NOT RECOMMENDED FOR PUBLICATION

No. 99-3215

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID B. SHILLMAN;
DOROTHY L. BRUEGGEMEYER; and
J.V. PETERS AND COMPANY,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA;
CAROL BROWNER, Administrator,
United States Environmental Protection Agency;
and UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

OPINION

Before: WELLFORD, SILER, and GILMAN, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge. This is a twenty-year old case about a $23,500 administrative fine imposed by the Environmental Protection Agency (EPA). David Shillman, Dorothy Brueggemeyer (Shillman's wife), and J.V. Peters & Co. petitioned the district court for judicial review of the fine levied against them. The EPA moved for summary judgment, which was granted by the district court. For the reasons set forth below, we **REVERSE** the judgment of the district court as to Brueggemeyer and **AFFIRM** its judgment in all other respects.

I. BACKGROUND

In May of 1980, David Shillman leased property in Middlefield Township, Ohio for the purpose of operating a hazardous waste storage and reclamation facility. The facility began operations in June of that year under the name J.V. Peters & Co, a partnership. Its partners were Brueggemeyer and John Vasi. Shillman managed the facility and maintained complete control over its daily operations. Vasi was apparently the cook for the facility's employees. In accordance with the requirements of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k, J.V. Peters & Co. applied to the EPA for a permit to treat, store, or dispose of hazardous waste. Under RCRA, J.V. Peters & Co. was allowed to operate the facility while its EPA application was pending. *See* 42 U.S.C. § 6925(e).

In December of 1980, an inspector from the Ohio Environmental Protection Agency (Ohio EPA) visited the facility and identified eighteen violations of RCRA. The inspector's report charged, among other things, that hazardous wastes were not being stored and handled in accordance with RCRA's requirements, and that J.V. Peters & Co. had totally failed to prepare a contingency plan for emergencies. A copy of the inspector's report was sent to J.V. Peters & Co.

Within two weeks of receiving the report, J.V. Peters & Co. was dissolved by its partners. They formed a corporation, and transferred all of the partnership's assets and liabilities to the corporate entity. The name of the corporation was J.V. Peters & Co., Inc. Shillman became president of the corporation and chairman of its board of directors. Brueggemeyer became its secretary and treasurer, and was also a member of its board of directors. The new corporation's business was identical to that of the partnership it had replaced—managing the Middlefield

Township, Ohio facility. If there was any reason for this transaction other than an attempt to evade liability for already-committed or ongoing violations of RCRA, the record fails to reveal it.

In April of 1981, the EPA filed an administrative complaint against J.V. Peters & Co., Inc. based on the Ohio EPA inspector's report, assessing a $25,000 civil penalty. Shillman filed a pro se answer on behalf of J.V. Peters & Co., Inc. He admitted some of the violations, denied others, and demanded a hearing. The case was assigned to an administrative law judge (ALJ).

On September 20, 1983, the EPA filed a "Motion for Leave to Withdraw Administrative Complaint" without prejudice. The ALJ granted the motion. On February 2, 1984, the EPA filed a "First Amended Complaint." The new complaint alleged the same violations, assessed the same $25,000 penalty, and named the same respondent—J.V. Peters & Co., Inc.—as had the original complaint. This time, J.V. Peters & Co., Inc. was represented by counsel when it answered the amended complaint. Counsel claims that the answer was based in significant part on the fact that J.V. Peters & Co., Inc. did not exist at the time the violations occurred. In fact, the answer simply denies "each and every allegation" in the EPA's complaint without comment, in boilerplate fashion.

The ALJ scheduled an evidentiary hearing, which was conducted between October 23 and October 25, 1984. Following the presentation of the EPA's case, J.V. Peters & Co., Inc. moved for a directed verdict. The ALJ denied the motion. J.V. Peters & Co., Inc. then put on its case, which for the most part consisted of Shillman testifying about the nature and the extent of the violations underlying the EPA's complaint, and about the relationship between J.V. Peters & Co., J.V. Peters & Co., Inc., and the people involved with each.

