and Compliance Order alleged that the various corporate and personal entities involved were operating a hazardous waste management facility without a permit. The Complaint and Compliance Order in regard to the Tacoma site also charges the land owners, Mr. Cragle and Mr. Inman, with violations of the Act in addition to the Drexlers and the various companies and corporations which they have, over the years, formed and operated.

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[1]Pertinent provisions of Section 3008 are:

Section 3008 (a)(1): "(W)henever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle (C) the Administrator may issue an order requiring compliance immediately or within a specified time...."

Section 3008 (g): "Any person who violates any requirement of this subtitle (C) 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."

Subtitle C of RCRA is codified in Subchapter III, 42 U.S.C. 6821-6931.

The Respondents filed letters and formal pleadings to the Complaint, some without the benefit of counsel and some by counsel, all of which essentially admitted the facts but denied any culpability. Mr. Warren Bingham, the owner of the Rathdrum, Idaho property was represented by counsel and prior to the hearing in this matter entered into a separate settlement agreement with the Agency and agreed to implement an approved closure plan for the facility and was not a party to the Hearing and is not a party to this Decision. At the time of the filing of the two Complaints, two of the Drexlers were incarcerated in a prison in California for activities associated with the various businesses they operated. The nature of said offenses are not relevant to this proceeding.

A Hearing on this matter was held in Seattle, Washington on April 30, and May 1, 1985 at which Mr. George Drexler appeared with his representative, Mr. Foss, who is an accountant, and the other parties did so without counsel. Following the hearing and the availability of the transcript, briefs were filed by all attending parties. The brief filed on behalf of the Respondents were, unfortunately, not particularly helpful since they were prepared by non-attorneys and did not conform to the requirements of the regulations. To the extent the briefs filed on behalf of the Respondents provided arguments and legal viewpoints relevant to this proceeding, they were considered. To the extent they provided arguments which were not supported by the evidence of record, they were disregarded.

In preparing this Initial Decision, I have carefully considered all of the materials appearing of record and the relevant portions of the briefs submitted by the parties and any findings proposed by the parties which are inconsistent with this Decision are rejected.

One may wonder at the length of time that has ensued between the issuance of the Complaints and the holding of the Hearing. As indicated above, two of the Respondents were serving time in Federal prison when the Complaints were issued and all of their records from their various corporations were seized by the Government. The Agency made several motions to postpone these proceedings so it could try to obtain the Respondents' records from the Government and additionally take the depositions of several of the Respondents who were either incarcerated or otherwise not available. My understanding is that the Agency was, for the most part, unsuccessful in retrieving many of the records seized by the Government and this apparently is true as well for the Respondents who at the time of the Hearing indicated that, although they had turned over several truck loads of materials to the Government, following their release from prison they were only returned two or three boxes of records. The lack of records for the benefit of both the EPA and the Respondents caused some delay in this matter. The efforts on the part of EPA to obtain additional information from the Justice Department also contributed to the delay.

Factual Background

The Tacoma Site - X-83-04-01-3008

Respondents, Arroom, Inc., and Drexler Enterprises, Inc., are corporations which were responsible for the beginning of the operation of a business involving storage of used oil and solvents located at the C Street facility in Tacoma, Washington. The President of both of these corporations is Respondent, George W. Drexler. The Respondent, Terry Drexler, Inc., was a corporation doing business as Golden Penn Oil Company

and Western Pacific Vacuum Service. Respondent, Terry Drexler, was the president of all of these corporations and organizations. Terry Drexler either acting as an individual or officer of one of his several corporations orally subleased the C Street facility from his father, George Drexler, the president of Arrcom, Inc. The Respondents, Richard Cragle and Ronald Inman, are the owners of the C Street facility and the lessors thereof.

In August of 1981, the property owners, Cragle and Inman, leased a portion of a warehouse facility to Empire Refining Company, another corporation owned by George W. Drexler. The facility leased consists of a cemented or asphalted yard under which are three (3) underground storage tanks. An unused loading rack and a small shed are also located on the premises. The facility address is 1930 C Street, Tacoma, Washington, and is located in an industrial area within the city limits of Tacoma, surrounded by other industrial facilities. All of the various corporations formed by George Drexler referred to above will be hereinafter referred to as Arrcom throughout this Decision for purposes of simplicity.

Arrcom began using the Tacoma facility in August 1981 for the storage of used oil and other materials. On December 3, 1981, George Drexler advised an EPA official that the facility was used for the storage of waste oil and solvents. Alan Pickett, an employee of Arrcom and Acting Secretary of Arrcom, confirmed this in a conversation held on the same day by telephone with the same EPA official. After written requests by EPA on January 6, 1982, Arrcom submitted a Notification of Hazardous Waste Activity which listed characteristic ignitable wastes in the form of used oil and various solvents as hazardous wastes which was handled at that facility. The Notification indicated that the hazardous waste was stored, treated or disposed of at the C Street facility. A Part A permit

application was submitted by Arrcom which indicated that 30,000 gallons of spent solvents and 500,000 of used oil were estimated to be stored a the site on an annual basis in the underground storage tanks. This application stated that the start-up date for the facility was August 1, 1981 and that both the Notification and the Part A application listed George Drexler as the facility contact for the C Street operation.

