BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF DEPARTMENT OF THE NAVY, UNITED STATES OF AMERICA, Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 79-217 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of three civil penalties totaling $750 for emissions allegedly in violation of respondent's Section 9.03(b) of Regulation I, came on for hearing before the Pollution Control Hearings Board, William A. Harrison, Hearing Examiner, convened at Seattle, Washington, on April 24, 1980. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its attorney, Timothy L. Leachman, LT, JAGC, USN. Respondent appeared by its attorney, Keith D. McGoffin. Reporter Mary C. Tevis recorded the proceedings.

Having heard or read the testimony, having examined the exhibits, having considered the contentions of the parties, and the Board having served its proposed decision upon the parties herein, and having received exceptions thereto; and the Board having considered the exceptions, and having granted the exceptions in part and denied said exceptions in part, the Board now 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

Respondent's inspector, while on routine patrol near the Navy facility at Pier 90, Seattle, observed a plume of smoke from the funnel of appellant's ship USS Esteem. The inspector positioned himself properly and read the plume's opacity. Thereafter appellant's ships USS Conquest and USS Implicit each emitted a smoke plume from its funnel. While properly positioned, the inspector read the opacity of these plumes. The inspector observed the following opacity for the following duration for the ships indicated:

Ship	Opacity	Duration
USS Esteem	25-40%	9 minutes
USS Conquest	25-100%	12-3/4 minutes
USS Implicit	50-100%	12 minutes

The Pier 90 Navy facility is the home port of the three ships in question which are mine-sweepers of the same type. Each is

approximately 27 years old.

III

The smoke emissions observed by the inspector in this matter occurred after start-up of the ship's engines but before the ships became under weigh. This is referred to as "no-load" operation and is a routine procedure. The emissions observed are typical of no load operation of the three ships concerned, and such emissions were not the result of any breakdown.

The smoke emissions in question were in plain view of members of the crews aboard appellant's ships. By prior agreement of the parties, the commanding officer of only one ship appeared at hearing to give his own testimony but which testimony was to be deemed similar to that which would be adduced from the commanding officers of the other two ships. The commanding officer who appeared testified that he saw the plume from his ship at the times in question. Appellant did not attempt to notify respondent of the smoke emissions.

IV

Because the three ships were on the verge of departure, respondent's inspector did not attempt to board them to notify appellant's personnel of his observation. Rather, he returned to his office and notified appellant's designated officer at the facility by telephone. Thereafter, appellant received three Notices and Orders of Civil Penalty each alleging violation of Section 9.03(b) of respondent's Regulation I and assessing a civil penalty of $250 (one violation and penalty per ship). From these appellant appeals.

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

Section 9.03(b) of respondent's Regulation I states:

> (b) 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% 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 Subsection 9.03(b)(1). . . .

The term "air contaminant" includes smoke. Section 1.07(b) of respondent's Regulation I. Appellant caused or allowed the emission of an air contaminant, smoke, from each of three ships in excess of the above standards of time and opacity. Appellant has violated Section 9.03(b) of Regulation I three times.

II

Appellant urges that the penalties assessed should be waived or dismissed because the ships were undertaking normal engineering start ups, the amount of smoke was not unusual, and all known precautions were observed. Whether all known precautions were taken is not a defense to a section 9.03(b) violation. What is a means of avoidance of what would otherwise be a violation caused by start-ups is set

forth in section 9.16. However, appellant did not comply with the requirements of Section 9.16 so as to exculpate itself by that means. However, the fact that this opacity was caused by normal start up can be considered in mitigation of the penalties assessed.

III

Appellant cites the Court of Appeals decision in Puget Sound Air Pollution Control Authority v. Kaiser Aluminum & Chem. 25 Wn. App 273. 607 P.2d 870 (Div. II, 1980). The facts of this case meet the test of "knowing violation" set out in that decision. The Court in Kaiser referred to the criminal code, RCW 9A.08.010(1)(b), to define the meaning of knowing:

> Knowledge. A person knows or acts knowingly or with knowledge when:
> (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
> (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

The air contaminant in Kaiser was a dust known as alumina. The Court of Appeals noted in its decision that:

> "There is no indication that Kaiser knew that alumina was leaking or escaping until the fact was brought to the attention of Kaiser's supervisory employees by the inspectors." Kaiser, supra, at P. 274.

In this case, by contract, the air contaminant, smoke, was escaping in plain view of the crews of the appellant's ships

concerned. Likewise the knowledge that engines had been started and were in "no-load" operation would lead a reasonable man in the same situation to believe that such smoke would be emitted as in fact occurred. Such smoke is the normal consequence of the routine procedure being conducted by appellant. There is no evidence that appellant took affirmative steps for the purpose of curtailing the smoke emitted. We conclude that appellant knowingly caused or permitted air pollution as proscribed by the Clean Air Act at RCW 70.94.040, and knowingly violated respondent's Section 9.03(b) of Regulation I.

IV

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

From these Conclusions the Board makes the following

ORDER

The three Notices and Orders of Civil Penalty (Nos. 4529, 4530 and 4531), totaling $750, are each hereby affirmed; provided. however, that $375 of these penalties 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.

DONE at Lacey, Washington, this 5th day of August, 1980.

POLLUTION CONTROL HEARINGS BOARD

NAT W. WASHINGTON, Chairman

DAVID AKANA, Member

CERTIFICATION OF MAILING

I, Trish Ryan, certify that I mailed, postage prepaid, copies of the foregoing document on the 25th day of August, 1980, to each of the following-named parties at the last known post office addresses, with the proper postage affixed to the respective envelopes:

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POLLUTION CONTROL HEARINGS BOARD