ORDER

The violations asserted by Notices of Civil Penalty 6026 through 6074 are affirmed. The penalties assessed by Notices 6026 through 6050 are vacated. The penalties assessed by Notices 6051 through 6074 are each vacated as to the amount in excess of $25. For Notices 6051 through 6074 penalties aggregating $600 are affirmed.

DONE this 9th day of November, 1984.

POLLUTION CONTROL HEARINGS BOARD

WICK DUFFORD, Lawyer Member

GAYLE ROTHROCK, Chairman

11/9/84

LAWRENCE J. PAULK, Vice Chairman

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Looking at the entire array of facts and circumstances, the imposition of any penalties at all for the days prior to March 2, 1984, is inappropriate. The violations were simply the result of a good faith misunderstanding as to what was required. However, for the 24 days of violation after March 2, 1984, there is no compelling mitigating explanation for ASARCO's continued violation. That discussions between attorneys were initiated does not obscure the clear message of the letter, received by ASARCO on March 2, 1984, stating PSAPCA's intentions under Resolution 503.

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Nonetheless, considering the technical character of the violation, the past behavior of the violator and the corrective action instituted, no more than a nominal penalty for the violations after March 2, 1984, should be imposed. Here the statutory maximum was levied. We conclude that one tenth of that amount or $25 per day would be a reasonable penalty for the 24 days in question.

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

From these Conclusions the Board enters this

physical consequences of the violation. Here the penalty is imposed for 49 days of missed sampling. However, Resolution 503 does not define the term "continuous." In light of the history of dealings on this matter between PSAPCA and ASARCO, the meaning of "continuous" monitoring was ambiguous in the context of the switch from low volume to high volume arsenic particulate samples. Under the circumstances, ASARCO adopted a plausible interpretation of the term and pursued the same in good faith until advised of PSAPCA's views to the contrary on March 2, 1984.

Moreover, the requirement violated has to do only with the frequency of monitoring for a contaminant not subject to any standard enforceable by penalty. There is no evidence that unusual or excessive emissions of arsenic occurred during the time in question. There is no suggestion that the failure to follow the daily sampling routine in and of itself resulted in any environmental harm.

VII

The prior behavior of the violator involves no previous violations of the "continuous" monitoring requirement first imposed in 1976 and observed for nearly eight years.

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Since the events at issue, ASARCO has returned to its prior practice and no other violations of the "continuous" monitoring requirement have occurred.

civil penalty for the violation of a provision of PSAPCA Board resolution.

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PSAPCA has the statutory authority to issue orders requiring monitoring of air contaminants. RCW 70.94.141

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The interpretation of an administrator who must implement a regulatory term is entitled to deference. Monitoring for arsenic "on a continuous basis" as required by the PSAPCA Board's Resolution 503 is interpreted by the agency's control officer as meaning daily sampling. We conclude that this was the meaning of the PSAPCA Board.

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ASARCO violated Resolution 503 by failing to collect a 24-hour sample of arsenic containing particulates at three monitoring sites on the 49 days in question.

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The appropriateness of the amount of a penalty is a matter involving consideration of factors bearing on its reasonableness. These include:

a) The nature of the violation;

b) The prior behavior of the violator;

c) Actions taken after the violation became known to solve the problem.

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The nature of the violation encompasses such matters as the duration of the offense, the type of requirement violated and the

issued a Notice of Violation alleging the violation of Resolution 503 on 49 days between February 1 and March 31, 1984. Of these, 24 days were after March 2, 1984, the date on which ASARCO received notice that in PSAPCA's view once every sixth day was not "continuous" monitoring. On May 31, 1984, PSAPCA sent ASARCO 49 separate Notices of Civil Penalty, each assessing $250, one for each of the days in February and March when arsenic particulate samples were not collected by ASARCO at three monitoring stations.

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At the time of the alleged violations there was no applicable ambient air quality standard for arsenic.

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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

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At the time of the violations asserted in these consolidated cases, RCW 70.94.431 stated in pertinent part:

> ...any person who violates any of the provisions of chapter 70.94 RCW or any of the rules and regulations of the department or the board shall incur a penalty in the form of a fine in an amount not to exceed two hundred fifty dollars per day for each violation....

At the hearing, ASARCO withdrew that portion of its appeal which asserted that chapter 70.94 RCW does not authorize imposition of a

to 6-day and 3-day schedules of PSAPCA hi-vols) as confirmation of the planned schedule change.

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On February 17, 1984, an engineer from PSAPCA learned in conversation from a member of the smelter's technical staff that samples were being collected on a once in six day schedule. This was reported to PSAPCA's control officer who, on February 29, 1984, wrote to ASARCO, quoting Resolution 503 and stating:

> Monitoring for arsenic once every sixth day...is not 'on a continuous basis' and does not conform to Board requirements.

