UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
J. V. Peters and Company, Inc.,	)	Docket No. V-W-81-R-75
J. V. Peters and Company	)	
A Partnership,	)	
David B. Shillman,	)	
Dorothy Brueggemeyer and	)	
John Vasi	)	
	)	
Respondents	)	

INITIAL DECISION ON COURT REMAND

At a hearing held because the individual Respondents had not been given adequate notice of prior hearing, incorporation of evidence presented at prior hearing does not deprive Respondents of a fair hearing where Respondents were given the opportunity to cross-examine the witnesses on their prior testimony and to present evidence on their own behalf.

The operator of a hazardous waste facility and the partners of the partnership that owned the facility held jointly and severally liable for RCRCA violations.

Appearances:

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OPINION

This proceeding is on a complaint issued on September 9, 1987, pursuant to the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), §3008(g), 42 U.S.C. §6928, seeking civil penalties against Respondents for alleged violations of the Act.[1] The proceeding is on remand from the United States District Court pursuant to its opinion and order in the case of J. V. Peters and Company, Inc. v. Reilley, No. 1:90 CV 2246 (N.D. Ohio, August 13, 1991). In that case the district court set aside the Agency's Final Decision in J. V. Peters and Company, Inc., 3 EAD 280 (CJO August 7, 1990), assessing a civil penalty of $25,000 against Respondents David B. Shilling, Dorothy L. Bruggemeyer, J. V. Peters and Company, and remanded the case to the Administrative Law Judge to conduct an evidentiary hearing wherein Respondents Shillman, Bruggemeyer and J. V. Peters and Company, in the words of the court, "are given an opportunity to present evidence to contest their liability for the $25,000, civil fine assessed against them." [2]

The hearing on remand was held in Cleveland, Ohio, on October 3, 1994. Both sides filed post-hearing briefs, and this initial decision is rendered on consideration of the entire record in this

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[1] The complaint is actually styled the "Second Amended Complaint." The original complaint, issued against J.V. Peters and Company, Inc. was filed on April 17, 1981. For history of proceedings, see infra.

[2] The Administrative Law Judge entered a default order against John Vasi, which Vasi did not appeal. The order in the Initial Decision, accordingly, became final as to him. J.V. Peters & Company, Inc., 3 EAD 282 n.4 (CJO August 7, 1990).

proceeding and the submissions of the parties.

I. Prior Administrative Proceedings.

The proceedings leading to the district court's remand are set out in the court's memorandum opinion.[3] They will only briefly be summarized here.

These proceedings were initially on a complaint naming only the corporation, J. V. Peters and Company, Inc., as respondent.[4] Following a three-day hearing before an administrative law judge, ("ALJ"), an initial decision ("ID-1") was issued in this matter in 1985.

In his initial decision the ALJ sustained the allegations of the complaint with respect to the violations but found that at the time of the EPA's inspection in December 1980, on which the violations were based, the facility was owned and operated by J. V. Peters and Company, a partnership, and that David B. Shillman was the person responsible for the overall operation and the managing partner.[5] The ALJ assessed a penalty against Respondent David B. Shillman, individually and as managing partner of the partnership of $25,000. No penalty was assessed against the corporation.

The decision was appealed to the Administrator. On May 9,

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[3] J. V.Peters & Co., Inc. v. Reilley, opinion at 2-10.

[4] The original complaint was filed on April 17, 1981. That complaint was withdrawn without prejudice and an amended complaint increasing the proposed penalty from $10,000 to $25,000, and adding the allegation that Respondents had abandoned the facility without following an acceptable closure plan, was filed early in 1984.

[5] ID-1 at 28. The corporation was organized on January 30, 1981. ID-1 at 9.

1986, the Chief Judicial Officer, who then decided appeals for the Administrator, issued his order remanding the case to the ALJ. The Chief Judicial Officer found that Shillman and the partnership had not been given fair notice of their liability for the violations, and had not had a fair hearing on the issue.[6]

On remand, Complainant was granted permission to file the second amended complaint, which is the current complaint in this matter. Following the filing of Respondents' answers to the second amended complaint, complainant moved for an accelerated decision pursuant to the applicable rules of practice, 40 C.F.R. §22.20.

