BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF PHILIP WHITNEY, dba A2W ENTERPRISES, INC., Appellant, v. BENTON-FRANKLIN-WALLA WALLA COUNTIES AIR POLLUTION CONTROL AUTHORITY, Respondent.	)	PCHB No. 81-110 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of five notices of citation for open burning of prohibited materials and the associated five penalties of $250 each, came on for formal hearing before the Pollution Control Hearings Board on November 24, 1981, at Prosser, Washington. Seated for and as the Board was David Akana and Gayle Rothrock (presiding). The proceedings were recorded by court reporter, Jane Ellis.

Representing the appellant was attorney Michael Everett, Grandview. Respondent appeared by its attorney Philip Rodriquez,

Richland.

Various exhibits were admitted and examined, and witnesses were sworn and testified. 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 80-7, covering air pollution sources, its current enforcement regulations, which is noticed.

II

Appellant, A2W Enterprises, Inc., is a corporation with three principals; Elmer Anderson, Henry Anderson, and Philip Whitney. Mr. Whitney is also general manager and operator of the company. The company is in the business of collecting and disposing of garbage and operating a fenced dumpsite.

The dumpsite and sanitary landfill is located on the Anderson Ranch, approximately nine miles north of Prosser, near the boundary between Benton and Yakima counties. It is also in proximity to Sunnyside.

III

Appellant constructed two firebreaks (or fireguards) on the dumpsite some time in the past. There is no water on the site. Appellant once applied for an air pollution variance from the respondent agency and was advised he could not have one. Truckloads of tires and other materials were allowed to be deposited and accumulated by appellant at the subject dumpsite in late spring and early summer of 1981.

IV

The site has been visited by local firefighters, a county health department official, and respondent agency officials on occasion over the past four years. Some visits were in response to reported fires and emanations of dense smoke from the site. During this period at least one violation-citation from respondent agency was issued to appellant for allowing prohibited materials to burn at the subject dumpsite. In October, 1981, the county's health department ordered the dump closed and revoked the dump's operating permit. Respondent agency has, on at least two occasions, advised appellant on the management of smoldering fires and on fire prevention techniques (e.g. covering dumped or smoldering material with dirt on a regular basis).

V

Evidence clearly indicates that on June 18, 19 and 20, of 1981, the appellant allowed an outdoor fire containing prohibited materials(e.g. rubber products and garbage) to burn at the subject dumpsite. The fire emitted dense black smoke and a noxious odor. There was a mainfire and several spot fires within at least an acre of ground used as the dumpsite.

VI

Respondent agency's control officer arrived at the fire site on June 18, 1981, and noted the nature and dimensions of the fire. Violation citation No. 81-6 was issued that same evening and received by appellant Whitney's spouse. Another respondent agency employee photographed the fire and dumpsite on June 19. Testimony reveals

citizens still saw dense black smoke and experienced offensive odor and particulate fall-out on June 20. It is unclear how long the subject fire smoldered thereafter.

VII

Appellant received four additional formal notices of citation-violation and an accompanying letter from respondent agency's Board Chairman on June 25th, citing violation of Regulation 80-7 Section 425-045 for June 17, 19, 20, and 21 of 1981, and assessing a $250 civil penalty for each day. From these five notices Philip Whitney and A2W Enterprises appeal.

VIII

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

From these Findings the Board enters these

CONCLUSIONS OF LAW

I

The Legislature of the State of Washington has enacted the following policy on outdoor fires:

> It is the policy of the state to achieve and maintain high levels of air quality and to this end to minimize to the greatest extent reasonably possible the burning of outdoor fires. Consistent with this policy, the legislature declares that such fires should be allowed only on a limited basis under strict regulation and close control. RCW 70.49.740.

The respondent agency has adopted its Regulation 80-7 which implements state policies on air pollution control--including outdoor fires and burning of prohibited materials--in Benton, Franklin, and Walla Walla counties.

In being responsible for allowing an outdoor fire, which contained prohibited materials, to burn at the A2W Enterprises, Inc., dumpsite, appellant has violated respondent's Regulation 80-7, Section 425-045.

II

By maintaining and operating a landfill site containing an underground smoldering fire and by allowing the deposition and accumulation of additional combustible materials on the site, appellant achieved the reasonable and foreseeable consequence of his actions; a large fire.

The sizeable area of unburied tires and other materials dumped at random at the site is testament to the absence of good management practices at the site, and contributed to increasing the degree of the conflagration.

III

In allowing the burning of prohibited materials at the dumpsite for more than one day after actual notice and citation of June 18, without being in cooperative contact with respondent agency, and without making any attempt to diminish or extinguish the fire, appellant has violated respondent's Regulation 80-7, Section 400-130 on continuing violations.

IV

In building only two firebreaks--or guards--and taking no other recommended steps to prevent fires, or manage the full extinguishment of them, appellant should be assessed the full ($250) penalty for each actual violation.

V

Three of the five citation-violations are clearly supported by evidence and testimony, thus sustaining the authority of citation-violations given for June 18, 19 and 20, of 1981. The civil penalties for June 17 and June 21, should be vacated, however, for lack of evidence.

VI

There is no evidence which supports a penalty assessed upon Whitney, personally, as opposed to the corporation, A2W. Accordingly, Whitney should be stricken from the penalty assessments as an individual.

VII

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

Respondent's Notices of Citation-Violation Numbers 81-7, 81-8, and 81-9 and the accompanying three civil penalties of $250 each are affirmed provided that Philip Whitney in his individual capacity is stricken from each assessment. Notices of Citation-Violation Numbers 81-6 and 81-10 are vacated.

DONE this 8th day of December, 1981.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock

GAYLE ROTHROCK, Vice Chairman

David Akana

DAVID AKANA, Member