BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF TACOMA SCHOOL DISTRICT NO. 10, Appellant, vs. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 585 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER being the appeal of Tacoma School District No. 10 to two notices of civil penalty in the amount of $50.00 each for two alleged violations of respondent's Regulation I; having come on regularly for hearing before the Pollution Control Hearings Board on the 12th day of July, 1974, at Tacoma, Washington; and appellant, Tacoma School District No. 10, appearing through its deputy prosecuting attorney, R. A. Monaghan and respondent, Puget Sound Air Pollution Control Agency, appearing through its attorney, Keith D. McGoffin; and Board members present at the hearing being William A. Gissberg (presiding) and Chris

Smith; and the Board having considered the sworn testimony, exhibits, post-hearing brief of respondent, records and files herein and having entered on the 26th day of August, 1974, its proposed Findings of Fact, Conclusions of Law and Order, and the Board having served said proposed Findings, Conclusions and Order upon all parties herein by certified mail, return receipt requested and twenty days having elapsed from said service; and

The Board having received no exceptions to said proposed Findings, Conclusions and Order; and the Board being fully advised in the premises; now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed Findings of Fact, Conclusions of Law and Order, dated the 26th day of August, 1974, and incorporated by this reference herein and attached hereto as Exhibit A, are adopted and hereby entered as the Board's Final Findings of Fact, Conclusions of Law and Order herein.

DONE at Lacey, Washington, this 20th day of September, 1974

POLLUTION CONTROL HEARINGS BOARD

W. A. Gissberg

W. A. GISSBERG, Member

Chris Smith

CHRIS SMITH, Member

S F No 9928-A

CERTIFICATION OF MAILING

I, LaRene Barlin, certify that I deposited in the United States mail, copies of the foregoing document on the 27th day of September, 1974, to each of the following-named parties, at the last known post office addresses, with the proper postage affixed to the respective envelopes:

Mr. R. A. Monaghan
Deputy Prosecuting Attorney
954 County-City Building
Tacoma, Washington 98402

Mr. Keith D. McGoffin
Burkey, Marsico, Rovai, McGoffin
Turner and Mason
818 South Yakima Avenue
Tacoma, Washington 98405

Puget Sound Air Pollution Control Agency
410 West Harrison Street
Seattle, Washington 98119

Tacoma School District No. 10
P. O. Box 1357
Tacoma, Washington 98401

LARENE BARLIN
POLLUTION CONTROL HEARINGS BOARD

S F No 9928-A

B RE THE
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STATE WASHINGTON

IN THE MATTER OF TACOMA SCHOOL DISTRICT NO. 10, Appellant, vs. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	R . 585 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A formal hearing on the appeal of Tacoma School District No. 10 to two notices of civil penalty in the amount of $50.00 each for two alleged violations of Respondent's Regulation I came on before Board members William A. Gissberg (presiding) and Chris Smith on July 12, 1974 in Tacoma, Washington.

Appellant appeared by and through its deputy prosecuting attorney, R. A. Monaghan; Respondent appeared by and through its attorney, Keith D. McGoffin.

Having heard the testimony and considered the post-hearing brief

EXHIBIT A

of the Respondent and being fully advised the Board makes the following

FINDINGS OF FACT

I.

Appellant made application to Respondent for an approval of an outdoor fire for the purpose of instruction in fire fighting. Such approval was conditionally granted by Respondent. The conditions relevant to this appeal were stated on the Exhibit R-1 to be:

> . . .2. The air contaminants emitted from the outdoor fires shall not be permitted to be a detriment to the health, safety or welfare of any person, or cause damage to property or business.
>
> 3. Particulate matter emitted from the outdoor fires shall not be allowed to become deposited upon the real property of others (Section 9.04 of Regulation I of the Puget Sound Air Pollution Control Agency). . . .

II.

On April 2, 1974, Appellant proceeded to ignite the permitted fires, being two buildings in Tacoma, Washington, at a time when the wind was blowing from 15 to 20 miles per hour, with occasional stronger gusts. The smoke from the fire rose a short distance into the air and then "looped" downward to the earth, enveloping an apartment residence building situated about 150 feet distant from the fire. Smoke entered the two apartments in the building and drove the downstairs tenants from their apartment. The strong smell of wood smoke and smoke haze were observed in the two apartments, notwithstanding the fact that Appellant had located "smoke ejectors" therein, whose purpose was to remove smoke from the building. Particulate, in the form of

soot, was also observed on the steps of the apartment building and on furniture located on its porch. Respondent's inspectors, called to the scene by a complaining citizen, observed the foregoing and called such to the attention of the person Appellant had charged with responsibility to conduct the training fires. No order was given to extinguish the fire. The soot was thereafter washed and cleaned by Appellant from the apartment house.

III.

Respondent served Appellant with its Notice of Violations Nos. 9130 and 9131 alleging violations of Section 9.04 and Section 9.11 of its Regulation I each of which were followed by Notices of Civil Penalty in the amount of $50.00, to which an appeal was taken.

IV.

All fires create particulates which become deposited on the property of others. Where there is a fire of this nature there is smoke.

V.

Section 9.02 of Respondent's Regulation I generally makes it unlawful for any person to cause or allow an outdoor fire. Subsection (i) of Section 9.02 provides:

> Nothing contained in Section 9.02 except during any state of an air pollution episode as defined in RCW 70.94.710 through 70.94.730 shall prohibit fires for instruction in the method of fighting fires. . .provided prior written approval has been issued by the Control Officer or Board <u>and</u> such fires are conducted at such times and under such conditions as may be established by the Control Officer or Board. (Emphasis added)

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VI.

