8/23/84

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	TSCA# PCB-83-017
ROCKY MOUNTAIN PRESTRESS, INC. and AERR.CO., INC.	)	
	)	INITIAL DECISION
Respondents	)	

1. Toxic Substances Control Act - Determination of Liability - In a situation where one contracts to have dust control oil applied on its premises, which was later determined to contain detectable levels of PCBs, both the applicator and the property owner are guilty of violating the Act, absent a showing that the property owner had the oil analyzed prior to application.

2. Toxic Substances Control Act - Duty of the Agency - When a property owner advises the Agency that it intends to hire a certain firm to apply dust suppression oil to its premises and inquires of the EPA as to whether or not it has any reason to doubt the reliability of such firm, the Agency owes the regulated community the duty of advising it of any dealings it may have had with such firm in the past. The ultimate decision as to whether or not to use such firm then rests with the property owner.

3. Toxic Substances Control Act - Penalty Determination - When two respondents have violated a single count of a complaint, the court must apportion the penalty determined to be appropriate between them based upon their respective degrees of culpability considering all of the facts surrounding the violation.

4. Toxic Substances Control Act - Penalty Determination - In determining a Respondent's ability to pay a penalty, the court must consider any published Agency penalty policy and, unless factors are present which would argue against its application, should apply such policy as written.

Appearances:

Gary E. Parish, Esquire
Denver, Colorado
For Respondent AERR.CO., Inc.

Gregory T. Hobbs Jr., Esquire
Zach C. Miller, Esquire
Davis, Graham and Stubbs
Denver, Colorado
For Respondent Rocky Mountain Prestress, Inc.

Kent B. Connally, Esquire
Daniel W. Hester, Esquire
U.S. Environmental Protection Agency
Denver, Colorado
For the Complainant

INITIAL DECISION

Preliminary Statement

This is a proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), instituted by a complaint issued November 2, 1983 by the Director of the Enforcement Division, Region VIII, United States Environmental Protection Agency (EPA), against Rocky Mountain

Prestress, Inc. (hereinafter RMP), and AERR.CO., Inc. (hereinafter AERR.CO.), the Respondents herein, for alleged violations of the Act and regulations issued thereunder.[1]

Specifically, the complaint alleges that the Respondents violated 40 CFR § 761.20(d) by applying or causing to be applied dust suppressant oil contaminated with PCBs. The complaint was issued November 2, 1983. The complaint proposed a civil penalty in the total amount of $25,000.00 for this violation.

The answers filed by the Respondents admitted and denied various aspects of the complaint as follows: both Respondents admitted that the oil was applied on the property of RMP on the date and manner alleged in the complaint, but AERR.CO. denied that such oil contained any detectable amounts of PCBs, and RMP denied (1) that they were liable under the Act since they were not a "user of the contaminated oil as contemplated by the regulations"; and (2) that even if such a violation were found, they were innocent of any violation because of the special situation surrounding its deposition.

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[1]Section 16(a) of the Act provides, in part, as follows:

> (a) Civil. - (1) Any person who violates a provision of section 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 15.

Section 15 of the Act (15 U.S.C. 2614) provides, in pertinent part, that it shall be unlawful for any person to "(1) fail or refuse to comply with... (B) any requirement prescribed by section...6, or (C) any rule promulgated under section...6" or to "(3) fail or refuse to (A) establish or maintain records...as required by this Act or a rule promulgated thereunder."

The parties submitted pre-hearing materials pursuant to § 22.19(e) of the pertinent rules of practice. A hearing was held on April 25-26, 1984 in Denver, Colorado.

Following the hearing and the distribution of the transcript, the parties filed initial and reply briefs, findings of fact and conclusions of law, all of which have been carefully considered by the court in the rendering of this decision.

