BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ROBERT W. SULLIVAN AND JAN SULLIVAN dba CROWN CEDAR PRODUCTS, Appellants, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB Nos. 78-132 and 78-180 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of three $250 civil penalties for smoke emissions allegedly in violation of respondent's Section 9.03(b) of Regulation I came on for hearing before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, convened in Seattle, Washington on September 18, 1978. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellants appeared by their attorney, Craig V. Wentz. Respondent

WAH/LB

appeared by its attorney, Keith D. McGoffin. Reporter Marilyn Hoban recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

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

II

Appellants own and operate a wood-waste burner on their property at 428th Avenue S.E. and S.E. Reinig Road in North Bend, from which certain emissions were observed.

III

At the following dates and times, respondent's inspector observed smoke coming from appellants' waste wood burner at the following density or opacity and for the following periods of time:

<u>April 18, 1978</u>

Time: 3:12 p.m.
Color: Gray Smoke
Density: No. 2-1/2 - 4 Ringelmann
Duration: Seven consecutive minutes

<u>May 10, 1978</u>

Time: 1:11 p.m.
Color: Blue smoke
Opacity: 40-60%
Duration: Six consecutive minutes

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June 29, 1978

Time: 1:12 p.m.
Color: Gray Smoke
Opacity: 70-90%
Duration: Eight consecutive minutes

IV

The inspector did not enter appellants' premises before, during or after his observation of the plumes because he feared intimidation from the appellants. Having recorded apparent violations, he mailed a formal Notice of Violation to appellants on each of the three days that he observed the plume. Each such notice contained information regarding the date, time, color, density and duration of the plume which the inspector observed on that day.

V

Concerning the events of June 29, 1978, respondent's inspector first recorded excess opacity at 1:13 p.m. Although the inspector did not enter appellants' premises, appellants telephoned respondent's office at 1:36 p.m. (24 minutes after excess opacity was first observed). The appellants reported that rain falling down the stack had moistened the fuel causing incomplete combustion and smoke. Respondent received no calls from appellants on the other dates in question, April 18 and May 10, 1978.

VI

Respondent's Regulation I, Section 9.03(b) makes unlawful the emission of an air contaminant described in Finding of Fact III above. Section 3.29 provides for a civil penalty of up to $250 per day for each violation of Regulation I. By Notices of Civil Penalty

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(Nos. 3815, 3835 and 3908) respondent has assessed $250 for each of the three days involved. From these penalties, appellant appeals.

The appellants have a lengthy record of violations of the respondent's Regulation I.

VI

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

Appellants urge that service of the Notice of Violation was untimely in each case, and therefore deprived appellants of their opportunity to prepare rebuttal evidence. We disagree.

Respondent's Section 3.21(a) authorizes service of notice of violation by certified mail. In these instances, respondent mailed such notice of violation to appellants within the same day that the alleged violative emission occurred. We conclude that such notice is timely even under the rule announced by another state in Air Pollution Board v. Western Alfalfa, 9 ERC 1236 (Colorado Supreme Court, 1976). In that case, cited by appellants, the court did not require contemporary notice of violation, but ruled that notice two weeks after violation was untimely. It then held that notice "within a reasonable time" was necessary to basic fairness. We conclude that the notice given in these matters was timely and consistent with basic fairness. We reserve to future cases the question of whether notice may be

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fatally "untimely" and, if so, the lapse of time necessary to make it so. We note in passing that Western Alfalfa, supra, focused on the appellants' opportunity to note weather conditions which affect the accuracy of the inspectors observation of a visible emission. An appellant may obtain objective, localized weather information from those agencies that record it, and may examine the inspector regarding weather or other factors in any proceeding before us. For this reason, service of a Notice of Violation by mail on the day of observation is not fatal to the appellants' opportunity to gather meaningful rebuttal evidence.

II

Appellants have not shown that respondent selectively enforces its regulations against appellants.

III

Appellants have not shown on this record, that respondent's visible emission standards cannot be met under available technology. If this were true in appellants' individual circumstances, the sole means of establishing this, in the first instance, would be by application for a variance presented to the respondent's Board of Directors. (See RCW 70.94.181 and Article 7, Regulation I which set forth the exact standard for an air pollution variance.)

IV

Respondent's visible emission standards are not vague and incapable of reasonable definition. A person of common intelligence need not guess at the meaning of what is prohibited, namely; emission of an air contaminant for:

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. . .
". . . more than three (3) minutes in any one hour, which is:
(1) Darker in shade than that designated as No. 1 (20% density) on the Ringelmann Chart, as published by the United States Bureau of Mines; or
(2) Of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in . . . (1) . . ." Section 9.03(b), Regulation I.

The Washington Supreme Court has held:

> "The Ringelmann Smoke Chart has been widely accepted throughout the United States as a measurement of air pollution by both legislatures and courts, and we find ourselves in agreement with the wisdom of this acceptance." Sittner v. City of Seattle, 62 Wn.2d 834, 836 (1963).

