IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

STATE OF OHIO, ex rel. LEE FISHER ATTORNEY GENERAL OF OHIO,	)	CASE NO. 90-CV-1606
Plaintiff	)	JUDGE W. WYATT McKAY
-vs-	)	**FINDINGS OF FACT AND**
STARR FABRICATING, INC., ET AL.,	)	**CONCLUSIONS OF LAW AND**
Defendants	)	**JUDGMENT ENTRY**

FINDINGS OF FACT

1. Defendants leased and operated two steel fabricating plants: "the Warren plant", from 1969 until August of 1990 and "the Vienna facility", since December 31, 1986 through to the present.

2. Defendant Starr is a corporation organized under the laws of the State of Ohio with its principal place of business in the State of Ohio.

3. From approximately 1969 until 1982 Defendant Kovacs was the Secretary and Treasurer of Starr and owned approximately one-third (1/3) of Starr's stock. In approximately 1982 Defendant Kovacs became the President of Starr. Since about 1987 Paul Kovacs has been the owner of greater than fifty percent (50%) of Starr's stock.

4. Wastes can be hazardous wastes under Ohio law either by exhibiting one of four characteristics - ignitability, corrosion, toxicity, and reactivity - or by being specifically listed as being a hazardous waste.

5. In the course of conducting its steel fabricating business Defendant Starr generated waste paints and waste solvents at both the Warren plant and the Vienna facility, and placed these

wastes into 55-gallon drums or 1 and 5 gallon buckets.

6. The products employed by Starr at both sites, when spent, discarded, or unwanted, are **"hazardous wastes"** within the definition of Ohio Revised Code ("O.R.C.") Section 3734.01(J) and O.A.C. Sections 3745-50-10(A)(42) and 3745-51-03. These wastes have the characteristic of **"ignitability"** as defined by O.A.C. Section 3745-51-21, and are **"listed"** hazardous wastes under O.A.C. Section 3745-51-31. These wastes fit under the Ohio EPA hazardous waste code classifications of D001 and/or F003 and/or F005 pursuant to O.A.C. Sections 3745-51-21 and 3745-51-30.

7. Responding to a complaint alleging that Starr was dumping hazardous wastes onto the ground and burning them at the Vienna facility, on July 6, 1989, Mr. Anderson traveled to the Vienna facility to conduct an administrative inspection.

8. At no time had Defendants ever analyzed any of the hazardous wastes generated at the Vienna facility to determine if the wastes generated were hazardous in accordance with the criteria set forth in O.A.C. Chapter 3745.51.

9. On approximately six (6) occasions in 1989 Starr dumped about 60 gallons in total of hazardous waste paints and solvents, generated by Starr at either the Warren and/or Vienna sites, onto several tree stumps to help burn these tree stumps. After dumping these wastes onto the tree stumps, Zirkle ignited and burned these wastes.

10. Starr never obtained a permit from the Ohio EPA to open burn. At no time have Defendants been the holders of a variance and at no time have Defendants ever received a permit or written permission from Ohio EPA to open burn. At the time of these burning events the Vienna facility was not operating under an Ohio Hazardous Waste Installation and Operation Permit issued in accordance with O.R.C. Chapter 3734.

11. Defendant Kovacs instructed employee John Zirkle to use hazardous wastes to burn the tree stumps, and at no time did he ever instruct him to cease this activity. Defendant Kovacs witnessed at least some of the approximately six (6) burning events which occurred in 1989 at the Vienna facility, and witnessed hazardous waste paints and solvents being used as a starter for these fires.

12. As a result of the dumping of hazardous waste paints and solvents onto the stumps

at the Vienna facility and then burning these stumps and wastes, hazardous wastes were absorbed into the soil surrounding and beneath the 10 by 10 burn area, contaminating some of this soil.

13. Starr generated approximately 25 gallons of hazardous wastes per month at the Vienna facility. At this rate of generation the Vienna facility would have been considered a conditionally exempt small quantity generator ("CESQG").

14. Starr had accumulated approximately 1500 kilograms of hazardous wastes on site.

15. The 55-gallon drums found on the Vienna facility had been on site for greater than 180 days and Defendant Kovacs was aware of this fact.

16. Nine (9) full 55-gallon drums of hazardous wastes were located on the Vienna facility on the day of the inspection, seven (7) of which were generated by Starr. There were also an additional 56 gallons of hazardous wastes stored in various buckets.

17. Wastes had been spilled in the area of several of the 55-gallon drums.

18. Samples from three (3) 55-gallon drums on the Vienna facility were found to be ignitable and listed toxic hazardous wastes.

19. A waste is listed as toxic when it is either a carcinogen (cancer causing) or when it will cause, in either chronic or acute exposures, a toxic side effect such as central nervous system depression or liver dysfunction.

20. On July 11, 1989, Paul Anderson returned to the Vienna facility to take samples of the soil in and around the burn area. The results of the two soil samples show the presence of toxic wastes in the burn area soil. When a listed hazardous waste is mixed with another substance, such as soil, it retains that listing under the mixture rule. Therefore, these soils were listed hazardous wastes.