Factual Background

Mr. Michael Bergin, an inspector of EPA, first visited the premises of RMP on May 10, 1983. During that inspection, the plant manager informed Mr. Bergin that the dirt roads in and around their facility were going to be oiled soon pursuant to the requirements of their state air pollution control permit which requires that the roads be treated for dust suppression twice a year. Mr. Bergin explained to the plant manager that the regulations of the Agency prohibit the use of oil containing any detectable levels of PCB for dust suppression purposes. Expressing some concern about this revelation, the plant manager asked Mr. Bergin whether or not EPA had any concern about the reputation of AERR.CO. since that was the firm with whom they had contracted to apply the oil. Mr. Bergin initially stated that he had inspected AERR.CO. and was unaware of any specific information concerning that Company's prior history but he would inquire on this subject of his colleagues at the regional office and report back to the manager. Upon his return to the regional office, Mr. Bergin, upon making an inquiry among his colleagues, reported back to RMP that AERR.CO. had never been found in violation of

the PCB regulations. Mr. Bergin suggested to RMP personnel that they get written assurances from AERR.CO. that the waste oil to be used on their roads contained no PCBs. It is alleged by Mr. Bergin that he informed the general manager of RMP that the only sure way to avoid liability under the PCB regulations was to have the waste oil to be spread on the road analyzed for PCB content prior to oiling.

Upon being advised that RMP intended to oil their roads in the near future, Agency personnel instructed Mr. Dorance to visit the premises and take soil samples of the areas to be oiled so as to provide background data to compare with post-oiling sample taking which the Agency intended to accomplish. In furtherance to that direction, Mr. Dorance went to the RMP premises on May 26, 1983 and upon being advised that the oiling had not yet taken place but would occur on the upcoming weekend, weather permitting, Mr. Dorance proceeded to take samples from the roads that were to be oiled. The oiling took place on May 28, 1983, and on June 2, 1983 Mr. Dorance returned to the RMP facility to take after-oiling samples. Mr. Dorance gathered a split sample in the same location south of the batch plant where he collected a previous sample and also took photos of the area sampled.

The samples both before and after oiling were submitted to the EPA laboratory for analysis and said analysis revealed PCB concentrations of no greater than 5 ppm in either of the two pre-oiling samples. The oily soil sample collected by Mr. Dorance on June 2nd following the oiling showed PCB contamination level of an average of 37 ppm of Arochlor 1254. No PCB concentrations were reported of Arochlor 1242 and 1260, although some low levels of those two polymers of PCBs had been found in the pre-oiling analysis.

Upon being advised of the presence of PCBs following the oiling, RMP contracted with several consultants for the purpose of: (1) conducting an extensive sample taking exercise of its own on the roads involved; and (2) to test all of the other oil on its premises to make sure that it was PCB-free. The results of these sampling programs showed that there were, in fact, moderately high levels of PCBs throughout the oiled roads of RMP's facilities and that no other source of PCB contaminated oil is or was present on their property. The conclusion drawn from this latter analysis was to conclusively show that the source of the PCBs found on RMP's premises did not come from any oil which it may use or have used in the course of its normal business processes.

None of the parties in this matter had subjected the dust suppression oil to laboratory analysis prior to its application on RMP's facilities. There was testimony from AERR.CO.'s witnesses to the effect that prior to the oiling they had offered to have the oil tested by a reliable laboratory if RMP was willing to pay the $25.00 laboratory fee. This allegation was vehemently denied by RMP witnesses who stated that the only time any conversation was had concerning laboratory analysis of the oil came up in conversations between AERR.CO. employees and RMP employees after the oiling took place. In this regard, RMP further argues that it would make no sense for them to refuse to pay a $25.00 analysis fee when they were buying oil which cost in excess of $1,500.00. In furtherance of the advice given to it by Mr. Bergin, RMP did, however, require that AERR.CO. certify that the oil to be applied was PCB free. AERR.CO. complied with this request and on the two invoices which accompanied the

oil to RMP's facility on the day of the oiling, there were printed: "Dust control oil from selected use crankcase oil not containing any PCB source material." RMP argues that, given the advice it received from EPA to the effect that they had no past problems with AERR.CO. in regard to PCBs and that they felt them to be a reliable and reputable supplier, it felt that it had taken all reasonable precautions under the circumstances by requiring AERR.CO. to certify that the oil they supplied was PCB-free.

