ATTACHMENT G

STATE OF OHIO)		IN THE COURT OF COMMON PLEAS
) SS:		
COUNTY OF CUYAHOGA)		CASE NO. 028657
STATE OF OHIO, ex rel. ANTHONY J. CELEBREZZE, JR. ATTORNEY GENERAL OF OHIO	)	
Plaintiff	)	
-vs-	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT
NORTHWAY ENVIRONMENTAL SERVICES, INC., et al.	)	
Defendants	)	

Burt W. Griffin, J.:

This matter came on for trial on October 9, 1985, upon the Complaint of the State of Ohio for Civil penalties pursuant to O.R.C. §3734.13 and upon the order of the Court dated June 1, 1984, assessing a further penalty against each defendant of $500.00 per week for every week that the particular defendant was not in compliance with the order of the Court to remove hazardous wastes from a site at 2484 West 4th Street, Cleveland, Ohio.

Although the Court's order dated June 1, 1984 imposed other sanctions upon the defendants and a violation of the order could constitute a contempt, no motion has been filed with the Court to enforce any sanctions or for contempt under the June 1, 1984 order. Thus, the sole matters before the Court are requested entries of judgment for civil penalties under O.R.C. §3734.13 and for civil penalties under the order of June 1, 1984 imposing a $500.00 weekly fine for each week after May 14, 1984 of non-compliance with that order.

In an earlier proceeding, the Court heard testimony and found that the defendants, Northway Environmental Services, Inc., Richard S. Brunsman, Morrell E. Dearing, and George Liviola, Jr., had, from October 23, 1980 to September 18, 1981, violated O.R.C. §3734.02(E), and (F) with respect to establishing without a proper permit a facility for storage and disposal of hazardous wastes at West 4th Street, Cleveland, Ohio (Count V) and at North

Bend Road in Ashtabula, Ohio (Count X) and transporting hazardous wastes to the facilities (Counts VII and XI). The oral findings at that hearing are incorporated herein.

FINDINGS OF FACT

1. Northway Environmental Services, Inc. is an Ohio corporation specifically organized for the purpose of engaging the business of storing and disposing of industrial wastes.

2. Prior to October 23, 1980, George Liviola, Jr., Norrell E. Dearing and Richard S. Brunsman organized such company with the hope and expectation that they could operate such company to transport, store, and dispose of industrial wastes without a permit from the Ohio Environmental Protection Agency (OEPA). Prior to commencing such activity, they were aware that the wastes that Northway was handling might contain chemicals hazardous to human life and the environment and that OEPA might require them to have permits before such activities could be undertaken and to regulate such activities.

3. Norrell E. Dearing had previously been engaged in the waste disposal business and during the period of the violations was a principal in Ashtabula County Septic and Waste, Inc. -- a waste disposal company. Richard S. Brunsman had a scientific education and a business management background. George Liviola, Jr. was and is a lawyer. As principals in Northway, they were aware that they were entering a field that was likely to be subject to OEPA regulations and had the combined skill, background, and knowledge to determine whether it was necessary to obtain OEPA permits or to seek an OEPA ruling before undertaking any of the business activities previously found by the Court to be in violation of law. They hired Rose Dumas, a lady with technical skills, to determine the toxic or other hazardous qualities of the waste materials they stored, transported, or disposed of.

4. Dearing, Brunsman, and Liviola decided to engage in transporting, storing, and disposing of hazardous industrial wastes through Northway

without first obtaining OEPA permits. After being notified by OEPA that such permits were necessary, they continued to carry on such activities. They made a calculated business decision to carry on the business of Northway without required OEPA permits regardless of the position of OEPA and until directed by a Court to cease business.

5. As a result of the illegal operations of Northway, Norrell E. Dearing earned $91,673.00, George Liviola, Jr. and his law associate, William P. Bobulsky, earned $69,800.00, and Richard S. Brunsman earned $68,400.00. In addition, Northway has become the owner of real property of an undetermined value.

6. As a result of the Court's order of September 18, 1981, Northway has ceased doing business. Dearing and Brunsman support themselves through other business. George Liviola, Jr. has continued in the practice of law. Since none of the defendants made a timely response to discovery requests, despite Court orders, the State of Ohio has not obtained sufficient pretrial information about the financial means of the defendants to be afforded a fair opportunity for the true financial means of these defendants to be accurately determined at trial.

7. Brunsman owns real property having a market value of not less than $85,290.00. Dearing owns real property having a market value of not less than $148,190.00. George Liviola, Jr. owns real property having a market value of not less than $205,000.00, and other members of his family own real property having a market value of not less than $180,000.00.

8. The defendants have not offered testimony, other than that offered at trial, to explain or justify their actions or to clarify their economic situations; and there is no reason for the Court to conclude other than that they are competent businessmen and professionals in the prime of life with the ability to provide a comfortable life for themselves and their families.

