UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

85 JUN 5 P2:34

IN THE MATTER OF:	)	RCRA DOCKET V-W-81-R-75
	)	
J.V. PETERS & CO., INC.,	)	
	)	
RESPONDENT	)	

1. Partnership - A partnership is created when persons join together their money, goods, labor or skill for the purpose of carrying on a trade or business and where there is a community of interest in the profits and and losses resulting from such effort.

2. Partnership - Where the rights of third persons are involved, it is immaterial whether a person chooses to refer to or regard himself as a partner for the reason that it is the substance, not form, of an arrangement which determines if a partnership exists. Where labor and management expertise existed in and was contributed by Shillman, who conceived the idea of a partnership business, procured the contributions of other parties, exercised absolute authority regarding the operation of the partnership business, including the receipt and expenditure of partnership funds, with the expectation of sharing in profits, if any, Shillman will be deemed a member of said partnership where the rights of third parties are involved.

3. Corporations - Where an Ohio corporation was organized without adequate capitalization and was thereafter not treated as a corporation by parties in interest except for the purpose of being employed as a cloak for the evasion of partnership obligations and to otherwise work injustice, the separate personality of the corporation was disregarded and it was treated as an association of persons.

4. Resource Conservation and Recovery Act (hereinafter "RCRA" or "the Act") - Parties - Assessment of Civil Penalty - Though not technically a party-Respondent named in subject Complaint, David B. Shillman was bound as a party because of his direct connection with the named Respondent's interest, by his individual interest in the result of a hearing held to determimine liability for civil penalties under the Act, and by his active participation in the preparation and presentation of the defense presented at said hearing. By such participation, Shillman entered his appearance as a party and there was no need or necessity to amend subject Complaint to make Shillman a new party or to serve him with a copy of said Amended Complaint as he was already a party appearing in the case by Counsel.

5. RCRA - Pleadings - Where the proceedings contemplated by an Amended Complaint are identical to those under the Original Complaint in that the forum and the parties are the same and said Complaints raise identical issues, it is proper to take official notice of the Answer filed, including judicial admissions, to the Original Complaint as it is well established that facts which are a part of a court's public records of prior litigation, closely related to the instant case, are facts of which a court will take judicial notice, and such notice may be taken ex mero motus or sua sponte. 40 CFR 22.22(f) provides that official notice may be taken of any matter judicially noticed in the Federal Courts.

6. RCRA - A prima facie case was made out that hazardous waste was on the site operated by J.V. Peters and Company when Complainant introduced exhibits which were a notification and Part A permit application filed by David B. Shillman for and on behalf of subject partnership, pursuant to the provisions of 42 USC Sections 6930(a) and 6925(e), respectively, which notified the U.S. EPA of the location and general description of said hazardous waste activity, along with a description of the identified or listed hazardous wastes so handled by said J.V. Peters and Company. 40 CFR 22.24 provides that following the establishment, by Complainant, of a prima facie case, Respondent shall have the burden of presenting and of going forward with (its) defense.

7. RCRA - Unless specific reasons exist for an increase or decrease, the amount of the penalty recommended to be assessed in the Complaint is the appropriate amount to be assessed. Where Complainant's evidence showed that the penalty recommended accorded with the criteria set forth in the Act, and that applicable civil penalty guidelines had been utilized along with consideration of whether mitigating or aggravating factors existed, there was no justification for the assessment of a penalty different in amount from that recommended in the Complaint (40 CFR 22.27[b]).

Entry of Appearance

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INITIAL DECISION

On January 31, 1984, subject "Amended Complaint" was filed by the United States Environmental Protection Agency (hereinafter "EPA", "the Agency" or "Complainant") against J.V. Peters and Company, Incorporated (hereinafter "Respondent" or "J.V. Peters"). The record reflects that the previous or original Complaint was filed by Complainant on April 17, 1981, and alleges the same findings from an inspection on December 17, 1980, and the identical charges of non-compliance by Respondent, in violation of specific sections of the Code of Federal Regulations (hereinafter "CFR") and the Ohio Administrative Code (hereinafter "OAC"). The original Complaint proposed assessment of a civil penalty of $10,000. The original Complaint was withdrawn without prejudice by Complainant, pursuant to 40 CFR 22.14(e) on September 19, 1983, after Motion for Leave to so Withdraw was granted. Respondent, by its attorney Brent L. English, filed Respondent's Answer to subject "Amended Complaint" and Respondent's Request for Hearing on March 1, 1984. Said hearing, requested by Respondent, was scheduled to be held in Chicago, Illinois, on June 19, 1984. On June 5, 1984, Respondent filed its Motion requesting that said hearing be moved to the greater Cleveland area for the reason that Respondent was financially unable to bear the expense attendant to a hearing in Chicago. Said Motion was granted by the undersigned and the date of hearing was continued to a date to be set.

On June 30, 1984, Respondent filed its Motion for Additional Discovery. On July 24, 1984, my Order granting the Discovery (due to Complainant's failure to respond to said Motion) was issued along with the directive that the requested hearing would be heard in the Cleveland, Ohio, area beginning on September 18, 1984, and that the precise location of same would be later advised. Complainant's Response to Respondent's Motions to Move the Hearing and for Additional Discovery

were received by me on July 25, 1984. Respondent responded to Complainant's said Responses on July 27, 1984. On September 4, 1984, I received a Motion from Complainant requesting that the hearing scheduled for September 18, 1984, be continued and that Counsel be granted more time to "complete discovery", due to serious illness in the family of Complainant's Counsel. The time for hearing on the basis of the Motion was continued to October 3, 1984; however, because Respondent Counsel was unavailable on October 3, 1984, said hearing was reset to begin on October 23, 1984, in the Moot Courtroom, Room 101, at the Cleveland-Marshall College of Law in Cleveland, Ohio. The first day of hearing was completed at said location and then the hearing was moved to 118 Mall Building, Room 401, in Cleveland, Ohio, where it was completed on October 24 and 25, 1984.

Subject Amended Complaint alleges that Respondent, at its hazardous waste site located at 17030 Peters Road, Middlefield, Ohio, violated Subtitle C of RCRA §3004, 42 USC 6924, and implementing regulations and hazardous waste rules 40 CFR Part 265 and parallel sections of OAC Chapter 3745, in the following particulars, to wit:

1. The owner/operator did not obtain a detailed chemical and physical analysis of representative samples of waste prior to its treatment, storage and disposal, and thus violated 40 CFR 265.13(a)(1).

2. At the time of subject inspection, the owner/operator did not provide a written analysis plan for hazardous waste stored on subject site, and thus violated 40 CFR 265.13(b).

3. 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.

4. 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.

5. Respondents violated 40 CFR 265.15(b) and (d) in failing to create and maintain at the facility a written inspection schedule and log.

6. Respondents violated 40 CFR 265.16(d) by failing to create and maintain at the facility personnel records which list the job titles and describe the type and amount of continuing and introductory training provided to each hazardous waste management person.

7. (a) Respondents violated 40 CFR 265.32(a) by failing to have installed an internal communications system or alarm capable of providing emergency instruction to facility personnel.

(b) Respondents did not maintain at the facility a telephone capable of summoning emergency assistance and, therefore, violated 40 CFR 265.32(b). 1/

(c) Respondents violated 40 CFR 265.32(c) by failing to maintain adequate fire extinguishers, spill control and decontamination equipment at the facility.