AERR. CO.'s position in the whole matter is that the oil that they supplied to RMP's premises and which was subsequently applied by their employees, in fact, contained no PCBs and that they, therefore, have no culpability for the violation alleged in the complaint.

Discussion

My disposition of this matter requires that I first determine the liability of the two Respondents and, secondly, assuming that both parties are found to be culpable, to apportion the proposed civil penalty among them based on their respective degrees of involvement. The penalty allocation exercise is required since the complaint only assesses one civil penalty and makes no attempt to apportion such penalty between the two Respondents. The post-hearing briefs of both the EPA and RMP did, however, address this question of apportionment in some detail.

As indicated above, RMP's defense to the complaint was two-fold. The first one being that they are not liable for any violation since they did not "use" the contaminated oil as that term is used in the regulations. The regulation applicable to this situation is found at 40 CFR § 761.20(d) which states:

"The use of waste oil that contains any detectable concentration of PCB as a sealant, coating, or dust control agent is prohibited. Prohibited uses include but are not limited to, road oiling, general dust control..."

In support of its argument that the language of the regulation is not applicable to it, RMP provides certain definitions of the word use and attempts to conclude that they did not use the contaminated oil but merely had it applied to their premises by a culpable applicator and they were merely an innocent third party. EPA counters this argument with a broader definition of the word use and users such as that found in Black's Law Dictionary which includes within its purview one who enjoys a benefit from such use. Clearly RMP enjoyed a benefit from the application of the PCB contaminated oil to its premises in that it was required to utilize some form of dust control technology under the terms of their state issued air pollution control permit and elected to use oil for this function. Clearly they benefitted from this application and, of course, were the persons who ordered the oil to be applied. This argument, although academically intriguing, can not be allowed to stand since its acceptance by the court would be contrary to the express purposes of the statutes and regulations promulgated thereunder. To allow this argument to stand would permit a person to cause contaminated oil to be applied to its premises by a third party and then appear later and say they have no responsibility for the irresponsible acts of others. Since one of the purposes of the Act and the regulations is to prevent the introduction of PCBs to the environment, the interpretation suggested by Respondent RMP would be contrary to that purpose and, therefore, be unacceptable. I am, therefore, of the opinion that RMP did, in fact, violate the terms of the above-cited regulation when they contracted with AERR.CO. to apply the oil to their property.

Having determined that RMP is guilty of a technical violation of the Act and the regulations promulgated pursuant thereto, I must now address their degree of culpability in this matter. As discussed above, RMP officials when being advised of the absolute prohibition against the application of any PCB contaminated oil for the purposes of dust suppression inquired of EPA agents as to whether or not it had any cause to be concerned about the reputation or liability of AERR.CO. particularly in the area of PCBs. The advice that they ultimately received from EPA was that their records revealed that AERR.CO. had not been found guilty of any prior PCB violations. This advice, although technically true, was for all practicable purposes, inaccurate and misleading since the record reveals that the Agency had, in fact, on a prior occasion attempted to prosecute AERR.CO. for a PCB violation, which prosecution was subsequently withdrawn for reasons unrelated to this decision. It, therefore, turns out to be the case that the EPA did, in fact, have some reason to believe that AERR.CO. was not the most reliable supplier of oil in the area. By failing to advise RMP of this fact, it lulled them into a sense of false security and as a result thereof RMP did not seek the services of another oil supplier, which they could have easily done, or gone to the expense of having the oil tested prior to its application. Rather they relied upon the advice given to them by the EPA inspector to the effect that it would be a good idea to obtain some sort of guarantee from AERR.CO. that the oil they supplied was PCB free. RMP did request and obtain such guarantee from AERR.CO.