The ALJ granted the motion and issued his Accelerated Decision on Remand (hereafter "ID-2") on September 30, 1988. The ALJ reaffirmed his previous findings as to the violations and included additional findings of fact relating, in general, to the operations of the facility by the partnership prior to incorporation, the formation of the corporation and transfer of the business to it and the operation of the business following incorporation.[7] He found that Respondents Dorothy Brueggemeyer and John Vasi as partners were jointly and severally responsible for the civil penalty assessed for the violations, and that David Shillman as the one responsible for the operation and as a "de facto" partner was also responsible for the civil penalty.[8] An order was issued assessing

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[6] J. V. Peters & Company, Inc., 2 EAD 177 (CJO May 9, 1986)

[7] ID-2, Findings of Fact Nos. 1-13. Judge Jones also found John Vasi in default since he did not file an answer to the Second Amended Complaint. ID-2, Finding 14.

[8] ID-2 at

a civil penalty of $25,000, against all Respondents except the corporation, for which they were made jointly and severally responsible. The corporation was found to be not responsible for the violations, because it was not in existence at the time, and no penalty was assessed against it.

Respondents appealed the order again. A Final decision affirming the Initial Decision was filed on August 7, 1990.[9] The Chief Judicial Officer agreed that the remand did not require a retrial of whether the violations occurred.[10] He held with respect to Respondents' liability for the violations and the penalty, that Complainant could properly rely upon the pre-remand record in its motion for an acceleration decision. That record, the Chief Judicial Officer stated, and Respondents' answers to the second amended complaint established the facts, as found by the ALJ, that the partnership owned the facility, that Dorothy Brueggemeyer and John Vasi were partners and David Shillman was the operator at the time of the violations, and that Respondents failed to produce any evidence to show that there was a genuine dispute over these facts. The Chief Judicial Officer, accordingly, held that an accelerated decision was properly granted and the order assessing the penalty against the partners individually was proper under Ohio law.[11]

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[9] J. V. Peters and Company, Inc., 3 EAD 280 (CJO August 7, 1990), (hereafter "Final Decision").

[10] Final Decision, 3 EAD 291.

[11] Final Decision, 3 EAD 290-296. The Chief Judicial Officer also held that the amendment of the complaint to include the partnership, Brueggemeyer, Vasi and Shillman was not barred by the statute of limitations. Final Decision, 3 EAD 284-290.

II. The District Court's Remand.

Respondents appealed the Final Decision to the United States District Court for the Northern District of Ohio. That court in a decision issued on August 13, 1991, set aside the Agency's order.[12] The court held that the accelerated decision arbitrarily denied Respondents the rights which the Chief Judicial Officer had found they were entitled to of presenting evidence to refute the charges against them. The court pointed out that even if it could be argued that Shillman had the capacity to assert his own interests by his appearance at the October 1984 hearing, he could not assert the rights of Brueggemeyer or the partnership of which he was not a member. The court further held that under 42 U.S.C. 6928 (RCRA §3008), the Presiding Officer had no authority to deny Respondents a hearing for any reason, even if he believes that there are no factual issues to resolve. The court, accordingly, ordered the case remanded to the Presiding Officer to conduct an evidentiary hearing wherein petitioners David B. Shillman, Dorothy L. Brueggemeyer, and J. V. Peters and Company are given an opportunity to present evidence to contest their liability for the fine assessed against them.[13]

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[12] J. V. Peters and Company, Inc. v. Reilley, No. 1:90 CV 2246 (N. D. Ohio Aug. 13, 1991)

[13] J. V. Peters and Company, No. 1:90 CV 2246, slip op. at 13-16 (N.D. Ohio Aug 13, 1991). The court, however, did affirm the Chief Judicial Officer's decision that second amended complaint naming the partnership and the individual Respondents was not barred by the statute of limitations. slip. op. at 12.

III. Administrative Proceedings Following Remand.

In accordance with the court's remand order, a hearing was convened in Cleveland, Ohio on October 3, 1994. Respondents' counsel, who also represented the corporation, the partnership and the individual Respondents in the prior proceedings, appeared at the hearing on behalf of the partnership, Shillman and Brueggemeyer.[14] Complainant proffered the previous testimony of its two witnesses, Ms. Becker and Dr. Homer along with the exhibits they relied upon, and made both witnesses available for cross-examination.[15] Complainant also stated his intention to rely upon the testimony of Mr. Shillman, the one witness who had been called by Respondents in the prior hearing.[16] Respondents declined to cross-examine Complainant's witnesses on their prior sworn testimony and argued, in general, that Complainant's reliance upon the prior testimony would not give Respondents the hearing that the court had held that they were entitled to. Respondents' position was that Complainant had to present its case anew, and Respondents were under no obligation to present any evidence on their behalf until Complainant had put on its case.[17] Respondents, accordingly, neither cross-examined any of Complainant's witnesses nor did they call any witnesses on their own behalf.[18]

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[14] Transcript of Proceedings ("Tr.") 20.