(d) Respondents violated 40 CFR 265.32(d) by failing to have available at the facility water at adequate volume and pressure, or foam-producing equipment, automatic sprinklers or water spray systems.

8. Respondents violated 40 CFR 265.34(a) by failing to have accessible, whenever hazardous waste was being mixed, poured or otherwise handled, an internal alarm or emergency communication device either directly or through visual or voice communication with another employee.

9. Respondents violated 40 CFR 265.35 by failing to maintain aisle space to allow unobstructed movement of personnel, fire control equipment, spill control equipment and decontamination equipment to any area of the facility operation in an emergency.

10. Respondents violated 40 CFR 265.37 in that they had failed to make any arrangements with appropriate state and local emergency response officials.

11. Respondents violated 40 CFR 265.51 through 265.56 in that they failed to create, maintain and follow a contingency plan for the facility.

12. Respondents violated 40 CFR 265.73 by failing to create and maintain at the facility a written operating record.

13. Respondents violated 40 CFR 265.74 in failing to make available, on request and at all reasonable times, all required records.

14. Respondents violated 40 CFR 265.173(a) in failing to maintain containers of hazardous waste, not being handled or processed, in a closed condition.

15. 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.

16. Respondents do not have a permit from the State of Ohio to operate said hazardous waste facility.

17. Respondents violated 40 CFR 265.110 through 265.115 by failing to have and to activate a closure plan for the facility.

18. Substantial quantities of hazardous waste remain on said site in tanks and other containers.

1/ Complainant, in its Brief, agrees that the requirement in Section 265.32(b) was met; it concedes the existence of telephones at the site (see Complainant Argument, Sec. 3, p. 13; Transcript [hereinafter "TR"] 22).

Respondent's Answer to the Amended Complaint generally denies the violations charged except for Complainant's statement that all operations as a hazardous waste management facility at subject location have ceased and Respondent has abandoned any intention to resume said operations, and that Respondent has not followed the closure procedures as required by 40 CFR 265.110 through 265.115; and that substantial quantities of hazardous waste remain on the facility in tanks and other containers.

Respondent's Answer to the Original Complaint responds to the charges numbered and referred to in the Complaint as "Findings" as follows:

1. Respondent had, at the time of said inspection, obtained chemical and physical analyses to some, but not all, of the waste stored at subject facility.

2. Admits that Respondent was unable to provide a written analysis plan at the time of the inspection, but states that the Inspecting Officer did not then request production of such written analysis plan. 2/

3. Admits that there was not, on and prior to December 17, 1980, any 24-hour surveillance or a fence completely surrounding the facility, but states that a 24-hour surveillance system was provided effective December 20, 1980. 3/

4. Admits that it did not post a sign at each entrance with the legend "Danger - Unauthorized Personnel Keep Out", but states that a "No Trespassing" sign was at the entrance to Respondent's facility at the time of the subject inspection.

5. Admits that Respondent was not then able to produce a written inspection schedule and log, but that same was not requested by the Inspecting Officer. 4/

6. Admits that Respondent could not then provide to the Inspector the documents and records required by regulation, i.e., job descriptions and a written description of introductory and continuing training to be given each waste management person there employed, but states that the Inspector did not then request production of same. 5/

2/ Complainant's witness testified that during the course of the inspection on December 17, 1980, she asked to see a detailed analysis of waste materials handled at Respondent's facility and was told that no such document then existed. (TR 53, 592.)

3/ Testimony at the hearing reflects that a security guard was posted at the site on December 20, 1980, and was maintained until summer or early fall, 1981 (TR 448.)

4/ Testimony at the hearing was to the effect that such documents did not exist. (TR 64-68; 566.)

5/ No such documents were then in existence. (TR 7; 566-567.)

7. (a) Admits the absence of internal communications or alarm systems but avers that, because of the size and physical arrangement of Respondent's facility, such equipment is not essential to the safety of its personnel, and

(b) A telephone was at all times available for the purposes set forth in 40 CFR 265.32(b). 6/

(c) States that fire extinguishers 7/ were available but neither admits nor denies the absence of required fire control, spill control and decontamination equipment.

(d) Admits that facility did not have a water supply available but avers that it is entitled to a variance from the requirements of §265.32(b) because the Middlefield Fire Department maintains equipment for transporting water to fire scenes and that Respondent's site is in a rural area and over one-fourth (1/4) mile from other structures.

8. Respondent denies that all personnel did not have immediate access to an alarm system or emergency communication device either directly or through visual or voice contact with another employee.

9. Respondent denies that it failed to maintain aisle space as required by 40 C.F.R. 265.35.

10. Admits that it failed to make arrangements with state and local emergency response officials but states that its efforts to enlist said assistance and cooperation was unsuccessful.

11. Admits that a contingency plan was not then available but states that the Inspector did not request same.

12. Admits that a written operating record could not then be produced by Respondent as required by §265.73 but states that such production was not requested by the Inspector.

13. Restates the answers given to Paragraphs 1 through 12, supra, and states that subject required records were not requested.

14. Denies the allegation that containers containing waste were not closed.

15. Admits that Respondent stored containers holding ignitable and reactive waste in an area less than 15 meters (50) from the property line and states that, because the parcel containing the facility has an east-west dimension (width) of only 120 feet, literal enforcement of §265.176 would result in confinement of material storage to a 20-foot-wide corridor in the center of said parcel, and Respondent is entitled to a variance from said regulatory provision.

6/ Complainant admits that a telephone was made available and excised said charge of violation from its Complaint. (Complainant Brief at 13.)

7/ Complainant admits that fire extinguishers were available at subject facility (Complainant Brief at 13), but contends that they were inadequate to deal with other than minor fires and did not satisfy the regulation.

Respondent, in its Answer to the Original Complaint, put forth seven Affirmative Defenses, to wit:

I The subject inspection in December, 1980, took place less than one month after the effective date of the regulations.

II Although Respondent was then in violation of recordkeeping requirements, it has at all times substantially, though not strictly, conformed to regulatory requirements concerning chemical and physical analysis of representative waste samples, procedures required by a general waste analysis plan, providing training to employees and provided, maintained and inspected emergency or contingency equipment which would properly be required by a contingency plan.

III Respondent's operations have been conducted to avoid damage to the environment; no chemical wastes have been spilled, dumped or buried and no pollutants have been permitted to leave said facility.

IV Any actual or potential hazard has not been increased by Respondent's non-compliance with said regulations.

V By reason of (large) quantity of wastes and local weather conditions in November and December, 1980, a transition period was required in order to achieve full compliance with waste analysis requirements and other provisions of the regulations. 8/

VI Because of the size of subject facility, the proposed civil penalty is not warranted.

VII Subject inspection was conducted in bad faith . . . and to entrap (Respondent) and to exaggerate the extent of . . . violations.