9. Since September 18, 1981, the defendants have been subject to various Court orders to clean up the Northbend and West 4th Street sites

according to OEPA standards. As of the date of hearing to determine penalties, the West 4th Street site has not met OEPA clean-up requirements, notwithstanding an order of this Court providing that "each . . . defendant with the exception of Northway . . . is further ordered to pay a fine of $500.00 per week commencing with the week which begins on Monday, May 14, 1984 if the . . . defendants have not totally complied with the previous orders of this Court." One of the defendants is a lawyer and all individual defendants have at all times been represented by counsel; but, at no time since May 1, 1984 has any defendant presented to the Court any evidence of inability to pay for the cost of bringing the West 4th Street site into compliance with Court orders, nor has any defendant petitioned the Court for a modification of the aforementioned order because of financial inability or any other reason.

10. Richard Brunsman has personally engaged in substantial labor and supervision for the purpose of complying with Court orders. There is no evidence before the Court that George Liviola, Jr. nor Norrell Dearing has made any significant effort to comply with Court orders since May 1, 1984.

11. The cost of bringing the West 4th Street site into compliance is no more than $35,000.00.

12. The individual defendants have had combined personal and financial resources since May 1, 1984 sufficient to comply with the Court's orders of clean-up.

13. Although there has been no evidence of any specific injury to any individual from hazardous wastes at the West 4th Street site, the hazardous wastes at said site posed a substantial threat to the public health and safety during the period October 23, 1980 until the removal of waste chemicals stored there, a danger to children who might be on the site or workmen who might come in direct contact with the chemicals since May 1, 1984, and a public health hazard from contamination of land at one tank storage site.

CONCLUSIONS OF LAW

Penalties for Violations of O.R.C. §3734.02(E) and (F)

1. The Court may impose on any person in violation of O.R.C. Chapter 3734 a "civil penalty of not more than ten thousand dollars for each day of each

violation of this chapter, which moneys shall be paid into the hazardous waste clean-up special account . . . " O.R.C. §3734.13.

2. Each defendant is guilty of four violations (four counts) for each of 330 days (October 23, 1980 to September 18, 1981) permitting a maximum penalty of $13,200,000.00 for each defendant.

3. The State of Ohio seeks total penalties of $327,000.00.

4. The purpose of penalties under Chapter 3734 is both deterrent and remedial; thus, the penalty must be sufficient to correct any damage done because of violations of the Act, to remove any gain resulting to the wrong-doers, and to deter others. See, State of Ohio, ex rel. William J. Brown v. Dayton Malleable, Inc., Court of Appeals of Montgmery County, Ohio, Case No. 6722 (April 21, 1981) (unreported); Cf., U.S. v. J. B. Williams Company, 498 F2d 198, 202 (2d Cir. 1974); Federal Trade Comm. v. Consolidated Foods Corp., 396 F. Supp. (S.D.N.Y. 1975); U.S. v. Velsecol Chemical Corp., 8 ELR 20745 (U.S. Dct. W.D. Tenn. 1978); U.S. v. ITT Continental Baking Co., 420 U.S. 223 (1975); U.S. v. Papercraft Corp., 393 F. Supp. 408 (1975); EPA Civil Penalty Policy for Major Source Violators of Clean Air Act and Clean Water Act, BNA Environmental Reporter, p. 2011 (April 21, 1978).

5. The residual damage to land and private citizens as shown by the evidence is approximately $35,000.00, representing the unfinished clean-up cost at the W. 4th Street site. No other unrepaired direct damage has been shown.

6. The illegal gains to the parties are shown by the gross receipts attributable to the parties as follows:

Northway	--	real estate of undetermined value
Brunsman	--	$68,400.00
Liviola	--	69,800.00
Dearing	--	91,673.00

Since each of the individual defendants was liable for undisclosed sums of State and Federal income taxes, those gross figures should be discounted. If the Court were to reduce them by one-third each, the net receipts would be:

Brunsman	--	$45,000.00
Liviola	--	46,533.00
Dearing	--	61,249.00

However, each individual has had the benefit of that money for over three and a half years. If a 10% rate of simple interest were applied, the discount for taxes would be more than lost. The Court will thus assess as a penalty for profits to each individual defendant the amount of gross receipts attributable to each individual. In Mr. Liviola's case, that should include payments to his law associate, Mr. Bobulsky.