21. At all times prior to August of 1989, the 55-gallon drums located at the Vienna facility were stored outside of the facility on a gravel parking lot, without a storage pad, with no warning signs posted on or around the drum storage area, and with no fence surrounding the drums. None of these drums were labeled with the words "hazardous waste", and none of the drums were marked with an accumulation date. Some of the drums were stored without lids. Defendant Kovacs was aware of all of these facts.

22. At no time prior to August of 1989 did Defendant Starr have a drum storage area

inspection plan at the Vienna facility, and at no time prior to August of 1989 did Defendant Starr inspect the drum storage area on a weekly basis in the manner required by O.A.C. 3745-66-74.

23. At no time prior to August of 1989 were emergency response devices, as listed in O.A.C. Section 3745-54-32, located in the drum storage area or available for use at the Vienna facility. At no time prior to August of 1989 had Starr made appropriate arrangements with the fire department, the police department, local hospitals or any other such agency to familiarize them with the layout of the Vienna facility, the characteristics of the wastes generated at the facility, and the types of illnesses which could result from fires, explosions or releases. At no time prior to August of 1989 was there any emergency information posted near the drum storage area, such as phone numbers of fire departments.

24. From April 1, 1987 through July of 1989, approximately 345 gallons of hazardous waste paints and solvents generated at the Vienna facility had been placed in a solid waste dumpster located on the Vienna facility.

25. Neither Starr nor any of its employees ensured or arranged for the disposal, at a properly licensed and permitted TSD facility, of any of the gallons of hazardous waste paints and solvents generated at the Vienna facility prior to July of 1989. Prior to July of 1989 all of the wastes generated at the Vienna facility were disposed of in the dumpster located on site or they were stored.

26. Defendant Kovacs witnessed his employees placing the hazardous waste paints and solvents into the solid waste dumpster at the Vienna facility.

27. A CESQG does not have to meet all of the hazardous waste generator requirements which larger generators must. However, certain basic requirements must be met at a minimum in order to enjoy and maintain this exempt status. These requirements include: (1) all wastes generated must be analyzed to ensure that they are not hazardous; (2) if wastes generated are found to be hazardous, the generator must ensure that these wastes are disposed of at a permitted treatment, storage and disposal ("TSD") facility; and (3) no more than 1000 kilograms of hazardous wastes may ever be accumulated on a site at any one time.

28. When Starr accumulated greater than 1000 kilograms of hazardous wastes on the Vienna facility, the Vienna facility lost its exemptions and became a regular small quantity

generator ("SQG") subject to all of the generator regulations. Thus, Defendant Starr was operating as a SQG at the Vienna facility.

29. A solid waste dumpster is not a properly licensed TSD facility. Therefore, Starr was acting as a SQG at the Vienna facility.

30. SQGs are not permitted by law to accumulate hazardous wastes for periods of greater than 180 days. If a SQG accumulates hazardous wastes on site for greater than 180 days, that site becomes a TSD facility by operation of law. Thus, the Vienna site was a TSD facility.

31. On July 11, 1989, Paul Anderson arranged with Defendant Kovacs to visit the Warren plant and thereafter to revisit the Vienna facility.

32. From January 1, 1981 through August of 1990, Defendant Starr began by generating approximately five (5) gallons of hazardous waste paints and solvents per month at its Warren plant and ended up generating approximately 18 gallons per month.

33. Starr had accumulated less than 1000 kilograms of hazardous wastes on the site.

34. At no time prior to August of 1989 did Defendants have a drum storage area inspection plan at the Warren plant.

35. At no time prior to July 11, 1989 had Defendants ever obtained an analysis of any of the wastes generated at the Warren plant to determine if it was a hazardous waste in accordance with the criteria set forth in Chapter 3745-51.

36. During the July 11, 1989 inspection, Paul Anderson sampled one (1) of the 55-gallon drums found on site. The sample taken from this drum proved to be an ignitable and a listed toxic hazardous waste.

37. Neither Starr nor any of its employees ensured that any of the hazardous waste paints and solvents generated at the Warren plant during the period of January of 1981 through August of 1989 were disposed of at a properly licensed and permitted TSD facility. All hazardous wastes generated at the Warren plant were either stored on site, taken to the Vienna facility to be burned, or were disposed of in the solid waste dumpster located on the Warren site.

38. Defendant Kovacs witnessed his employees placing the hazardous waste paints and solvents generated at the Warren plant into the solid waste dumpster located on the Warren plant.

39. When Starr disposed of hazardous wastes generated at the Warren plant into

dumpsters and at the Vienna facility, Starr failed to ensure that hazardous wastes were disposed of in a properly licensed TSD facility. Therefore, the Warren plant lost its exemptions and became, by operation of law, a regular SQG and was subject to all of the generator requirements.

40. Starr failed to ensure that all of the containers of hazardous wastes which were shipped from the Warren plant to the Vienna facility were accompanied by a hazardous waste manifest when they were being shipped.

41. Starr failed to ensure that all of the containers of hazardous wastes which were shipped from the Warren plant to the Vienna facility were labeled with the words "hazardous waste" and labeled with a specific shipping label prescribed by the Department of Transportation. Starr failed to ensure that the pickup truck used to ship hazardous wastes from the Warren plant to the Vienna facility was properly placarded according to Department of Transportation specifications.