I shall in this case take notice of the Answer, filed by Respondent J.V. Peters and Co., Inc., to the Original Complaint previously filed herein. It is well established that facts which are a part of a court's public records of prior litigation, closely related to the instant case, are facts of which a court will take judicial notice (Insurance Co. of North America v. National Steel Service Center, Inc. [DC W. Va., 1975] 391 F.S. 512, 1.c. 518 [4], affirmed 529 F.2d 515; Chandler v. O'Bryan, [DC OK, 1969], 311 F.S. 1121, 1.c. 1122[3]). Where, as here,

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8/ Said regulations were promulgated, pursuant to 42 USC 6921 et seq., on May 19, 1980. Under §3010 of RCRA, 42 USC 6930, the effective date of the regulations (40 CFR Parts 260-265) was six months later, or November 19, 1980. This was done in order to afford facilities, subject to said regulations, adequate time to come into compliance and to obtain interim status in lieu of a final permit (see 42 USC 6925[e]).

the proceedings are in the same forum, concerning the same parties and the Original and Amended Complaints raise identical issues, I may take judicial cognizance of my own records and act ex mero motu or sua sponte (in re Dunn [DC GA, 1966] 251 F.S. 637; Baldwin v. Local 843, International Brotherhood of Teamsters [DC NJ, 1982], 562 F.S. 36, 38[1], citing Welles v. U.S., 318 U.S. 257, 63 S.Ct. 582 [1943]).

I have set forth, supra, the content of the Answer filed on May 12, 1981, to said Original Complaint, by David B. Shillman, attorney for and President of Respondent J.V. Peters & Co., Inc. Mr. Shillman was manager with complete authority over subject facility and its operation on June 1, 1980 (when the business began as a partnership), at the time of its incorporation on January 27, 1981, and at all pertinent times subsequent thereto (TR 430-437; 508).

Concerning the issues unresolved and based upon the record, including the testimony elicited and exhibits received at the hearing held herein, I make the

FINDINGS OF FACT

1. J.V. Peters and Co. was a partnership, prior to formation of said J.V. Peters and Co., Inc., on January 30, 1981, and began doing business on June 1, 1980 (TR 432), at its facility at 17030 Peters Road, Middlefield, Ohio.

2. Said partnership business consisted of picking up, transporting and collecting, at subject site, spent industrial solvents which were disposed of, usually by sale, to a user or "reclaimant" (TR 433); David B. Shillman maintained control of what materials were received at subject hazardous waste site (TR 472).

3. The business of the corporation was the same as that of its predecessor partnership (TR 433). Correspondence after January 30, 1981, was on the "partnership" stationery and David B. Shillman signed as President of J.V. Peters and Company (see, e.g., Respondent's [hereinafter "R"] Exhibit [hereinafter "EX" 8, 9 and 10) with no indication of the existence of said corporation.

4. At the time of the partnership's formation, on or about June 1, 1980, and at all pertinent times subsequent thereto, David B. Shillman has exercised complete authority over subject operation, representing himself as secretary-treasurer of the partnership and as president of said corporation (TR 432).

5. The site of the subject operation was two acres on which David B. Shillman individually procured a lease, with option to purchase, in May, 1980, when Shillman formulated his intention to start said operation and to organize people who would help him so engage in said business (TR 549-550).

6. Said partnership, known as J.V. Peters and Co., was formed subsequent to procurement by Shillman of said lease and prior to commencement of business. Shillman testified (TR 550) that Dorothy L. Brueggemyer and John Vasi were partners.

7. The entire capitalization of the partnership, $25,000, was contributed by Mrs. Brueggemyer, and was used to purchase initial equipment including paints, pumps, trailers and fire extinguishers and for a $1100 deposit required in procurement of said lease (TR 551, 552). Mrs. Brueggemyer had had no past experience or connection with the hazardous waste business.

8. Shillman, in August, 1980, filed a notification of hazardous waste activities and, on September 4, 1980, filed a Part A application for a permit (Complainant's [hereinafter "C"] EX 4); Shillman signed the letter of transmittal, notification and said Part A application on behalf of J.V. Peters Company as its Secretary-Treasurer.

9. After organization of J.V. Peters Company, Incorporated, the directors of the the corporation first met on February 2, 1981, when David B. Shillman was elected Chairman of the Board and President of the corporation. At said meeting, said Dorothy Brueggemyer, Angelo I. Colon (described as plant supervisor [TR 478]) and Robert P. Warner were elected directors. Other officers elected were

Angelo I. Colon, Vice President, and Dorothy L. Brueggemyer as Secretary and Treasurer. At said meeting, the corporation, by resolution adopted, entered into an Employment Agreement whereby David B. 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 (R EX 11).

10. In March, 1981, David B. Shillman was charged by the State of Ohio with operating a facility without a permit (TR 453).

11. Shillman hired security guards on December 20, 1980, who were kept at the facility until the summer or fall of 1981, when he no longer had money to pay the guards (TR 448). His stated reason for not installing a fence pursuant to regulations was that "we didn't have title to the property" (TR 453). Shillman later acquired title to subject site from a trustee in bankruptcy in the name of the corporation (TR 454). The lease option agreement contracted by Shillman individually (TR 550) was never consummated (TR 454).

12. When served with the original EPA Complaint, on behalf of the corporation, Shillman first filed an Answer to said Complaint and, second, requested a hearing and made an appointment to meet with EPA personnel in Chicago (TR 456) to "find out what the Agency wanted me to do" to achieve compliance with regulations and to make arrangements with them that "I would do whatever they wanted me to do that the regulations required" (TR 457), after which he made contact by letter with the hospital, sheriff and fire department and contracted with an engineering firm for the services of Ed Fritz, R.P.E., and, with the engineer, prepared a technical response document (C EX 3).

13. Said technical response document and a supplement thereto (R EX 6) were prepared by his attorney in conjunction with said engineer, at Shillman's direction (TR 462), as were Part B applications later submitted (R EX 7A, B, C and D; TR 464).

14. At the hearing, the "present assets" of the corporation consisted of three pumps and a $5000 cash deposit that had been "filed with Geauga County Clerk"; its liabilities totaled "many thousands of dollars", including cost of litigation and substantial liability to customers - because of "our inability to complete the disposal of drums" which (Respondent) was obligated to dispose of (TR 501, 502).

15. The Articles of Incorporation, dated January 27, 1981, and approved by the State of Ohio on January 30, 1981, provided for the issuance of 500 shares of common stock without par value. The corporation purported to begin business with $500 cash (R EX 11; TR 430-31).

16. Robert P. Warner resigned as director on March 18, 1983 (when the corporation was indebted to him). David Shillman and Angelo Colon were then described as "surviving directors". Dorothy Brueggemyer was elected as director to fill the vacancy created by Warner's resignation (Corporate Minutes, March 18, 1983; R EX 11).

17. Operations at the Peters Road facility ("the facility") involving the treatment and storage of industrial waste began at least as early as June, 1980 (TR 26-38; 432).

18. Both prior to and during the entire period from June, 1980, to May, 1981, materials falling within the definition of hazardous wastes set forth in 40 CFR 261 were transported to and from, handled at, treated and stored at the facility (C EX 4, 11, 12, 13, 15; TR 537-540, 540, 543-46, 547-8; R EX 17; TR 510, 512-14).

19. The facility was closed by Order of the Geauga County Court of Common Pleas in May, 1981, under a temporary restraining order based, inter alia, on the facility's failure to have a permit from Ohio EPA for operating a hazardous waste facility (TR 440; 542-3).

20. After the facility was closed by Order of Court, hazardous wastes continued to be stored on the facility (TR 568; R EX 7-C [page 4a, Table One]).

21. David B. Shillman, a graduate of Harvard Law School, knew at least as early as August 21, 1980, that the operations at the facility would be subject to the hazardous waste rules. Shillman was personally engaged in the business of treating and storing hazardous waste, and he exercised complete control and authority over operations at the facility (TR 431-3, 555, 604).