At the trial, and in their post-hearing briefs, EPA points out that RMP was negligent in not having the oil subjected to laboratory analysis prior to its application. RMP counters this argument with the observation

that since EPA is in the business of protecting the environment that perhaps it was derelict in not having the oil tested itself. EPA's position on this point is that: (1) they do not have the wherewithall nor the obligation to test all of the thousands of oil suppliers located within its Region; and (2) that in any event it is the ultimate responsibility of the user of the oil to see that it is contamination free. EPA also points out that under the regulations generally applicable to PCB matters there is a 50 ppm limitation below which the Agency has no authority. Although EPA is correct in its observation that it has no obligation nor facilities or resources to test the oil in its geographical jurisdiction, under the circumstances of this case, a good argument could be made that EPA, knowing that the oil was to be used for road application purposes, a use that has no 50 ppm limitation, should have tested the oil themselves. Under the circumstances of this case, I need not decide who among the parties to this proceeding were the most derelict in their duty in not having the oil subjected to laboratory analysis since such determination is not crucial to my ultimate decision.

In this regard, I am of the opinion that RMP acted reasonably under the circumstances and their failure to have the oil subjected to laboratory analysis prior to its application was not negligent, given EPA's statements as to the reliability of the supplier and the fact that they did, in fact, obtain a guarantee of PCB-free oil. In this regard it should be noted that the record reveals that RMP has used AERR.CO. in the past as a supplier of dust suppression oil without any apparent repercussions.

Section 16 of the Act which has to do with the assessment of civil penalties in these matters, requires that the Agency consider, among other things, prior violations of the Respondent, degree of culpability,

and other matters as justice may require. In evaluating Respondent RMP's degree of culpability in this matter, it should be noted that they have agreed to clean up the facility and transport all of the contaminated soil to an approved disposal site at a cost of approximately $350,000.00. The record also reveals that the Respondent RMP has expended in excess of an additional $50,000.00 for sample taking and analysis, and consultant fees (exclusive of attorney fees). Considering all of these facts and applying the statutory mandate of consideration of "such other matters as justice may require", I am of the opinion that RMP's degree of culpability in this matter is relatively small.

To the extent the record reflects a posture of cooperativeness and responsbility on the part of RMP, the record reflects the opposite in the case of AERR.CO. My reading of the record reflects that AERR.CO. has consistently refused to share any of the costs of the subsequent investigation undertaken by RMP and its consultants or to contribute in any way to the costs of the clean-up, discussed above. AERR.CO.'s position in this matter is that they have no liability whatsoever since the evidence shows (at least in their view) that the oil which they delivered to RMP's facility was PCB-free. The post-hearing brief of AERR.CO. rests its defense in this regard entirely upon its analysis of the results of the sampling protocol accomplished by EPA and RMP. As discussed above, the initial sampling done prior to the oiling revealed the presence of low levels of certain Arochlors of PCBs. Arochlor is a trade name utilized by Monsanto Company, one of the primary producers of PCBs and the numbers follwing the designation Arochlor, such as 1242, 1260, and 1250, merely reflect the number of chlorine molecules that are

bound in the ultimate product. In its post-hearing brief, counsel for AERR.CO. engages in a rather imaginative and intriguing analysis of all of the sampling done on the subject premises and takes the position that since certain Arochlors were found at the first sampling which were not found in the more extensive subsequent samplings, demonstrate that all of the PCBs ultimately discovered on RMP's facilities were there prior to the May 28th oiling. They argue that since higher concentrations of certain Arochlor isomers were found at depth and, in some instances, higher concentrations at the surface that, for the most part, certain of the isomers were found in some portions of the property and not in others, and that this confusing array of data clearly demonstrates that the dust suppression oil applied by AERR.CO. on May 28th contained absolutely no PCBs.