42. On approximately six (6) occasions in 1989 a total of approximately 60 gallons of hazardous waste paints and solvents generated by Starr at the Warren plant were transported from Starr's Warren plant to its Vienna facility in the back of one of Starr's pickup trucks, in 5-gallon buckets.

43. Starr's Vienna facility was not operating under a permit issued in accordance with O.R.C. Chapter 3734, had not first registered with the Public Utilities Commission of Ohio, and had not first obtained an Ohio transporter registration number during each of the occasions on which hazardous waste paints and solvents generated at the Warren plant were transported to the Vienna facility. No uniform hazardous waste manifests accompanied that waste in its transportation from the Warren plant to the Vienna facility.

44. From January of 1981 through July of 1989 Robert Freeman collected all of the waste deposited into the solid waste dumpsters located at the Warren plant and Vienna facility and hauled these wastes for disposal to solid waste landfills. Mr. Freeman was unaware that there were hazardous wastes contained in the dumpsters located at either the Warren plant or the Vienna facility.

45. If a solid waste hauler is unaware that there are ignitable hazardous wastes mixed in with the solid wastes in his truck, he will be in personal jeopardy as he hauls that waste mixture

to the landfill as these materials can spontaneously combust or decompose, causing an explosion or a fire.

46. Vehicles which haul solid waste are not required to have placards. If such a vehicle contains hazardous wastes and is involved in an accident on the highway, an emergency responder would not know that that vehicle contained such wastes and could become severely injured if, for example, he used water to put out a fire composed of hazardous wastes which are water reactive.

47. From at least June of 1988 through July of 1989 Mr. Freeman took several of his loads of "general solid wastes", which were picked up in Trumbull County, to the Carbon Limestone Landfill in Poland, Ohio and to the County Land Development-Lewis site in Salem, Ohio. Both of these sites are solid waste landfills and are owned and operated by Browning Ferris Industries. ("BFI").

48. No waste which contains free liquids may be disposed of even in a hazardous waste landfill. The 5-gallon buckets of hazardous waste paints and solvents such as were disposed of by Defendants were free liquids.

49. BFI employees spot check the loads of wastes as they enter the landfills to ensure that there is nothing in the load which should not be in there, as, for example, hazardous wastes. Spot checks are just that and it is not possible for these checks to find all nonconforming wastes in a given load, if any. From June of 1988 to July of 1989 there is no record of spotters finding nonconforming wastes in Mr. Freeman's loads of wastes.

50. Solid waste landfills on their own will generate explosive gases which, in certain circumstances, are ignitable. The addition of an ignitable liquid hazardous waste would further increase the potential for explosions at the landfill.

51. By law, a solid waste landfill must deposit each days waste receipts into a burial cell and cover that waste up. If hazardous wastes were being placed into these cells as well, even in amounts as small as 5-gallons and in scattered areas of the cell, explosive gases could build up in the cell. These gases, along with the migration of other gases out through the cover, could cause explosions.

52. Unlike hazardous waste landfills, solid waste landfills typically bulldoze the wastes

as they come into the burial cells so as to crush and compact the wastes. This procedure would be very dangerous if ignitable hazardous wastes were present in the landfill as the pressure that the bulldozer is applying to the wastes, and the fact that metal objects are typically being pushed around, can easily lead to the creation of sparks.

53. If an ignitable liquid hazardous waste migrates out of a landfill into drinking wells or surface water, there would be the potential for that waste to explode or burn in that well or on that surface water.

54. Prior to July of 1989, no solid waste landfills in northeast Ohio had liners or leachate collection systems. This being the case, prior to July of 1989 there was no solid waste landfill in Ohio in which it could be reasonably expected that hazardous liquids leaching off and from buried wastes would not enter the ground water.

55. Liquid hazardous wastes in unlined solid waste landfills can become intermingled with the leachate produced from the solid waste. This mixture of liquids can then be conveyed into the ground water under the site. From this location the liquid wastes can then migrate off site and have potential impacts upon residential wells and public water supply wells, or it could infiltrate into surface waters and cause detrimental effects to aquatic life.

56. As a result of the stipulated actions taken by Starr regarding the disposal of their hazardous wastes into solid waste dumpsters, Starr's hazardous wastes have the potential to move and exit a solid waste landfill, and to enter ground or surface water, creating a negative impact on the environment. The potential for, the distance of and the amount of migration of these wastes is dependant upon how deeply these wastes are placed in the burial cell, the type of container the wastes are in, the liquidity of the wastes, the location of the ground water aquifer or nearby surface water, and the permeability of the soils surrounding the landfill. The greater the amount of hazardous wastes which are placed in a solid waste landfill, the greater the chances are that this waste will migrate to an aquifer.

57. If five (5) gallons of a material that contained wastes such as Starr's generates entered into a five (5) million gallon body of water, the concentration of those constituents would be one (1) part per million. For these wastes, one (1) part per million is considered to be a lot of contamination in a ground water system.

58. Contamination has been found in the ground water below two sites in which it is likely that Starr's wastes were taken. This contamination has come from the landfill itself and is an unusual occurrence for solid waste landfills.

59. Preliminary observations suggest that it is probable that one of the sites to which Starr's wastes were taken generates an enhanced amount of leachate. Consequently, it is very likely that wastes are migrating from the site, then into the Ohio River. Located in the proximity of this site is an aquifer used by a number of private water well owners as a drinking water source.