22. David B. Shillman understood that, with the filing of the RCRA Part A application and notification of hazardous waste activities, the facility received interim status and was subject to the hazardous waste rules (TR 555-6).

23. At some time between the execution of the said lease-option agreement and the commencement of operations at the facility, David B. Shillman formed a partnership with John Vasi and Dorothy Brueggemyer, doing business as J.V. Peters and Company (TR 432-3).

24. 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. (R EX 7; TR 432, 508; C EX 4; R EX 7 A-D).

25. The purpose of the partnership, and later the corporation, was to transport and collect spent solvents and other industrial waste materials at the facility for mixing and resale or disposal (TR 432-3, 514-5; C EX 4).

26. David B. Shillman testified that, on or about January 30, 1981, the partnership transferred both its assets and liabilities to a newly-formed corporation, J.V. Peters and Co., Inc., and that he understood that whatever status the facility had with respect to approval to store or treat hazardous waste would pertain to the facility after the formation of the corporation (TR 556-8).

27. U.S. EPA and Ohio EPA were never given formal notice of the change of ownership prior to its undertaking, as required in 40 CFR 270.72(d) (TR 557-8).

28. The operations at the facility were continued under the new name, without change in those operations (TR 433, 553; C EX 1).

29. John Vasi sometimes acted for J.V. Peters and Company, and represented himself as President of said partnership, from formation of the partnership until around December, 1980, or when his connection with the operation was terminated. Vasi's primary function was to cook meals for the workers at subject site (TR 52, 441, 553; C EX 1 and 5).

30. David B. Shillman was and is President of J.V. Peters and Company, Inc. (C EX 16; TR 430).

31. Melinda Becker was an employee of Ohio EPA from June of 1978 until mid-1983, and was a field inspector who conducted inspections to determine compliance with the Interim Status Standards under the RCRA Act beginning on November 19, 1980 (TR 31, 35).

32. Ms. Becker first visited the facility on or about July 7, 1980 (TR 36).

33. Ms. Becker again visited the facility on or about November 4, 1980, in the presence of David B. Shillman and John Vasi, and told Shillman at that time that she was concerned that the RCRA regulations were about to become effective and there had been no apparent attempt to bring the facility into compliance with the regulations, including the requirement for a fence (TR 117-8).

34. David Shillman stated that his reason for not installing a fence was that he did not own the property and therefore did not want to make improvements on it (TR 567).

35. On November 10, 1980, Ms. Becker sent a letter to John Vasi, as a follow-up to the November 4, 1980, inspection, requesting information on the waste treatment

processes and noting concerns about the large number of drums accumulated on-site since the previous inspection, and that no apparent efforts had been made to comply with the Interim Status Standards to become effective November 19, 1980 (C EX 5).

36. After the effective date of the RCRA regulations (November 19, 1980), but before the date of the December 8 and 17, 1980, inspections, a cooperative agreement existed between Ohio EPA and U.S. EPA, under which Ohio EPA personnel would perform RCRA compliance inspections, including the inspections of the facility, as agents of the U.S EPA (TR 35-67, 337).

37. Ms. Becker went to the facility on December 8, 1980, to conduct an inspection to determine compliance by the faciity with the Interim Status Standards under 40 CFR 265. This inspection was the first of 40 to 45 conducted by her at facilities in northeast Ohio to determine interim status compliance and was conducted in a manner not materially different from subsequent inspections (TR 36, 39, 304-5).

38. The facility was selected for inspection because of concerns the Ohio EPA had about the site based on prior inspections (TR 401).

39. Complainant's Exhibit 1 is a true and correct copy of the inspection form filled out by Ms. Becker contemporaneously with her inspections on December 8 and 17, 1980 (TR 44, 141).

40. Ms. Becker was, during the month of December, 1980, the only Interim Status Standards Compliance Field Inspector in the Northeast District Office of the Ohio EPA, and was responsible for the conduct of such inspections in the 15 counties around that office, including Geauga County (TR 304-5).

41. During Ms. Becker's visit to the facility on December 8, 1980, the only person on the facility was Mark Brostek, who held himself out as manager of the facility and was unable to produce or locate any of the documents sought by Ms. Becker to determine compliance with the Interim Status Standards, or to contact David Shillman by telephone (TR 50-51).

42. On December 9, 1980, John Vasi, who presented himself as President of J.V. Peters and Co., came to the Ohio EPA's offices and requested that the inspection of the facility be redone because he felt the December 8, 1980, inspection was not representative (TR 52, 123).

43. On December 17, 1980, Ms. Becker again inspected the facility in the presence of John Vasi, David Shillman and Angelo Colon (TR 63-4).

44. During the course of the December 17, 1980, inspection, Ms. Becker asked to see a detailed physical and chemical analysis of waste materials handled at the facility, and was told that no such document, which is required by 40 CFR 265.13(a)(1), existed on that date (TR 53).

45. David Shillman admitted that no such document had been prepared, and that the facility relied on analysis conducted by customers who purchased material from Respondents and, to a lesser extent, by generators of the material and on field tests, including specific gravity, smell and a "copper wire test" (TR 515-16, 519, 606, Original Answer ¶1).

46. During the course of the December 17, 1980, inspection, Ms. Becker asked to see documents that would evidence a written general waste analysis plan for the wastes handled at the facility pursuant to 40 CFR 265.13(b), and was told that no such document existed on that date. David Shillman admitted that no such document had been prepared, and stated that they relied on analyses produced by generators and by persons to whom they sold hazardous wastes (TR 56, 606, Original Answer ¶2).

47. During the course of the December 17, 1980, inspection, Ms. Becker observed that no fence or other barrier had been installed around the facility, as required by 40 CFR 265.14(b), and subsequently was informed that a security guard was posted from three days after the December 17, 1980, inspection until late May, 1981 (TR 475; R EX 7C, pp. 6-7; C EX 3, p. 4; TR 563-567).

48. Said guard was removed after the facility had been barred from operating by a temporary restraining order issued by the Geauga County Court of Common Pleas in May, 1981, and no fence was ever installed around the facility because David Shillman or the Company did not have title to the site and thus did not want to spend money for such improvements on the facility (R EX 7B, page 6; Original Answer ¶3; TR 448).

49. During the course of the December 17, 1980, inspection, Ms. Becker observed that there were no signs reading "Danger - Unauthorized Personnel Keep Out", as required by 40 CFR 265.14(c), posted at each entrance to the facility (TR 60; Original Answer ¶4).

50. Such signs were not posted until May 14, 1981, even though Ms. Becker discussed the requirement for their presence with David Shillman on December 17, 1980 (TR 249-50; C EX 9).

51. During the course of the December 17, 1980, inspection, Ms. Becker asked to see documents evidencing the existence of a written inspection schedule and log for the facility, as required by 40 CFR 265.15(b) and (d), and was shown no such documents and told they did not exist. David Shillman admitted that such documents did not exist on that date (TR 64-8, 566; Original Answer ¶5).

52. During the course of the December 17, 1980, inspection, Ms. Becker asked to see written personnel records that list the job titles and provide job descriptions for each position related to hazardous waste management, together with a written description of the type and amount of introductory and continuing training given to each hazardous waste person, as required by 40 CFR 265.16(d). She was told that no such documents existed at the facility, and David Shillman admitted that no such documents existed on that date (TR 70, 566-7; Original Answer ¶6).