In April of 1985, the EPA filed a motion captioned as one to "Conform the Pleadings to Evidence" in an attempt to add Shillman and the now-defunct J.V. Peters & Co. as respondents. No attempt was made to add Brueggemeyer as a respondent. The ALJ did not enter an order expressly ruling on the EPA's motion. Instead, on May 15, 1985, he issued an initial decision that found Shillman and J.V. Peters & Co. both liable for the violations, and assessed a $25,000 civil penalty. The respondents appealed the ALJ's decision to the Chief Judicial Officer of the EPA.

On May 9, 1986, the Chief Judicial Officer vacated the ALJ's decision, concluding that Shillman and J.V. Peters & Co. had been denied notice of their potential liability for the penalties and the opportunity to be heard. The Chief Judicial Officer then remanded the case to the ALJ with instructions to allow the EPA to amend its complaint to name Shillman and J.V. Peters & Co. as respondents, and to grant them a hearing to present evidence on their behalf.

In June of 1986, the EPA filed a motion for reconsideration, which the Chief Judicial Officer denied. On December 17, 1986, the ALJ issued an order instructing the EPA to advise him as to how it wished to proceed. When the EPA failed to respond, the ALJ entered an order dismissing the case with prejudice for failing to comply with the order. In September of 1987, the EPA moved for relief from the dismissal. The ALJ granted the motion, permitting the EPA to file a "Second Amended Complaint."

In November of 1987, the EPA filed its Second Amended Complaint, naming as respondents J.V. Peters & Co., Inc., J.V. Peters & Co., Shillman, Brueggemeyer, and Vasi. All but Vasi filed answers denying the allegations. (Vasi, who is now deceased, did not answer. A

default judgment was taken against him, and he did not appeal from that judgment.) Once again, the answer filed on behalf of J.V. Peters & Co., Inc. consisted almost exclusively of boilerplate denials and denials of knowledge and information sufficient to respond to the EPA's allegations. The closest its answer came to explaining its theory that J.V. Peters & Co., Inc. was not a proper respondent because it did not exist when the violations occurred was the conclusory assertion of an affirmative defense based on the EPA's purported failure to join an unspecified indispensable party.

On April 13, 1988, the EPA moved for an accelerated decision (the administrative equivalent of summary judgment) against all of the named respondents on the ground that the testimony and evidence adduced at the hearing in October of 1984 established that they were all liable for the violations. The ALJ, in an order dated September 30, 1988, found Shillman, Brueggemeyer, Vasi, and J.V. Peters & Co. jointly and severally liable for the $25,000 civil penalty. Shillman, the ALJ held, was liable as the facility's "operator," and Brueggemeyer and Vasi (who were the partners in J.V. Peters & Co.) were liable as the facility's "owners." The ALJ did not find J.V. Peters & Co., Inc. liable. Additionally, the ALJ concluded that the statute of limitations defense did not apply to the government and did not apply to the type of civil penalty assessed, because it was remedial and not punitive in nature.

On October 24, 1988, all of the respondents who had been found liable (except for Vasi), appealed the ALJ's decision to the EPA's Chief Judicial Officer. The Chief Judicial Officer affirmed, holding that the EPA's Second Amended Complaint was timely filed because it "related back," in a manner consistent with Rule 15(c) of the Federal Rules of Civil Procedure.

(Although ALJs are not bound by the Federal Rules of Civil Procedure in administrative proceedings, *see Sloan v. SEC*, 547 F.2d 152, 155 (2d Cir. 1976), they may—and frequently do—look to them for guidance, as the Chief Judicial Officer acknowledged.)

On September 4, 1990, Shillman, Brueggemeyer, and J.V. Peters & Co. petitioned this court for judicial review. Pursuant to 28 U.S.C. § 1631, the case was transferred to the United States District Court for the Northern District of Ohio. The district court affirmed the Chief Judicial Officer's conclusions on the statute of limitations issue, but remanded the case to the ALJ on the grounds that Shillman, Brueggemeyer, and J.V. Peters & Co. were entitled to an evidentiary hearing. On remand, the case was heard by a different ALJ, who determined that he would accept as evidence the testimony adduced at the 1984 hearing. The hearing took place in October of 1994. At the hearing, the EPA did not present any new witnesses, but made the witnesses who testified in 1984 available for cross-examination. Shillman, Brueggemeyer, and J.V. Peters & Co. objected, asserting that the EPA could not prove its prima facie case against them by relying on the prior testimony of the EPA witnesses in the proceeding against J.V. Peters, Inc., but was required to present live testimony. They refused to cross-examine the EPA's witnesses or to present any defense.