7. To achieve the remedial purposes of an administrative penalty, it is also appropriate that the State should be relieved of extraordinary or unnecessary expenses associated with enforcement of the statute. Although the initial investigative costs are perhaps expenses that would be incurred regardless of whether a violation were found, enforcement expenses that occur after a violation is detected and expenses attributable to efforts by the State to correct an identified violation are extraordinary and unnecessary -- resulting only because of the illegal actions of a violator. The enforcement efforts directed at defendants after the violation is detected are, in fact, either a diversion of personnel and other resources (and, thus, public money) from the inspection of others subject to the regulatory scheme or are a public expense for enforcement that would not be necessary if compliance had occurred. The State has offered evidence of 801 hours expended in enforcement since May 21, 1982 and has suggested a value of $12.07 per hour for a total of $9,668.07. That figure does not include time spent in enforcement subsequent to discovery of the violations from 1980 to May 21, 1982, nor legal expenses to prosecute enforcement. The figure submitted by the State is entirely reasonable and will be accepted by the Court.

8. The State has asserted that the hazardous wastes at the West 4th Street site posed and continue to pose a hazard to human health and safety. At the same time, no evidence of actual injury to individuals nor evidence of the probability of injury to individuals has been shown. Accordingly, it is not appropriate to assess a further penalty because of the hazard to human health

that is alleged to have existed since the stored chemicals were removed from West 4th Street.

9. The primary harm in this case is not a harm to the health and safety of human beings or even a harm to property. Rather the primary harm is one of attempting to and succeeding in profiteering by deliberately attempting to operate as an unregulated enterprise a business that was clearly subject to regulation or concerning which the State's claim to regulate could readily be secured and, in any event, required prior permission. The defendants, instead of awaiting a decision by OEPA as to the conditions under which the business could be operated, elected with full awareness of the possible consequences to start a new business without the necessary prior approvals. After those approvals were denied, the defendants continued their business while resisting the legal processes of OEPA. And, after the Court determined that OEPA's action was properly brought, the parties have deliberately failed to use in an expeditious manner their available personal and financial resources to correct the harm which the Court ordered to be corrected. The evidence is clear that each of these defendants has been recalcitrant, although in differing individual degrees, and in willful, calculated disobedience of the statute. Unlike an ongoing business which is newly subjected to regulation or needs to make changes in order to maintain its viability, these defendants chose to embark upon a new business while ignoring regulatory requirements. Their conduct is devoid of mitigating circumstances.

10. Based solely on the considerations of depriving the defendants of profit and compensating the State for damages caused, it would be appropriate to assess a total penalty of $274,541.07 plus the value of the real property still owned by Northway.

11. Since the individual participants had different individual responsibility and showed different levels of cooperation in remediating the harm caused, the damages caused by their actions should not be allocated equally. Mr. Brunsman would appear to have been least responsible for the illegal conduct and most cooperative in attempting to correct the harm. His

lesser degree of responsibility for Northway's activities is reflected both by his lower financial gain from the enterprise and by his lack of prior experience in the industry. Mr. Dearing and Mr. Liviola both gained more and had greater decision-making culpability insofar as the initial violations were concerned. As a lawyer, Mr. Liviola was in a position to make the crucial decision as to whether to proceed without OEPA approval. His culpability is greatest. The Court will therefore allocate the $44,668.07 in damages to the public as follows:

Mr. Brunsman	--	$ 4,668.07
Mr. Dearing	--	10,000.00
Mr. Liviola	--	30,000.00

12. The corporation's responsibility, of course, is the combined responsibility of all participants. It is no longer operating and has been declared bankrupt, although for some unknown reason it owns real property of undisclosed value. It is appropriate also to assess the entire $44,668.07 in public harm against the corporation.

13. Based on such calculations, the appropriate penalties for remediation would be:

Northway	--	$ 44,668.07
Brunsman	--	73,068.07
Liviola	--	99,800.00
Dearing	--	101,673.00

14. There remains, however, the goal of deterrence -- that is, the discouragement of the defendants and others from continuing or commencing other activities that violate the OEPA regulatory scheme. The extent to which further financial penalties are needed to deter the defendants and others must be determined from an assessment of the resources of each defendant, the burden on that defendant of the penalty already deemed appropriate for remedial purposes, the attitudes of the particular defendant, the likelihood that the defendant will come in contact with OEPA again, and the extent to which others are inclined to engage in similar activity. On the latter issue, the Court is without specific knowledge of similar violations in the industry. Examining each defendant individually on the issue of deterrence, the Court concludes as follows:

a. Mr. Brunsman must already pay a penalty of $73,068.07 -- a substantial amount for an individual with talent but not shown to be of other than ordinary means. Mr. Brunsmen has been, by far, the most cooperative in attempting to comply with the Court's orders for clean-up. The Court deems it unlikely that he will commit a further offense. The only function of a deterrent penalty on Mr. Brunsman would be its effect on others. $4,668.07 -- assessed share of public damage -- also serves as a personal deterrent to Brunsman and others.