V

The appellants violated respondent's Regulation I, Section 9.03(b) on April 18, May 10 and June 29, 1978. The $250 civil penalty assessed therefor is reasonable in amount and in light of the purposes of the Washington Clean Air Act and, under the circumstances of this case, should be affirmed.

Concerning the events of June 29, 1978, appellant's telephone call to respondent was made to take advantage of respondent's Section 9.16 which states:

> Emissions exceeding any of the limits established by this Regulation as a direct result of start-ups, periodic shutdown, or unavoidable and unforeseeable failure or breakdown, or unavoidable and unforeseeable upset or breakdown of process equipment or control apparatus, shall not be deemed in violation provided the following requirements are met:
>
> (1) The owner or operator of such process or equipment shall immediately notify the Agency of such occurrence, together with the pertinent facts

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relating thereto regarding nature of problem as well as time, date, duration and anticipated influence on emissions from the source.

(2) The owner or operator shall, upon the request of the Control Officer, submit a full report including the known causes and the preventive measures to be taken to minimize or eliminate a re-occurrence.

We have previously held that notice capable of invoking this exculpatory provision must be immediate, that is, "instantly and at once". U.S. Navy v. PSAPCA, PCHB No. 78-28. A total lapse of 24 minutes from the first observed excess emission until notification did not constitute immediate notice, and appellants therefore violated Section 9.03(b) on June 29, 1978. Nevertheless, because appellants voluntarily notified respondent of the excessive emissions the civil penalty should be remitted under the facts of this case. The Board encourages the voluntary notification embodied in respondent's Section 9.16.

VI

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

Each violation is affirmed, provided however, that the two $250 penalties (Nos. 3815 and 3835) of April 18 and May 10, 1978, are each hereby affirmed while the $250 penalty (No. 3908) of June 29, 1978, is hereby entirely remitted.

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DONE at Lacey, Washington this 29th day of November, 1978.

POLLUTION CONTROL HEARINGS BOARD

DAVE J. MOONEY, Chairman

CHRIS SMITH, Member

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RECEIVED
Pollution Control Hearings Board
By_____

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF KING

In the matter of the Pollution Control Hearings Board Order	)	
	)	No. 78-132 and 78-180
ROBERT W. SULLIVAN and JAN SULLIVAN d/b/a CROWN CEDAR PRODUCTS,	)	PETITION FOR JUDICIAL REVIEW
Petitioners,	)	
vs.	)	
PUGET SOUND AIR POLLUTION CONTROL AGENCY,	)	
Respondent.	)	

COMES NOW ROBERT W. SULLIVAN and JAN SULLIVAN d/b/a CROWN CEDAR PRODUCTS, petitioners herein, and pursuant to RCW 34.04.130 and to RCW 43.21B.190, respectfully show the court that

I.

Petitioners are residents of King County, State of Washington.

II.

Petitioners have elected to lay venue in King County in accordance with the express provisions therefor contained in the Administrative Procedure Act, RCW 34.04.130(2).

III.

The Pollution Control Hearings Board (hereinafter "Board") is an administrative agency of the State of Washington, having been established by RCW 43.21B.010.

IV.

Petitioners are the appellants in the contested proceeding before the Board wherein petitioners pray for an order striking

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and invalidating certain conditions and two $250 civil penalties imposed by the Puget Sound Air Pollution Control Agency.

V.

A hearing was held by the Board on September 13, 1978.

VI.

On November 29, 1978, the Board entered a decision, a true and correct copy of which is annexed hereto and incorporated as Exhibit "A".

VII.

Petitioners' request for review was heard by two members of the three-member Board. The Board entered a final decision and order in which these two members concurred. Pursuant to the Board's procedural rules, WAC 371-08-200, such final decision and order is a final decision for purposes of judicial review.

VIII.

The Board's final decision of November 29, 1978, has prejudiced petitioners' substantive rights and petitioners are aggrieved thereby.

IX.

Petitioners hereby petition the above-captioned court for a review of the Board's Findings of Fact, Conclusions of Law, and Final Order on the grounds that they are:

1. In violation of constitutional provisions;

2. In excess of the statutory authority or jurisdiction of the Board;

3. Made upon unlawful procedure;

4. Affected by errors of law;

5. Clearly erroneous in view of the entire record as submitted and the public policy contained in the act;

6. Arbitrary and capricious because the Findings of Fact were inadequate to justify the Board's Conclusions of Law and Order.

KELLER, JACOBSON, HOLE, JACKSON & WENTZ

2200 BUILDING
[illegible] N.E.

WHEREFORE, Petitioners pray that:

(1) This court proceed to review the decisions of the Board in the manner provided in RCW 34.04.130 and in RCW 43.21B.1[illegible]

(2) The court modify the Board's final order so as to render it consistent with the applicable laws and public policies of the State of Washington, or, to strike the final order in its entirety.

(3) The court grant such other and further relief as it deems just and proper.

KELLER, JACOBSON, HOLE, JACKSON & WENTZ

BY: _____
CRAIG V. WENTZ
Attorney for Petitioners