53. The written job titles and job descriptions, and records of personnel training required by 40 CFR 265.16(d), were not prepared until several months after the inspection (C EX 3, p. 5).

54. A telephone was available at the facility both at the time of the December 17, 1980, inspection and thereafter, at least through 1981 (TR 22).

55. No internal alarm or communications system capable of providing immediate emergency instruction to personnel was ever installed at the facility, as required by 40 CFR 265.32(a), and David Shillman admitted that a person inside the building and the facility could not easily hear a person outside the building (TR 80-81, 266, 601).

56. The facility consists of approximately two acres, with dimensions of approximately 120 by 720 feet with the long dimension north and south. It is located in an agricultural area in flat terrain and has on it a wooden pole barn (C EX 9; R EX 7A-D).

57. Cattle have grazed within five feet of the property line of the facility, and crops have been grown directly adjacent to the east and west property lines. Access and egress can easily be had from any direction, and evidence of livestock entry has been seen on the facility (TR 243-46; R EX 7B, "Contingency Plan", page 5; TR 476).

58. On the facility were two 20,000-gallon steel tanks of dimensions 10 x 34 feet, one of which was used for the mixing of hazardous wastes in the form of waste solvents, and the other of which was used to contain water contaminated with hazardous wastes that was delivered mixed with the referenced solvents (R EX 7C, p. 3).

59. Flammable wastes were originally stored inside the building on the facility, but were removed to tanks on a diked pad at the rear of the building after the Fire Marshall of Geauga County filed suit to force their removal due to fire code violations (TR 570-71).

60. On the date of the December 17, 1980, inspection and subsequently, there were seven portable hand-held and one-wheeled foam-producing fire extinguishers on the facility (TR 484, 568).

61. There was no well or public water supply available at the facility at any time (R EX 7B, p. 8; Original Answer ¶7[d]; TR 568).

62. Other than said fire extinguishers, there was no equipment at the facility to produce fire-fighting foam or water hose streams, and Respondents proposed that the availability of a volunteer fire department and the presence of a lake approximately 1/4 mile away satisfied the requirements of 40 CFR 265.32(d) (TR 444; Original Answer ¶7[a]).

63. Respondent admits that said equipment is inadequate to deal with other than small ground fires, and the contingency plan submitted over Shillman's signature as part of R EX 7C admits that such equipment could not control a conflagration, which might, as set forth in such contingency plan, be simply allowed to burn itself out (C EX 13, p. 9; R EX 7C, "Contingency Plan", pp. 9-10; TR 92-94).

64. At the time of the December 17, 1980, inspection, drums of hazardous waste were stored with aisle space considered inadequate to meet the purposes of 40 CFR 265.35, as there was but one major aisle space (down the center of the building) sufficient to accommodate spill and fire equipment (TR 94-98, 273-4, 487-8).

65. At the time of the December 17, 1980, inspection, the facility had no internal alarm or communication device immediately available to all personnel to allow communication between all such personnel involved in the pouring, mixing or handling of hazardous wastes, consistent with the requirements of 40 CFR 265.34(a), and none was subsequently subsequently installed (TR 80-81, 266, 601, 94, 567-8).

66. Among other operations carried out at the facility, hazardous wastes were handled during the unloading of trucks into the building, there was movement of drums of waste around the facility and reloading onto other trucks for shipment to customers (R EX 7C, p. 7; TR 488-9).

67. Hazardous wastes were mixed at the facility by being pumped into one of the 20,000-gallon bulk storage tanks on the facility (R EX 7C, p. 2-3).

68. At the time of the December 17, 1980, inspection, no attempts had been made to make, consistent with the requirements of 40 CFR 265.37, any arrangements with the appropriate state and local officials to familiarize them with the layout of the facility, the properties of and hazards associated with the materials handled, location of work stations, evacuation routes, or contact with hospitals relating to the properties of materials handled at the facility and types of injuries that might occur (TR 99; R EX 8, 9, 10, 13; Original Answer ¶10).

69. David Shillman admitted at the time that such arrangements would be a good idea, but no efforts were made to contact emergency response or other local authorities until May 26, 1981 (TR 99; R EX 8, 9, 10, 13; TR 594).

70. At the time of the December 17, 1980, inspection, no contingency plan had been prepared for the facility (TR 100, 102, 595; Original Answer ¶11).

71. The contingency plan ultimately submitted as part of the Part B application for the facility on or about November 24, 1981, was inadequate in at least two respects: an appropriate emergency coordinator was not identified, and the egress provisions merely had personnel running off the site in all directions in case of an emergency (TR 101, 102).

72. At the time of inspection, there was no written operating record, consistent with the requirements of 40 CFR 265.73, maintained or available at the facility, or in existence (TR 566, 102-103, 104-105; Original Answer ¶12).

73. At the time of the December 17, 1980, inspection, none of the records and plans required under the Interim Status Standards were available at the facility or presented, upon request, to Ms. Becker in her capacity as representative of the U.S. EPA, even though Ms. Becker went with Shillman to his office specifically to see any such documents (TR 225-7).

74. The State of Ohio sued J.V. Peters and Company in April, 1981, seeking an injunction against further operation of the site until an appropriate state permit was obtained (TR 452-3).

75. At some time in May, 1981, the State of Ohio obtained a temporary restraining order shutting down the facility until such permit was obtained. This order was subsequently modified to allow and require the defendants to remove the waste materials from the facility (TR 212, 215, 326).

76. On December 17, 1980, some hazardous waste containers, that were being processed, were in an open condition. Other containers in storage were closed, as required by 40 CFR 265.173(a) (TR 107-8).

77. Subsequently, Ms. Becker observed barrels of hazardous waste on the facility that were "closed" only in the sense that a piece of plywood or plastic lawn bags had been placed over the open ends, and also observed barrels completely or almost "rusted out" (TR 108-9).

78. On December 17, 1980, the operators of the facility had stored drums containing flammable waste within 15 meters or 50 feet of the property line (C EX 10; Original Answer ¶15; TR 111).

79. Flammable hazardous waste had been received at the site prior to the December 17, 1980, inspection (C EX 11, 12; R EX 17).

80. On December 17, 1980, there was no way to determine, from an examination of records maintained at the facility or prepared by the operator, the contents of drums located at various points around the facility (TR 506-8).

81. In May, 1981, David Shillman attended a compliance conference with representatives of the U.S. EPA in Chicago, at which time he admits stating that confining storage of flammable hazardous wastes to the small area legally available at the facility was impracticable (TR 562).

82. On November 10, 1980, and on January 14, 1981, the Ohio EPA sent letters to John Vasi, as President of J.V. Peters and Co., first describing observations on November 14, 1980, and next with a copy, as an attachment, of the inspection report prepared by Melinda Becker relating her observations on December 8 and 17, 1980 (C EX 1 and 5).

83. David Shillman acknowledged receipt of said letters in the course of business (TR 440-41; C EX 6).

84. In September, 1983, the U.S. EPA spent money from the federal Superfund to remove and dispose of the drums and bulk fluids of hazardous waste left on the site by the operator (TR 364; Response of Counsel to Order of ALJ, dated April 12, 1984, p. 2, ¶¶ 17, 18).

85. Dr. David Homer is an expert with respect to the coverage and requirements of the hazardous waste rules in 40 CFR, and was assigned to the duty of writing the final hazardous waste permit for subject facility (TR 327-331).