[15] Tr. 16, 24, 30, 35,45, 48-50, 50-51.

[16] Tr. 53, 59.

[17] Tr. 7 passim.

[18] Tr.83.

IV. Discussion

The issues presented by the pleadings are (1) whether the violations alleged in the complaint occurred, (2) are the partnership and the individual Respondents liable for the violations and (3) what is the appropriate penalty.

In their brief, Respondents argue that the only evidence adduced at the hearing was the short testimony by Ms. Becker affirming her testimony given at the previous hearing. Respondents were told at the hearing, however, that the initial decision would be made on consideration of the entire record, including the evidence presented at the 1984 hearing.[19] Respondents objected that as they were not parties to the 1984 hearing, the evidence presented at that hearing was inadmissible and reliance upon it deprives them of the fair hearing to which the court held they were entitled. They claimed that they were under no obligation to present evidence on their behalf until Complainant at this hearing had first made out a prima facie case on admissible evidence.

The question initially presented, accordingly, is whether Respondents, having been given the opportunity to cross-examine Complainant's witnesses on their sworn testimony at the prior hearing and to present evidence on their own behalf, will be deprived of a fair hearing if the evidence adduced at that prior hearing is made part of the record of this hearing and relied upon to determine Respondents' liability for a penalty. If Respondents prevail on this issue, the complaint must be dismissed. If

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[19] Tr. 74, 77, 82.

Respondents do not prevail, it must then be determined whether the reliable and probative evidence of record, giving consideration to the record as a whole, supports a finding that the violations have occurred and that Respondents are liable for the penalty of $25,000, proposed in the complaint or for some lesser penalty.[20]

A. Reliance Upon Evidence Adduced At the Prior Hearing Does Not Deprive Respondents of a Fair Hearing.

There is no difference between the complaint before the ALJ in the 1984 hearing and the second amended complaint as to the violations charged with respect to the facility located at 17030 Peters Road, Middlefield, Ohio. The testimony of the EPA's investigator, Ms. Becker, at the 1984 hearing concerned the same violations charged in the second amended complaint.

At the hearing in 1994, Complainant advised Respondents that he intended to rely upon Ms. Becker's testimony at the 1984 hearing and the exhibits introduced through Ms. Becker.[21] He thereupon called Ms. Becker to the stand solely for the purpose of having her affirm her previous testimony and then proffered her for cross-

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[20] Respondents also contend that at the time the second amended complaint was filed, the statute of limitations had run as to the partnership, Shillman and Brueggemeyer. That claim was initially rejected by the Chief Judicial Officer in his final decision, and was rejected again by the district court on appeal of the Final Decision. Supra, n. 13. The claim was also denied by me on Respondents' motion to dismiss. Order dated September 26, 1994. Respondents' request for reconsideration of my order is denied for the reasons stated by the district court and my order of September 26, 1994.

[21] Tr. 16. Complainant stated that he intended to rely upon Ms. Becker's entire testimony including her cross-examination. Tr. 24.

examination.[22] Respondents' counsel declined to engage in any cross-examination of Ms. Becker, even though it was made clear to him that he would be given the widest possible latitude in his cross-examination.[23]

Respondents' attempt to limit the record to Ms. Becker's brief testimony at the 1994 hearing is how Respondents would like to interpret the proceedings but in no way correctly states Complainant's position at the hearing and his purpose in putting Ms. Becker on the stand. Ms. Becker, having been put on the stand, affirmed her previous testimony and then was made available for cross-examination on her previous testimony. Respondents' counsel refused to cross-examine her[24]. Dr. Ferguson was not called as a witness because Respondents' counsel made it clear that he did not intend to cross-examine him either.[25] Except for the brief testimony of Ms. Becker, the hearing was spent in discussing Complainant's and Respondents' respective positions with respect to relying upon the testimony and exhibits put into evidence at the

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[22] Tr. 21-23.

