

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

83-11020
P12: 54

In the Matter of

RINDO Casting Co.,

Respondent

)
)
)
)

Docket No. TSCA-82-1089

1. Toxic Substances Control Act - PCBs - Owner of diecasting machines using PCB hydraulic fluid found to have violated 40 C.F.R. 761.40(a)(7), by not marking its machines, and to have violated 40 C.F.R. 761.20(a), for its unauthorized use of PCBs in a manner other than in a totally enclosed manner.
2. Toxic Substances Control Act - PCBs - In determining a violator's degree of culpability with respect to the assessment of a penalty, the test is not what the violator actually knew, but whether it should have known of the relevant PCB requirements and their applicability to its operations.
3. Toxic Substances Control Act - PCBs - Defense of lack of culpability based on claim that owner of diecasting machines containing PCB fluid did not know of the requirements of the PCB rule and that the fluid contained PCBs rejected. Publication of the PCB Ban Rule in the Federal Register Notice is sufficient notice to the affected public of the requirements of the rule. Since the owner had been purchasing hydraulic fluid over many years and did not know its chemical composition, it should have tested the hydraulic fluid for its PCB content.
4. Toxic Substances Control Act - PCBs - Proposed penalty of \$35,000 reduced to \$16,250, because of violator's promptness and thoroughness in eliminating the hazards created by its PCB contaminated hydraulic machines, and because it expended a substantial sum going beyond the requirements of the rule in order to ensure that none of its diecasting machines contain PCBs of 50 ppm or more.

Appearances:

George Ciampa, United States Environmental Protection Agency, Region I, Boston, Massachusetts, for Complainant.

Gregory L. Benik, Hinckley & Allen, 2200 Fleet National Bank Building, Providence, Rhode Island, for Respondent.

INITIAL DECISION

This is a proceeding under the Toxic Substances Control Act ("TSCA"), Section 16(a), 15 U.S.C. 2615(a), for the assessment of civil penalties for violation of the rule promulgated under Section 6(e) of the Act, 15 U.S.C. 2605(e), governing the manufacturing, processing, distribution, and use of polychlorinated biphenyls ("PCB Ban Rule"), 40 C.F.R. Part 761.^{1/} The complaint issued by the Regional Administrator of the United States Environmental Protection Agency charged Respondent, RIDCO Casting Co., with failing to mark hydraulic systems using PCB hydraulic fluid, as required by 40 C.F.R. 761.40(a)(7), and with the unauthorized use of PCBs in a manner other than a totally enclosed manner in violation of 40 C.F.R. 761.20(a), since RIDCO did not test the hydraulic fluid in its hydraulic systems for its PCB content as required by 40 C.F.R. 761.30(e)(1). A penalty of \$35,000 was requested, \$15,000 for failure to mark, and \$20,000 for using PCBs in a manner other than totally enclosed. RIDCO answered and admitted that its hydraulic systems using PCB hydraulic fluid were not marked in compliance with the PCB Ban Rule, and that it did not test the

^{1/} Section 16(a) of the Act, 15 U.S.C. 2615(a), provides in pertinent 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 [15 U.S.C. 2605], or (c) any rule promulgated under section . . . 6"

hydraulic fluid as required by the rule. It alleged, however, that the violations were inadvertent, were done without knowledge, and that the penalty was excessive.^{2/}

A hearing was held in Providence, Rhode Island on October 4, 1983. Thereafter, each party submitted proposed findings of fact, conclusions of law, and a proposed order together with a supporting brief. On consideration of the entire record and the briefs submitted by the parties, a penalty of \$16,250 is assessed. All proposed findings and conclusions inconsistent with this decision are rejected.