60. Wastes leaving another site to which Starr's wastes were likely taken probably enter a surface water stream, then into the Mahoning River. Three constituents found in the ground water below this site were also found in the hazardous wastes stored on the Warren plant and the Vienna facility.

61. Some of the constituents found at the above described site and at the Warren plant and the Vienna facility are systematic toxicants. Over short periods of exposure they can have an immediate toxic impact. Over long periods of exposure, be it by ingestion, inhalation or dermal contact, they can cause liver damage and also central nervous system depression of activity.

62. Methylene chloride, which has been found in drum and soil samples from both the Warren plant and the Vienna facility, has been classified as a potential human carcinogen. Exposure to a carcinogen in any amount increases the likelihood of contracting caner.

63. Since many of the constituents found at Starr's two sites can be toxic at quite low levels and since methylene chloride can be cancer causing at any level, repeated discharge of materials containing these constituents can cause extensive damage.

64. There are about 3000 known generators in northeast Ohio which generate hazardous wastes similar to those of Starr Fabricating. In 1991 known generators in Trumbull and northern Mahoning County alone generated about 13,000 tons of hazardous wastes, 12% of which consisted of wastes which are listed in the same category as wastes generated by Starr. If a significant number of those generators chose to ignore the law as Defendants did, northeast Ohio would be suffering from severe damage to the environment and would likely have a great deal more superfund sites. The ground water quality around these facilities would be completely jeopardized and undrinkable, and extreme impacts to the surrounding surface waters and soils

would be expected. This situation would be of such a significant public health concern that these water supplies would have to be abandoned. As aquatic organisms are significantly more vulnerable to the effects of toxic compounds in the environment than are humans, the effects on these organisms would be even more severe. Thus, the relevant question is not what was the actual harm done by this one entity nor is it what was the health of the body of water or landfill that this entity illegally sent its wastes to. Rather, the relevant question is: Did this entity comply with the law.

65. The cost of remediating an aquifer contaminated with one(1) part per million of wastes such as Starr generated would be very high. The preliminary studies alone would begin at about $50,000.00 to $200,000.00.

66. The U.S. EPA created an exclusion from the hazardous waste rules and regulations for debris and soils surrounding underground storage tanks ("UST") which had been filled with petroleum, where these soils and debris had become contaminated with constituents from these USTs having a toxicity characteristic for organics. The U.S. EPA did not create an exclusion for generators of paint and solvent wastes or for hazardous paint wastes and solvents or for free liquids.

67. Many USTs are embedded into a relatively hard clay soil. In northeast Ohio the soils tend to be of a very hard clay. After a UST is placed into this clay hole in the ground, a backfill such as sand or gravel is placed into the hole to stabilize the tank. This backfill is typically highly absorbent. Thus, when these USTs are dug up and removed, the leakage from these tanks is usually sitting in a puddle, mixed in with water, atop of the clay soil beneath. These liquids, like all other hazardous liquids, are not excluded from the hazardous waste rules and regulations and must be treated as such. Accordingly, these liquids are pumped out of the hole and treated and disposed of as a hazardous waste. The remaining backfill material will usually have only a trace amount of these hazardous wastes, usually about 500 parts per million. This trace amount is significant. However, because benzene is often one of the constituents and benzene at very low levels still causes the waste to be considered a hazardous waste. These trace amounts, though, are at a far lower level than what would be found in a free liquid such as the wastes that Starr illegally disposed.

68. Defendants failed to follow any of the requirements for the operation of a TSD at their Vienna facility.

69. Although Ohio's hazardous waste and air pollution laws and regulations are strict liability laws, Defendant Kovacs' knowledge, concerns and responsibilities are relevant to a determination of amount of civil penalty and come into consideration during the mitigation portion of such a calculation.

70. Defendant Kovacs has worked with and handled materials and substances which are considered to be hazardous wastes, including waste paints and waste solvents, since approximately 1957. Defendant Kovacs was aware prior to the burning events at the Vienna facility that waste paints and solvents were flammable and that burning paint and waste solvents may cause health hazards. Defendant Kovacs has been aware of these characteristics of paint and solvent wastes since he was a little boy.

71. During the period of January 1, 1981 through July of 1989, Defendant Kovacs was aware of all of the waste storage and disposal practices at the Warren plant and Vienna facility, including the transportation of wastes to the Vienna facility for burning and the disposal of wastes into the dumpsters at both sites.

72. From at least 1981 through to the present Defendant Starr has received from paint and solvent product vendors and/or manufacturers material safety data ("MSD") sheets which describe the hazardous characteristics of the paint and solvent products used by Starr in its fabricating business.

73. If the product listed on the MSD sheet contains F listed hazardous constituents in an amount equal to 10% or greater of the product, that product, when spent or used, would be a listed hazardous waste. There is no chemical difference between a paint or solvent product and a paint or solvent waste. The warning, safety and personal protection information given on the MSD sheets is just as relevant for the particular product described as for the waste generated by that particular product.

74. All of the MSD sheets in the possession of Starr warned that the products were highly flammable, could cause health problems if inhaled, and should be treated and disposed of as a hazardous waste.