[23] Tr. 4, 14-15, 17, 24, 47.

[24] Tr. 23-25. It should have come as no surprise to Respondents that Complainant at the 1994 hearing intended to rely upon Ms. Becker's testimony at the 1984 hearing. That procedure had been the subject of a prehearing conference with the parties as early as September 9, 1993. See letter of that date reporting on the conference. Respondents had been notified several months prior to the 1994 hearing as to what parts of the existing record Complainant intended to rely upon at the hearing. Letter of Complainant's counsel, Mr. Krueger, to Senior Administrative Law Judge Harwood dated January 31, 1994.

[25] Tr. 48-52.

1984 hearing and not making Complainant present its entire case again[26].

Respondents allege that relying upon the testimony given at the 1984 hearing, and making those witnesses available for cross-examination did not satisfy the District Court's order that Respondents be given an evidentiary hearing on their liability for a penalty. The only specific statement said by the court about the evidentiary hearing was that each of the respondents be given an opportunity to present evidence in their own defense.[27] Here, Respondents have been given not only the opportunity to present evidence in their own defense through oral testimony but the opportunity to orally cross-examine the witnesses on their sworn testimony that will be used against Respondents. I do not construe the court's opinion as requiring anything more. The hearing now being afforded Respondents is completely different from the accelerated decision that the court was reviewing.

Respondents argue that the record of the 1984 hearing is deficient because the corporation, which was the only party, decided not to call various witnesses, deliberately declined to explore certain cross-examination and chose not to make a certain number of evidentiary objections since it knew it would not be liable anyway. Respondents now had the opportunity to set the

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[26] Tr. 26-82.

[27] J. V. Peters and Company, Inc. v. Reilly, No. 1:90 CV 2446, Slip. op. at 15. The court's statement was made in conjunction with the court's ruling that Respondents had been improperly denied a hearing by the Agency's action in deciding the case on the basis of the papers submitted in a motion for an accelerated decision.

record straight by calling whatever witnesses and presenting whatever evidence they considered relevant to meeting the charges against them. They were also given the opportunity to engage in whatever cross-examination with respect to the previous testimony of Complainant's witnesses that they thought necessary.[28] Having declined to take advantage of any of these opportunities, their arguments as to the asserted deficiencies in the 1984 record are unpersuasive.

As to Respondents' asserted prejudice from the failure to make evidentiary objections that they would have made if they had been parties, it would have been helpful in evaluating the merits of that argument, if Respondents had been more specific either at the 1994 hearing or in their brief as to what objections they would now raise to the testimony or evidence in the record of the 1984 hearing and the grounds for them. The mere fact that they would have made objections does not mean that the objections would have had merit.

Respondents argue further that they were entitled to have the credibility of Complainant's witnesses on their direct testimony observed by the Administrative Law Judge now presiding. The argument has a certain superficial plausibility, but fails to take into account the factors that I would have in evaluating the witness' credibility, namely, the fact that the testimony was given under oath, the demeanor of the witness on cross-examination, the

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[28] It was made clear to Respondents's counsel that he would not be limited in his cross-examination by his previous cross-examination of witness. Tr. 15, 17.

nature of the matters the witness was testifying to, and whatever facts were in the record or brought out in cross-examination that would bear upon the witness's possible bias, the witness's opportunity to observe the matters testified to, and possible flaws in the witness' narration of these matters.

Reliance upon the testimony and exhibits from the 1984 hearing has much to commend it in that it can expedite the hearing. This benefit may possibly be diminished by the time spent in arguing the procedure, but it can still result in a saving of the time and expense of the hearing as a whole.[29]

Respondents argue that the testimony taken at the prior hearing is hearsay that is admissible only under conditions that are not present here. As support for their argument they cite Fed. R. Evid. 804. What determines the admission of evidence in an administrative proceeding is whether it is reliable and of probative value, and not whether it complies with the Federal Rules of Evidence governing hearsay.[30] The EPA's witnesses, whose written testimony under oath is being considered here, were Ms. Becker, who made the investigation of the facility at which the alleged violations were discovered, and Dr. Homer, an EPA employee who was

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[29] One would also think that it would be to a respondent's advantage to know precisely what evidence it will have to meet in preparing its defense and cross-examination. Obviously, Respondents did not consider this to be to their advantage in this case.