Findings of Fact

1. RIDCO operates a custom zinc diecasting business in Pawtucket, Rhode Island. Complaint, Par. 1, and answer; Tr. 51.^{3/}
2. In its fiscal year immediately prior to that in which the date April 28, 1982, occurred, RIDCO's gross sales (total business revenue from all operations) exceeded \$4 million. Complaint, Par. 2, and answer.
3. From 1970 to 1972, RIDCO purchased PCBs from Monsanto. Complaint, Par. 4, and answer.
4. On April 28, 1982, RIDCO's facility was inspected by a duly designated representative of the Administrator of the United States Environmental Protection Agency ("EPA"), Donald K. Fulton. Mr. Fulton is a compliance auditor for Versar, Inc. which is under contract with the EPA to do TSCA

^{2/} RIDCO also alleged that the definition of "totally enclosed manner" in the PCB Ban Rule, 40 C.F.R. 761.3(hh), was in excess of delegated congressional authority. That issue, however, may not be considered in this proceeding. See the decision of the Judicial Officer in The Dow Chemical Company, Docket No. TSCA (16(a))-1 (July 28, 1982). In its prehearing letter, RIDCO agreed that Dow precludes consideration of its claim that the rule is invalid in this enforcement proceeding, but said that it was reserving its right to place on the record its position as to the invalidity of the rule.

^{3/} "Tr." refers to the transcript of the hearing.

inspections for the EPA. Complaint, Par. 3, and answer; Complainant's Exhibit 2; Tr. 12.

5. Fulton found sixteen diecasting machines owned and operated by RIDCO. Each of these machines had a hydraulic reservoir containing hydraulic fluid used to operate the machine. Tr. 16.

6. The hydraulic fluid in eight of these diecasting machines contained PCBs in excess of 50 parts per million (ppm). The PCB content ranged from 5,000 ppm to 270,000 ppm. Complaint, Par. 6, and answer; Complainant's Ex. 2.

7. The hydraulic fluid containing PCBs was in use in RIDCO's diecasting machines prior to November 1, 1979. Complaint, Par. 6, and answer.

8. The eight diecasting machines containing the PCB fluid were not marked with the large PCB Mark ("M_L") as required by the PCB Ban Rule, 40 C.F.R. 761.40(a)(7). Complaint, Par. 7, and answer.

9. RIDCO did not test the hydraulic fluid of each of the eight diecasting machines containing the PCB fluid by November 1, 1979, and at least annually thereafter, for the concentration of PCBs in said hydraulic fluid, as required by 40 C.F.R. 761.30(e)(1). Complaint, Par. 8, and answer.

10. All of RIDCO's diecasting machines leak and this was known by RIDCO. Tr. 91, 103.

11. The EPA inspector saw evidence of hydraulic fluid leaking from the eight diecasting machines containing PCBs. The existence of leaks was disclosed by the presence of oil on top of the machines and of fresh absorbent material on the machines and on the floor beneath the machines. Tr. 22-24, 30, 34-37, 40-41; Complainant's Exhibit 2.

12. On May 27, 1982, the EPA sent RIDCO a written notice of violation informing RIDCO of the violations alleged in the complaint. Complaint, Par. 10 and answer; Complainant's Exhibit 4.

13. Upon being advised that the hydraulic fluid in the eight diecasting machines contained PCBs in excess of 50 ppm, RIDCO immediately undertook to test, drain and properly dispose of the PCB fluid. Tr. 58-60, 135-38.

14. In addition, RIDCO drained and disposed of the hydraulic fluid in a ninth machine, which contained PCBs at a concentration of 48 ppm. Tr. 65.