The Part A application was rejected by EPA as incomplete. Numerous deadlines were set for re-submittal of the forms and providing proper and complete information. The Agency also advised Arrcom that if they were not able to provide the necessary information that they would be given the option of submitting and implementing a closure plan for the facility pursuant to 40 C.F.R. Part 265. Apparently there was some confusion within EPA as to whether or not this was a facility that would qualify for interim status which apparently it was not since it did not come into operation until August 1, 1981, well past the November 1980 statutory deadline. Subsequent to this exchange of applications and letters to and from the Agency and the Respondent, Arrcom, Arrcom sub-leased the facility to Terry Drexler and Terry Drexler, Inc., which continued to utilize the storage activities involving used oil and spent solvents. None of the individuals or entities which have operated the facility have completed the necessary application forms for either a Part A or Part B permit nor have they submitted a closure plan.

EPA, in conjunction with State officials, conducted an inspection at the facility on June 9, 1982. Terry Drexler, who apparently was sub-leasing the facility from his father, accompanied the inspectors during this visit. A sample of the oil from one of the underground tanks was taken by EPA Inspector, William Abercrombie. Subsequent to that inspec-

tion and the analysis of the samples taken, the Agency advised Terry Drexler on July 27, 1982 that all requirements under 40 C.F.R. 261.6(b) would be applicable if the waste were determined, in fact, to be hazardous.

Analysis of the samples taken was performed by Washington State Department of Ecology Laboratories and by EPA laboratories. The State analysis revealed that the waste oil flash point was below 140° F, making it a hazardous waste. Analysis at the EPA laboratory revealed the presence of several hazardous wastes including toluene, a listed hazardous waste at 1700 ppm, as well as trace amounts of ethyl benzene and methylene chloride. The sample analysis also revealed the presence of naphthalene and other solvents in the oil stored in the tank.

Since the facility did not qualify for interim status and had not made the proper submissions to enable it to be permitted completely under the Act, the operation of the facility by Arrcom and Terry Drexler constitutes the operation of a facility without a permit, in violation of the statute and the regulations promulgated pursuant thereto.

The numerous corporations created by George Drexler and his son, Terry, are, for all practical and legal purposes, inseparable from the individuals which created them and control and own all of the stock in said corporations.[2] The corporations appear to own no assets either in the form of equipment or real estate, and therefore, any finding of liability against the corporations will amount to a finding against George and Terry Drexler as the alter-egos of these corporations. Why the Drexlers went to the time and expense of forming these multitudinous corporations is unknown to the writer, but their creation appeared to have

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[2]In some cases, stock not owned by Respondents is owned by a wife or other family member.

no illegal nor nefarious motives associated therewith. The Drexlers apparently operated all of their facilities on an individual basis without regard to corporate involvement and, for the most part, apparently ignored any distinction among their various corporations for the purposes of transacting the business which is the subject of this Decision.

In regard to the Tacoma facility the Agency is arguing that the land owners, Cragle and Inman, are jointly and severally liable for any fines that would be assessed and are liable under the Act for the activities which are found to have taken place on their property in Tacoma.

In support of this notion, the Agency draws the Court's attention to several cases under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) usually referred to as Superfund. The Court has carefully reviewed the cases cited by the Agency and finds that, in fact, the Courts have found that non-negligent land owners are liable for contribution to the cost of cleaning-up the facilities involved.
Language in the various decisions reviewed is not particularly helpful in that they contain little or no analysis of the rationale behind the Court's ruling that the non-negligent and non-participatory property owners were liable for paying their share of the cost of the clean-up. The Court merely cited the language of the statute which states that owners, operators, transporters, and those who arrange for the transport of hazardous substances are liable under the Act. In the case of United States v. Argent, 21 ERC 1354 (D.N.M., 1984), the Court found that the owners of land leased to operators of a silver recovery business are liable under the Act for costs incurred by the Government in responding to a spill of sodium cyanide even though the land owner was not connected

with the silver recovery business because the legislative history shows Congress intended land owner/leassors to be within the definition of owners liable under §107 of CERCLA.

Although these cases are interesting, they are not, in my judgement, controlling in the case presently before me. There are several reasons why this is true. The first being, of course, the obvious one that the cases cited by the Agency to support its theory were decided under a completely different statute. The other reason being that when one examines the sanctions available to the Government under CERCLA and the purposes for which it was enacted, they are, in regard to land owners, very different from the provisions under RCRA. In the CERCLA cases the costs are recovered for clean-up and the bringing of the properties in question back to a non-hazardous state. Clearly this enterprise on behalf of the Government and/or its contractors inures to the benefit of the land owners because, absent such clean-up, the land would be, for all practical purposes, useless to him and unavailable for any commercial use. Since in the case of CERCLA, the absent and non-participatory land owner has reaped a benefit by the clean-up accomplished by the Government, it is only fair that he share in the costs involved therein. Such is clearly not the case here where the land owners, Cragle and Inman, were merely arms-length lessors of a discrete piece of real property and had nothing whatsoever to do with the operation of the business engaged in by the Drexlers. Also at no time prior to the institution of the Complaint in this matter were they advised that there was any improper activity being conducted by the Drexlers on their property. The record indicates that this facility has historically been used for the storage of oil many years prior to the enactment of RCRA and that there was nothing to alert

the land owners to the fact that some how the activities being conducted thereon by the Drexlers was in any way different from what previous tenants had been doing in the past.