[30] 40 C.F.R. §22.22(a); Klinestiver v. Drug Enforcement Administration, 606F. 2d 1128 (DC Cir. 1979). See also Administrative Procedure Act, 5 USC §556(d), "Any oral or documentary evidence may be received, but the agency shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."

familiar with the RCRA regulations and their application to the operation of the facility, and who had calculated the proposed penalty.[31] Clearly, their testimony at the former hearing had the attributes both of reliability and relevance to satisfy the broad standard of admissibility in an administrative proceeding. Respondents were given the opportunity to attack the probative value of their testimony both by cross-examination and by introducing countervailing evidence. They did not avail themselves of either opportunity.[32]

With respect to the testimony of Respondent David Shillman at the 1984 hearing, the only witness called by the party appearing as Respondent in the proceeding, there has never been any question but that he had overall responsibility for the operations at the facility from the beginning. Mr. Shillman so testified under oath at the 1984 hearing and he has admitted this in his answer to the second amended complaint.[33] Respondents argue that the trial strategy pursued by the Corporation in defending against the complaint was different from that which have been followed if

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[31] Transcript of 1984 hearing (hereafter "1984Tr.") at 39, 329.

[32] Respondents point to matters that they allege demonstrate that Ms. Becker was biased against Respondents. Initial brief at 19, n.18. None of the incidents cited, however, indicate that Ms. Becker was not truthful about the violations she observed and reported on her investigation in December 1980. Respondents at the hearing would have been free to question Ms. Becker further about these matters as well as to bring out other matters bearing upon Ms. Becker's credibility, but they did not do so.

[33] 1984 Tr. at 432, 508; Answer of David B. Shillman to Second Amended Complaint, ¶19, admitting allegations contained in ¶19 of Complainant's complaint.

Respondents had been properly made parties, because the Corporation "knew it could never be liable anyway."[34] Respondents, again, were given the opportunity either by recalling Mr. Shillman, or by other evidence to correct whatever inaccuracies there may have been in his testimony or to fill in any gaps that were not thought to be important at the time. Again Respondents chose not to avail themselves of this opportunity.

I find, accordingly, that reliance upon the testimony and evidence adduced at the 1984 hearing does not deprive Respondents of a fair hearing. It remains, then, to assess that evidence and, giving it such weight as it is entitled to taking into account its inherent probative value and any evidence in the record which detracts from the conclusions that may be drawn from any particular evidence, determine whether Complainant has sustained its burden that the violations occurred as alleged and that the proposed penalty against Respondents is appropriate.[35]

B. Findings And Conclusions

1. Respondent J. V. Peters and Company, a partnership, in December, 1980, was engaged in the business of collecting, treating and storing hazardous waste at the facility located at 17030 Peters Road, Middlefield, Ohio (the "Facility"). Answers of Shillman & Brueggeman to ¶10 of the Complt.[36]; 1984Tr. 432-433, 436;

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[34] Respondents Initial Brief at 20.

[35] 40 CFR §22.24.

[36] Unless otherwise specified, "Complt." refers to the second amended complaint. Purported admissions by Respondent Shillman in answer to the original complaint are disregarded in view of the

Complainant's Exhibit ("CX") 4.[37] The partnership occupied the premises under a lease with an option to purchase. 1984Tr. 435.

2. Among the hazardous wastes Respondents reported handling were spent halogenated solvents (EPA hazardous waste nos. F001 and F002), plating bath residues (F008) and spent solutions from electroplating operations where cyanides are used in the process (F009). CX 4. At the time of the inspection in December 1980, Mr. Shillman admitted to storing flammable wastes and chlorinated solvents. 1984Tr. 290, 293; see also, RX 7c, Table One, listing wastes on site as of May 1982, including wastes accepted by the company shortly after it commenced operations.

3. Respondent Dorothy Brueggemeyer was a partner in the partnership. Answer of Brueggemeyer to ¶7 of the Complt; 1984Tr. 550. Ms. Brueggemeyer contributed $25,000 in capital to the partnership. 1984Tr. 551.

4. Respondent David B. Shillman managed the facility and was given complete authority over the operations of the facility. 1984Tr. 432, 508, Answer of Shillman to ¶19 of the Complt.

