UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	
J.V. PETERS AND COMPANY, INCORPORATED, ET AL., RESPONDENT	RCRA Docket Number V-W-81-R-75 (Remanded by Chief Judicial Officer RCRA (3008) Appeal No. 85-4)

INITIAL DECISION
(ORDER ON REMAND)

COMES NOW the Complainant (hereinafter "C"), United States Environmental Protection Agency (hereinafter "EPA" or "the Agency) and files its "Motion for Accelerated Decision", pursuant to 40 CFR 22.20, contending that, on this record, including its Second Amended Complaint and the respective Answers filed in response thereto, by Respondents (hereinafter "R") J.V. Peters, a partnership, J.V. Peters and Company, Inc., David B. Shillman and Dorothy Brueggemeyer, there remain no genuine issues of material fact and, as a matter of law, Respondents should be found responsible for the violations alleged and be ordered to pay the civil penalty proposed. Respondent John Vasi, served with said pleading on June 14, 1988, did not file an Answer to said Second Amended Complaint and should be and is hereby found to be in default under the provisions of 40 CFR 22.17.

The First Amended Complaint, alleging that violations were found during an inspection on December 17, 1980, was dated and filed on January 31, 1984, and February 7, 1984, respectively. Respondent's Answer and Request for Hearing was timely filed and hearing was ultimately held in Cleveland, Ohio, on October 23, 24 and 25, 1984. Following said evidentiary hearing, and after a succession of post-trial Motions and filing of post-hearing briefs and proposed

findings, my Initial Decision was issued on May 15, 1985, finding that David B. Shillman, severally and jointly with his partners, if any, was responsible for the violations shown by the evidence (Initial Decision, page 24, Conclusions of Law Numbers 1 and 2). A civil penalty was assessed against Shillman in the total sum of $25,000.00 (Initial Decision, page 35), it being found that he was a managing partner of J.V. Peters and Company, a partnership. I further concluded that "As a partner, he is entitled to seek contribution from others who he may show to have been partners" (Initial Decision, Conclusion 4, page 25). I further concluded that, on the basis of evidence, the corporation J.V. Peters and Company, Inc. should be disregarded and that satisfaction of all obligations incurred from the subject operation should be the responsibility of the persons shown, with Shillman, to comprise the partnership (Initial Decision, pages 24-25, Conclusions 3 and 5).

On May 9, 1986, said Initial Decision was "vacated" and the case was remanded by the Chief Judicial Officer (Remand, page 16) "to allow Complainant to amend its complaint (if it wished), and to allow the case to proceed in a manner consistent with this opinion."

In the Remand, page 5, it is stated:

> "The Presiding Officer issued his Initial Decision . . . holding that Stillman, the partnership and the corporation were jointly and severally liable for the violations . . . There is some confusion as to whether all three were also held responsible for the $25,000 civil penalty."

At page 7, the Remand continues:

> "As explained below, further proceedings will be necessary to determine if any of the three 1/ can or should be held liable for the penalty" (emphasis supplied).

1/ "The three" refers to Shillman, the corporation and the partnership.

And at page 9, the Remand further states:

> " . . . it is reasonable to assume that a fair trial of the issue would have given the unnamed parties an opportunity to present evidence at the hearing to contest responsibility for the violations and an opportunity for Shillman to substantiate his claim that he was not a member of the partnership" (emphasis supplied).

The "Remand" does not disturb the findings set forth in the Initial Decision that the subject violations occurred; but it does require the case to proceed to establish which, if any, of the Respondents, now named in said Second Amended Complaint, are responsible for said violations for which a civil penalty in the total sum of $25,000.00 has been found to be appropriate (Remand, pages 9-11).

40 CFR 22.20(a) (Accelerated Decision) provides that an accelerated decision may be rendered . . . without further evidence . . . "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law . . . ". It is not disputed 2/ that said provision is analogous to Federal Rule of Civil Procedure (FRCP) 56(c), which provides that summary judgment is proper "if the pleadings, depositions, answer to interrogations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" (emphasis supplied).

On the record before me, including the pleadings and the record evidence elicited at said evidentiary hearing, I make the following additional

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2/ See C's Motion for Accelerated Decision, page 7; Respondent's (hereinafter "R") Memorandum Opposing Complainant's said Motion, page 4.

FINDINGS OF FACT

1. Respondent David B. Shillman (hereinafter "Shillman") individually procured a lease with option to purchase the site of subject operation circa May, 1980 (Complaint, page 2, paragraph 2, and Shillman's Answer thereto).