The letter went on to inform ASARCO that PSAPCA expected an immediate resumption of "continuous monitoring." This letter was not actually received by ASARCO until March 2, 1984.

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After ASARCO was apprised of PSAPCA's position on "continuous" monitoring it initiated discussions through its attorney with PSAPCA's attorney to see if agreement could be reached on a monitoring schedule less frequent than daily. PSAPCA's attorney replied in effect, in the negative, by a letter dated March 30, 1984. On this same day, by a letter crossing in the mail, ASARCO advised PSAPCA of its intention to return to daily sampling with low volume samplers.

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ASARCO reported to PSAPCA the dates and places of its once in six day sampling and also its return to daily sampling in its Quarterly Report dated April 6, 1984. Thereafter, on April 30, 1984, PSAPCA

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Prior to the events at issue, ASARCO made a corporate decision to undertake a shift from low volume to high volume samplers for particulate in its facilities nationally. Management at the smelter was anxious to make this change because environmental groups had criticized the accuracy of its low volume sampling for arsenic.

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Some time in December of 1983 or in January of 1984, the plant manager of the smelter called the control officer for PSAPCA and advised the agency of the plan to shift to the use of high volume samplers for arsenic particulates. There was no objection. However, the conversation did not include any discussion of the sampling interval to be used. Because of both EPA's program and common practice, ASARCO's manager assumed that the approved shift to high volume samplers implied approval to shift to a once in six days sampling schedule. He believed that such a schedule was consistent with the directive of PSAPCA Resolution 503 to maintain monitoring stations to determine ambient concentrations of arsenic containing particulates "on a continuous basis." While PSAPCA never expressly authorized ASARCO's use of a one daily sample every sixth day routine, ASARCO's manager read PSAPCA's letter of January 23, 1984, (referring

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VIII

Ambient particulate monitoring is not done by continuous analyzers, but rather by the collection of samples gathered by monitoring equipment over some time interval. The United States Environmental Protection Agency (EPA) receives data on ambient air quality generally from a monitoring network maintained throughout the nation. Under this EPA program, data on particulates from high-volume monitors is collected on a one 24-hour sample every six days schedule. (See 40 CFR 58.13.) PSAPCA maintains 28-30 high-volume monitors in its geographic area to collect particulate samples. The majority of these monitors are operated on a once in six day schedule, although some are operated on a once in three day schedule. ASARCO's prior experience with the use of high volume monitoring of particulate from the smelter has involved use of a once in six day schedule.

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These terms were continued in force and effect by Resolution 446 adopted June 7, 1979.

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On April 10, 1980, PSAPCA's Board approved Resolution 464, granting a variance for the smelter. Section 1(10) stated:

> ...ASARCO, Inc. shall continue to operate and bear all costs of operating and maintaining three monitoring stations to determine ambient air concentrations of arsenic containing particulate on a continuous basis...

No explicit mention was made in this resolution of the type of monitors to be used or of the frequency of sampling. The monitoring language of Resolution 464 was continued in effect by Resolution 491, adopted March 12, 1981.

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ASARCO complied with PSAPCA's 1976 directive to install three low-volume monitors and collect samples daily. This type of equipment was used and this daily routine was followed until the end of January, 1984. On February 1, 1984, two of the units were replaced with high-volume monitors and the sampling schedule at these stations was

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

FINDINGS OF FACT

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Appellant ASARCO, Incorporated, is a corporation which operates a copper smelter (the smelter) at Ruston, near Tacoma, Washington.

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Respondent Puget Sound Air Pollution Control Agency (PSAPCA) is a municipal corporation of the State of Washington with responsibility for enforcing the provisions of the Washington Clean Air Act (Chapter 70.94 RCW) within its geographical area--an area which includes the site of the smelter.

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PSAPCA is governed by a Board of Directors which, among other actions, adopts resolutions and orders directed to individual air contaminant sources. PSAPCA is administered by a Control Officer who enforces the resolutions and orders adopted by the Board of Directors.

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On February 19, 1976, PSAPCA's Board approved Resolution 359 granting a variance to the smelter from certain emission limitations and requiring ASARCO to install and maintain three monitoring stations to determine ambient air concentrations of arsenic particulates. The variance specified:

> The monitors will be low-volume monitors..., will operate continuously, and will report on a 24-hour basis.

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF ASARCO, INC., Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 84-120 thru 84-168

These consolidated matters, the appeal of forty-nine (49) civil penalties of $250 each, aggregating $12,250, for violation of Resolution No. 503 of the Puget Sound Air Pollution Control Agency, were heard before Board members Gayle Rothrock, Lawrence J. Faulk and Wick Dufford at the Board's office in Lacey, Washington, on Wednesday, October 10, 1984. Mr. Dufford presided.

Appellant ASARCO, Inc., was represented by Michael R. Thorp. Respondent Puget Sound Air Pollution Control Agency was represented by Keith D. McGoffin. Kim L. Otis, court reporter, recorded the

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