75. Prior to August of 1989 all MSD sheets in the possession of Starr were held by Starr's purchasing agent and were not available for inspection by any employees at either site, but were available for inspection to Defendant Kovacs at any time.

76. During the period of January 1, 1981 through to present, Defendant Kovacs possessed the authority to direct the manner in which Starr employees stored and disposed of wastes at the Warren plant and the Vienna facility, and possessed the authority to establish waste storage and disposal policies for Starr at both locations. Despite this fact, prior to August of 1989 Starr had no waste storage or disposal policies at either the Warren plant or the Vienna facility.

77. As president of Starr, it was Defendant Kovacs' duty to read the MSD sheets in his possession and to familiarize himself with all of the warnings and hazardous waste characteristics and safety precautions listed in these sheets. Defendant Kovacs never made a sufficient attempt to follow the guidelines and warnings outlined on these sheets or to familiarize himself with the laws, rules and regulations to which they refer.

78. Defendant Kovacs was aware that hazardous wastes were in the dumpsters that Mr. Freeman was loading onto his truck and driving across town.

79. Defendant Kovacs was never concerned about where the hazardous wastes he was placing into the solid waste dumpsters was going until Paul Anderson's July 1989 inspection. In fact, he has stated that "it was the least of my concerns... when you are trying to make money, you don't think of some of these things."

80. Ability to pay analyses for industrial Defendants are done to ensure that the civil penalty assessed will hurt the entity enough to make them think twice before violating the law again but will not significantly interfere with their ability to continue as a viable business. The viability of a business and the level of significance of the interference is derived at by a comparison of this entity to the health of similar industries in the United States.

81. The Ohio EPA did an ability to pay analysis for Starr Fabricating, Inc. As compared to other similar industries in the United States, Starr performed firmly in the average range.

82. The Ohio EPA also did an ability to pay analysis for Defendant Kovacs. As a

result of this analysis, it was found that Defendant Kovacs' total assets were over 1.2 million dollars ($1,200,000.00) and he has no more than $5000.00 total debt.

83. An entity can enjoy an economic benefit by not complying with the law for a certain period of time. By delaying this expenditure, they are able to enjoy a return on the money not spent for the period of time that the delay continues. Such a delay and the ensuing economic benefit can result in an entity obtaining an unfair advantage over its competitors.

84. At a generation rate at the Vienna facility of twenty-five (25) gallons per year, Starr would need to dispose of approximately five and one half (5.5) drums of waste per year. If the cost of disposing of these drums in 1989 was $150.00 per drum, then the economic benefit enjoyed by Defendants as a result of failing to dispose of this waste since at least April of 1987 would be, according to BEN, $1,397.00.

85. At a generation rate at the Warren plant of five (5) gallons per year, Starr would need to dispose of approximately one (1) drum of waste per year. If the cost of disposing of this drum in 1989 was $150.00 per drum, then the economic benefit enjoyed by Defendants as a result of failing to dispose of this waste since at least January of 1981 would be, according to BEN, $1,529.00

86. At a generation rate at the Warren plant of twelve(12) gallons per year, Starr would need to dispose of approximately two and one half (2.5) drums of waste per year. If the cost of disposing of these drums in 1989 was $150.00 per drum, then the economic benefit enjoyed by Defendants as a result of failing to dispose of this waste since at least January of 1981 would be, according to BEN, $4,620.00.

87. At a generation rate at the Warren plant of eighteen (18) gallons per year, Starr would need to dispose of approximately four (4) drums of waste per year. If the cost of disposing of these drums in 1989 was $150.00 per drum, then the economic benefit enjoyed by Defendants as a result of failing to dispose of this waste since at least January of 1981 would be, according to BEN, $7,689.00.

CONCLUSIONS OF LAW

1. O.R.C. Chapter 3734 and O.A.C. Sections 3745-50 to 3745-69 set forth the laws and regulations, respectively, in Ohio, regarding solid and hazardous wastes.

2. O.A.C. Section 3745-52-11 states, inter alia, that any person who generates a "waste" (as defined by O.A.C. Section 3745-51-02) in the State of Ohio, no matter what the amount, must determine if that waste is a "hazardous waste" (as defined by O.R.C. Section 3734.01(J) and O.A.C. Section 3745-51-03), using the methods outlined in that section.

3. Starr is a "person" as that term is defined in O.R.C. Sections 3734.01(G) and 3704.01(J) and O.A.C. Sections 3745-50-10(A)(83) and 3745-15-01(U).

4. Paul E. Kovacs is a "person" as that term is defined in O.R.C. Sections 3734.01(G) and 3704.01(J) and O.A.C. Sections 3745-50-10(A)(83) and 3745-15-01(U).

5. A waste is a characteristic hazardous waste if it is either: 1) ignitable; 2) reactive; or 3) toxic.

6. Characteristic wastes are hazardous only as long as they possess their hazardous characteristics.

7. Any liquid with a flash point which is less than 140 degrees Fahrenheit is considered to have the characteristic of ignitability and therefore to be a hazardous waste. Ignitable hazardous wastes are designated with the code number "D001". A flash point is defined as the temperature at which the vapor over the liquid ignites.