5. On December 17, 1980, Ms. Melinda Becker, an employee of the Ohio EPA working in cooperation with the U.S. EPA, Region V, made a RCRA inspection of the facility. 1984Tr. 39; CX 1. Ms. Becker found several violations of the RCRA Interim Status

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finding of the Chief Judicial Officer and the court that the original complaint did not give fair notice to Shillman of his individual liability for the violations.

[37] Exhibit references are to the Exhibits contained in the record of the 1984 hearing unless otherwise noted.

Standards (40 CFR Part 265) to which Respondents were subject.

6. Respondents violated 40 CFR §265.13(a)(1) by failing to obtain a detailed chemical and physical analysis of representative samples of waste handled at the facility prior to its treatment and storage. 1984Tr. 53, 55, 225-226; CX 1.

7. Respondents violated 40 CFR §265.13(b) by failing to develop and follow a written waste analysis plan. 1984Tr. 56, 224, 351; CX 1. The documents described generally by Mr. Shillman as being in the facility's file at the time, 1984Tr. 471, were not shown to have complied with the requirements of §265.13(b).

8. Respondents violated 40 CFR §265.14(b) by failing to install either a barrier around the active portions of the facility or 24-hour surveillance. 1984Tr. 57-58, 447-448; 475, 563-565; CX 1.

9. Respondents violated 40 CFR §265.14(c) by failing to post signs bearing the legend "Danger-Unauthorized Personnel Keep Out" at each entrance to the facility. 1984Tr. 60-61, 477-478; CX 1.

10. Respondents violated 40 CFR §265.15(b) and (d) in failing to create and maintain at the facility a written inspection schedule and log. 1984Tr. 64, 566; CX 1.

11. Respondents violated 40 CFR 265.16(d) by failing to create and maintain at the facility personnel records that list the job titles and describe the type and amount of continuing and introductory training provided to each hazardous waste management person. 1984Tr. 70, 482; CX 1.

12. Respondents violated 40 CFR 265.32(a) by failing to have

installed an internal communications system or alarm capable of providing emergency instructions to facility personnel. 1984Tr. 80-81, 484; CX 1.

13. Respondents violated 40 CFR §265.32(c) by failing to maintain adequate fire control equipment including decontamination equipment at the facility. 1984Tr. 86, 93-94; CX 1.

14. Respondents violated 40 CFR §265.32(d) by failing to have available at the facility water at adequate volume and pressure to supply water hose streams, or foam producing equipment or automatic sprinklers or water spray systems. 1984Tr. 86, 568, 93-94.

15. Respondents violated 40 CFR §265.34(a) by failing to provide all personnel involved in the pouring, mixing spreading or otherwise handling of hazardous waste with immediate access to an internal alarm or emergency communication device. 1984Tr. 80-81, 94, 484; CX 1.

16. Respondents violated 40 CFR §265.35 by failing to maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment and decontamination equipment to any area of facility operation in an emergency. 1984Tr. 94-96, 273-274; CX 1.

17. Respondents violated 40 CFR §265.37 by having failed to make the arrangements with state and local emergency response officials required by that regulation. 1984Tr. 99, 594; CX 1.

18. Respondents violated 40 CFR §265.51 through 265.56 in that they failed to have a contingency plan for the facility. 1984Tr. 102, 574, 588, 595; CX 1.

19. Respondents violated 40 CFR §265.73 by failing to maintain a written operating record at the facility. 1984Tr. 102-103, 280-281, 566.

20. Respondents violated 40 CFR §265.74 in failing to make available upon request and at all reasonable times, all required records. The records were requested but not furnished or made available at the inspection in December 1980. 1984Tr. 53, 56, 64, 69-70, 102, 224-226, 588; CX 1. There is no evidence that the inspection was being conducted at an unreasonable time.

21. Respondents violated 40 CFR §265.173(a) in that containers holding waste were not closed as required by the regulation. 1984Tr. 107-109.

22. Respondents violated 40 CFR §265.176 by storing containers of flammable hazardous waste within 15 meters (50 feet) of the property line of the facility. 1984Tr. 110-111, 545, 562; CX 1, 10.

23. On January 30, 1981, J. V. Peters & Co., Inc. ("Corporation") was organized and took over the hazardous waste business of the facility. Respondents' answers to ¶ 14 of the Complt.; 1984Tr. 433, 557.