Section 9.04 of Respondent's Regulation I, which Appellant has allegedly violated, makes it unlawful (with exceptions not relevant to this appeal):

> . . . for any person to cause or allow the discharge of particulate matter which becomes deposited upon the real property of others. . . .

Soot is a "particulate matter" within the meaning of the foregoing. See Exhibit R-2, Section 1.07(w)).

VII.

Section 9.11 of Respondent's Regulation I which it is also alleged Appellant violated provides:

> (a) It shall be unlawful for any person to cause or permit the emission of an air contaminant or water vapor, including an air contaminant whose emission is not otherwise prohibited by this Regulation, if the air contaminant or water vapor causes detriment to the health, safety or welfare of any person, or cause damage to property or business.

Section 1.07(b) of Respondent's Regulation I defines "air contaminant" as "dust, fumes, mist, smoke, other particulate matter, vapor, gas, odorous substance, or any combination thereof."

VIII.

Any Conclusion of Law hereinafter recited which should be deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

I.

Appellant violated the conditions imposed by Respondent on its

approval of the fire fighting instruction outdoor fire. Appellant violated Section 9.04 and Section 9.11 of Respondent's Regulation I.

II.

The larger legal question to be determined is whether Respondent has the requisite authority to impose a civil penalty in the manner in which it was done on one who has a valid conditional burning permit. We turn to an examination of the state statutes for that answer.

RCW 70.94.775 (1973 Supp.) provides in part:

> No person shall cause or allow any outdoor fire:
>
> . . .(3) In any area which has been designated. . . as an area exceeding or threatening to exceed state or federal ambient air quality standards, or after July 1, 1976, state ambient air quality goals for particulates: PROVIDED, That the provisions of this subsection shall not become effective in relation to instructional fires permitted by RCW 70.94.650(2) until September 20, 1974.

This same subsection was amended in 1974 by striking the proviso and adding instead, "except instructional fires permitted by RCW 70.94.650(2). Chapter 164, Laws of 1974, 3rd Ex. Sess.

Although the legal effect is not different for purposes of the matter at hand, we glean a legislative intent to continue to exempt instructional fires from an area that may even exceed state standards and goals. A fortiori, the exemption must extend to areas <u>not</u> "exceeding or threatening to exceed" the pertinent standards. However, this exemption is not a carte blanche for fire training organizations to pollute. Rather, this exemption is expressly made subject to RCW 70.94.650(3):

> . . . All permits so issued shall be conditioned to insure that the public interest in air, water, and land pollution and safety to life and property is fully considered. . . All burning permits will be designed to minimize air pollution insofar as practical. (Emphasis added)

Taking these statutory provisions together, we hold that the proper standard to apply under these particular circumstances is one derived from balancing the interests to be forwarded in accordance with reason and rationality. There is a public interest in training fire fighting personnel to protect the health, safety, and welfare of the community. The special statutory air pollution exemptions attest to this fact. On the other hand there is urgent need to attain a level of air quality to protect human health and safety. RCW 70.94.011; chapter 70.94 RCW. As such, Respondent's Regulation I cannot be read as imposing strict liability for acts contemplated by the statutory scheme of RCW 70.94. Rather, the test to apply to determine if a violation has in fact occurred in an otherwise permitted burn is whether or not the condition imposed can be reasonably complied with.

In the matter at hand Appellant had knowledge that a substantial amount of particulates had accumulated in a localized area after the fire was started despite the strong wind. Notwithstanding this knowledge, Appellant continued with its training burn. Its action was unreasonable in light of the restrictions placed upon the permit and the amount of soot noticeably discharged. Although Appellant may reasonably be allowed to discharge some soot notwithstanding the outright prohibition of Regulation I, where this discharge becomes objectionable, immediate steps must be taken to prevent further

accumulations. Appellant could have reasonably complied with the conditions of the burning permit and Regulation I by terminating the training session upon any notice of a problem or keeping a proper lookout for such problem. Because Appellant failed to take these measures, we hold that it violated a reasonable interpretation of Section 9.04 of Respondent's Regulation I.

III.

We hold that Appellant must have caused the emission of an air contaminant that results in an unreasonable "detriment to the health, safety or welfare of any person, or causes damage to property or business" before any violation can occur. The record amply shows the detrimental results of Appellant's burn. Tenants were driven from two apartments because of the smoke, and this, notwithstanding the "smoke ejectors" placed therein. The record does not show any precautionary measures taken by Appellant to ascertain the likely path of the smoke by using, for example, a test fire or smoke source to chart the course and effect of the prevailing wind. In view of all the circumstances and interests concerned, the emission was an unreasonable result caused by Appellant. This emission violated a reasonable interpretation of Section 9.11 of Respondent's Regulation I.

IV.

We emphasize that this interpretation of the Clean Air Act and regulations issued thereunder comprise but a very narrow relaxation of the strict rules to which we must adhere. It is a necessary relaxation in view of the competing interests and statutory exemptions

involved and would not otherwise apply in a different situation given another party-appellant.

V.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

ORDER

The appeal from the imposition of the $50.00 Civil Penalty No. 1500 for causing or allowing the discharge of particulate matter is denied.

The appeal from the imposition of the $50.00 Civil Penalty No. 1501 for causing or allowing the emission of an air contaminant detrimental to person or property is denied.

The payment of the penalties are suspended and shall not become due and payable unless Appellant shall violate Respondent's Regulations within six months of the date that this Order becomes final.

DATED this 26th day of August, 1974.

POLLUTION CONTROL HEARINGS BOARD

W. A. Gissberg

W. A. GISSBERG, Member

Chris Smith

CHRIS SMITH, Member

S F No 9928-A