Discussion and Conclusions

RIDCO does not question the violations with which it is charged except to assert that the EPA has not proved that RIDCO's diecasting machines were operated in a manner other than totally enclosed. "Totally enclosed manner" is defined as "any manner that will ensure that any exposure of human beings or the environment to any concentration of PCBs will be insignificant; that is, not measurable or detectable by any scientifically acceptable analytical method." 40 C.F.R. 761.3(hh). RIDCO argues that the EPA's proof is deficient since the EPA inspectors did not take samples of the fluid on top of the machines or of the absorbent material in the immediate area of the machines and test them for their PCB content. It is reasonable to infer, however, that hydraulic fluid leaking from the machines accounted for the presence of the fluid on the machines and underneath the machines (as evidenced by the absorbent material), particularly in view of the uncontroverted evidence that diecasting machines always leak.^{4/} RIDCO has produced no evidence indicating that the fluid could have come from some other source besides the diecasting machines. It can also be reasonably

^{4/} See Findings of Fact Nos. 10 and 11 supra.

inferred, given the large concentration of PCBs found in the hydraulic fluid, that PCBs would be present in measurable or detectable quantities in the leaked fluid.^{5/} In short, the record does establish that RIDCO's diecasting machines were using PCBs in a manner other than a totally enclosed manner as defined in the PCB Ban Rule.^{6/}

Accordingly, it is concluded that RIDCO has violated 40 C.F.R. 761.40(a)(7), by not marking its hydraulic systems using PCB hydraulic fluid with the large PCB Mark ("M_L") as required by 40 C.F.R. 761.40(a), and has violated 40 C.F.R. 761.20(a), by its unauthorized use of PCBs in a manner other than in a totally enclosed manner.

The Appropriate Penalty

The remainder of RIDCO's objections are directed to the penalty proposed by the EPA of \$15,000 for failure to mark the PCB hydraulic systems, and of \$20,000 for using PCBs in hydraulic systems that are not totally enclosed without testing for PCBs in the hydraulic fluid. RIDCO contends that these penalties do not properly take account of the statutory criteria for assessing penalties under TSCA, Section 16(a), and are not in accord with the EPA's PCB penalty policy.

5/ The detectable limit of PCBs in oil samples is one ppm. Tr. 47. Here there is no evidence whatever that the leaked fluid would have a lower concentration of PCBs than the fluid in the machines.

6/ As previously noted, *supra*, n. 2, RIDCO's defense that the EPA's definition of "totally enclosed manner" is in excess of congressionally delegated authority is not an appropriate defense in this proceeding and therefore has not been considered.

The statutory criteria for assessing penalties under TSCA, Section 16(a) are listed in Section 16(a)(2)(B), 15 U.S.C. 2615(a)(2)(B), which provides as follows:

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, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

To provide guidance on the assessment of penalties under Section 16, the EPA enforcement staff has issued guidelines setting forth the general policies it will follow and has supplemented these guidelines with a specific policy for assessing penalties for violations relating to PCBs.^{7/} The procedural rules for these proceedings require that I consider the guidelines and PCB penalty policy in determining the appropriate penalty, and that if I assess a penalty different in amount from that proposed in the complaint, I must give my reasons therefore.^{8/}

The PCB penalty policy uses a matrix to establish an initial penalty based on the nature, extent, circumstances, and gravity of the violation. The initial penalty can then be adjusted upwards or downwards depending upon consideration of the other statutory factors, i.e., culpability, history of such violations, ability to pay, ability to continue in business, and such other matters as justice may require.^{9/}

The matrix classifies violations involving 1,100 gallons or more of liquid PCBs as a major violation. The EPA treats RIDCO's violation as one involving nearly 1,320 gallons of PCB fluid. It arrives at this figure from

^{7/} See 45 Fed. Reg. 59770-59783.

^{8/} 40 C.F.R. 22.27(b).