86. Respondent submitted six documents for review by the U.S. EPA and the State of Ohio for purposes of seeking a "Part B" final hazardous waste permit under 40 CFR Part 264 (R EX 6 and 7, A, B, C and D; C EX 3).

87. None of said Part B permit applications for a permit were sufficiently complete to satisfy the requirements of the hazardous waste rules governing the issuance of hazardous waste permits (TR 333).

88. In considering the penalty to be assessed against the facility, Dr. Homer considered both mitigating and aggravating factors, including the fact that the operator was not actively doing business and the lack of efforts to subsequently comply with the Interim Status Standards, including maintaining records reflecting the character and extent of hazardous waste in storage (TR 368-70).

89. Dr. Homer applied the penalty policies established by U.S. EPA in 1980 in formulating the penalty assessed in this action (TR 344-5).

90. The penalty proposed by Dr. Homer, prior to reductions for mitigation, experience and purposes of consistency, is $70,675 to $79,675 (C EX 8; TR 345).

91. The submissions made by Respondent operator in the form of a technical submission, a supplement thereto, and four Part B applications, did not correct many of the deficiencies noted during the inspections, especially the continued lack of site security through fencing or guard service, a proper physical and chemical analysis, and a proper waste analysis plan (TR 372, 377, 379, 383-4).

92. On December 17, 1980, there was present on the site a quantity of Sorball, a commercial product used to absorb spilled material (TR 124-5).

93. At the time the facility ceased operations, there were by its count some 1572 drums of hazardous waste on site (R EX 7C, pp. 4-5, Table One).

94. Nearly half of said drums contained flammable materials, both solid and liquid (R EX 7C).

95. Respondent admitted that certain wastes on the site could not be reclaimed or sold but must be disposed of by landfilling or incineration, and proposed to store such materials until the operations at the site generated cash to pay for such disposal (R EX 7C).

96. Under the Court Order closing the facility, issued in May, 1981, the Respondents were required to allow Ohio EPA to inspect the facility at any time (TR 301-3).

97. On July 3, 1981, Ms. Becker attempted to go on the facility to check compliance with the Court Order closing the facility and was denied access by David Shillman (TR 214, 215).

98. In November, 1982, Ms. Becker attempted to conduct a follow-up Interim Status Standards inspection at the facility by prearranged agreement with David Shillman, who did not appear on that date at the facility (TR 68).

99. David Shillman stated that the reason the documents he claimed to exist in December, 1980, that responded to the requirements of 40 CFR Part 265, were no longer in existence is that they were the type that get "dirtied up" and were probably thrown away (TR 601-604).

100. Though not of major proportions, there were spills of hazardous waste on the facility (TR 576).

101. Respondent did not activate a closure plan for the facility, despite having been out of business and acknowledging its intent to abandon the facility because of the continuing injunction applicable to their operations (TR 335, Response to Order of ALJ, April 12, 1984).

102. Substantial quantities of hazardous waste remain on said site in tanks and other containers.

CONCLUSIONS OF LAW

1. David B. Shillman, even though not technically a party Respondent herein, was and is so directly connected with the Respondent interests by his individual interest in the result and by his active participation in the case as to be bound as a party Respondent herein and the assessment of a civil penalty against David B. Shillman, severally and jointly with his partners, if any, is appropriate (See Conclusion 2, infra, and cases cited).

2. For the reason that the Counsel for Respondent was retained and professional advisors were employed by David B. Shillman to protect interests which were, in fact, the interests of Shillman, and whereas Shillman was the moving party in preparing the defense offered herein and participated in presentation of said defense by his appearance to testify in support of said defense, Shillman entered his appearance as a party herein and there was no need or necessity to issue a summons for him or to amend pleadings to make Shillman a new party as he was already a party appearing in the case by Counsel (Ocean Accident and Guarantee Corp., Ltd. v. Felgemaker et al., 143 F.2d 950, 952[2] [CCA, 6, 1944]; 47 F.S. 660, 663[5]).

3. On this record, it is clear that the Ohio Corporation J.V. Peters and Company, Incorporated, was organized without adequate capital to be employed as a cloak for the evasion of obligations and to work injustice, that is, to shield David B. Shillman from his liability for civil penalties provided by the Act to be assessed against him for violations of regulations promulgated pursuant to the Act, and that the separate personality of said corporation should and will be disregarded and said corporation will be treated as an association of persons (Mull v. Colt Co., 31 F.R.D. 154, 166 [1962]; see also DeWitt Truck Brokers, Inc. v. Flemming Fruit Co. et al., 540 F.2d 681, 685[10][USCA, 4th Cir. 1976] and West v. Costen, 558 F.S. 564, 585[44][1983]).

4. A partnership is generally said to be created when persons join together their money, goods, labor or skill for the purpose of carrying on a trade or business and where there is a community of interest in the profits and losses resulting from such effort. David B. Shillman, by his contribution of labor and management expertise, whereby he exercised absolute authority regarding the procurement and disposal of subject waste and the receipt and expenditure of the operation's money, was a member of J.V. Peters and Company, the alleged partnership and, particularly, where the rights of third parties are involved, it is immaterial whether or not he chose to refer to himself as a partner, for the reason that it is the substance, not form, of said arrangement that is determinative. As a partner, he is entitled to seek contribution from others who he may show to have been partners with him, and thus jointly and severally liable for any violations of the Act attributable to operation of subject hazardous waste facility (Nelson v. Seaboard Sur. Co., 269 F.2d 882 [CCA, MN 1959]).

5. Where a corporation is formed by members of a partnership with the intent of shielding partnership members from partnership civil penalty obligations, if a "mere transformation" is made with the real parties in interest remaining the same, no real change has taken place and creditors may look to the members of the partnership for satisfaction (Metalock Repair Service, Inc., v. Harman, 258 F.2d 809, 813[4], [6 USCA, 1958]), citing Andres v. Morgan, 62 Ohio St. 236, 245, 56 N.E. 875, 877).

6. David B. Shillman and J.V. Peters and Company were, on December 17, 1980, the owners and operators of a hazarous waste treatment and storage facility at 17030 Peters Road, Middlefield, Ohio (the "facility" or "site") pursuant to 40 CFR 260.10. Findings 1, 2, 3, 4, 17, 20, 24.

7. David B. Shillman was managing partner in a partnership styled J.V. Peters and Co., which purportedly transferred its assets and liabilities, including liabilities for noncompliance with interim status standards applicable to that facility under 42 USC 6925(e) and 40 CFR 265.1(b), to a corporation formed in January, 1981, styled J.V. Peters and Co., Inc. Findings 2, 3, 4, 6, 9.

8. David Shillman, J.V. Peters and Co., a partnership, and J.V. Peters and Co., Inc., are each jointly and severally liable for violations of the Interim Status Standards detected at the 17030 Peters Road facility under 42 USC 6925 and 6928, and 40 CFR Part 265. Findings 2, 3, 4, 9.

9. 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 its facility prior to treatment and storage. Findings 44, 45.

10. Respondents violated 40 CFR 265.13(b) by failing to develop and follow a written waste analysis plan. Finding 46.

11. 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. Findings 47, 48.

12. 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. Findings 49, 50.

13. Respondents violated 40 CFR 265.15(b) and (d) in failing to create and maintain at the facility a written inspection schedule and log. Finding 51.

14. Respondents violated 40 CFR 265.16(d) by failing to create and maintain at the facility personnel records which list the job titles and describe the type and amount of continuing and introductory training provided to each hazardous waste management person. Findings 52, 53.