Although this argument is certainly intriguing, it ignores the testimony of Mr. Topolski, the only identifiable PCB expert to appear and testify at the hearing. Mr. Topolski, who was the president of one of the consulting firms hired by RMP, has an impressive array of credentials in the area of PCB chemistry, analysis, control and disposition. It was Mr. Topolski's uncontroverted testimony that the PCBs found on the premises of RMP were the result of a single application and that that application was the one done by AERR.CO. on May 28th. Mr. Topolski, after explaining in some detail how PCB oil is manufactured, testified that the variety of results shown by the sampling protocols and the laboratory analysis, thereof, are consistent with his understanding of the behavior of PCBs in the environment. For one thing, he explains the absence of the laboratory discovery of certain PCB Arochlors in the subsequent

samplings by his explanation that in some cases a higher concentration of certain PCB Arochlors will mask the presence of other Arochlors which are present in smaller concentrations and that simply because one only finds a particular Arochlor, upon laboratory analysis, does not necessarily mean that the other forms of Arochlors were not, likewise, present. He also explains that the different concentrations of PCBs found at different depths throughout the Respondent's premises are explained by the difference in the matrix of the soils upon which the PCB oil was applied, the effect of sunlight and other chemicals that might be present in the soil.

As we discussed above, none of the parties to this proceeding performed any laboratory analysis on the oil at any time prior to its application. The record does reveal, however, that the tank in which AERR.CO. stored the oil which it ultimately applied to the premises of RMP, did contain PCB contaminated sludge. One of the employees of AERR.CO. testified that the tank in question was accidently punctured by one of its employees with a forklift while practicing the use of that device and that the tank was subseqently cut up for scrap. The whereabouts of its component parts is unknown to AERR.CO. officers. Given the nature of PCBs, that is, that they do not degrade in the environment but are, on the contrary, extremely persistent, leads one to the conclusion that the oil applied by AERR.CO. was most likely contaminated with PCBs and, despite counsel's ingenious arguments to the contrary concerning the results of the analysis of the samples obtained from the RMP premises, I am of the opinion that the oil which AERR.CO. applied did, in fact,

contain detectable limits of PCBs. It necessarily follows that AERR.CO., likewise, violated the provisions of the Act and the regulations by applying PCB contaminated oil to the premises of RMP.

Having determined that both of the Respondents violated the Act and the applicable regulation, I must now determine whether or not the penalty proposed by the Complainant is appropriate and, if so, how that penalty should be allocated between the two Respondents.

Penalty Assessment and Allocation

In the pre-hearing exchange directed by the court, EPA was required to explain in some detail how it calculated the proposed penalty as found in the complaint. Their response indicated that the penalty was calculated in accordance with the PCB penalty policy found in 45 F.R. 59776. The use of this penalty policy in these matters is recognized both by the pertinent regulations and has been cited with approval by the undersigned and all of his colleagues in similar cases. EPA's witness at the hearing on the question of penalty calculation was Mr. J. William Geise, who is the chief of the Toxic Substances Branch of Region VIII, EPA. After explaining that he used the above-mentioned penalty policy in calculating the proposed penalty in this case, Mr. Geise went on to describe how the penalty policy is structured and how he applied the various elements of the penalty policy to the facts of this case in arriving at the penalty set forth in the complaint. What the penalty policy does is take the various elements set forth in the statute, which the Administrator must consider in arriving at a penalty in these cases, and discusses them separately and in some detail. The policy

contains a table which has in it a matrix of suggested penalties ranging from $200.00 to $25,000.00, the statutory maximum. The matrix has on one axis, an array of columns to measure the extent of potential damage under the categories "major", "significant", and "minor". On the other axis, there is a description of circumstances surrounding a violation (probability of damages). This axis is divided into three categories: high range, mid-range, and low range, which are further subdivided into two levels. Therefore, the matrix presents six levels of probability of damage on one axis and three levels of extent of potential damage on the other.

Mr. Geise placed the "probability of damage" in the high range and major category based on the language of the policy which states that "the Agency chose to prohibit these areas whenever detectable levels of PCB were present, because any such use of PCB is likely to result in widespread environmental and health damage." The witness said that since that language suggests to him that the discharge of PCB contaminated oil for road oiling purposes would result in widespread health and environmental problems, that that was similar to the type of penalty that the policy discussed under the "improper disposal" category of PCBs. Having determined the appropriate place on the two axis of the matrix which are appropriate to this matter, reference to the policy shows that the appropriate penalty for this violation would be $25,000.00. I have no argument with the Agency's penalty assessment in this case and my reading of the briefs of the parties indicates that Respondent, RMP, does not either, but they say that they are not responsible for any of it. On on the other hand, AERR.CO. says they do not have much of an argument with it either except that by reference to that same penalty

policy their liability can not exceed four per cent of the average of their last four years gross sales which results in a substantially smaller number than $25,000.00. Having determined that $25,000.00 is an appropriate penalty to be assessed in this case, I must now make a determination as to how to equitably apportion that number between the two Respondents.

