BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF MARINE POWER AND EQUIPMENT COMPANY, INC., Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB Nos. 81-141, 81-142 & 81-143 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of three $250 civil penalties for alleged emission of particulate matter in violation of respondent's Sections 9.03(b), 9.11(a) and 9.15(a) of Regulation I, came on for hearing before the Pollution Control Hearings Board, David Akana and Gayle Rothrock, Members, convened at Lacey, Washington on January 19, 1982. William A. Harrison, Administrative Law Judge, presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its attorney, George S. Martin. Respondent appeared by its attorney, Keith D. McGoffin. Reporter Lois Fairfield

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

On August 6, 1982, respondent Puget Sound Air Pollution Control Agency (PSAPCA) received a citizen complaint concerning visible emissions into the air. Respondent's inspector went to the complainant's place of business, a food processing facility located on the Duwamish Waterway in Seattle. The inspector observed rust-colored emissions emanating from a barge tied to a pier in the shipyard next door to the complainant. This is the appellant's (Marine Power's) shipyard. The emissions resulted from abrasive blasting being performed on the barge for removal of rust. The day in question was Thursday, an ordinary working day. The emission in question would be as apparent to Marine Power as it was to the complainant and respondent's inspector.

III

Placing himself in a proper position (relative to the sun, the direction of the emission and other factors), the inspector observed

the emission so as to read its opacity. During the observation of not more than 20 minutes, the emission was of 25-50% opacity for 15-1/2 minutes.

IV

The inspector observed that the emission rose into the air and settled onto the next door property where the complainant, a supervisor of the food processing operation, was working. The emission settled as a fine, black dust onto the buildings, grounds and automobiles at the food processing site. The dust was sufficient to cause employees at the site to leave their workplace out of concern for damage to their automobiles. The dust caused irritation to the complainant's face and hands and was extremely irritating to his eyes, causing him to flush his eyes with water.

V

The inspector went to the shipyard of Marine Power and asked a guard for permission to enter the fenced enclosure. This was granted and the inspector advanced to the offices of the facility where he asked to see the superintendent. A man identifying himself as such granted permission to the inspector to visit the barge. Another man within the office accompanied the inspector.

At the barge, the inspector observed that abrasive blasting was being carried out which was the source of the airborne particulate matter. Reasonable precautions to prevent particulate matter from becoming airborne during abrasive blasting include either tarp covering or water spray dampening. Neither of these precautions were

being taken. Appellant presented no evidence that any precaution was being taken to prevent the emission of particulate matter from becoming airborne.

VI

Marine Power received three Notices and Orders of Civil Penalty from PSAPCA, each assessing a $250 civil penalty ($750 total). The Orders cited violation of respondent's Sections 9.03(b), 9.11(a) and 9.15(a) of Regulation I. From this appellant appeals.

VII

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

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 (30% 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); provided that, 9.03(b)(2) shall not apply to fuel burning equipment utilizing wood residue when the particulate emission from such equipment is not greater than 0.05 grain per standard cubic foot.

We reject appellant's contention that respondent's inspector must compare the Ringelmann Chart to an emission while observing it. The

Ringelmann Chart is merely a measure of darkness, Section 9.03(b)(1) supra. Opacity which obscures an observer's view to the same degree as that darkness (20% density) is also prohibited. Respondent proved an opacity of 20% or greater in excess of permissible time limitations and thus proved that the emission in question violated the standard of Section 9.03(b)(2).

II

Section 9.11(a) of respondent's Regulation I states:

> It shall be unlawful for any person to cause or permit the emission of an air contaminant or water vapor, including an air contaminant whose emission is not otherwise prohibited by this Regulation, if the air contaminant or water vapor causes detriment to the health, safety or welfare of any person, or causes damage to property or business. (Emphasis added.)

The test for determining whether emissions are detrimental to the welfare of any person, under Section 9.11, is not expressly stated in respondent's Regulation I. Such a test must therefore be inferred with particular reference to the policy of respondent's Regulation I. That policy is to "secure and maintain such levels of air quality as will prevent injury to property...(and) foster the comfort and convenience" of the people. Section 1.01 and RCW 70.94.011. The antithesis of this policy is "air pollution" which is defined as the "emission of" and "air contaminant" which "is, or is likely to be, injurious to...property, or which unreasonably interfers with enjoyment of life and property." Section 1.07(c), (d), and (o) and RCW 70.94.030(1), (2), and (8).