In this regard, I am more persuaded by the language of the Court in Amoco Oil Company v. EPA, 543 F.2d. 270 (D.C. Cir., 1976), which held that the Agency acted improperly when it promulgated regulations under the Clean Air Act which attempted to make refiners of gasoline responsible for illegal activities committed by tenants of retail gasoline service stations. The Court held that the mere fact that a refiner may have leased certain real estate and equipment to an individual who sells his product but does not, without more, furnish any logical or legal basis for imposing blanket responsibility upon the owner for offenses or illegal acts committed by the lessee of the premises. In the absence of any indication of a specific intent on the part of Congress to create a "new tort, the traditional common law rules of vicarious liability must apply." In the Amoco case, supra, the Court refused to hold the refiner liable for the illegal acts of its lessee even though such lessees were purchasing and selling products manufactured and distributed by the refiner. That relationship is certainly a lot closer and of a more mutually beneficial nature than that which exists between the Drexlers and the land owners in this case who had no interest, knowledge or association with the used oil business conducted on the property.

Therefore, I am of the opinion that, under the facts in this case, the notion of vicarious liability as to the non-negligent and non-paticipatory land owners in this case is not applicable and that I herewith find that the lessors, Craigle and Inman, are not liable for any civil penalty, nor are they subject to any Order which might issue under

this case. There is, of course, nothing to prevent the Agency from causing the facility to be cleaned up and then attempting to obtain contribution from the land owners under CERCLA. They may not, however, impose a civil penalty under RCRA in these circumstances.

The Drexlers, as to the Tacoma facility, argued several defenses. One of which is that they did not know that the materials they were processing at the facility constituted hazardous wastes. And secondly, that they are not liable for any civil penalty under the Act because of an agreement they entered into with the Department of Justice in association with their criminal conviction and subsequent incarceration for activities un-related to this matter.

As to the first defense, it may well be true that, initially the Drexlers were not aware that what they were doing constituted the handling of waste materials. However, they admitted on several occasions that they were handling certain solvents and other highly flamable materials and were apparently freely mixing them with the waste oil which they had collected from other sources. Under the circumstances, it is clear that the Drexlers, George and Terry, are liable under the Act for the operation of a hazardous waste facility without first obtaining a permit.

As to the second defense, that is the agreement they entered into with the Department of Justice prior to entering a guilty plea in a criminal matter, the record is clear that nothing contained in that agreement has any bearing whatsoever on the matter currently before me. Paragraph 5 of the agreement entered into between the Drexlers and the Department of Justice states that "this agreement is in disposition of all Federal criminal charges arising from the defendants George and Terry Drexler's businesses and in further consideration of the defendants

guilty pleas the Government agrees there will be no additional Federal charges filed on events which occurred on or before November 24, 1982 in connection with those businesses." Although the language quoted is not without ambiguity, it is clear that it was the intent of the Government and of the Drexlers that the agreement that they signed only applied to Federal criminal charges arising from their businesses and did not, and in my judgement could not, have constituted an absolute granting of immunity to the Drexlers by the Government for any and all unrelated criminal and civil matters that the Drexlers might have additionally been guilty of. I, therefore, am of the opinion that the above-mentioned agreement does not insulate the Drexlers from liability relating to civil penalties asociated with the operation of the Tacoma or Rathdrum facilities. This interpretation is further bolstered by a letter dated October 19, 1984 from Stephen Schroeder, Assistant U.S. Attorney in Seattle, to Ms. Barbara Lither, then the EPA attorney in charge of this matter, which stated that the "parties to the attached agreement neither contemplated nor intended to dispose of any civil proceedings which might be conducted. Indeed, everyone assumed that civil tax consequences would ensue from the criminal judgement."

The Rathdrum Site - X-83-04-02-3008

This Complaint involves once again George Drexler and his corporations, Terry Drexler and W. A. (Alan) Pickett, which owned and operated a hazardous waste management storage and disposal facility in Rathdrum, Idaho. Since the facility commenced operation prior to November 1980, it was eligible for interim status. The facility did notify EPA of its existence under the Act and filed a Part A application which was signed

by Mr. Pickett as owner when, in fact, he was not the owner. At the time that the Part A application was filed with the Agency, EPA was unaware of the problems associated with Mr. Pickett signing and it assumed the facility was enjoying interim status. Upon being advised by Mr. Warren Bingham, one of the Respondents and the owner of the property, that he had not authorized Mr. Pickett to sign the application, the Complainant requested that the Respondent submit a corrected Part A application or submit a closure plan. Respondents subsequently stopped operations but have neither re-submitted the Part A application, nor submitted a closure plan. Dispite that discrepancy, the Agency apparently still considers the facility to have obtained interim status for the purposes set forth in the application, that being storers and treators of hazardous wastes.