b. Mr. Dearing has long been engaged in the waste disposal business. He is likely to engage in regulated activities. He has made modest efforts to comply with the Court's clean-up orders, but those efforts do not communicate a genuine desire to meet his responsibilities under either the OEPA scheme or the Court's orders. As a person regularly engaged in the waste disposal business, the penalties assessed against him will have an effect on others similarly situated and a meaningful penalty is necessary to deter him and others. $10,000.00 of the remedial penalty is in addition to profits he has made on the illegal business. Thus, the only deterrent burden on Brunsman is $10,000.00.

c. In this scheme to make money by evading the OEPA regulatory scheme, Mr. Liviola, as a lawyer who was best able to assess the risk of non-compliance, is most culpable and has been most recalcitrant since he -- more than anyone else -- apparently had the financial ability to comply with the Court's orders. His treatment by the Court will be a signal to all other lawyers who must deal with regulatory agencies. The remedial fine of $99,800.00 contains $69,800.00 which is simply a denial of profits; thus, $30,000.00 now serves as a deterrent to him and others.

d. The corporation's remedial share of $44,668.07 is of unknown impact since its assets are unascertained. It is not now in business and should not be in business. None of its assets should ever be available to any investors or to the individual defendants. Accordingly, it should suffer a substantial deterrent penalty.

15. Based on these foregoing considerations of remediation and deterrence and considering relative culpability, the following total penalties are appropriate:

Northway	--	$327,000.00 as requested by the State
Brunsman	--	75,000.00
Dearing	--	105,000.00
Liviola	--	115,000.00

Penalties for Continuing Violation of the Court's Order of June 1, 1984

1. It is clear that the parties have failed to comply with the Court's clean-up order of June 1, 1984, that approximately $35,000.00 in clean-up costs are still required, and that the defendants have never availed themselves of the opportunity to request modification of the order from the Court. Their violations are willful. Mr. Brunsman, however, has made a substantial personal effort to comply. Mr. Dearing has done little, and Mr. Liviola has done nothing to comply.

Inasmuch as fairness among the defendants required each to share the financial burden, since Mr. Liviola and Mr. Dearing had greater financial resources and since Mr. Brunsman had already made a greater contribution of personal effort than either Mr. Liviola or Mr. Dearing, the primary responsibility of violation of the Court's order rests with Mr. Liviola and Mr. Dearing.

Mr. Brunsman, having already been penalized by the Court and showing reasons to mitigate further penalties, will be relieved of the $500.00 per week penalty. Mr. Dearing and Mr. Liviola will not unless prompt payment of the other penalties assessed is made within sixty days hereof, or a supersedeas bond is posted.

2. Accordingly, a penalty of $500.00 per week from June 1, 1984 (the date the Court's order was journalized) to October 10, 1985 (the date of the hearing to determine penalties) will be imposed on Mr. Dearing and Mr. Liviola. A penalty is, thus, assessed against each in the amount of $36,750.00.

JUDGMENT

Judgment is entered against Richard S. Brunsman in the amount of $75,000.00 as a penalty to be paid into the hazardous waste clean-up special

account of the Ohio Environmental Protection Agency by January 1, 1986; against Norrell E. Dearing in the amount of $105,000.00 as a penalty to be paid into the hazardous waste clean-up special account of the Ohio Environmental Protection Agency account by January 1, 1986; against George Liviola, Jr. in the amount of $115,000.00 to be paid into the hazardous waste clean-up special account of the Ohio Environmental Protection Agency by January 1, 1986; against Northway Environmental Services, Inc. in the amount of $327,000.00 to be paid into the hazardous waste clean-up special account of the Ohio Environmental Protection Agency forthwith.

Judgment is further entered in the amount of $36,750.00 each against Norrell E. Dearing and George Liviola, Jr. payable to the Clerk of Court, Cuyahoga County, Ohio Common Pleas Court unless all previous penalties assessed against those defendants are paid as required, or a supersedeas bond posted by January 1, 1986.

BURT W. GRIFFIN
JUDGE

BURT W. GRIFFIN, JUDGE

DATE: 10/24/85, 1985

NOTICE OF SERVICE

A copy of the foregoing Findings of Fact, Conclusions of Law, and Judgment was sent by ordinary U.S. mail this 24th day of October, 1985 to: Henry Roth, Esq., 1010 Engineers Building, Cleveland, Ohio 44114; Anthony J. Garofoli, Esq., 1300 East Ninth Street, Cleveland, Ohio 44114; Pat Caticchio, Esq., Jefferson Center, Mayfield and Richmond Roads, Lyndhurst, Ohio 44124; Anthony J. Celebrezze, Jr., Attorney General, Dale T. Vitale, Assistant Attorney General, Martyn T. Brodnik, Assistant Attorney General, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215.

BURT W. GRIFFIN
JUDGE

BURT W. GRIFFIN, JUDGE