2. Shillman filed, in August, 1980, a Notification of Hazardous Waste Activities and, on September 4, 1980, filed a Part A application for a permit and signed the letter of transmittal, and said Notification and Part A application, on behalf of J.V. Peters Company as its Secretary-Treasurer (Shillman Answer to paragraph 4, Second Amended Complaint (hereinafter "Cplt"); C Exhibit (hereinafter "Ex") 4).

3. Shillman was the responsible party with respect to operation of subject facility (Shillman Answer to paragraph 5, Cplt).

4. Subject partnership, known as J.V. Peters and Company, was comprised of Respondent Dorothy L. Brueggemeyer, Shillman's wife, and Respondent John Vasi (Answers of Partnership, Shillman and Brueggemeyer to paragraph 7, Cplt; Transcript (hereinafter "TR) 550).

5. The site of subject operation was two acres on which Shillman indivually procured a lease, with option to purchase, in May, 1980 (TR 549-550).

6. The partnership business consisted of picking up, transporting and collecting, at the site, spent industrial solvents which were disposed of, usually by sale, to a user or "reclaimant" (Answers of Shillman and Brueggemeyer to paragraph 10, Cplt; TR 433).

7. Shillman maintained control of what materials were received at subject hazardous waste site (Answers of Shillman and Brueggemeyer to paragraph 10, Cplt; TR 472).

8. On or about January 30, 1981, subject partnership transferred both its assets and liabilities to a newly formed corporation, J.V. Peters and Co., Inc. (Answers of Shillman and Brueggemeyer to paragraph 14, Cplt).

9. After organization of J.V. Peters and Co., Inc., the directors of the corporation first met on February 2, 1981, when Respondent Shillman was elected Chairman of the Board and President of the Corporation. At said meeting, Respondent Brueggemeyer was elected director and Secretary-Treasurer of the Corporation. At said meeting, the Corporation adopted a resolution and thereby entered into an Employment Agreement whereby Shillman was to serve as President and Chief Executive Officer and receive compensation equal to 20% of the net profits of the corporation. A further resolution, proposed by Shillman, authorized him, acting alone, to withdraw funds from the corporate bank account and to borrow money, acting concurrently with the secretary of the corporation (Shillman Answer to paragraph 17, Cplt; R Ex 11).

10. David B. Shillman had overall responsibility for and managed the operations at the facility, and represented himself as Secretary-Treasurer of J.V. Peters and Co., during the period prior to January 27, 1981, and subsequently had overall responsibility for and managed the operations at the facility and represented himself as President of J.V. Peters and Co., Inc. (Shillman Answer to paragraph 19, Cplt; R Exs 8, 9 and 10; C Ex 4).

11. The State of Ohio sued J.V. Peters and Co. in April, 1981, seeking an injunction against further operation at subject site until an appropriate state permit was obtained (Shillman Answer to paragraph 23, Cplt).

12. Letters sent by the Ohio EPA, on November 10, 1980, and January 14, 1981, to John Vasi, as President of J.V. Peters and Co. (concerning inspection of subject facility on December 8, 1980) were received and acknowledged by Respondent David Shillman (C Exs 1, 5 and 6; Findings 82 and 83, Initial Decision).

13. On July 3, 1981, the Ohio EPA inspector attempted to enter the facility to check compliance with a Court Order closing it; she was denied access by David Shillman (Finding 97, Initial Decision).

14. Respondent John Vasi, who was personally served and did not file an Answer to said Second Amended Complaint, is in default and has thereby admitted all of the factual allegations in said Complaint (40 CFR §22.15(d), 22.17(a)(1)).

CONCLUSIONS OF LAW

1. David B. Shillman was the "operator" of subject facility, i.e., the person responsible for its overall operation, and as such violated the Resource Conservation and Recovery Act (hereinafter "RCRA" or "the Act") and the regulations promulgated pursuant thereto, for which violations a civil penalty should and will be assessed against him (40 CFR 260.10).

2. Respondents Dorothy Brueggemeyer and John Vasi, as partners in J.V. Peters and Company, a partnership which existed at the time of the inspections of subject facility on December 8, 1980, and December 17, 1980, are "owners" of said facility, i.e., persons who owned all or part of said facility and, as such, violated the Act and regulations promulgated pursuant thereto, for which violations a civil penalty should and will be assessed against them (40 CFR 260.10).

3. Respondents David B. Shillman, Dorothy Brueggemeyer and John Vasi, being, respectively, the operator and owners of subject facility 3/ at the time and in the particulars alleged in said Second Amended Complaint, are jointly and severally liable for a civil penalty in the sum of $25,000.00 (AARCOM, Inc., Drexler Enterprises, Inc., et al., RCRA (3008) Appeal No. 86-6, 1.c. 6-8, citing United States v. Johnson & Towers, Inc., 741 F.2d 662 (3rd Cir., 1984); 42 USC §6924; Finding 6, page 25, Initial Decision issued on May 15, 1985; see also "Order on Interlocutory Appeal", Hawaiian Western Steel Limited, Inc. et al. Docket No. RCRA-09-87-0006).