The Complaint states that the Respondents spilled and/or disposed of hazardous wastes or hazardous waste constituents into the soil surrounding some of the buildings and tanks on the facility and such release constitutes disposal. Since the facility had not qualified for interim status for disposal it is therefore in violation of § 3005 of the Act. The Complaint then goes on to list approximately eleven (11) discrepancies which the inspections and investigations of the facility disclosed and for which the Complaint proposes to assess penalties. The Complaint initially proposed a civil penalty in the amount of $75,925.00 which was subsequently reduced to $73,500.00.

As I understand the Complainant's position, they view the Respondents in this case as operating a facility which enjoys interim status despite the fact that they have alleged in the Complaint that the Part A application originally filed was defective inasmuch as it listed W. A. Pickett as the owner of the facility, when, in fact, the premises were owned by

Mr. Bingham. This situation is slightly perplexing in that, on the one hand, the Agency recognizes the facility as having been granted interim status and, on the other hand, cites them for a violation of the regulations for filing a defective and insufficient Part A application. The Agency advised the Respondents that they must re-submit their Part A application properly filled in, an act which was never accomplished, for a variety of reasons.

Additionally, during late 1981 and early 1982, the Agency advised the operators of the Rathdrum facility that they must revise their Part A application since it failed to list certain hazardous wastes that the Agency had reason to believe they were handling. Several deadlines were set for this re-submission. The record indicates that none of these deadlines were met, or if some response was made, it was deemed by the Agency to be unacceptable. The question arises as to whether or not this facility had interim status.

The Agency generally has taken the position that a facility may have interim status as to waste "X", but not as to waste "Y". Or that it has interim status as a storer of waste, but not as a disposer. That language has always troubled me. It seems to me that a facility either has interim status or it does not. If one equates the term interim status as being synonymous with having a temporary or probationary permit, pending the issuance of a full or true permit, the language is understandable. Therefore, if one is handling a waste which he failed to identify in his Part A application, he is operating without a permit as to that waste and is, therefore, violating the Act.

In the instant case, the Agency seems to take the position that the facility had interim status as to the waste listed as D001, or ignitable

waste, but not as to the other wastes that it handled. However, the Part A application and the supplement later filed, were both signed by Alan Pickett as owner, a defect which the Agency considers as rendering the application unacceptable. Therefore, it would seem that the Rathdrum facility was operating without interim status for any waste, including D001. This conclusion is bolstered by the language of the regulations. 40 C.F.R. § 270.70(b) provides that:

> "Failure to qualify for interim status. If EPA has reason to believe upon examination of a Part A application that it fails to meet the requirements of § 270.13, it shall notify the owner or operator in writing of the apparent deficiency. Such notice shall specify the grounds for EPA's belief that the application is deficient. The owner or operator shall have 30 days from receipt to respond to such a notification and to explain or cure the alleged deficiency in his Part A application. If, after such notification and opportunity for response, EPA determines that the application is deficient it may take appropriate enforcement action."

The footnote to this section advises that:

> "When EPA determines on examination or reexamination of a Part A application that it fails to meet the standards of these regulations, it may notify the owner or operator that the application is deficient and that the owner or operator is therefore not entitled to interim status. The owner or operator will then be subject to EPA enforcement for operating without a permit."

The scenario depicted in the regulations is exactly what happened in this case. The Respondents never filed an amended application which the Agency found to be acceptable. (See the testimony of Linda Dawson, Tr. 83-89.)

The lack of interim status does not, however, relieve a facility of the duty to comply with the provision of Part 265 of the regulations. This is clear from a reading of § 265.1 which states that the regulations apply to those who have been granted interim status as well as those who failed to notify under § 3010 of the Act or to file an acceptable Part A application.

For all practicable purposes, the result of this analysis is that a facility must abide by the provisions of Part 265 of the regulations whether they enjoy interim status or not. The only difference is that those who do not enjoy such status are also guilty of operating without a permit. In this case, the Agency proposed a substantial penalty for disposing of waste without a permit. Assuming my analysis is valid, a similiar penalty could have been proposed for all activies engaged in at the facility.

Arrcom used the facility for the storage and disposal of used oil, spent solvents and other substances prior to the treatment of these materials for resale as fuel. On December 14, 1979, Arrcom sold the facility along with all equipment, stock and vehicles to Mr. Bingham. Mr. Bingham leased the facility back to Arrcom, which continued to use the property as before.