8. Listed hazardous wastes are hazardous until they are delisted through a formal petition granted by the U.S. EPA.

9. O.A.C. Section 3745-50-10 defines a "small quantity generator" ("SQG") as a generator who generates less than 1000 kilograms of hazardous waste in a calendar month. These wastes are subject to, inter alia, regulation under Chapters 3745-52 to 59, 3745-65 to 69, and to Rules 3745-50-40 to 50-62.

10. O.A.C. Section 3745-51-05 states that, inter alia, a generator of less than or equal to 100 kilograms of hazardous waste in a calendar month is a "conditionally exempt small quantity generator" ("CESQG"). Further, a CESQG is only required to:

(a) Determine whether the waste they generate is hazardous pursuant to O.A.C. Section 3745-52-11; and

(b) Ensure delivery of their hazardous waste to a properly permitted off-site TSD facility.

If a CESQG fails to comply with either of the above two requirements, it loses its conditionally exempt status and becomes a regular SQG subject to all of the generator requirements.

11. O.A.C. Section 3745-51-05 states that, inter alia, if and when a CESQG accumulates, at any time, more than a total of 1000 kilograms of hazardous wastes, the generator is then immediately treated under the law as a "small quantity generator" pursuant to O.A.C. Section 3745-52.

12. O.R.C. Section 3734.15(C) states, inter alia, that no person who generated hazardous waste (with the exception of a CESQG) shall cause the waste to be transported by any person who is not a registered transporter.

13. O.A.C. Section 3745-52-12 states that, inter alia, a SQG or large quantity generator ("LQG") must not treat, store, dispose of, transport, or offer for transportation hazardous wastes without having received a generator identification number from U.S. EPA or Ohio EPA. Further, a generator must not offer hazardous waste to transporters or to treatment, storage, or disposal facilities that have not received an EPA identification number. This identification number is good for one site only. That is, although Starr had an identification number for the Warren plant, that identification number does not transfer to the Vienna facility which needs to get its own separate and distinct identification number.

14. O.R.C. Section 3734.15(C) states, inter alia, that no person shall accept for treatment, storage, or disposal, any hazardous waste from an unregistered transporter.

15. O.R.C. Section 3734.15(C) states, inter alia, that if a SQG or a LQG causes an unregistered transporter to transport the hazardous waste, the generator of the waste, the transporter, and any person who accepts the waste for treatment, storage, or disposal shall be jointly and severally liable for any damage or injury caused by the handling of the waste and for the costs of rectifying their violation and conditions caused by their violation.

16. O.R.C. Section 3734.02(E) prohibits the establishment of a TSD facility without first having obtained a permit issued by the Ohio Hazardous Waste Facility Board.

17. O.A.C. Section 3745-52-34(D) states that, inter alia, a SQG may accumulate hazardous wastes on-site for less than or equal to 180 days without an Ohio hazardous waste permit provided that:

(a) The quantity of waste accumulated on-site never exceeds 6000 kilograms;

(b) The generator complies with applicable listed requirements of the O.A.C., including the labeling of containers with the words "Hazardous Waste" and the marking of an accumulation start date on each such container;

(c) An employee who has been designated as the emergency response coordinator is on-site during all times of operation;

(d) Emergency information is posted next to the telephone;

(e) Facility employees are thoroughly familiar with proper waste handling and emergency procedures; and

(f) The emergency coordinator responds to all facility emergencies properly.

18. O.A.C. Section 3745-55-73(B) states that, inter alia, an owner or operator must transfer a hazardous waste from a container which is not in good condition or which is leaking to a container which is in good condition.

19. O.A.C. Section 3745-55-73(B) states that, inter alia, an owner or operator must ensure that containers of hazardous wastes are always stored in a closed condition with their lids on. These containers must be stored in such a manner that they are free from possibility of rupturing or puncturing.

20. O.A.C. Section 3745-66-74 states that, inter alia, an owner or operator must inspect areas where containers are stored on a weekly basis to look for leaks and other deterioration and must record such inspections in an inspection log which must be kept at the facility.

21. O.A.C. Section 3745-53-11(A) states that, inter alia, any SQG or LQG who

transports hazardous wastes which originate or terminate in the State of Ohio shall, prior to transporting such waste, register with the Public Utilities Commission of Ohio and obtain an Ohio transporter registration number.

22. O.A.C. Section 3745-53-11(D) states that, inter alia, any SQG or LQG who transports hazardous wastes must have first received a U.S. EPA identification number from the Ohio EPA.

23. O.A.C. Section 3734.02(F) provides, inter alia, that no person shall treat, dispose or transport or cause to be transported any hazardous waste to any facility which does not have a permit issued in accordance with O.R.C. Chapter 3734.

24. O.A.C. Section 3745-52-20 states that, inter alia, a SQG or LQG who transports, or offers for transportation, hazardous waste for off-site treatment, storage, or disposal shall prepare a uniform hazardous waste manifest (U.S. EPA Form #8700-22 or 22A) before transporting the hazardous wastes off-site.

25. O.A.C. Section 3745-52-30 states that, inter alia, a SQG or LQG shall, before transporting hazardous waste or offering hazardous wastes for transportation off-site, package the waste in accordance with the applicable United States Department of Transportation regulations on packaging.

