Sixth Circuit Upholds Fine In Twenty Year Old RCRA Enforcement Action

In an opinion criticizing both the EPA and the owners and operators of a hazardous waste facility for needlessly dragging out an administrative enforcement action, the United States Court of Appeals for the Sixth Circuit has upheld a $23,500 fine for violations of the Resource Conservation and Recovery Act (RCRA) that occurred almost 20 years ago.

In May of 1980, David Shillman (Shillman) leased property in Middlefield Township, Ohio for the purpose of operating a hazardous waste storage and reclamation facility. The facility was operated by a partnership, J.V. Peters & Co. (the Partnership), formed by Shillman's wife and an acquaintance. The Ohio Environmental Protection Agency (OEPA) inspected the facility in December, 1980 and identified eighteen RCRA violations related to the improper storage and handling of hazardous waste and the lack of a contingency plan for emergencies. Within two weeks after receiving the inspector's report, Shillman and his wife dissolved the Partnership and formed a new corporation with an identical name: J.V. Peters & Co., Inc. (the Corporation). Shillman and his wife transferred all of the Partnership's assets and liabilities to the new Corporation, and continued to operate the facility without change. According to the court, "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 the Corporation (not the Partnership) based on the violations identified in the OEPA inspector's report, assessing a $25,000 civil penalty. The Corporation answered the complaint by simply denying "each and every allegation" in boilerplate fashion. Although the Corporation's defense was apparently based on the fact that it had not been incorporated at the time of the violations and that EPA should have pursued the now-dissolved Partnership, the Corporation's answer did not even "hint[ ] at its belief that EPA had sued the wrong entity."

The EPA administrative law judge (ALJ) assigned to the matter held an evidentiary hearing in October 1984 at which both parties presented evidence. The Corporation's case consisted generally of Shillman testifying about the nature and extent of the RCRA violations, and about the relationship between the Corporation and the Partnership, and the people involved with each.

Following the 1984 hearing, EPA apparently realized that it had indeed sued the wrong party and, in April of 1985, filed a motion to "Conform The Pleadings To Evidence" in an attempt to add Shillman and the Partnership as respondents to the complaint. Although the ALJ did not expressly rule on EPA's motion, he issued a decision in May of 1985 finding Shillman and the Partnership (but not the Corporation) liable for the violations, and assessed a $25,000 civil penalty. EPA's Chief Judicial Officer (CJO), however, vacated the ALJ's decision because Shillman and the Partnership had neither received adequate notice of their potential liability nor an opportunity to present a defense at the 1984 hearing. The CJO then remanded the case to the ALJ with instructions to allow the EPA to amend its complaint to name any additional parties, and then provide those parties with a new hearing to present evidence on their behalf.

In November 1987 (seven years after the alleged RCRA violations) EPA filed an amended complaint naming the Corporation, the Partnership, Shillman, his wife, and her former partner. Once again, the Corporation's answer to the amended complaint consisted of boilerplate denials without explaining its theory that it did not exist when the violations occurred.

A second evidentiary hearing was held in October 1994 before a different ALJ. The ALJ in this second hearing determined that he would accept as evidence the testimony provided at the first hearing conducted over 10 years earlier. Accordingly, EPA did not present any new witnesses, but made the previous witnesses available for cross-examination. Shillman and the Partnership objected to this process, and refused to cross-examine EPA's witnesses or to present any defense. In July of 1995, after reviewing the 1984 transcript, the second ALJ issued his decision, again finding Shillman and the Partnership jointly and severally liable for the RCRA violations, this time assessing only $23,500 in fines.

The respondents then filed a judicial appeal of the ALJ's decision, arguing that it violated their rights to due process because the decision was based solely upon evidence introduced in the 1984 hearing, which preceded EPA's amended complaint adding them as respondents. Further, the respondents argued that, because EPA did not file its amended complaint until 7 years after the alleged violations, EPA's claims were barred by RCRA's 5-year statute of limitations. The district court affirmed the ALJ's decision and the respondent's appealed to the Sixth Circuit Court of Appeals, which also affirmed the ALJ's decision.

First, the Sixth Circuit dismissed the Corporation's claim that it was not responsible for violations that occurred prior to its incorporation. The court noted that the Corporation's deceptive litigation tactic of providing only boilerplate denials to EPA's allegations was intended for the benefit of the Partnership as much as for the Corporation. The court held, however, that "a corporate defendant is not entitle 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 to statute of limitations has expired." Although the Sixth Circuit found it unnecessary to hold the Corporation liable in this matter, the court explained that it wanted to "refute the assertion of [the Partnership] that it was unfair to let the EPA decide so late in the litigation to proceed against it."

The Sixth Circuit next summarized the respondent's due process argument as follows: "Essentially, they assert that all of the evidence presented in the 1984 hearing pertained to the liability of [the Corporation], 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." The court, however, rejected any argument that the admission of the 1984 testimony violated the respondents' rights to a fair hearing in 1994, noting that the same attorney represented the Corporation in 1984 and Shillman and the Partnership in 1994. The court further noted that, in the 1994 hearing, both Shillman and the Partnership "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." Moreover, the court found that "had it not been for the unreasonable litigation tactics orchestrated by Shillman, there would have been no need for a 1994 hearing." Accordingly, the

court held that ALJ's decision to admit the 1984 testimony was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Finally, with respect to RCRA's 5-year statute of limitations period, the Sixth Circuit held that EPA's 1985 motion constituted a formal request to proceed against Shillman and the Partnership. "Although the EPA captioned the motion as one 'To Conform Pleadings To Evidence,' there can be little doubt that Shillman and [the Partnership] knew or should have known that the EPA was formally requesting leave to proceed against them." Because EPA brought its motion within the 5-year period following the violations, the court held that EPA's claims against both Shillman and the Partnership were not barred by the statute of limitations.

At the conclusion of its opinion, the Sixth Circuit expressed its annoyance with both EPA and the respondents regarding the 20-year history of this matter: "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." Accordingly, the court affirmed the ALJ's decision holding Shillman and the Partnership liable for the RCRA violations that occurred 20 years earlier.

Shillman v. United States, 221 F.3d 1336, 2000 WL 923761 (6th Cir. 2000)

This article was prepared by Jeffrey L. Woolstrum, a partner in our Environmental Department, and previously appeared in the November, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.