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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF E. F. TWITCHELL; UNITED BURNERS; T. W. TRAVERSO; T. W. TRAVERSO CONSTRUCTION COMPANY, INC., and PETER JOUFLAS, Appellants, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB Nos. 78-39, 78-40 and 78-41 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of four $250 civil penalties, arises from alleged violations of Sections 8.02(5) and 9.03(b) of respondent's Regulation I (outdoor fire and opacity). The hearing was held before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, convened at Seattle, Washington on May 23, 1978. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant United Burners appeared by its General Manager, E. F.

Twitchell, who also appeared on his own behalf. Appellants T. W. Traverso, registered agent, and T. W. Traverso Construction Company, Inc. and Peter Jouflas did not appear. Respondent appeared by and through its attorney, Keith D. McGoffin. Court reporter Susan Cookman of Olympia recorded the proceedings.

Having heard the testimony and considered the exhibits and arguments, and being fully advised, the Hearings Board makes the following

FINDINGS OF FACT

I

Respondent, pursuant to RCW 43.21B.260, has filed with this Hearings Board a certified copy of its Regulation I containing respondent's regulations and amendments thereto, of which official notice is taken.

II

This appeal concerns the clearing of trees and brush, prior to commercial development of a parcel of land at 132nd Avenue and Northup Way in Bellevue, Washington. The land is owned by Peter Jouflas. Mr. Jouflas engaged the T. W. Traverso Construction Company, Inc. as general contractor for the commercial development. The general contractor then engaged United Burners as sub-contractor for disposing of wood waste residue. The project involved disposal of more than 500 tons of wood waste residue.

The equipment used by United Burners for disposal of wood waste is called an "air curtain destructor." The theory of this process is to control combustion by placing the prepared wood waste in a special,

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open truck trailer and maintaining a higher temperature than would result from open burning by properly distributing air in and over the trailer box. This should lead to less smoke emission than merely setting the wood waste on fire without any attempt to control combustion, which practice is referred to as open burning.

Although an employee of T. W. Traverso Construction Company, Inc. loaded the special truck trailer, that trailer was owned and controlled by United Burners whose crew operated it, exclusively, and without supervision by either Traverso, the general contractor, or Jouflas, the land owner.

III

Section 8.02(5) of respondent Puget Sound Air Pollution Control Agency's Regulation I provides:

> It shall be unlawful for any person to cause or allow any outdoor fire: . . .
> (5) in violation of any applicable law, rule or regulation of any governmental agency having jurisdiction over such fire.

Section 1.07(u) of respondent's Regulation I provides:

> "Outdoor fire" means the combustion of material in the open or in a container with no provision for control of such combustion or the control of the emissions of the combustion products.

A rule of the State Department of Ecology, WAC 173-425-115 (filed with the Code Reviser October 24, 1977), provides, in pertinent part:

> (1) To further the policies of this chapter and policies expressed in RCW 70.94.745, the department has determined, that alternate technology and methods exist for disposing of wood waste residue resulting from highway right of way land clearing projects or commercial land clearing projects which generate five hundred or more tons of wood waste residue (two thousand or more cubic yards). Further, these methods and technology are

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considered less harmful to the environment than open burning. These alternates are also reasonably economical when the cost of disposal is nine hundred dollars or less per acre.

(2) These alternate methods and technology are:

(a) Chipping, with chips disposed of commercially or by on-site dispersal, haul to landfill, burning in an approved way, or other approved methods, as may be available.

(b) Hauling for disposal elsewhere, such as landfill, commercial use, or other approved methods, as may be available.

(c) On-site disposal in landfill.

(d) On or off-site disposal by a waste combustion method capable of complying with the emission standards set forth in WAC 173-425-115(3).