In July of 1995, after reviewing the 1984 transcript de novo, the ALJ issued his decision, finding Shillman, Brueggemeyer, and J.V. Peters & Co. jointly and severally liable for the violations that had occurred nearly fifteen years earlier. He assessed a fine of $23,500, concluding that the EPA had not proven one of the alleged violations. The ALJ rejected the argument that the EPA's utilization of the transcripts from the 1984 hearing deprived the

respondents of their due process rights. Instead, the ALJ concluded that their rights had been protected because the respondents were given the opportunity to cross-examine the EPA's witnesses and to present evidence on their own behalf. Once again, Shillman, Brueggemeyer, and J.V. Peters & Co. appealed, this time to the Environmental Appeals Board, the successor to the Chief Judicial Officer.

On April 14, 1997, the Environmental Appeals Board issued a decision affirming the ALJ. In doing so, the Board deferred to the district court's conclusion that the EPA's complaint was not time-barred. It ruled that this determination was the law of the case. The Board also rejected the argument that the EPA's use of the 1984 testimony was a violation of due process, concluding that the testimony was "probative, relevant, and reliable," and thus properly admitted.

On May 14, 1997, Shillman, Brueggemeyer, and J.V. Peters & Co. petitioned the district court for review. Subsequently, both they and the EPA filed motions for summary judgment. The district court granted the EPA's motion and denied the petitioners' motion. In doing so, the district court concluded that the EPA's Second Amended Complaint "related back" and was thus timely filed. It also determined that the decision of the ALJ in 1994 to allow the EPA to essentially stand on the testimony presented against J.V. Peters & Co., Inc. in 1984 did not violate the respondents' rights to due process. The district court decided that due process was satisfied because the respondents were accorded an evidentiary hearing at which they had the opportunity to cross-examine the EPA's witnesses and to present evidence of their own.

II. ANALYSIS

A. Pleading strategy

In responding to the EPA's original complaint and first amended complaint, J.V. Peters & Co., Inc. filed answers denying liability, apparently on the theory that it could not be held liable for violations that occurred before it was incorporated, but without hinting at its belief that the EPA had sued the wrong entity. As noted above, the answers simply denied each and every allegation in the complaint in boilerplate fashion. From the record, it appears clear that this strategy was part of an intentional litigation tactic, intended for the benefit of J.V. Peters & Co. as much as for J.V. Peters & Co., Inc. *See* Mem. in Opp. to Mot. for Reconsideration (filed June 24, 1986, purportedly on behalf on J.V. Peters & Co., Inc.) ("[J.V. Peters & Co., Inc.] had no duty to point out to [the EPA] that it had sued the wrong entity . . . Such a defendant has no duty to implead or to affirmatively defend the case on the grounds that someone else is responsible, although it could do so . . .[O]ne must wonder whether [the EPA] is aware of the most basic principles of civil procedure."). J.V. Peters & Co., of course, has eagerly adopted this argument.

As a matter of basic civil procedure, however, J.V. Peters & Co. is mistaken. *See* FED. R. CIV. P. 8(b) ("Denials shall fairly meet the substance of the averments denied."); *Weade v. Trailways of New England, Inc.*, 325 F.2d 1000, 1001 (D.C. Cir. 1963) (per curiam) (vacating an entry of summary judgment on statute of limitations grounds, concluding that the defendant's blanket denials of "each and every allegation" in the complaint did not fairly meet the substance of the plaintiff's allegations, and remanding for the district court to consider whether the defendant's failure to give the plaintiff "plain notice" that he had sued the wrong corporation

should estop that corporation from defending itself on that basis, and estop the related corporation that should have been named as a defendant from asserting the statute of limitations as a defense); *Eddinger v. Wright*, 904 F. Supp. 932, 935 (E.D. Ark. 1995) (concluding that under Arkansas's substantially identical Rule 8(b), an answer to a negligence complaint that simply denied "that this defendant was in any way negligent with regard to this occurrence" did not "fairly meet the substance" of the complaint, because it did not explain that the defendant's son, Robert A. Wright, and not the defendant, Robert L. Wright, who had been mistakenly served with process, was driving the car at the time of the accident) (internal quotation marks omitted). *See also Zielinski v. Philadelphia Piers, Inc.*, 139 F. Supp. 408 (E.D. Pa. 1956) (estopping a corporate defendant from denying that it was the tortfeasor's employer because, among other reasons, its answer did not make clear that it was denying agency rather than simply denying liability).