26. O.A.C. Section 3745-52-31 states that, inter alia, a SQG or LQG shall, before transporting hazardous waste or offering hazardous wastes for transportation off-site, label each package of hazardous waste in accordance with the applicable United States Department of Transportation regulations on hazardous materials.

27. O.A.C. Section 3745-52-33 states that, inter alia, a SQG or LQG shall, before transporting hazardous waste or offering hazardous wastes for transportation off-site, placard the transporting vehicle according to United States Department of Transportation regulations for hazardous materials.

28. O.R.C. Section 3734.01(K) and O.A.C. Section 3745-50-10(A)(115) define treatment as any method, technique, or process, including neutralization, designed to change the physical, chemical or biological character or composition of any hazardous waste so as to neutralize such waste, or so as to recover energy or material resources from the waste, or so as to

render such waste nonhazardous, or less hazardous; safer to transport, store, or dispose of; or amenable for recovery, amenable for storage, or reduced in volume.

29. The burning of hazardous wastes is equivalent to "treating" hazardous wastes.

30. O.R.C. Section 3734.01(M) and O.A.C. Section 3745-50-10(A)(102) define "storage" as the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere.

31. O.R.C. Section 3734.01(F) and O.A.C. Section 3745-50-10(A)(24) define "disposal" as the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water or air so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters, except where such activity constitutes "storage" or "treatment".

32. O.R.C. Section 3734.01(N) and O.A.C. Section 3734-50-10(A)(32) define "facility" or "hazardous waste facility" as all contiguous lands and structures, other appurtenances, and improvements on the land used for treating, storing or disposing of hazardous waste.

33. O.A.C. Section 3745-52-34(F) states that, inter alia, if a SQG accumulates hazardous waste in quantities exceeding 6000 kilograms or if a SQG accumulates hazardous waste for more than 180 days, that generator is deemed to be, by operation of law, an operator of a storage facility (a "TSD facility") and is subject to the requirements of Chapters 3745-54 to 57 and 3745-65 to 69 and to Rules 3745-50-40 to 50.62.

34. Starr is the "operator", as that term is defined in O.A.C. Rule 3745-50-10(A)(78), of the Vienna facility which is a "hazardous waste facility" as that term is defined in O.R.C. 3734.01(N) and O.A.C. 3745-50-10(A)(32).

35. Paul E. Kovacs is an "owner" and/or "operator", as that term is defined in O.A.C. 3745-50-10(A)(78) and (79), of the Vienna facility.

36. O.R.C. Section 3734.02(E) provides that no person shall establish or operate a hazardous waste facility in the State of Ohio without a hazardous waste facility installation and operation permit issued by the Ohio Hazardous Waste Facility Board.

37. O.A.C. Section 3745-54-11 states that, inter alia, owners and operators of TSD facilities must apply to Ohio EPA for an EPA identification number.

38. O.A.C. Section 3745-54-13 states that, inter alia, before owners and operators of TSD facilities can treat, store, or dispose of any hazardous waste, he must obtain a detailed chemical and physical analysis of a representative sample of the waste. Further, the owner or operator must develop and follow a written waste analysis plan which describes the procedures to be implemented in order to comply with the requirement to obtain a detailed analysis. This plan must be kept at the facility.

39. O.A.C. Section 3745-54-14 states that, inter alia, the owner or operator of a TSD facility shall prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the active portion of the facility. This shall be accomplished by, inter alia, erecting a barrier which completely surrounds the active portion of the facility and providing a means to control entry at all times through the gates or other entrances to the active portion of the facility. Finally, the owner or operator must post a sign with the legend "Danger - Unauthorized Personnel Keep Out" at each entrance to the active portion of the facility.

40. O.A.C. Section 3745-54-15 states that, inter alia, the owner or operator of a TSD facility shall develop and implement a written schedule for inspecting his facility for malfunctions and deterioration, operator errors and discharges which may lead to a release of hazardous wastes to the environment or to a threat to human health. The owner or operator must maintain a written inspection log at the facility.

41. O.A.C. Section 3745-54-16 states that, inter alia, the owner or operator of a TSD facility shall ensure that facility personnel successfully complete a training program that teaches them how to perform their duties in a way that ensures the facility's compliance with the requirements of the TSD facility standards chapters.

42. O.A.C. Section 3745-54-17 states that, inter alia, the owner or operator of a TSD facility shall take precautions to prevent the accidental ignition of ignitable wastes. Such wastes must be separated and protected from sources of ignition. When such waste is being handled, the owner or operator must confine smoking and open flame to specially designated locations. "No Smoking" signs must be conspicuously placed wherever there is a hazard from ignitable waste.

43. O.A.C. Section 3745-54-32 states that, inter alia, the owner or operator of a TSD facility shall ensure that all facilities shall be equipped with specified emergency equipment and communication devices.

44. O.A.C. Section 3745-54-34 states that, inter alia, the owner or operator of a TSD facility shall ensure that whenever hazardous wastes are being handled, all personnel involved in the operation shall have immediate access to an internal alarm or emergency communication device.

45. O.A.C. Section 3745-54-34 states that, inter alia, the owner or operator of a TSD facility shall attempt to make arrangements with local emergency response personnel, such as the local fire department and hospital, to familiarize these personnel with the types of wastes handled at the facility and the types of hazards associated with the handling and treating of each.