3/ The instant "further proceedings" were deemed necessary for the stated purpose of determining if some or all of the named Respondents "can or should be held liable for the penalty" (Remand, page 7). Consistent with the opinion, all of the named Respondents were served with process and with the Second Amended Complaint and it is on the basis of the facts admitted in the Responsive Pleadings of the parties that responsibility for the violations and penalty has been determined.

4. On this record, Respondent J.V. Peters and Company, Inc., was incorporated on or about January 30, 1981, and, thus, was not in existence in December, 1980, when the subject inspections were made and the subject violations were found to exist. It is, therefore, here concluded that said corporation is not responsible for such violations. It has been previously concluded that said incorporation was a nullity and should be disregarded and be treated as the subject partnership (Conclusion 3, page 24, Initial Decision).

5. Respondents Dorothy Brueggemeyer and John Vasi, partners owning J.V. Peters and Company, a partnership, are jointly and severally responsible and liable for the civil penalty assessed for subject violations along with David B. Shillman, who, on this record, was responsible for said overall operation and thus its "operator" and also a "de facto" partner for the reasons set forth in Conclusion 4, page 25, of the Initial Decision issued herein on May 15, 1985.

DISCUSSION

On the basis of the record evidence, judicial admissions and the conclusions reached upon consideration of the briefs and arguments of Counsel, I find that the Complainant's Motion for an Accelerated Decision should be and it is hereby granted. I find that David B. Shillman, Dorothy Brueggemeyer and John Vasi, as operator and owners respectively of subject facility, are jointly and severally liable for the violations found and should be and will be ordered to pay the appropriate penalty of $25,000.

As pointed out, supra, the Remand provided, 4/ as cited by Respondent Counsel's Argument, page 6, that the unnamed parties be given "an opportunity

4/ 40 CFR 22.30(c) - "Appeal, Initial Decision" - provides that the Administrator may remand a case for further proceedings.

to present evidence . . . to contest responsiblity for the violations . . . "

John Vasi did not file an Answer after being duly served with a copy of the Second Amended Complaint and, by such failure to Answer, admits all of the allegations in said Complaint, including the fact that he was a partner in J.V. Peters and Company, the partnership (Finding 14, page 6, supra). David B. Shillman and Dorothy Brueggemeyer were duly served with said Second Amended Complaint and filed their Answers to each allegation therein. The "additional findings", supra, setting forth the factual allegations by them admitted, are sufficient to conclude that Dorothy Brueggemeyer was a partner with John Vasi and that they comprised the partnership known as J.V. Peters and Company and as owners were responsible for violations along with the "operator" of said facility, David B. Shillman. That Shillman was responsible, at all times, for operation of subject facility is apparent.

Complainant urges and Respondent Counsel resists application of the Law of the Case Doctrine as discussed by the Court in Central Soya Co., Inc. v. Geo. A. Hormel Co., 723 F.2d 1573, l.c. 1580 (12-13). It is not necessary to determine if said doctrine (which "acts as a deterrent to vacillation on arguable issues") is here appropriate. To decide issues other than determining the parties responsible for subject violations is beyond the scope of the Order of Remand, which orders that the person or persons responsible for the violations should be identified. Those persons have been pinpointed by the admissions in the pleadings. The Chief Judicial Officer, in limiting this inquiry, was probably mindful of the Doctrine, as stated by the Court in Central Soya, supra, which "expresses the practice of courts . . . to refuse

to reopen what has been decided", citing Messenger v. Anderson, 25 U.S. 436, 444, 32 S.Ct. 739, 740 (1912); "No litigant deserves an opportunity to go over the same ground twice . . . ", citing U.S. v. Turtle Mountain BCI, 612 F.2d 517 (1979).

The analogy to the language cited above becomes apparent when the Answers filed in the instant proceeding by Shillman and Brueggemeyer again reveal that Shillman was informed as to what transpired with respect to the subject violations while Brueggemeyer claims insufficient knowledge. Further, the Answers of the partnership and corporation were made through Counsel, and failed to divulge the identity of the partners or of the officers of the corporation 5/ who are required by Rule to clearly and directly admit, deny or explain each of the factual allegations contained in the Second Amended Complaint with regard to which Respondent "has any knowledge" (40 CFR 22.15(b)). The admissions of Shillman and Brueggemeyer in their respective Answers sufficiently establish their responsibility for the subject violations (Findings 3, 4, 7, 9, 10 and 13, supra).