In sum, a corporate defendant is not entitled to run interference for a related entity by interposing a boilerplate answer to a complaint and then participating extensively in the litigation, only to later spring the dual defenses that the plaintiff cannot proceed against the named defendant because it is the wrong party and also cannot proceed against the related entity because the statute of limitations has expired. Estopping J.V. Peters & Co., Inc. from denying that it was the owner of the property when the RCRA violations occurred would have been an appropriate response to this litigation tactic. Another appropriate response would have been to estop J.V. Peters & Co. from asserting a statute of limitations defense.

Finally, we are at a loss to understand why the ALJ did not simply impose successor liability on J.V. Peters & Co., Inc. as the successor to J.V. Peters & Co., consistent with the standard of successor liability that has been applied in CERCLA cases. *See, e.g.*, *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 518 (2d Cir. 1996) (applying the common-law rule that successor liability can properly be imposed if (1) the successor expressly or impliedly agreed to assume the predecessor's liabilities, (2) the transaction is a de facto merger or consolidation, (3) the successor is a "mere continuation" of the predecessor, or (4) the transaction is fraudulent).

We make note of the above points to refute the assertion of J.V. Peters & Co. that it was unfair to let the EPA decide so late in the litigation to proceed against it. Even if we were inclined to accept J.V. Peters & Co.'s argument that the EPA's assertion of claims against it came after the expiration of the limitations period (which we are not), the ALJ would have been fully justified in concluding that J.V. Peters & Co. was estopped from asserting a statute of limitations defense. And the argument of Shillman and J.V. Peters & Co. concerning the allegedly unfair procedures utilized at the 1994 hearing comes with very poor grace, because had it not been for the unreasonable litigation tactics orchestrated by Shillman, there would have been no need for a 1994 hearing. Instead, the liability of all of the potentially responsible parties could have been determined in 1984, if not earlier.

B. Statute of limitations

Shillman and J.V. Peters & Co. argue that the EPA's action against them is barred by the statute of limitations. We conclude that the amended complaint was timely filed, and that the parties' discussion of the "relation back" doctrine is misplaced. The purpose underlying the

"relation back" doctrine is to permit amendments to pleadings when the limitations period has expired. *See Hill v. Shelander*, 924 F.2d 1370, 1377 (7th Cir. 1991).

In this case, the EPA filed a motion on April 15, 1985 that, if granted, would have added Shillman and J.V. Peters & Co. as respondents. The date that the EPA formally requested permission to proceed against those respondents was within five years of the date that J.V. Peters & Co. began operating the site, and was thus within five years of the alleged violations. This satisfies the five-year limitations period that applies generally to "action[s], suit[s] or proceeding[s] for the enforcement of any civil fine, penalty, or forfeiture . . . " 28 U.S.C. § 2462; *3M Co. (Minnesota Mining & Mfg.) v. Browner*, 17 F.3d 1453, 1462-63 (D.C. Cir. 1994) (concluding that § 2462 bars the government from assessing civil penalties under the Toxic Substances Control Act for violations occurring more than five years before the commencement of the EPA proceeding). Although the EPA captioned the motion as one "To Conform Pleadings To Evidence," there can be little doubt that Shillman and J.V. Peters & Co. knew or should have known that the EPA was formally requesting leave to proceed against them.

If a motion to amend is granted, the complaint is deemed amended as of the date the proponent of the amendment sought leave to amend, and not when the request is actually granted. *See Mayes v. AT&T Information Systems, Inc.*, 867 F.2d 1172 (8th Cir. 1989) (per curiam). The ALJ never formally granted the request, apparently for no other reason than his understanding that it was unnecessary to do so in order to add Shillman and J.V. Peters & Co. as parties. Holding that the ALJ's understanding was incorrect, the Chief Judicial Officer

concluded that the ALJ should have granted the EPA the formal permission that it had sought to proceed against Shillman and J.V. Peters & Co.