15. Respondents violated 40 CFR 265.32(a) by failing to have installed an internal communications system or alarm capable of providing emergency instruction to facility personnel. Finding 55.

16. Respondents violated 40 CFR 265.32(c) by failing to maintain adequate fire extinguishers, spill control and decontamination equipment at the facility. Findings 60 through 63.

17. Respondents violated 40 CFR 265.32(d) by failing to have available at the facility water at adequate volume and pressure, or foam-producing equipment, automatic sprinklers or water spray systems. Findings 61, 62 and 63.

18. Respondents violated 40 CFR 265.34(a) by failing to have accessible, whenever hazardous waste was being mixed, poured or otherwise handled, an internal alarm or emergency communication device. Finding 65.

19. Respondents violated 40 CFR 265.35 by failing to maintain aisle space to allow unobstructed movement of personnel, fire control equipment, spill control equipment and decontamination equipment to any area of the facility operation in an emergency. Finding 64.

20. Respondents violated 40 CFR 265.37 in that they had failed to make any arrangements with appropriate state and local emergency response officials. Findings 68, 69.

21. Respondents violated 40 CFR 265.51 through 265.56 in that they failed to create, maintain and follow a contingency plan for the facility. Findings 70, 71.

22. Respondents violated 40 CFR 265.73 by failing to create and maintain at the facility a written operating record. Finding 72.

23. Respondents violated 40 CFR 265.74 in failing to make available, upon request and at all reasonable times, all required records. Findings 73, 80.

24. Respondents violated 40 CFR 265.173(a) in failing to maintain containers of hazardous waste, not being handled or processed, in a closed condition. Findings 76, 77, 79.

25. 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. Finding 78.

26. Respondent does not have a permit from the State of Ohio to operate said hazardous waste facility. Findings 74, 75.

27. Respondents violated 40 CFR 265.110 through 265.115 by failing to have and to activiate a closure plan for the facility. Finding 101.

Discussion

It is stated by Counsel in Respondent's brief that David B. Shillman was not and is not now a partner in J.V. Peters and Company. On this record, while Shillman does not profess to have been and to be a partner, it is clear that he acted as an "authorized representative" of the business, operating subject facility, as he was the "person responsible for the overall operation" of same (40 CFR 260.10; Finding 24), exercising complete authority over subject operation (Findings 4, 8 and 12, supra). The representation (TR 550) that the partnership consisted only of Mrs. Brueggemyer and John Vasi (Finding 6) is not credible. Mrs. Brueggemyer had had no experience or connection with the hazardous waste business, but allegedly contributed the entire capitalization of $25,000 used primarily to purchase equipment necessary to the operation of said business as conceived by Shillman. John Vasi's main function, prior to his "termination", was to cook meals for workers (Finding 29). It must be concluded that the investment of said $25,000 was made at the instance of Shillman, who agreed to be responsible for the overall operation, thereby applying his training, skill and labors to that end. A partnership is generally created when persons join together their money, goods, labor and skill for the purpose of carrying on a trade or business for profit, and where the rights of third parties are involved, it is the substance, not the form, of the arrangement that is determinative. It is, therefore, immaterial whether Shillman professed to be a partner in determining here that he was indeed the managing partner who stood to benefit, as such, from said operation (Nelson v. Seaboard Sur. Co., 269 F.2d. 882 [CCA, MN, 1959]).

Respondent moved (TR 412) for dismissal of subject Complaint on the ground that the named Respondent, J.V. Peters and Co., Incorporated, was not in existence on the date of the alleged violations. Subject operation was a partnership on

said date, December 17, 1980, and the partners were not served with process. As a further ground for dismissal, it is argued that, aside from the "Part A Application" of Respondent, there is no evidence that hazardous waste was present on the site on that particular day. Respondent admitted in its Answer to the Original Complaint that said hazardous waste was present on the site (e.g., Paragraph 15 admits that Respondent stored containers holding ignitable and reactive waste in an area less than 15 meters from the property line and argued that Respondent is entitled to a variance due to the dimensions of said site). More importantly, Complainant made a prima facie case on said issue on showing that said notification and Part A application (C EX 7) were filed by Respondent in August and September, 1980, and Respondent then had the burden of going forward with any defense to said allegations (40 CFR 22.24). I have further concluded that the Ohio Corporation, J.V. Peters and Company, Inc., was, on this record, organized without adequate capitalization 9/ or assets, that it was

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9/ Said corporation purported to begin business with $500 cash and "thousands of dollars" in liabilities (Findings 14 and 15). West v. Costen 558 FS 564, 585 (44) states:

> "Undercapitalization, coupled with disregard of corporate formalities, lack of participation on the part of other shareholders and failure to pay dividends while paying substantial sums whether by salary or otherwise, all fitting into a picture of basic unfairness, has been regarded fairly uniformly to constitute a basis for the imposition of individual liability under the doctrine . . . "

At l.c. 586 (46, 47), West v. Costen further states:

> ". . . undercapitalization is a ground for piercing the corporate veil because it is the policy of the law that shareholders should in good faith put (into) the risk of the business capital reasonably adequate for its prospective liabilities",

citing Ballentine on Corporations, 302-303 (1946 ed.).

In addition to the finding of undercapitalization of the corporation (Findings 14 and 15), it is further found that J.V. Peters and Co., Inc., was not at all times treated by its principals as a corporation. U.S. EPA and Ohio EPA were never given formal notice of a change in ownership as required by 40 CFR 270.72(d) (Finding 27); said operations were continued under the new name without change in those operations (Findings 3, 28); Shillman exercised the same absolute authority (Findings 9 through 13); correspondence was prepared and mailed by David Shillman, after January 30, 1981, on "partnership" stationery with no indication of the existence of said corporation (Finding 3).

not treated by Shillman as a corporation after January 30, 1981, and that the purpose of its organization was to shield David B. Shillman and the partnership from liability for civil penalties proposed to be here assessed. Under said facts, the separate personality of the corporation should and will be disregarded and said corporation will be treated as an association of persons (Mull v. Colt Co, 31 F.R.D. 154, 165-166 [1962]; and cases cited, Conclusion of Law No. 3, p. 29, supra).

It is held in Metalock Repair Service, Inc. v. Harman, 258 F.2d. 809, 1.c. 813(4), citing Andres v. Morgan, 62 Ohio St. 236, 245, 56 N.E. 875, 877, that where a corporation is formed by the members of a partnership with the intent of defrauding partnership creditors, if a "mere transformation" is made with the parties remaining the same, no real change has taken place and the creditors look to the same persons for satisfaction. Said case speaks to the facts here presented. On this record, Shillman and Brueggemyer joined their money, skills and labor together to carry on said business of operating said facility.

It is obvious that the participation of John Vasi was as a nominal partner, at most, as no contribution of either money, skills or management effort is shown, and he was "terminated" peremptorily in December, 1980, without any indication that his purported partnership interest was of any value. Likewise, Angelo Colon served as Plant Manager in 1980 and, though he ostensibly received qualifying shares (R EX 11) of no par stock, and was listed as a corporate director in January, 1981, when said corporation was organized, absolute authority to manage the corporate affairs, including the finances, was immediately delegated to David Shillman. Robert Warner left the corporate board in 1983 (as a corporate creditor) and was replaced by Brueggemyer. Again, it is clear that Brueggemyer and Shillman were the source of the capital and management of the business, and that said other persons served passively and nominally, as they had no voice in management, and there is no showing that they could expect to share in any profits which might be realized from said operation.

