BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF IRMA A. DOWNS and JAMES W. MISICH, d.b.a. Misich Construction Co., Appellants, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB Nos. 78-55, 78-68, 78-69 78-70 and 78-71 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the consolidated appeals from the issuance of four $250 civil penalties for the alleged violation of Sections 9.03, 8.02(3), 8.02(4) and 8.05(1) of respondent's Regulation I, came before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, at a formal hearing on April 24, 1978 in Seattle, Washington. Hearing officer David Akana presided.

Appellant Irma A. Downs appeared pro se; appellant J. W. Misich was represented by his attorney, Bruce Kiethly; respondent was represented by its attorney, Keith D. McGoffin.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Board makes these

FINDINGS OF FACT

I.

Pursuant to RCW 43.21B.260, respondent has filed with the Board a certified copy of its Regulation I and amendments thereto which are noticed.

II

On February 6, 1978 at about 9:30 AM, respondent's inspector arranged over his radio what he thought was a 1:30 PM appointment to discuss open burning with appellant Misich at appellant's job site near the Town of Snohomish on Highway 9 and Marshland Road in Snohomish County. When the inspector arrived at the job site at 1:10 PM, he saw a 10 foot wide by 20 foot long outdoor fire in process. He observed white smoke emissions from the fire and recorded 100 percent opacity for six consecutive minutes. An inspection of the materials in the pile revealed the presence of small pieces of tar paper, wiring, and materials from a demolished building. Appellant Misich's employee was on the job site and admitted starting the fire under appellant's direction. No permit for the fire was produced. Appellant Misich did not meet with respondent's inspector that afternoon. Respondent sent four Notices of Violation to appellant Misich for alleged violations of Sections 9.03(b)(2 8.02(3), 8.02(4) and 8.05(1) by certified mail. From these notices followed four $250 civil penalties to appellant Misich, who was the independent contractor, and appellant Downs, who was the part-owner of the property, and at whose request the instant property was being cleared.

S F No 9928-A

III

Prior to the burn, appellant Misich telephoned several agencies, including the State Department of Natural Resources, Fire District 4, and the Snohomish Fire Chief. Although employees of these agencies saw no problem with appellant Misich's proposed burn, they referred him to the "pollution people." Appellant Misich then called respondent's radio telephone operator who arranged for an appointment with respondent's inspector at 1:30 PM. Appellant Misich did not intend to meet the inspector but thought, from the substance of his conversation, that he was not prohibited from burning the demolition materials. Appellant Misich then gave the order to burn the demolition materials which had been substantially stripped of composition roofing, simulated brick, tar paper, wiring and plumbing, and other debris which would cause coloration of smoke. The burn pile of demolished materials nonetheless contained some tar paper and wiring despite appellant's efforts to remove such.

IV

Section 9.03(b)(2) of respondent's Regulation I makes it unlawful for any person to cause or allow the emission of an air contaminant for a period totaling more than three minutes in any one hour which is of an opacity equal to or greater than 20 percent.

Section 8.02(3) makes it unlawful for any person to cause or allow an outdoor fire containing prohibited materials.

Section 8.02(4) makes it unlawful for any person to cause or allow an outdoor fire for the purpose of demolition.

Section 8.05(1) makes it unlawful for any person to cause or allow

S F No 9928-A

any outdoor fire for other than land clearing or residential burning except with the written approval of respondent.

Section 3.29 provides for a civil penalty of up to $250 per day for each violation of Regulation I.

V

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

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

On February 6, 1978, appellant Misich violated Section 9.03(b)(2) by causing the emission of white smoke which exceeded the limits established by the regulations.

II

On February 6, 1978 appellant Misich violated Section 8.02(3) by conducting an open fire containing prohibited materials therein, i.e., tar paper and wiring.

III

On February 6, 1978 appellant Misich violated Section 8.02(4) by conducting an outdoor fire for the purpose of demolition of building materials.

IV

On February 6, 1978 appellant Misich violated Section 8.05(1) by causing or allowing an outdoor fire without written approval from respondent.

S F No 9928-A

V

In each of the foregoing, appellant Downs did not cause the violations alleged. As to appellant Downs, the four civil penalties should be vacated.

VI

In each of the foregoing, appellant Misich was responsible for the violations. Although we are persuaded that appellant Misich acted in good faith, such action does not excuse the instant violations. Appellant Misich technically violated Sections 8.02(3) and 8.05(1), but in view of the actual fire which occurred, and the other violations found under Sections 9.03(b) and 8.02(4) for the same event, there should be a suspension of the penalties assessed. The penalties assessed for the violation of Sections 9.03(b) and 8.02(4) should be affirmed, but payment of a portion thereof should be suspended. We believe that our disposition of the penalties in this manner is consistent with the purpose of the Washington Clean Air Act, which is to secure compliance with the policies therein. See Yakima Clean Air Authority v. Glascam Builders, Inc., 85 Wn.2d 255 (1975). Appellant has sought, with good intentions, to comply with the regulations and it is not appropriate in the instant case to pile penalty upon penalty on him to force compliance with the Act.

VII

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

From these Conclusions the Board enters the following

S F No 9928-A

ORDER

1. Each $250 civil penalty assessed on appellant Downs is vacated.

2. Each $250 civil penalty assessed upon appellant Misich for the violation of Sections 8.02(3) and 8.05(1) of Regulation I is affirmed and payment thereof suspended.

3. Each $250 civil penalty assessed upon appellant Misich for the violation of Sections 9.03(b) and 8.02(4) of Regulation I is affirmed, provided however, that $150 of each penalty is suspended on condition that appellant not violate respondent's regulations for a period of six months from the date of this Order.

DATED this 3d day of May, 1978.

POLLUTION CONTROL HEARINGS BOARD

Dave J. Mooney

DAVE J. MOONEY, Chairman

Chris Smith

CHRIS SMITH, Member

S F No 9928-A