Despite representations to the contrary by Arrcom personnel, the facility was accepting and treating hazardous wastes other than ignitable waste oil (D001) at the facility. These wastes were identified as spent solvents in the F001 series. (Complainant Exhibits No. 40 and 48, Idaho.) Mr. Alan Pickett, secretary of Arrcom, belatedly admitted that the facility was accepting spent solvents and mixing them with the waste oil.

Mr. Bingham, in January 1982, evicted Arrcom from the premises for non-payment of rent. On July 20, 1982, the Agency conducted an inspection and sampling effort at the Rathdrum facility. At the time of this inspection, the facility was not in operation and appeared to have been abandoned since the eviction. The EPA inspector determined that prior to the abandonment, oil had been spilt throughout the location and the tanks

containing oil were very visibly leaking onto the ground. This oil on the ground was present despite the fact that Arrcom had changed the dirt and gravel at the facility before it began operations there. The inspection revealed no evidence of any record keeping of any kind at the facility. There was no complete or continuous fence surrounding the site and the tanks were in general disrepair. No safety equipment or fire extinguishers or telephones were present at the facility. One can only speculate as to the presence of these items when the facility was in operation by Arrcom, but no evidence was forthcoming that the required equipment was, at any time, present. As indicated above, the records of the Respondents, George and Terry Drexler, were confiscated by the Government in connection with their criminal problems and after the Agency finally gained access to those records, a diligent search thereof revealed none of the records required by the regulations.

The inspector took a variety of samples from several locations on the property and subsequent analysis of those samples revealed significant concentrations of trichloroethane, ethyl-benzene, and methylene chloride, toluene and trace amounts of other listed hazardous wastes. A second and more extensive sampling and analysis effort was conducted June 6 through June 8, 1983 at the Rathdrum facility. A sample was taken from a large storage tank on the north end of the facility used for the initial storing and mixing of used oils and solvents. Analysis of that sample revealed the presence of ethyl benzene at 5,000 ppb, toluene at 6200 ppb, and xylene at 17,600 ppb. Samples from other tanks on the facility also revealed the presence of solvents and other listed hazardous wastes in high concentrations. Soil samples taken near the large storage tank also

revealed the presence of a variety of hazardous solvents in significant concentrations. The concentration of the solvents found in the soil samples was substantially higher than that found in the storage tanks.

The Agency considers such spillage to constitute disposal, a conclusion supported by the language of the regulations, and inasmuch as the facility is located over a sole source acquifer, the Agency considered such illegal operation to constitute a serious threat to the public health and environment which resulted in emergency removal action under Superfund.

The Respondents in defense of their activities at the Rathdrum facility testified that they had never used the tank from which the sample was taken and that primarily they used rail tankers to heat the oil and that these tankers sat on a concrete pad which was bermed in on all sides and had an 8,000 gallon drain tank located under ground of the center of the concrete pad. Their contention being that if anything had leaked from their tank it would have been captured in the underground storage tank which is placed there for that purpose. Mr. Drexler also testified that he completely bermed the other storage tank and that to his knowledge no oil that he had processed on the facility ever escaped to the bare ground. This facility had been used for many years as a oil refining and treatment plant as well as for other chemical activities related to the petroleum industry. Mr. Drexler's position is that any oil or solvents found on the ground by the EPA inspectors was placed there by previous owners and operators of the facility and that he contributed nothing to the hazardous wastes that were detected by the Agency sample and analysis program.

The Agency apparently takes the position that it is immaterial whether or not the Respondents placed the hazardous waste on the property

since as owners and operators they are responsible for any conditions that exist thereon and that the Agency can only be guided by what its inspections and sampling analysis endeavors produce, since they did not inspect the premises until after they were abandoned by the Drexlers due to their forced eviction. Given the record in this case, one must recognize that the credibility of the Drexlers must be viewed with some suspicion. In addition, the Agency provided for the record, copies of manifests which indicated that the Drexlers were, in fact, handling hazardous wastes at the facility in the form of spent solvents and, there fore, their protestations to the contrary are not worthy of significant weight. In this regard, the Drexlers stated that the paint thinner which they recieved on their property was taken there by one of their truck drivers without knowing of its nature and that except for that one instance, they had never received anything else other than used oil at the Rathdrum facility. The Respondents further argue that Arrcom had been locked out of the Rathdrum site since December 1981 and that the owner since 1979, Mr. Warren Bingham, would not allow anyone associated with Arrcom on the premises. The Respondents argue that this lockout was so sudden that there was no opportunity to empty out the tanks and police the area and Arrcom had no idea what, if any, activities occurred on the premises since January 1982. Mr. Drexler also argues that he never authorized anyone in his employ to apply for a Part A permit for the facilities but, in Court, upon cross-examination, he admitted that Mr. Alan Pickett had the apparent authority to act in Mr. Drexler's stead to accomplish whatever business activities were necessary in order to keep the operation running. Apparently Mr. George Drexler, the President of Arrcom, did not spend much time on the facilities in question since he

was devoting most of his time and efforts to running the facilities located in the State of Washington and relied on family members and Mr. Pickett to take care of the operation of the Rathdrum facility.