^{9/} 45 Fed. Reg. 59777.

the fact that the PCB fluid initially drained from the eight machines was stored in twenty-four 55 gallon drums.^{10/} RIDCO contends, that the drums were only filled to 75 percent of their capacity, which would reduce the total amount to less than a 1,000 gallons. Mr. Cohen's testimony, however, on which RIDCO relies, does not square with the testimony of Mr. Leo, of the Rhode Island Department of Environmental Management, who had looked inside some of the drums and found them filled to one, two or three inches from the top.^{11/} The figure of 1,320 gallons is also consistent with the evidence as to the capacity of the reservoirs on the machines. It is true that Mr. Rapaporte testified that the machines could operate without filling the tanks to their full capacity.^{12/} That testimony, however, is unconvincing as proof that the levels of fluid were generally much lower than the capacity of the tanks in view of the testimony of the EPA Inspector that he looked inside the reservoirs of two of the machines and saw that they were both nearly full.^{13/} As to the capacities of the tanks, there is some conflict as to whether all the machines had a 200 gallon capacity as the EPA inspector was told, or whether some may have had a capacity of as little as 140 gallons.^{14/} The truth probably lies somewhere in between. Assuming, then, an average volume of 170 gallons per tank for the eight tanks (midway between 200 and 140), there would be a total of 1,360

^{10/} Tr. 129-30.

^{11/} Tr. 140.

^{12/} Tr. 99.

^{13/} Tr. 19.

^{14/} See Tr. 21; Complainant's Exhibit 2; Tr. 99, 101-02. Mr. Rapaporte first said that the capacity could range from 170 to 201 gallons, and later appeared to change these figures to 140 to 200 gallons. Tr. 99, 101-02.

gallons, or about the same quantity as is indicated by the capacity of the twenty-four 55 gallon drums, into which the fluid was drained. Hence, it is concluded that the violation was properly classified as a major violation.

With respect to the probable harm from the violations which forms the other axis of the matrix, Complainant classifies the marking violation as a level three violation and the unauthorized use as a level two violation. The large PCB mark contains a warning that PCBs are present, and must be specially handled and disposed of, and also provides a reporting point in the event of an accident or spill. The potential injury to human beings and the environment inherent in not making such information available to those who come into contact with the fluid fully justifies classifying the absence of the mark at level three. As to the failure to test and drain the hydraulic systems, the EPA imposed these requirements in order to reduce the exposure of man and the environment to the highly toxic PCBs in as short a time as possible without unduly disrupting the diecasting industry.^{15/} EPA points out that by failing to test and drain the hydraulic systems, RIDCO has extended the use of a large volume of PCBs in unenclosed systems and the risk of exposure that this entails for a longer period than if the testing and draining had been done.^{16/} Such consequences justify the level two classification for this violation.

It remains, then, to consider the statutory factors of RIDCO's ability to pay, the effect of the penalty on RIDCO's ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

^{15/} 44 Fed. Reg. at 31534-535.

^{16/} Complainant's post trial brief at 10.

RIDCO does not claim that the \$35,000 penalty is beyond its ability to pay or would affect its ability to continue to do business. There is also no evidence of any prior violations by RIDCO of this nature. According to the PCB Penalty Policy, however, the absence of prior violations would not be a reason for decreasing the initially determined penalty, but, instead, the existence of prior violations would be a grounds for increasing the initial penalty.^{17/}

To show its lack of culpability, RIDCO argues that prior to May 27, 1983, it did not know of the possible existence of PCBs in its hydraulic fluid. To support this claim it points out that it has always purchased hydraulic fluid by its trade name, such as Pydraul F-9 or Pydraul 312-C, on the basis of recommendations made by the machine suppliers.^{18/} RIDCO further asserts that there is no evidence that the drums identified the fluid as containing PCBs or that Monsanto, the supplier of the product, distributed any product safety data sheets which indicated the existence of PCBs. Finally, RIDCO contends that it never received any communication from Monsanto or the EPA regarding the possible existence of PCBs in the hydraulic fluid.^{19/} None of these allegations is controverted by the EPA.

The record does support RIDCO's claim that it was unaware that its hydraulic fluid contained PCBs. The test, however, is not what RIDCO actually knew, which is what RIDCO seems to assume, but whether RIDCO should have known of the relevant PCB requirements and their applicability to its operations.^{20/} The published rule and preamble thereto, of which I may

^{17/} 45 Fed. Reg. 59773-774 (September 10, 1980).