The emission of air contaminant is therefore detrimental to the welfare of a person, and unlawful under Section 9.11, when it unreasonably interferes with a person's enjoyment of life and property. Such emissions are inimical to the policy of respondent's Regulation I. Crow Roofing and Sheet Metal, Inc., v. Puget Sound Air Pollution Control Agency, PCHB No. 1098 (1977); Boulevard Excavating, Inc., v. Puget Sound Air Pollution Control Agency, PCHB No. 77-69 (1977); Cudahy Company v. Puget Sound Air Pollution Control Agency, PCHB No. 77-98, et seq (1977). The emission in question caused substantial discomfort and annoyance to the complainant, a person of normal sensibilities. The emission unreasonably interfered with enjoyment of life and property at the food processing neighbor of appellant and thereby proved detrimental to the welfare of persons working there. The emission in question violated the standard of Section 9.11(a).

III

Section 9.15(a) of respondent's Regulation I states:

> (a) It shall be unlawful for any person to cause or permit particulate matter to be handled, transported or stored without taking reasonable precautions to prevent the particulate matter from becoming airborne.

Particulate matter is defined as "any material, except water in an uncombined form, that is or has been airborne and exists as a liquid or a solid at standard conditions." Section 1.07(w) of respondent's Regulation I. The emission in question was of particulate matter. Where, as here, a party is shown to have permitted particulate matter

to become airborne, a presumption arises that reasonable precautions were not taken. The burden of proceeding with the evidence then shifts to that party (appellant) to show reasonable precautions. Boulevard Excavating, Inc., v. Puget Sound Air Pollution Control Agency, PCHB No. 77-69 (1977), Weyerhaeuser Company v. Puget Sound Air Pollution Control Agency, PCHB No. 1076 (1977) and Kaiser Aluminum Company v. Puget Sound Air Pollution Control Agency, PCHB No. 1079 and 1085 (1977). Appellant failed to rebut that presumption, which presumption was bolstered by the failure to use tarps or water spray in connection with the sandblasting. The emission in question violated the standard of Section 9.15(a).

IV

Appellant contests its liability for the violative emissions in question. It asserts that respondent's case should be dismissed because there was no proof that appellant owned the barge or conducted the abrasive blasting which gave rise to the emissions. We disagree.

The barge was tied to appellant's pier within the appellant's shipyard. When the inspector asked to speak with the superintendent of appellant's facility, that person undertook to grant permission to approach the barge. This and the other evidence in this case combine to support our conclusion that the barge was in the shipyard with appellant's consent.

The barge being tied to appellant's premises with appellant's consent, on a normal working day, on which appellant's superintendent and others were present, and the emission from the abrasive blasting

being openly and obviously apparent to those within and without the premises, and appellant adducing no evidence that it attempted to control the emissions or withdraw its consent for moorage, we conclude that appellant allowed or permitted the emissions in question. To "allow" or "permit" a prohibited emission is conduct prohibited by Sections 9.03(b), 9.11(a) and 9.15(a). This is so regardless of whether appellant owned the barge or employed the abrasive blasting operator. Likewise this is so whether appellant's personnel actually saw the emission which because it was open and apparent, they should have seen. Scienter is not an element of any of the three sections cited. See also Section 2, chapter 175, Laws of 1980. RCW 70.94.040.

V

Appellant violated Sections 9.03(b), 9.11(a) and 9.15(a) of respondent's Regulation I.

VI

Appellant has violated respondent's rules by abrasive blasting operations on two occasions prior to this matter. See Marine Power and Equipment Company, Inc., v. Puget Sound Air Pollution Control Agency, PCHB No. 80-139 (1980). The amount of penalty assessed by respondent is fully justified.

VII

We have considered the other contentions of appellant and find them to be without merit.

VIII

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 three $250 civil penalties (Nos. 5246, 5247 and 5248) are each affirmed (total $750).

DONE at Lacey, Washington this 23rd day of March, 1982.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock

GAYLE ROTHROCK, Member

David Akana

DAVID AKANA, Member

William A. Harrison

WILLIAM A. HARRISON
Administrative Law Judge