Although courts may (and in the ordinary course should) require an amendment's proponent to attach a copy of the proposed amended complaint for filing in the event the motion for leave to amend is granted, "the motion itself may be acceptable so long as it puts the opposing party on notice of the content of the amendment." *Moore v. Indiana*, 999 F.2d 1125, 1131 (7th Cir. 1993). Neither Shillman (who, as president of J.V. Peters & Co., Inc., participated actively in the litigation of the EPA's case against the corporation) nor J.V. Peters & Co. argue that the EPA's failure to attach an amended complaint to its motion deprived them of notice either that the EPA was seeking permission to proceed against them, or of what the EPA was seeking to hold them responsible for. Nor did they argue in their opening brief that they were not served with process. *Cf. Robinson v. Jones*, 142 F.3d 905, 906 (6th Cir. 1998) (noting that arguments not raised in the proponent's opening brief are deemed abandoned, and will ordinarily not be considered). For all of the above reasons, we conclude that the EPA's action against Shillman and J.V. Peters & Co. was not barred by the statute of limitations.

But the EPA's case against Brueggemeyer is another matter. The EPA's "Motion to Conform Evidence to Pleadings" does not mention her, and it does not appear that the EPA did anything to add her as a party during the five-year limitations period. It seems fairly clear, as she argues in her brief, that the EPA knew within five years of the violations that she was a proper respondent. We thus conclude that the district court erred in not dismissing Bruggemeyer. As a practical matter, though, this may be of no great benefit to her because,

under Ohio law, when a partnership has insufficient assets to satisfy a judgment—and it appears that J.V. Peters & Co. has no assets with which to satisfy a judgment—the judgment creditor may initiate an action against the partners to execute the judgment, even if the partner in question could have been made a party to the prior suit against the partnership. *See Heinz v. Steffen*, 678 N.E.2d 264, 269-70 (Ohio Ct. App. 1996).

C. Due process

Finally, we reject the argument that Shillman and J.V. Peters & Co. were deprived of their due process rights because of the ALJ's reliance on the testimony of the EPA's witnesses in the 1984 hearing against J.V. Peters & Co., Inc. Essentially, they assert that all of the evidence presented in the 1984 hearing pertained to the liability of J.V. Peters & Co., Inc., which at the time was hanging its hat on the theory that it could not be liable simply because it had not been formed when the violations occurred in December of 1980. During the proceedings in 1984 (in which Shillman participated as the president and chief executive officer of J.V. Peters Co., Inc.), the EPA produced evidence of RCRA violations. It is uncontroverted that J.V. Peters & Co. operated the facility at the time the violations occurred and that Shillman managed all of the facility's operations. In the absence of another logical explanation, it is not unreasonable to infer that those who operated hazardous waste facilities at the time that RCRA violations occurred are responsible for the violations.

Shillman and J.V. Peters & Co. (who were and are represented by the same attorney who represented J.V. Peters & Co., Inc. at the 1984 hearing) were given the opportunity to cross-examine the EPA's witnesses, to present evidence that the violations did not occur, or to

show that they should not be held responsible if they did occur. They did none of these things. Although Shillman and J.V. Peters & Co. argue that the corporation had no motivation to challenge the evidence because it could never have been held liable for the claimed violations, this is refuted by the uncontested fact that the corporation expressly assumed all of the partnership's liabilities. As noted above, we also have no idea why the ALJ did not impose liability on J.V. Peters & Co., Inc. as the successor to J.V. Peters & Co., consistent with the standard of successor liability that has been applied in CERCLA cases.

For all of the above reasons, we do not believe that the ALJ's decision to admit the testimony from the 1984 hearing was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2), which is the standard by which this court must assess the ALJ's legal determinations. *See National Engineering & Contracting Co. v. OSHA*, 928 F.2d 762, 767 (6th Cir. 1991).

III. CONCLUSION

In summary, the EPA's action against Shillman and J.V. Peters and Co. was timely filed without the benefit of the "relation back" doctrine. The EPA's case against Brueggemeyer is barred by the statute of limitations, although the EPA would presumably be able to proceed against her in an action to enforce any judgment against J.V. Peters & Co. Finally, because Shillman and J.V. Peters & Co. were afforded the right to cross-examine the EPA's witnesses, and the opportunity to present evidence to refute their responsibility for the RCRA violations that concededly occurred at the facility under Shillman's management, their due process rights were not violated by the 1994 ALJ hearing.