As pointed above, any facility which is eligible for interim status is governed by the provisions of 40 C.F.R. Part 265, and inasmuch as the facility never filed a closure plan the activities accomplished thereon were subject to the provisions of the Act even though Mr. Drexler and his various corporations were no longer on the premises.

Discussion and Conclusion

Mr. George Drexler, the patriarch of the Drexler clan, has apparently been in the oil recovery business for approximately 38 years and his sons, Tommy and Terry, followed in their father's footsteps and became involved in this industry as well. The Drexlers, by their own admission, are relatively un-educated and certainly unsophisticated in the role that the Government plays in the industry which they have chosen. My analysis of the record indicates that the Drexlers, in good faith, felt they were rendering a beneficial environmental service by re-refining used oil and placing it back in the economy, a service which, in their judgement, prevented such used oil from finding its way into the waters and land of the Country. Although I have no reason to disbelieve the Drexlers position on this issue, it is quite clear that the provisions of RCRA caught the Drexlers unaware and their continued operation, in the face of the rather complex regulations promulgated by the Agency, ultimately placed them in the position of violating many of the provisions of such regulations.

From this record, it is clear that as to the Tacoma facility they operated a hazardous waste facility without obtaining interim status therefore. As to the Rathdrum facility they were either operating without interim status as to disposal and the handling of certain spent solvents or, depending on which legal philosophy you want to adopt, they were operating the Rathdrum facility without interim status as to <u>any</u> pollutants or hazardous wastes. The Drexlers, through their various corporations, in my judgement, made a good faith effort to operate the Rathdrum facility in a way that they felt would not harm the environment. However, they did not appreciate the impact of the regulations on the those portions of the Rathdrum facility which they did not actively operate. They apparently took the position that they were not responsible for the conditions existing on the premises when they purchased it and that as long as they operated those discrete portions in a safe and business-like manner, that they would not violate any environmental regulations. Unfortunately, history in this case has demonstrated the incorrectness of that posture.

The decision in this case is further complicated by the fact that none of the Respondents appeared by counsel at the Hearing and, therefore, their presentation and their subsequent filing of post-hearing briefs was, to that extent, deficient, although Mr. Foss, the accountant who appeared on behalf of Mr. George Drexler, did a commendable job considering his lack of expertise and training in the area under discussion. As indicated above, the factual investigation of this case was further complicated by the fact that the great bulk of Respondent's records were previously seized by the Federal government and, if one believes the Respondent's testimony, large portions of those records were never returned to them

and thus they could not bring forth evidence to support their allegation that they have in fact filed all the necessary documents that the law requires and had on file the various management documents which the regulations also require. Given the rather lax way in which the Rathdrum facility was apparently operated by either the Drexlers or Mr. Pickett, I find it difficult to believe that the Respondents had prepared all the rather voluminous and technically difficult documents which the regulations envision that a facility such as theirs have on file. I, therefore based on this record, find that the allegations of the Complaint having to do with the failure of the Respondents to have certain equipment and documentation on file and present at the Rathdrum facility must be sustained.

The question of the amount of the penalty to be assessed is now ripe for discussion. EPA's Exhibit No. 42, Idaho, and No. 25, Tacoma, are the penalty calculation worksheets which the Agency witness used to come up with the fines and penalties proposed in this case. It should be noted that the amounts set forth in the penalty calculation sheet differ substantially from those which are set forth in the Complaint. Although the total amount of the proposed fine has been reduced from $75,000.00 to $73,350.00, the individual differences, on a count-by-count basis, differ widely from that set forth in the Complaint. For example, the Compliant proposes a penalty of $22,500.00 for the failure to have the signature on the Part A application and the revised calculation proposes a penalty of $850.00 for this offense. The violation as to the failure to have adequate security on the premises was increased from $7,500.00 to $22,500.00, and so on down the list. The proposed penalty as to the Tacoma site, that is, operating without a permit, was reduced from $22,500.00 to

$13,500.00. Apparently, this reduction had to do with the potential risk associated with this facility since the tanks in question were all underground and apparently intact and, therefore, the Agency took the position that the likelihood of release to the environment of these materials was rather remote.

If one believes the testimony of the Respondents, and in this instance I have little doubt as to its validity, they are for all practical purposes judgement-proof. All the corporations formed by the Drexlers have been either dissolved or declared bankrupt and in addition to having no assets the Drexlers are facing a $10,000.00 fine from the Federal Government. Mr. George Drexler and his wife are living off the proceeds of their social security check and are without additional income.

The newest version of the Agency's penalty policy for RCRA, discusses what the Agency should do in the case of the inability of the Respondent to pay a proposed penalty and the effect that the paying of such penalty would have on his ability to continue in business. The draft penalty policy, which the Agency used in this case, also discusses the question of whether or not a reduction of the proposed penalty should be made in view of the purported inability of the Respondents to either pay the fine or continue in business. The draft policy states that no reduction should be made unless it is apparent from the record that the Respondents would be forced to close their business in the face of payment of the proposed penalty and further that the closing of the business would, either: (1) have a serious economic effect on the economy of the area surrounding the facility; or (2) that the continued operation of the facility is deemed by the Agency to provide a worthwhile environmental benefit and the closing of which would result in potential damage to the

environment. All of these considerations are inapplicable here since all of the businesses that the Drexlers had previously run are shut down and at best they employed only a few persons and therefore their impact on the economy would certainly be incapable of being measured. Likewise, the continued operation of these facilities would, in my judgement given the nature in which they were operated, provide little or no benefit to the general environment.