(3) As a result of the determination made in WAC 173-425-115(1) for disposing of wood waste residue that results from highway right of way land clearing projects which generate five hundred or more tons of wood waste residue (two thousand or more cubic yards) or from commercial land clearing projects which generate five hundred or more tons of wood waste residue (two thousand or more cubic yards):

(a) No person shall cause or permit the emission, for more than three minutes in any one hour, of an air contaminant from any disposal method covered by WAC 173-425-115 which, at the emission point or within a reasonable distance from the emission point, exceeds twenty percent opacity, except as follows:

(i) The emission may exceed twenty percent opacity for the first fifteen minutes after a startup, for not more than two startups every twenty-four hours.

(ii) When the person responsible for the source can show that the emission over twenty percent opacity will not exceed fifteen minutes in any eight consecutive hours after startup.

. . . .

WAC 173-425-030(8) defines "open burning" as:

. . .

(8) Open burning: The combustion of material in an open fire or in an outdoor container, without providing for the control of combustion or the control of the emissions from the combustion.

. . . .

Section 9.03 of respondent's Regulation I provides, in pertinent part:

After July 1, 1975, it shall be unlawful for any person to cause or allow the emission of any air contaminant for a period or periods aggregating more than three (3) minutes in any one hour, which is:

(1) Darker in shade than that designated as No. 1 (20%

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density) on the Ringelmann Chart, as published by the United States Bureau of Mines; . . . . Section 9.03(b)(1).

Bellevue City Ordinance No. 1795 provides, in pertinent part:

> . . .
> (8) Fires for the disposal of bulky waste natural vegetation or debris when due to unusual and exceptional conditions of the land whereon the same exists, relating to location and topography, no reasonable alternate means of disposal exists; provided, that prior written approval for the fires described in this subsection must be obtained from the Puget Sound Air Pollution Control Agency and the Bellevue Fire Chief, as Fire Marshal for the City of Bellevue, or his designated representative.

We take official notice of this Bellevue City Ordinance.

IV

Appellant, United Burners, did not make any showing to the Department of Ecology, or to the respondent, justifying an authorization to open burn. See WAC 173-425-115(6). As required by another section of respondent's Regulation I (Section 8.06), the appellant did obtain a written population density verification from respondent. This is merely a requirement in addition to those which appellant is now alledged to have violated. Appellant further obtained a written permit from the Bellevue Fire Department authorizing "Clean Air Burner only/Smokeless." Appellant contends that Bellevue prohibits open burning.

V

On January 4, 1978, respondent's inspector observed large, continuing emissions of smoke from the "air curtain destructor" being operated by appellant, United Burners, at the site in Bellevue described above. At 11:13 a.m., United Burners caused smoke emissions of 60 consecutive minutes of a shade equivalent to Nos. 4-5 on the Ringelmann Chart. (Each

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number, 1 through 5 on the Ringelmann Chart, represents a shade which corresponds to 20 percent opacity, thus Nos. 4-5 correspond to 80-100 percent opacity.) Later, at 2:37 p.m. on the same day, United Burners caused smoke emissions of 30 consecutive minutes of a shade equivalent to Ringelmann No. 5. Respondent's inspector did not notify United Burners of the violations which he observed but rather returned on the two following days and continued his observations. On January 5, 1978, United Burners caused smoke emissions of 59-3/4 consecutive minutes of a shade equivalent to Ringelmann Nos. 4.5-5. On January 6, 1978, United Burners caused smoke emissions of 30 consecutive minutes of a shade equivalent to Ringelmann Nos. 4-5. The smoke plume was some 100 yards in length on each of the dates involved. Rain during these days caused the wood waste to be wet and the burning of the wood while in this condition contributed greatly to the amount of smoke emitted. The United Burner's crew who operated the air curtain device were inexperienced.