Under the circumstances, I am of the opinion that, although RMP is guilty of violating the above-cited regulation, its culpability in this matter is extremely small given the steps it took to assure that the oil to be applied was PCB-free and, just as importantly, its cooperative attitude in assuring that the contaminated soil will be cleaned up and removed at a cost of approximately $350,000.00, in addition to the more than $50,000.00 that RMP was forced to expend in hiring consultants and running its own tests on the premises, all of which demonstrated a position of cooperation and corporate responsibility. I am, therefore, of the opinion that the $25,000.00 should be allocated on the following basis: 80 per cent to AERR.CO., and 20 per cent to RMP. I further am of the opinion that the $5,000.00 penalty allocated to RMP should, in this case, be reduced to $-0- on the condition that within sixty (60) days from the date of this decision RMP has cleaned up the premises and removed the contaminated materials to an authorized site and that such fact has been certified to the Agency.

Having determined that, under the circumstances of this case, AERR.CO. should be assessed a penalty of $20,000.00, I must now address AERR.CO.'s argument that even if they are found to be liable for some penalty, it can not exceed 4 per cent of the last four-year average of gross sales, which in this case turns out to be $8,990.00.

Section 16 of the Act requires that in assessing a civil penalty, the Administrator must consider the following:

> "In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, and history of prior violations, the degree of culpability, and such other matters as justice may require." (Emphasis supplied.)

The regulations which establish the rules of procedure in these cases found at 40 CFR 22 states in § 22.27(b) that:

> "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 than the 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."

During the course of the hearing in this matter, counsel for AERR.CO., revealed that his client has a serious problem as to its ability to pay a penalty under the Act and the penalty policy. This disclosure came as a relative surprise to the court and the other parties since the usual practice is that if a Respondent in these matters wishes to contest the amount of the penalty based on its inability to pay, such defense must be raised in its answer. No such defense was set forth in AERR.CO.'s answer to the complaint and, thus, neither the court nor the other parties were aware that this defense would be forthcoming until the middle of the trial. When this procedure was made known to counsel for AERR.CO., he agreed to provide the other parties and the court with certain financial documents, such as--income tax returns and financial statements--as proof of his client's inability to pay the proposed

penalty. Pursuant to a post-hearing order issued by the court, Respondent, AERR.CO. provided copies of its income tax returns and other financial data for the years 1980 through 1983 and, although counsel for the Complainant objected that these returns were not signed and therefore unreliable, I have no reason to suspect that counsel would provide false documentation to a Federal agency, an act which is associated with substantial criminal sanctions. The documentation provided by AERR.CO. reveals that the gross sales of that Company were as follows: 1980 - $163,617.00; 1981 - $313,973.00; 1982 - $212,000.00; 1983 - $209,405.00. These figures total $898,995.00, giving an average of $224,749.00, which when multiplied by 4 per cent results in a figure of $8,990.00.

Referring to the above-mentioned penalty policy, one finds that in assessing a Respondent's ability to pay and ability to continue in business as used in the statute, it is believed that a year's net income as determined by a fixed percentage of total sales will generally yield an amount which the firm can afford to pay. The policy goes on to state that: "the average ratio of net income to sales level for U.S. manufacturing in the past five years is approximately 5 per cent. Since small firms are generally slightly less profitable than average size firms, and since small firms are the ones most likely to have difficulty in paying TSCA penalties, the guideline is reduced to 4 per cent." The penalty policy then goes on to say that for purposes of calculating the ability to pay, figures for the current year and the prior three years should be averaged. Four per cent of the average sales will serve as the guideline for what the company has the ability to pay.