This case has dragged out appallingly. Part of the blame rests with the EPA, whose procedural ineptitude in this action leaves little to be proud of. But a greater portion of the blame for the delay rests with Shillman and the incorporated and unincorporated incarnations of J.V. Peters & Co. Fortunately, all litigation must eventually end. This case is no exception. For all of the reasons set forth above, we **REVERSE** the judgment of the district court as to Brueggemeyer and **AFFIRM** its judgment in all other respects.

HARRY W. WELLFORD, Circuit Judge, **concurring in part** and **dissenting in part**:

This unnecessarily complicated case arises because of clear negligence and misfeasance on the part of representatives of the Environmental Protection Agency ("EPA") in not pursuing adequately claims of improper operation of a hazardous waste storage site in Middlefield Township, Ohio, between *June and December of 1980*. Judge Gilman has carefully set out the series of blunders and missteps committed by the EPA, its representatives, and its lawyers in attempting to levy a fine against the operator of that site in pursuit of the asserted statutory remedy for the alleged violations.

The unfortunate series of events began when the EPA assessed the $25,000 civil penalty (for the alleged 1980 violations) against the corporation which, of course, was not even in existence in 1980. This initial effort was aborted in 1983 by a motion to withdraw the initial Complaint after an answer was filed by the corporation. Over three years after the inspection, the EPA filed a "First Amended Complaint," asserting essentially the same things as the initial withdrawn Complaint, against --once again-- *only* the corporation. There was no claim of any personal or partnership liability. Once again, the corporation answered and denied liability.

By the time of the hearing in October of 1984, the EPA had almost four years in which to identify specifically the responsible party or parties, but still sought liability against *only* J.V. Peters & Co., Inc. The EPA's proof at that hearing did not indicate personal liability against Shillman or his wife, the corporate officers, nor against Vasi, the former partner. The corporation then moved for a directed verdict. I am of the view that it should have been granted. The EPA failed to make out a case for violations when the corporation was not in existence. At

that juncture, as Judge Gilman acknowledges, the EPA made no motion at that point to assert possible successor liability against the corporation or to asset personal liability against the corporate officers (and former partners).

Subsequently, the April 1985 motion by the EPA sought to "conform pleadings to evidence." The ALJ hearing the case did not rule upon this EPA motion but held, erroneously in my view, Shillman personally liable, as well as J.V. Peters & Co., the partnership. The apparent basis for this holding, without any advance notice to Shillman or the partnership, was that they should have been named defendants and responsible parties. In 1986, the chief judicial officer of the EPA properly vacated this 1985 decision of the ALJ. This action should have ended the controversy once again; more than five years had passed and the EPA had only named J.V. Peters & Co., Inc. as a defendant and responsible party. Any effort by the EPA to name someone else--Shillman or the partners of J.V. Peters & Co.--would have been a new action, and probably time-barred. The chief judicial officer, however, remanded the case after denying the EPA's motion for reconsideration in 1986 to allow the EPA to amend its complaint against the corporation. In any event, the ALJ, upon remand in 1987, dismissed the case because the EPA failed to file any amendment. This was now some seven years after the alleged violations.

I would hold this action by the ALJ to be correct and a proper dismissal under the circumstances. Not until September of 1987 did the EPA move for relief, again without filing any purported amendment which would give the first notice that it was very belatedly--too late from my perspective--seeking to hold Shillman, his wife, and Vasi responsible personally. I

would adjudge the November, 1987 "second Amended Complaint" to be without effect, too late, and precluded by the EPA's ineffectual prior actions over many years.

Shillman is certainly not a paragon of virtue in this case. Had the government made a modicum of effort to discover and assert in a timely fashion the true facts as to responsibility for the 1980 violations, if any, the result, in my view, would have been entirely different. The EPA simply failed in this effort, regrettably, and I have found no effort to explain its deficiencies in the record.

If I am unsuccessful in persuading my brothers to deny the "relief" gratuitously granted the EPA, I would, in any event, deny any interest on the fine asserted against any individual defendant prior to 1994.

I, therefore, respectfully dissent from the decision of Judge Gilman except as to that part denying direct personal liability against Shillman's wife, Dorothy Brueggemeyer.