24. Respondent Shillman was Chairman of the Board and President of the Corporation. Respondent Brueggemeyer was a Director and Secretary-Treasurer of the Corporation and also a stockholder. Answers of Respondent Corporation and Respondent Shillman to ¶17 of the Complt; CX 16.[38]

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[38] The finding that Ms. Brueggemeyer was a shareholder of the corporation is based upon a certified copy in the file of the corporate proceedings (of which RX 11 is a part) listing Dorothy

25. After the operation was taken over by the Corporation, Respondent Shillman continued to have overall responsibility for and to manage the operations at the facility. Respondent Shillman's answer to ¶19 of the Complt.

26. The complaint alleges that Respondents ceased all operations as a hazardous waste management facility at the location, have abandoned any attempt to resume operations at the facility and have not followed the closure proceedings required by 40 CFR §265.110 through §265.114. Complt. "Findings of Violation" No. 16. The record does show that Respondents did not have a written closure plan in place at the time of the inspection in December 1980. 1984Tr. 355. This, however, was not considered a violation by Ms. Becker.[39] It also shows that a written closure plan was submitted in March 1982, in a Part B application, and that a revised Part B application was submitted in May 1982. RX 7B and 7C. Dr. Homer on reviewing this plan found it to be inadequate but these inadequacies were not communicated to the Respondents. 1984Tr. 372-373, 375-376. It also appears to be uncontested that

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Brueggemeyer as a subscriber to 40 % of the corporate stock. Official notice is taken of this document. See 40 CFR §22.25(d).

[39] The regulation requiring a closure plan was published on May 19, 1980, and by statute became effective six months thereafter, or on November 19, 1980. 45 Fed. Reg. 33157, 33242 (May 19, 1980); RCRA, Section 3010, 42 U.S.C. 6930. The closure plan must be submitted to the Regional Administrator at least 180 days before closure is expected to begin. 40 CFR §112(c) (1980). The EPA interpreted this as requiring a closure plan available for inspection by May 19, 1981. CX 1.

the facility was closed.[40] I find, however, that this evidence is inconclusive on what closure procedures were actually followed and, if there were any deviations from regulatory requirements, how material they were.[41] Accordingly, "Finding of Violation 16" in the Complaint is dismissed. In view of the dismissal of this count, it is unnecessary to consider Complainant's arguments with respect to disregarding the corporate structure under which Respondents continued the business after January 30, 1981.

C. The Liability of Respondents

The liability of Shillman is not predicated upon his alleged position as a partner but upon his being the operator of the facility within the meaning of RCRA, regardless of his technical status as partner. Mr. Shillman admitted to being responsible for the operations of the facility both at the time it was owned by the partnership and later by the Corporation. He organized the operation and acquired the property for it.[42] He was engaged in the daily running of the operation.[43] So far as this record is

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[40] See letter from Respondents' attorney, writing on behalf of the Corporation, dated April 12, 1984, admitting that the Corporation ceased all operations on the site and abandoned its intention to resume operations. The reference in Mr. English's letter to the EPA expending money to implement the Company's closure plan may refer to the EPA's removal of drums on the site. See 1984Tr. 364.

[41] It is to be noted that Dr. Homer based his penalty for this alleged violation on the fact that there was no written closure plan at the time of the inspection in December 1980. 1984Tr. 371-372.

[42] 1984Tr. 550-551; Shillman's answer to ¶2 of the Findings of Facts in the Complaint..

[43] 1984 Tr. 508.

concerned, he made the decisions as to the facility's compliance with RCRA whether it was owned by the partnership or the corporation. In short, I find that Mr. Shillman exercised sufficient active and pervasive control over the operations as to make him an operator within the meaning of RCRA.[44]

The liability of Respondent Brueggemeyer is predicated upon her being a partner. It is not denied that the partnership owned the business in December 1980. Ms. Brueggemeyer's status as partner was admitted in her answer to the Complaint and testified to by Mr. Shillman. The details of the partnership arrangement are not spelled out in the record except that Ms. Brueggemeyer put $25,000 of capital into it.[45] Respondents have not seen fit to either explain or rebut this evidence, and I find that it is sufficient to establish that Ms. Brueggemeyer was a general partner and subject to liability as such.