^{18/} See Tr. 55; Complainant's Exhibit 2.

^{19/} See Tr. 56, 57, 93, 94.

^{20/} Penalty guidelines, 45 Fed. Reg. 59773.

take official notice, and also the evidence of record, disclose that a reasonably prudent and responsible person in RIDCO's position would have known that it should test its hydraulic fluid for its PCB content:

The PCB Ban Rule itself, 40 C.F.R. 761.30(e), contains specific provisions for the use of PCBs in hydraulic systems in a manner other than a totally enclosed manner, allowing for that use until July 1, 1984, subject to certain conditions. RIDCO knew that its hydraulic systems leaked fluid and therefore would not have been justified in assuming that its system was operated in a totally enclosed manner.^{21/} Relevant is 761.30(e)(1), which provides as follows:

(1) Each person who owns a hydraulic system that ever contained PCBs must test for the concentration of PCBs in the hydraulic fluid of each such system no later than November 1, 1979, and at least annually thereafter. All test sampling must be performed at least three months after the most recent fluid refilling. When a test shows that the PCB concentration is less than 50 ppm, testing under this subparagraph is no longer required. (Emphasis added).

The preamble to the PCB Ban Rule published with the rule in the Federal Register, specifically discusses the use authorization for PCBs in hydraulic systems, including diecasting machines, and stating in pertinent part as follows:

This authorization is necessary because a large number of die casting systems currently in use were once filled with PCB hydraulic fluid. Although this use of PCBs has been discontinued, equipment containing PCB hydraulic fluid is still in service. Some systems have been topped off with non-PCB fluids, and others have been drained and flushed in an attempt to reduce PCB contamination. However, systems may still be contaminated with residual PCB that either remain after flushing or are

^{21/} See supra, pp. 4-5.

gradually released from interior surfaces. As a consequence, hydraulic systems can contain concentrations of PCB ranging from less than 10 ppm to thousands of parts per million PCB. **** 22/

RIDCO argues, that there is no evidence that either safety data sheets for the hydraulic fluid or the drums they were shipped in designated or identified the presence of PCBs. By this I assume that RIDCO means that it has not been shown that there was a specific reference to the presence of PCBs by their chemical name of "polychlorinated biphenyl", or by the abbreviated term "PCB". What the evidence does show is that RIDCO did not trouble to inform itself about the chemical composition of the hydraulic fluid it was purchasing but knew that it was purchasing from Monsanto a special type of hydraulic fluid that was more fire resistant than mineral oil. 23/ As Mr. Rapaporte testified:

- Q. But everybody you called was aware he had PCB's in his hydraulic diecasting machines, wasn't he?
- A. [Mr. Rapaporte] Not necessarily. I'll tell you why. Some people had never converted. Some of the diecasting machines were run on mineral oil only, and they are prone to fire. Most of the diecasters went away from the mineral oil because they were afraid of fire regulations, plus the insurance companies, I guess, they forced them to do it. It costs, the mineral oil costs maybe \$1.75 a gallon, and the Monsanto oil was \$7.00 a gallon. So, they figured what the hell, they are working out at the dollar and a quarter gallon, so they stuck and took a chance with the mineral oil. Mineral oil never had PCBs in it. It was the inception of Monsanto, that's the business that put the PCB's into the oil. We changed from the mineral oil and spent all this money for the Pydraul so we can make our plant safer, and that's what we did. So all plants don't have PCB's. 24/

22/ 44 Fed. Reg. 31534 (May 31, 1979). Similar language was contained in the proposed rule published about a year earlier, in which the regulation of hydraulic systems was limited to diecasting hydraulic systems. See 43 Fed. Reg. 24809 (June 7, 1978). The final use authorization was changed to cover other hydraulic systems besides diecasting machines, and to permit the testing for PCBs and the use of PCB contaminated systems over a longer period of time. 44 Fed. at 31534-535.