Respondents' Counsel urges that the Five Year Statute of Limitations provided in 28 USC §2462 is here applicable, arguing that the statute started to run on December 17, 1980, and thus "ran out" on December 17, 1985. The subject Second Amended Complaint was filed on November 16, 1987.

I reject said argument because the "civil penalty" here sought is a civil administrative sanction, regulatory in nature and remedial in character, and is not considered penal in any sense, but assessed for the sole purpose of achieving compliance with the Act (RCRA). U.S. v. Davis, 136 F.S. 423 (1955) states, l.c. 427, that the general rule is that the statutes of limitation do

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5/ 40 CFR 22.10 provides that a partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation

not ordinarily run against the United States, and that 28 USC §2462 is an exception to be strictly construed. In holding that said Statute of Limitations does not apply where the government is seeking to recover civil damages and is not attempting to apply a penalty, the Court stated, l.c. 426(2):

> "Defendant's contention that the present action (Anti Kick-back Act) is barred by the provisions of 28 USC §2462 is without merit . . . that statute has no application to cases wherein the Government is seeking to recover civil damages and is not attempting to apply a penalty."

In U.S. v. Schneider, 139 F.S. 826, 828, it was held that the availability of said Section 2462 turned upon whether the Surplus Property Act imposed a civil penalty or a civil sanction of a remedial character. The Court quoted Helvering v. Mitchell, 1938, 303 U.S. 391, that civil administrative sanctions are not to be considered penal in any sense and that said Section 2462 could not be pleaded as a defense. See also U.S. v. Chas. George Trucking Co., Inc. (1986), 642 F.S. 329, l.c. 334, holding that the civil penalty provision of RCRA is essentially regulatory, seeking to enhance compliance with the Act rather than impose penal sanctions on those who violate the statute, in view of Congressional intent that penalty serve (as) a civil sanction, fact that imposition of penalty does not require scienter, and fact that penalty imposes no affirmative restraint.

In the premises, and pursuant to subject Order in the Remand hereof on May 9, 1986, I find that Complainant's Motion for an Accelerated Decision should be and it is hereby granted for the reason that, based on the Judicial Admissions contained in the pleadings, Respondent Dorothy Brueggemeyer, as a partner in J.V. Peters and Co., a partnerhip, with defaulting Respondent John Vasi, is an owner, as defined in the applicable regulations, along with Respondent John Vasi, of the subject partnership facility on which the subject violations

occurred; that the owners of said facility are liable, jointly and severally, with the "operator" of said facility, viz., Respondent David B. Shillman (see cases cited, supra, Conclusion of Law No. 3, page 6).

Accordingly, I propose the issuance of the following

FINAL ORDER 6/

1. Pursuant to Section 3008(c) of the Act, 42 USC 6928(c), a civil penalty in the total sum of $25,000 is hereby assessed against David B. Shillman, operator, and Dorothy Brueggemeyer and John Vasi, d/b/a J.V. Peters and Company, a partnership, which civil penalty shall be borne by them jointly and severally.

2. No penalty is assessed against Respondent J.V. Peters and Company, Inc. Payment of full amount of the civil penalty so assessed shall be made by the Respondents named in paragraph 1 of this FINAL ORDER within 60 days of the Service of the FINAL ORDER upon Respondents, by forwarding a Cashier's or Certified Check payable to the Treasurer, United States of America, to

EPA - Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, Illinois 60673.

IT IS SO ORDERED.

DATE: September 26, 1988

Marvin E. Jones
Administrative Law Judge

6/ 40 CFR 22.27(e) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its Service upon the parties unless (1) an appeal is taken by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision. 40 CFR 22.30(a) provides that such appeal may be taken by filing a Notice of Appeal within 20 days after Service of this Decision.

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded, via Certified Mail, Return Receipt Requested, the Original of the foregoing INITIAL DECISION (ORDER ON REMAND) of Marvin E. Jones, Administrative Law Judge, to Ms. Beverely Shorty, Regional Hearing Clerk (5MFA-14) United States Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604; and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said INITIAL DECISION (ORDER ON REMAND) to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk (A-110) EPA Headquarters, Washington, D.C., who shall forward a copy of said INITIAL DECISION (ORDER ON REMAND) to the Administrator.

DATE: September 27, 1988

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ALJ

CERTIFICATE OF SERVICE

IN THE MATTER OF

J.V. PETERS AND COMPANY

INCORPORATED, ET AL.

DOCKET # V-W-81-R-75

I HEREBY CERTIFY THAT COPIES OF THIS INITIAL DECISION AND CETIFICATE WERE SENT CERTIFIED MAIL TO THE FOLLOWING PARTIES:

(CERTIFICATE ONLY)

Honorable Marvin E. Jones
Administrative Law Judge
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INITIAL DECISION, CERTIFICATE AND ORIGINAL FILE

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