The Interim Status Standards apply to both owners and operators.[46] The Agency gave the following explanation as to why this is so:

> [T]he Agency is primarily concerned with compliance, and is secondarily concerned with who ensures compliance. The Agency believes that decisions concerning who should be responsible for ensuring compliance for which requirements can properly and adequately be a matter between the owner and the operator. Nonetheless, both the owner and operator ultimately remain responsible,

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[44] Cf., Southern Timber Products, on reconsideration, 3 EAD 880, 895 (JO Feb 28, 1992)

[45] 1984Tr. 551.

[46] 40 CFR §265.1(b).

regardless of any arrangement between them.[47]

The violations found in Findings Nos.6 through 22 above relate to the operations of the facility in December 1980, when the business was owned by the partnership. "Owner" is defined as "the person who owns the facility" and "Person" is defined to include a partnership.[48] Ms. Brueggemeyer, accordingly, is found to be liable for those violations as a partner in the partnership owning the facility.[49]

D. The Appropriate Penalty

Dr. Homer testified for Complainant on how the proposed penalty was determined.[50] Dr. Homer has a Ph. D. in environmental science.[51] His work at the EPA has required that he be familiar with the RCRA regulations and the Agency's policy interpretations of those regulations.[52] He reviewed the Agency's records with respect to the facility, including Ms. Becker's inspection

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[47] 45 Fed. Reg. 33169 (May 19, 1980).

[48] 40 CFR §260.10.

[49] Ms. Brueggemweyer's liability as a partner under Ohio law has been briefed by Complainant, see Initial Brief on Remand at 27-29. It was also considered by the Chief Judicial Officer in his Final Decision, 3 EAD 280, 295 (CJO August 7, 1990). Respondents have not come forward with any authorities indicating that Complainant's and the Chief Judicial Officer's analysis of the law is incorrect.

[50] 1984Tr. 328-401. If there was any further pertinent testimony of Dr. Homer beyond p.411, that has not been cited or furnished to me.

[51] 1984Tr. 328-329.

[52] 1984Tr. 329-331.

report.[53] He evaluated each violation noted in the papers on the basis of what the damage or potential damage could be, the nature of the conduct and whether there were any mitigating factors, and then assigned a penalty in accordance with the Agency's penalty policy.[54]

Dr. Homer was made available for cross-examination at the 1994 hearing.[55] It was also open to Respondents to introduce whatever evidence or make whatever arguments they thought relevant to Dr. Homers' calculations. Respondents did not avail themselves of any of these opportunities at the hearing and have not done so in their post hearing brief.

I find that Dr. Homer is qualified as an expert to testify on the seriousness of the violations and on the Agency's policies with respect to determining the appropriated penalty. His calculations are entitled to weight and are accepted here. The only adjustment that needs to be made is for dismissal of Finding of Violation 16. In his calculations, Dr. Homer included a penalty of $4500 for failure to have a disposal plan at the time of the inspection.[56] Dr. Homer arrived at his proposed penalty by taking one-third the amount initially determined.[57] Applying the same adjustment here, the proposed penalty is reduced by $1500 to $23,500.

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[53] 1984Tr. 337, 344.

[54] 1984Tr. 345-346, 362-363; CX 8.

[55] Tr. 48-50.

[56] 1984Tr. 356.

[57] 1984Tr. 345.

I find, accordingly, that the appropriate penalty is $23,500 for which Respondents David B. Shillman, Dorothy Brueggemeyer and J. V. Peters and Company are jointly and severally liable.

ORDER[58]

Pursuant to the Resource Conservation and Recovery Act, as amended, §3008(g), 42 U.S.C. §6928(g), Respondents David B. Shillman, Dorothy Brueggemeyer and J. V. Peters and Company are jointly and severally liable for a civil penalty of $23,500, for violations of the Act and the pertinent regulations. The full amount of the penalty shall be paid within sixty (60) days of the effective date of the final order. Payment shall be made in full by forwarding a cashier's check or a certified check in the full amount payable to the Treasurer, United States, at the following address:

EPA-Region 5
(Regional Hearing Clerk)
P.O. Box 360582M
Chicago, IL 60673

Gerald Harwood
Gerald Harwood
Senior Administrative Law Judge

Dated: July 18 1995

[58] Unless an appeal is taken pursuant to 40 CFR §22.30, or the Environmental appeals Board elects, sua sponte, to review this order, this decision shall become the final order of the Agency. 40 CFR §22.27(c). If a motion to reopen the hearing is filed, it must be filed within 20 days after service of the initial decision as provided in 40 CFR § 22.28, and must conform to the requirements stated therein.