The respondent mailed Notices of Violation pertaining to January 4, 5, and 6, 1978, at one time and these were received by United Burners on January 9, 1978. United Burners was not aware that violations were being recorded until all violations had been recorded. No further violations were recorded after that date. The purpose of the Clean Air Act is to preserve clean air and protect the health of persons who breathe it. The Board encourages the Agency inspectors to give notice at the time of violation so that corrective actions may be taken immediately. Appellants received Notices and Orders of Civil Penalty citing WAC 173-425-115(3)(a), and Sections 8.02(5) and 9.03(b)(1) of respondent' Regulation I. These Notices imposed four $250 civil penalties for a

total of $1,000. From these penalties, appellants appeal.

VI

The appellant, United Burners, is a professional contractor specializing in the disposal of wood waste after land clearing. The appellant has no prior record of any violation of the regulations of respondent.

VII

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

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

"In Washington, vicarious liability for the acts of an independent contractor-and, indeed, for the acts of an 'employee' or 'agent', however labeled--'arises only where one engaging another to achieve a result controls or has the right to control the details of the latter's physical movements.'" S. S. Kresage Co. v. Port of Longview, 18 Wash. App. 805, 573 P.2d 1336 (1977). Appellants Jouflas and T. W. Traverso Construction Company, Inc. did not have this requisite control over United Burners, whom they engaged to achieve disposal of the waste wood. Therefore, appellants Jouflas and Traverso, Inc. did not "cause or permit," (WAC 173-425-115(3)(a) and Section 8.02(5), Regulation I) nor "cause or allow" (Section 9.03 of Regulation I) these emissions and have not violated the regulations alledged nor are they liable for any civil penalty in this matter.

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There is insufficient evidence to prove that appellant, E. F. Twitchell, personally caused, allowed or permitted these emissions and he therefore has not violated the regulations alleged nor is he personally liable for any civil penalty in this matter.

II

Both the state regulation, WAC 173-425-115(6) and Bellevue City Ordinance No. 1795 allow open burning where specific permission is sought and obtained after the applicant shows certain facts. In this appeal, United Burners did not seek nor obtain such permission for open burning. Instead, it conducted a controlled-combustion burn. Because of this, the fire involved was not an "outdoor fire" within the meaning of respondent's definition of that term. See Section 1.07(u) quoted in Finding of Fact III, supra. It follows, therefore, that the alleged violation of respondent's Section 8.02(5) pertaining only to "outdoor fires" cannot be sustained.

III

The respondent's regional opacity standard, Section 9.03(b)(1) (quoted in Finding of Fact III, supra) does apply to the fire involved here. Had the respondent been able to apply WAC 173-425-115(3)(a) through its own Section 8.02(5), the effect would only have been to apply a less stringent state-wide, opacity standard rather than the more stringent regional opacity standard which the respondent is entitled to enforce. RCW 70.94.331(6).

By emitting an air contaminant, smoke, for more than three minutes in any one hour which contaminant is of a shade darker than that designated on the Ringelmann Chart as No. 1 (20 percent density), appellant violated Section 9.03(b) of respondent's Regulation I, twice

on January 4, 1978 and once, each, on January 5 and 6, 1978 for a total of four violations.

IV

Because the violations committed by appellant United Burners are its first offenses against respondent's Regulation I, part of the assessed penalties should be suspended.

V

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

From these Conclusions, the Board enters this

ORDER

The violations of Section 9.03(b)(1) of respondent's Regulation I, and four $250 civil penalties are each affirmed as to appellant, United Burners; provided, however, that one-half of each penalty is suspended on condition that appellant not violate respondent's regulations for a period of six months from the date of appellant's receipt of this Order.

The violations of Section 8.02(5) of respondent's Regulation I are reversed as to appellant, United Burners. All violations and civil penalties, herein, are reversed as to appellants E. F. Twitchell, T. W. Traverso, T. W. Traverso Construction Company, Inc. and Peter Jouflas.

DONE at Lacey, Washington, this 15th day of June, 1978.

POLLUTION CONTROL HEARINGS BOARD

Dave J. Mooney

DAVE J. MOONEY, Chairman

Chris Smith

CHRIS SMITH, Member