Under these circumstances, one is faced with the dilemma of imposing a substantial penalty upon individuals who are not only judgement proof but whose potential future earnings seem to be already spoken for by other elements of the Federal Government.

The new, and hopefully final, RCRA Civil Penalty Policy which was issued on May 8, 1984 takes a little more realistic and liberal view as to the downward adjustment of the proposed penalty based on the ability of a violator to pay. This new Policy states that: "The Agency generally will not request penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability of a violator to pay a penalty." The Penalty Policy goes on to say that: "when it is determined that a violator can not afford the penalty prescribed by this policy, or the payment of all or a portion of the penalty will preclude the violator from achieving compliance or from carrying out any remedial measures which the Agency deems to be more important than the deterrence effect of the penalty, in other words, payment of the penalty would preclude proper closure/post-closure", the following options may be considered. Then the policy lists three options such as a delayed payment schedule, installment plan or a straight penalty reduction as a last recourse.

As to the Rathdrum facility, the record indicates that the Agency has already commenced clean-up of that location and has obtained the pledge of the owner, Mr. Bingham, to help in that endeavor. The Drexlers are apparently in no position to assist in that effort. As to the Tacoma facility, it apparently imposes no immediate environmental risk and closure thereof would probably constitute the pumping out of underground storage tanks and a rinsing thereof, all of which would probably not cost a great deal of money. In any event, it is unlikely that the Drexlers are in a position to effectuate that clean-up, although the record in that regard is unclear since a discussion of the costs incident to such a clean-up were never presented.

Although the draft policy which was utilized by the Agency to calculate the proposed penalties in this case is the one which is apparently applicable to this case, one can not ignore the Final Agency Penalty Policy which was promulgated subsequent to the issuance of the two Complaints in this case but prior to the Hearing and this Decision. It occurs to me that under the strange and unique circumstances present here, the language and spirit of the Final Penalty Policy, to the extent it is deemed appropriate, should apply.

My decision as to the Respondents, Rich Cragle and Ron Inman, owners of the C Street property in Tacoma, has already been set forth above. It is true, as the Agency points out in its brief, that the congressional discussion associated with this Bill indicates that it was Congress' intent to impose liability on owners who are not also the operators of RCRA facilities. I do not believe, however, that it intended the result herein urged by the Agency. It is quite easy to conceive a situation where a parcel of real estate is owned by an individual who enters into a

long-term lease with a corporation who builds a substantial RCRA facility and in turn then hires a third corporation to operate the facility on its behalf. In that instance, it would seem to me that the language urged by the Agency would make both the primary lessee of the premises who owned and built the facility in question, as well as the corporation which it hired to operate the facility would both be liable under RCRA, but that absent some unusual circumstance the owner of the bare real estate would not be liable under RCRA for penalties such as proposed here. Agency policy apparently requires the signature of the owner of the facility on the Part A and B applications as a means of notifying him that he is in some way liable under RCRA for what ultimately might happen on his property. Just how the signing of an application for a Part A or Part B permit somehow advises a land owner of the potential for vicarious liability certainly escapes me. In any event, I find no reason to alter my decision that the land owners, Cragle and Inman, are not liable for the payment of any civil penalty in these proceedings.

In accordance with the above discussion, I am of the opinion that a civil penalty as to the Tacoma facility in the amount of $3,000.00 should be assessed against Arrcom, Inc., Drexler Enterprises, Inc., George Drexler, Terry Drexler, Inc., and Terry Drexler as an individual, jointly and severally.

As to the Rathdrum facility, under the circumstances in this case I find that a civil penalty in the amount of $4,500.00 is appropriate against Arrcom, Inc., Drexler Enterprises, Inc., and George W. Drexler and Thomas Drexler, individually, with joint and several liability among these corporate and individual Respondents. As to Respondent, W. A. (Alan) Pickett, his involvement in this matter is unclear and as indicated