23/ Tr. 55-56, 105-07, 111-12.

24/ Tr. 111-12.

Given the provisions of the PCB Ban Rule and its preamble, and the fact that RIDCO had been purchasing hydraulic fluids over a period of many years of unknown chemical composition, I find that RIDCO, if it had read the PCB Ban Rule, would not have been justified in assuming that its hydraulic machines were not subject to regulation. I further find that it is no defense to RIDCO, that it did not know about the PCB Ban Rule, since publication in the Federal Register was all the notice to which RIDCO was entitled.^{25/}

RIDCO pleads that as a small company it cannot keep abreast of all developments in the field of environmental law.^{26/} The PCB Ban Rule, however, was a very significant development, issued pursuant to an express congressional direction that PCBs be regulated. The final rule was published following publication of a proposed rule, the receipt of numerous comments, and several public hearings.^{27/} When RIDCO did start inquiring about the PCB regulations it found that other diecasters were familiar with

^{25/} See 44 U.S.C. 1508. In Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947), the Supreme Court stated, "[J]ust as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents.

^{26/} Memorandum and Proposed Findings of Fact of Respondent, at 11.

^{27/} See the list of Federal Register notices published in the preamble to the rule, 44 Fed. Reg. at 31540. See also the support document for the PCB Ban Rule, PCB Manufacturing, Processing, Distribution in Commerce, and Use Ban Regulation: Economic Impact Analysis, EPA 230-03/79-001 (March 1979). This document is referred to in the Federal Register notice of the rule, 44 Fed. Reg. at 31514, and, therefore, is properly a subject of official notice.

them.^{28/} It would appear, then, that RIDCO's ignorance about the PCB regulation stems more from deficiencies in its own way of keeping itself informed about environmental regulations, than from any alleged inadequacy in the notice to the public about the existence of the regulation.

In addition, to asserting its lack of culpability, RIDCO points to its good faith efforts to remedy the violations once it became aware of them. The machines were drained, cleaned and refilled within four months of the EPA's notice of violation. The cleanup was done under the general guidance of the Rhode Island Department of Environmental Management. RIDCO cooperated fully with the State and used procedures which were to the fullest protection of both the environment and the public safety. RIDCO did not stop with just cleaning up the eight machines found to contain in excess of 50 ppm PCBs, but also cleaned up another machine which contained 48 ppm PCBs even though it was not required to do so by the PCB rule. The cleanup cost RIDCO over \$91,000. All of RIDCO's machines now have PCB levels of less than 50 ppm.^{29/}

Again, none of RIDCO's claims are controverted by the EPA. The EPA, however, does argue that the money spent in cleanup costs should be discounted as a mitigation factor, because of the testing, draining and refilling costs alleged to be saved by RIDCO, and because many dollars spent would have gone to pay taxes anyway.^{30/} Whether there were any savings on

^{28/} See Mr. Rapaporte's testimony, Tr. 111-12, 121. Mr. Cohen's subsequent testimony, Tr. 127-29, can be read as qualifying Mr. Rapaporte's testimony about the extent to which the PCB regulation was known among diecasters. Mr. Rapaporte's testimony, however, seemed to be more spontaneous account of what RIDCO was told by other diecasters, and to more accurately reflect the facts.

^{29/} See Tr. 56, 57, 93, 94; Respondent's Exhibit I.