46. O.A.C. Section 3745-54-34 states that, inter alia, the owner or operator of a TSD facility shall have a contingency plan for the facility which shall be designed to minimize hazards to human health or the environment from fires or accidents at the facility.

47. O.A.C. Section 3745-54-55 states that, inter alia, the owner or operator of a TSD facility shall ensure that at all times at least one present or on call employee is available to take the responsibility for coordinating all internal emergency response measures.

48. O.A.C. Section 3745-54-73 states that, inter alia, the owner or operator of a TSD facility shall keep a written operating record at the facility.

49. O.A.C. Section 3745-55-12 states that, inter alia, an owner or operator of a TSD facility must have a written closure plan for the facility.

50. O.R.C. Chapter 3704 sets forth Ohio's laws regarding air pollution control.

51. O.R.C. Section 3704.05 states that, inter alia, no person shall cause, permit or allow emission of an air contaminant, as defined by O.R.C. Section 3704.01(B), without a permit to so burn.

52. O.R.C. Section 3734.01(H) defines "open burning" as the burning of solid wastes in an open area.

53. O.R.C. Section 3734.03 and O.A.C. Section 3745-19-04 provide that no person or property owner shall cause or allow open burning in an unrestricted area prior to receipt of

written permission to do so from the Ohio EPA.

54. O.R.C. Section 3734.13 addresses the civil penalties which may be assessed against a person who violates O.R.C. Chapter 3734. O.R.C. Section 3734.13(C) specifically provides that "a court may impose upon the person a civil penalty of not more than Ten Thousand Dollars ($10,000.00) for each day of each violation of this chapter . . . "Under the plain reading of this statute, this Court has the discretion to not impose a penalty, or to impose a penalty in any amount up to Ten Thousand Dollars ($10,000.00) for each day of each violation.

55. The amount of the penalty is left to the informed discretion of the trial court based on the totality of the evidence in each case. State of Ohio v. Howard (1981), Ohio App. 3d 216, 217; State of Ohio v. Dayton Malleable, Inc. (1979), 13 E.R.C. 2189, 2194.

56. The trial court may, in the exercise of sound discretion, properly consider the economic status of the violator in assessment a penalty. United States v. J. B. Williams Co. (S.D. N.Y. 1973), 354 F. Supp. 521, aff'd in part and rev. in part, 498 F. 2d 414 (2nd Cir. 1974).

57. It is well settled that violations of general police regulations passed for the safety, health or well being of the community must be penalized whether or not there was any intent to commit the act. United States v. Balint (1922), 258 U.S. 250, 252.

58. In a case where testimony has shown that if the quantity of pollutant that a defendant has placed into the environment was duplicated by other potential polluters in the area such that the sum total of all of their pollution could cause serious harm, then the part cannot be separated from the whole. A civil penalty may then be imposed even if the harm to the public as to the violator is not quantifiable. It is not necessary to prove actual damages. United States v. J. B. Williams Co., supra; State of Ohio v. Dayton Malleable, Inc., supra.

59. The purpose of the civil penalty is remedial and not punitive. A civil penalty is for deterrence or compensation and not for retribution. State of Ohio v. Dayton Malleable, Inc., supra. A civil penalty needs to be sufficient so that it is not regarded by potential violators as nothing more than an acceptable cost of violation, rather than as a deterrence to violation. United States v. ITT Continental Baking Co., (1975), 420 U.S. 223, 231; United States v. Papercraft Corp., (W.D. PA 1975), 393 F. Supp. 408, 420.

60. The courts are free to consider numerous factors in assessing a civil penalty,

including without limitation, the Defendant's good or bad faith, the economic benefit gained by the Defendant's non-compliance, and the harm to the environment. United States v. Papercraft Corp., supra; United States v. J. B. Williams Co., supra; United States v. Swingline, Inc. (E.D. N.Y. 1974), 371 F. Supp. 37, 47; State of Ohio v. Dayton Malleable, Inc., supra; United States v. ITT Continental Baking Co., supra; State of Ohio v. Howard, supra; and Mentor v. Nozik, et al. (19913), 85 Ohio App. 3d 490.

CONCLUSION AND JUDGMENT ENTRY

Based upon the Court's view that the burning events described above caused no permanent harm to the surrounding environment, that the quantity of wastes placed by Starr into its dumpsters and subsequently hauled to landfills had a de minimis impact, if any, on the surrounding environment, that those same landfills lawfully accept the same basic hazardous wastes in the form of excavated underground storage tank material and discarded household wastes, that Defendants have been exemplary citizens in their community, that Defendants acted in good faith in promptly undertaking and completing all required remedial measures, and that Defendants have expended a substantial amount of money completing said remedial measures, the Court hereby orders that a civil penalty in the amount of $40,000.00 be assessed against Defendant, Starr Fabricating, Inc., and $10,000.00 against Defendant, Paul Kovacs. Costs to be paid by Defendants.

DATE: 10/14/98

JUDGE W. WYATT McKAY

THE CLERK OF COURTS: YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT ON ALL COUNSEL OF RECORD AND THE PARTIES WHO ARE UNREPRESENTED BY COUNSEL BY ORDINARY MAIL