in the record he did not appear at the Hearing either in person or through counsel. Apparently, Mr. Pickett was the former owner of the Rathdrum facility and sold it to the Drexlers in the 70s and continued to function as an employee of the operators of the facility up until the time the Drexlers and their corporation were evicted from the premises by Mr. Bingham. The record is not clear as to exactly what the relationship was between Mr. Pickett and the Drexlers although there was testimony to the effect that he had some form of employment contract with the Drexlers following his sale of the facility to them. A copy of this employment contract was not available for the record and consequently no one knows what it contained. Mr. George Drexler testified that, as to Arrcom corporation, Mr. Pickett held no office but was rather an employee. There is testimony that suggests that Drexler Enterprises, one of George Drexler's other corporations, which was in some fashion dissolved by the IRS, Mr. Pickett was the secretary of that corporation and that he apparently felt that he had some authority to function as an officer in regard to Arrcom corporation, when in fact he held no office with said corporation. It is true that Mr. Pickett signed the Part A application both as operator and owner of Arrcom, Inc. but apparently such signature on behalf of Arrcom was just as improper as his signature as that of the owner of the facility. Given the rather imprecise testimony of Mr. George Drexler relative to his association with Mr. Pickett and Mr. Pickett's authority and position with Arrcom, Inc., it is difficult to determine whether or not Mr. Pickett should be assessed a penalty in this matter as one of the operators of the facility in question at the Rathdrum site. He apparently had wide latitude to operate the Rathdrum facility on the behalf of the Drexlers and their corporations and inas-

much as he signed the applications in two capacities, it occurs to me that he should be included as one of the joint and severally liable Respondents in this matter. I am, therefore, of the opinion that in addition to the Drexlers and their corporations, Mr. Pickett should also be jointly and severally liable for the penalty proposed to be assessed herein as to the Rathdrum facility.

ORDER[3]

Pursuant to the Solid Waste Disposal Act, as amended, Section 3008, 42 U.S.C. 6928, the following Order is entered against Respondents, Arrcom, Inc., Drexler Enterprises, Inc., George W. Drexler and Terry Drexler:

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[3]The Court has carefully read the novel arguments put forth by the Complainant as to the Court's power and authority to alter the original Order issued by the Agency as part of its Complaint. (See pp. 48-51 of Complainant's initial post-hearing brief.) The Agency's argument, in this regard suggests that an ALJ has no authority to alter the Compliance Order associated with a Complaint issued by the Agency on the theory that such Orders are "executive commands and do not constitute adjudicative authority by E.P.A." The Complainant further points out that 40 C.F.R. Part 22 does not address the Compliance Order or control the disposition of such an Order in proceedings such as this. These arguments are rejected.

40 C.F.R. § 22.27 clearly directs the ALJ to issue an Initial Decision which contains, inter alia, a civil penalty and a proposed Final Order. Common sense dictates that a Compliance Order must be consistent with the factual and legal findings of the Court. If portions of the Compliant are dismissed or no violation is found, it would be absurd to leave intact those portions of the Compliance Order dealing with those issues. Conversely, additional facts developed at the Hearing may require some supple ment to the original compliance order to assure that all violations and environmental hazards are addressed and remedied.

The Court perceives the fine hand of the innovative and skillful legal staff in Region X in this matter. Although novel and inventive legal propositions are encouraged by the Court, in this instance, they are not accepted.

1. (a) As to the Tacoma site, a civil penalty of $3,000.00 is assessed against Respondents for violations of the Solid Waste Disposal Act found herein.

(b) As to the Rathdrum site, a civil penalty of $4,500.00 is assessed against Respondents and Alan Pickett for violations of the Solid Waste Disposal Act found herein.

(c) Payment of the penalty assessed herein shall be made by forwarding a cashier's check or certified check payable to the United States of America, and mailed to:

EPA - Region X
(Regional Hearing Clerk)
Post Office Box 360903M
Pittsburgh, PA 15251

in the full amount within sixty (60) days after service of the Final Order upon Respondent, unless upon application by Respondent prior thereto, the Regional Administrator approves a delayed payment schedule, or an installment payment plan with interest.[4]

Order as to the Tacoma Site

2. Respondents or companies owned and/or operated by the Respondents shall not accept at this facility any hazardous waste for disposal. Furthermore, Respondents and/or said companies shall not accept at this facility any hazardous waste for storage or treatment unless

[4]Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the Administrator elects to review this Decision on his own motion, the Decision shall become the Final Order of the Administrator. See 40 C.F.R. § 22.27(c).

said storage or treatment preceeds the use, reuse, recycling or reclamation of the hazardous waste and such hazardous waste is neither a sludge nor a hazardous waste listed in Subpart D of 40 C.F.R. 261 until such time as a permit is issued by EPA pursuant to 40 C.F.R. 122 (recodified on April 1, 1983 as 40 C.F.R. 270) and 124 for this facility.

3. Respondents shall submit an approvable closure plan for this facility in accordance with 40 C.F.R. 265, Subpart G within thirty (30) days of receipt of this Order. Closure shall commence upon EPA approval of the plan and shall be accomplished in accordance with 40 C.F.R. 265, Subparts G and J as expeditiously as possible but in no event later than one hundred and eighty (180) days from EPA's approval.

Order as to the Rathdrum Site

4. Inasmuch as the above-named Respondents are currently barred from any access to this facility and further since the Agency has entered into a separate agreement with the landowner, Mr. Bingham, as to the future disposition of this site, no Compliance Order as to this facility will be issued by the undersigned.

Thomas B. Yost
Administrative Law Judge

DATED: October 21, 1985