^{30/} See Complainant's Post-trial brief at 10.

testing and draining and filling the machines is purely speculative. Under the regulation itself, RIDCO would have had to test for concentrations of PCBs by November 1, 1979, and at least annually thereafter. If a machine showed a concentration of over 50 ppm PCBs, it would have to be drained and refilled but there was no requirement that the machine be brought down to a level of below 50 ppm, until July 1, 1984.^{31/} Here, RIDCO did the necessary testing, draining and refilling of its machines to bring the machines down to a level of below 50 ppm almost two years before the July 1984 date. In some cases this appears to have involved draining and refilling the machine three times.^{32/} It seems unlikely that this was less costly to RIDCO than if the expenditures for testing, draining and refilling had been spread out over a longer period. Moreover, RIDCO did not confine its draining and refilling to the eight machines found to contain over 50 ppm PCBs, but also drained and refilled another machine in which the hydraulic fluid had tested at 48 ppm PCBs.^{33/} As to the savings in taxes, it would seem that balanced against these, whatever they may be, should be the production costs which RIDCO incurred as a result of the machines being out of service during the cleanup, a sum estimated by RIDCO's officer to be over \$320,000.^{34/}

Aside from attempting to discredit RIDCO's cleanup costs, which I find unpersuasive, the EPA has ignored RIDCO's argument that its good faith efforts to correct the violation and its cooperation with the EPA and willingness to do more than what minimally may have been required of it justify a substantial reduction in the initially determined penalty for both the marking

^{31/} 40 C.F.R. 761.30(e).

^{32/} Tr. 96.

^{33/} Respondent's Exhibit I, Tr. 64-65.

^{34/} Tr. 68

and unauthorized use violation. Instead, the EPA has implicitly taken the position that no reduction is warranted. Nevertheless, RIDCO's argument has support in the guidelines and PCB Penalty Policy.^{35/} It also has merit. The proposed penalty of \$35,000, accordingly, is rejected as not in accord with the guidelines and the PCB Penalty Policy, and excessive under the facts in this case.

As to how much the total penalty for these two violations should be reduced, the guidelines propose an adjustment of up to 15% for the attitude of the violator, i.e., its good faith efforts to comply with the regulations, the promptness of its corrective actions and any assistance provided the EPA to minimize the harm to the environment.^{36/} That figure, however, is a guide only and not an inflexible limit to cover all cases. In this case, I find that the promptness and thoroughness with which RIDCO acted to eliminate the hazards presented by its hydraulic systems merits a reduction of 25% in the proposed penalty. I also find that it would be in interest of justice to credit against the penalty the \$10,000 in costs estimated to have been incurred in cleaning up the ninth machine, which contained

^{35/} See 45 Fed. Reg. 59773, 59775.

^{36/} 45 Fed. Reg. 59773.

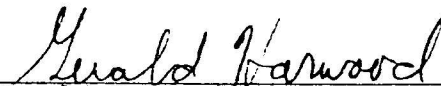
^{37/} Tr. 67.

less than 50 ppm. Taking these two factors into account, I find that an appropriate penalty is \$16,250.^{38/}

ORDER^{39/}

Pursuant to Section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), a civil penalty of \$16,250 is hereby assessed against Respondent RIDCO Casting Co., Inc. for the violations of the Act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.


Gerald Harwood
Administrative Law Judge

December 28, 1983

^{38/} The EPA argues that RIDCO failed to post the large PCB mark after receiving notice of the violation. Post-trial brief at 9. Presumably, what is referred to is that there is no evidence that the machines themselves were marked between the time of the inspection and the time the fluid was brought down to a concentration of less than 50 ppm. In view of the fact that RIDCO promptly directed its efforts to removing the basic cause of the violation, namely, the presence of hydraulic fluid with PCBs in excess of 50 ppm, and also that in doing the cleanup, the PCBs were properly stored and their containers properly marked (Tr. 63, 136-37), any violation represented by the absence of the mark in the machines themselves between the inspection and the time the cleanup was finished was a technical violation at most, and does not adversely reflect on RIDCO's good faith efforts to comply.

^{39/} Unless an appeal is taken pursuant to the rules of practice, 40 C.F.R. 22.30, or the Administrator elects to renew the decision on his own motion, the initial decision shall become the final order of the Administrator. See 40 C.F.R. 22.27(c).