Complainant urges (TR 43) that we find that the pleadings have been amended to conform to the evidence and that Rule 15(b) and (c) of the Federal Rules of Civil Procedure (Title 28) be invoked and that David B. Shillman and J.V. Peters and Company, the partnership, also be added as parties Respondent. The suggestion has merit but it would appear that Rule 15 actually codifies what has been declared by the courts to be the applicable law. I find that David B. Shillman acted as counsel and shouldered the overall managerial responsibility of said hazardous waste management facility, hiring counsel and professional advisors, and was the moving party in preparing the defense offered herein and participated in presentation of said defense by his appearance as a witness to testify to the facts in issue and, thus, entered his appearance as a party herein. Under such circumstances, there was no need or necessity to issue a summons for him or to amend pleadings to make him a new party as he was already appearing in the case by counsel (Ocean Accident and Guarantee Corp., Ltd., et al v. Felgemaker et al., 143 F.2d. 950, CCA, 6th Cir., 1944; 47 F.S. 660, 663 [5]).

At the conclusion of the hearing in Cleveland, Ohio, on October 25, 1984, the parties were directed to simultaneously file their proposed Findings of Fact, Conclusions of Law, Brief and Argument on or before December 28, 1984, and their respective replies thereto on or before January 10, 1985. At the joint request of the parties, the date for the first filing was extended to January 11, 1985. On February 6, 1985, neither of the parties had filed any post-hearing briefs and the parties were notified that they were not required by the regulations to file post-hearing proposed findings, etc; however, since both had indicated that they desired to so file, I advised that if said filings were not made by February 21, 1985, I would assume that none would be filed. My secretary was advised, first by Complainant Counsel's office and later by Respondent Counsel's office, that they each desired to file their post-hearing briefs. Complainant's

brief was received by me on February 12, 1985, with the advice of Counsel that he had filed same with the Regional Hearing Clerk, along with Respondent's copy, with instructions to the Regional Hearing Clerk that Respondent's copy should be mailed to Respondent's Counsel when Respondent's brief was received by the Regional Hearing Clerk. Respondent's Counsel's communication, through his secretary, on or about February 21, 1985, advised that he intended to mail his brief on February 25, 1985. However, I did not receive Respondent's brief until March 19, 1985. Through a succession of motions filed, dating from April 18, 1984, there has been a continuous exchange between Counsel, including additional discovery requests, motions regarding the time and place of the hearing, and motions to compel discovery and to impose sanctions. I find that the parties adequately responded to discovery requests for the reason that either valid objections were made to the request on the ground of materiality or the information requested was furnished. It should suffice to point out that Respondent's requests respecting Superfund studies and activities at the subject site are not here material. The exchange between Counsel, as recently as May 10, 1985, complains of "tardiness" of opposing Counsel, and requests that certain contentions of opposing Counsel be excluded. Such requests are denied. The public interest in this matter far outweighs the derelictions of Counsel. Both Counsel have filed post-hearing documents later than directed and without respect to time frames provided by regulation. The principles contended for are intended to promote fairness and prevent injustice. It would indeed seem unfair and unjust to strike such submissions at the behalf of a complaining party who was guilty of the identical demeanor and dereliction complained of. Further, there has been no showing that either party has been prejudiced.

I have considered the entire record, including the motions, briefs and proposals of the parties, and any argument, suggestion or finding therein not ruled by or inconsistent with this decision is hereby overruled.

Civil Penalties

In assessing the civil penalties, I have given consideration to 40 CFR 22.27(b) which provides:

> "(b) Amount of civil penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease . . . "

Section 3008(c) of RCRA, 42 USC 6928(c) provides the criteria for penalty assessment, stating:

> "Any order issued under this section . . . shall state with specificity the nature of the violation and specify a time for compliance and assess a penalty, if any, which the administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements."

I have reviewed memoranda developed in EPA Headquarters, entitled, respectively: "Penalty Policy 10/ for RCRA Subtitle C Violations, Guidance on Developing Compliance Orders Under Section 3008 of RCRA", and "Guidance of Application of Interim Status Standards . . . "

Said Penalty Policy classifies Subtitle C violations (both statutory and regulatory) into three groups, with Class I and II violations being the most serious. A penalty matrix is created for each such group. One axis of each matrix requires a determination of the potential harm which could occur from a particular violation, while the other axis involves an assessment of the degree to which the violator's conduct deviated from the regulatory requirements. Each axis is

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10/ The Final Penalty Policy developed by the Agency, dated May 8, 1984, is not here applicable as it applies to "RCRA Administrative actions instituted after the date of the policy" (page 2 thereof).

divided into three categories: Major, Moderate and Minor, in descending order of seriousness. Each cell thus created contains a limited range from which the base penalty amount is to be chosen. Factors, which permit an adjustment to said base penalty amount, pertain to actions or failures to act on the part of the violator, such as history of prior violations and remedial action voluntarily taken.

At the hearing, Dr. David Homer was called as an expert witness and testified that, under said Penalty Policy, he determined that an appropriate base penalty (using said matrices in the manner above described; see Complainant's Exhibit 8) totaled $79,675. 11/

As shown by Complainant's Exhibit 8, such figure was arrived at by determining as to each violation found the class of the violation, what potential damage could result, and assessing the "conduct deviation" of the violator. Each such finding determined whether the violation, within the class determined, was major, moderate or minor, whereupon a penalty amount was selected from the matrix (TR 345). Dr. Homer considered Respondent's operational history (TR 342); that subject facility was not in operation after May, 1981, and that the violations noted by subject inspection persisted (except for the reported posting of a security guard on December 20, 1980), up to that time. Upon consideration of such facts, no adjustment was made to the base penalty provided by the matrix (TR 346). Dr. Homer, along with Counsel and his supervisors, noted that penalties awarded by Initial Decisions usually amount to about one-third of the base penalty (TR 346) and, for that reason, cut the amount of the penalty to be proposed to $25,000.

11/ It is noted that the testimony (TR 345) varies from Complainant's Exhibit 8 in stating that the total penalty calculation was $70,675.00.

I have considered Dr. Homer's testimony and his assessment of the violations as set forth in detail in Complainant's Exhibit 8.

In addition, I have considered said guidelines, Respondent's operational history, the seriousness of the violations found and the conduct of the operators with respect to their efforts to comply with the applicable regulations. I find no reason to increase or decrease the $25,000 penalty proposed by Complainant, and recommend that said amount be assessed. By reason of the foregoing, I recommend issuance of the following

FINAL ORDER 12/

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 the Respondent, David B. Shillman, individually and as managing partner of J.V. Peters and Company, a partnership.

2. Payment of the full amount of the civil penalty assessed shall be made, within 60 days of the Service of the Final Order upon Respondent, 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.

DATED: May 15, 1985

Marvin E. Jones
Administrative Law Judge

12/ 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 to Ms. Beverly Thompson, Regional Hearing Clerk (5 MFA-14), Region V, U.S. Environmental Protection Agency, 230 South Dearborn Street, Chicago, Illinois 60605, the Original of the foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk, EPA Headquarters, Washington, D.C., who shall forward a copy of said Initial Decision to the Administrator.

DATED: May 15, 1985

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