The testimony of AERR.CO.'s officers and employees indicate that over the past several years the Company has consistently lost money, and as counsel for AERR.CO. states in his brief even the $8.990.00, as calculated by the penalty policy, would be practicably impossible for this Respondent to pay, given its continuing negative cash flow.

Although the court is not absolutely bound by any published penalty policy of the Agency in assessing an appropriate penalty in these cases, should the court deviate from the terms thereof it must explain the reasons for such differences. In this particular case, I am unable to establish a creditable argument for increasing the assessed penalty against AERR.CO. given the clear language of the penalty policy and the absence of any other factors which would argue against its application in this case. Unlike most of the numbers suggested by this penalty policy, which involve a great deal of subjective evaluation, the "ability to pay" portion of the policy is totally objective in that it requires only the application of arithmetic to arrive at a given figure. Since I have no reason to suspect the figures provided by AERR.CO. in response to the court's post-hearing order and the clear, unequivocable language of the penalty policy applicable to these proceedings, I must reduce the assessed penalty applicable to AERR.CO. from $20,000.00 to $8,990.00, based on its inability to pay.

In making this determination, I must observe that it is unfortunate that a Company possessing such meager funds is able to cause the potential for such widespread environmental damage, and in the course of doing so, has caused a relatively innocent party to expend in excess of $400,000.00 to clean up the mess made by the more culpable and apparently more irresponsible party.

In arriving at this conclusion, I have carefully considered the entire record in this case, consisting of the transcript, the exhibits and the briefs of all the parties. All contentions of the parties presented for the record have been considered, and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this initial decision are denied.

ORDER[2]

Pursuant to § 16(a) of the Toxic Substances Control Act (15 USC 2615(a)), a civil penalty of $8,990.00 is hereby assessed against Respondent, AERR.CO., Inc., for the violation of the Act found herein.

Pursuant to § 16(a) of the Toxic Substances Control Act (15 USC 2615(a)), a civil penalty of $5,000.00 is hereby assessed against Respondent, Rocky Mountain Prestress, Inc., which penalty shall be reduced to $-0- contingent upon Rocky Mountain Prestress, Inc. cleaning up the subject site and removing the contaminated material to an approved disposal site in accordance with an approved procedure agreed to by the Complainant. Such clean up and disposal must be accomplished within 60 days of the date of this Order and certified to by the Complainant. Failure to accomplish such clean up and disposal shall result in the assessment of the full $5,000.00 penalty herein established against said Respondent.

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[2]Unless an appeal is taken pursuant to § 22.30 of the interim rules of practice, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. (See § 22.27(c)).

Payment of the full amount of the civil penalties assessed shall be made within sixty (60) days of service of the final Order upon Respondent, AERR.CO., Inc., by forwarding to the Regional Hearing Clerk a cashiers' check or certified check payable to the United States of America.

Should Respondent, Rocky Mountain Prestress, Inc., fail to comply with the conditions set forth herein within the time periods established, payment in the full amount of the assessment against said Respondent shall be paid in a like manner.

T. B. Yost

Thomas B. Yost
Administrative Law Judge

DATED: August 23, 1984

CERTIFICATE OF SERVICE

I hereby certify that the original and copies of the attached decision rendered by Administrative Law Judge Thomas B. Yost were recieved by the Regional Hearing Clerk on this date. I further certify that on this date I hand delivered a true copy of the same to Daniel Hester, Office of Regional Counsel, 1860 Lincoln Street, Denver, CO, and sent a true copy of the same by Certified Mail, Return Receipt Requested, to:

Gary E. Parish
R. Daniel Schied
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2660 Petro-Lewis Tower
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Gregory J. Hobbs, Jr.
Zach C. Miller
Davis, Graham & Stubbs
P.O. Box 185
Denver, CO 80201

August 28, 1984
Date

Barbara M. Niebauer
Regional Hearing Cle

cc: Thomas B. Yost
Administrative Law Judge

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

P 717 266 419

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Gregory J. Hobbs, Jr.
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