BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF PUGET CHEMCO, INC., Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB Nos. 84-245, 84-304, 84-305, 84-306, and 84-307 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal from the issuance of five $1,000 civil penalties for the alleged violation of Regulation I and WAC 173-400-040(8) came on for hearing before the Pollution Control Hearings Board; Lawrence J. Faulk (presiding), Gayle Rothrock, and Wick Dufford, on November 15, 1984, at Lacey, Washington. The proceedings were reported by Marcia Erwin of Gene Barker and Associates, Olympia court reporter.

Appellant company was represented by Norman Pitt, President. Respondent Agency was represented by Keith D. McGoffin, attorney.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. From testimony, evidence and legal argument, the Board makes these

FINDINGS OF FACT

I

Respondent Puget Sound Air Pollution Control Agency (PSAPCA) has submitted a copy of its Regulation I, of which judicial notice is taken.

II

Appellant Puget Chemco, Inc., is a new industrial operation located on the tideflats of Tacoma. Its business is the production of dry calcium chloride ($CaCl_2$) to market commercially. The product has various applications, including use as a road spray and as an agent for melting ice. The plant constructed by Puget Chemco takes wet calcium chloride liquor from the neighboring Reichhold Chemicals, Inc., and subjects it to an elaborate drying process which ultimately results in a product in the form of a white powder.

III

Puget Chemco received approval for its construction as a new air contaminant source from PSAPCA on August 16, 1983. The company submitted a notice of completion of construction dated April 10, 1984, indicating an intention to be completed by April 15, and in operation by May 1, 1984. On April 20, 1984, PSAPCA's inspector issued the company a notice of violation for excessive opacity from the stack of its submerged combustion evaporator. The demister malfunction which

caused the problem was later corrected. On June 6, 1984, PSAPCA's inspector conducted the formal post-notice-of-completion inspection of the installation, and observed, among other things, a serious problem inside the plant with $CaCl_2$ dust, some of which was escaping to the outside air through vents in the side of the building.

IV

The company, since it began operations in the spring of 1984, has experienced a long series of frustrations in its air pollution control efforts. The baghouses installed to control emissions from the rotary dryers suffered numerous breakdowns involving failures of several kinds of bag cloth and failures of various bag threads. The property of $CaCl_2$ is to draw moisture to itself. Inside the baghouses this has resulted in the formation of a glass-like material which has interfered with proper function. When the baghouse suction is not satisfactory, leaks from equipment throughout the plant increase, creating a severe dust problem. (In an interview with PSAPCA's inspector at the plant on August 24, 1984, the company's president could not see through his glasses because of a calcium chloride coating on the lenses.)

Even absent baghouse difficulties, equipment leakage within the plant has resulted in substantial levels of ambient dust. After the alleged violations at issue, in an effort at further particulate control, the company installed a wet scrubber near the screen and grinder, a point in the process downstream from the baghouse takeouts.

V

As of the date of hearing, the Puget Chemco plant had run only sporadically and had not achieved either full or sustained production. The company president described operations to date as being in a "startup mode." The company has moved from crisis to crisis, trying to solve air quality problems as they arise. Its efforts, however sincere, have met with less than total success.

VI

On July 25, 1984, commencing at approximately 1:06 a.m., PSAPCA's inspector observed airborne particulate matter at appellant's plant emanating from the main building and the No. 1 baghouse vent for at least fourteen minutes. On August 23, 1984, commencing at approximately 8:22 a.m., the inspector observed airborne particulate matter coming from doorways and vents in the main plant building for at least fifteen minutes. On August 24, 1984, commencing at approximately 9:36 a.m., the inspector observed airborne particulate matter coming from the doorways and vents of the main building for at least 28 minutes. On September 10, 1984, commencing at approximately 9:27 a.m., the inspector observed airborne particulate matters issuing from the main building vents for at least 24 minutes. On September 12, 1984, commencing at approximately 7:55 a.m., the inspector observed airborne particulate matter coming from the main building vents for at least 28 minutes.

Conditions at the time of the inspector's observations were inappropriate for taking opacity readings. However, in each instance

the inspector's testimony was that "the plume was significant in terms of the plume's ability to be observed by the human eye." The inspector, an employee of considerable training, expertise and experience, concluded, in each instance, that the particulate emissions were sufficient to adversely impact the ambient air.

VII

PSAPCA issued five separate civil penalties aggregating $5,000; $1,000 for each of the five events observed by its inspector at Puget Chemco. In every case, violation of Section 9.15 of PSAPCA Regulation I and of WAC 173-400-040(8) was alleged. The company appealed each of these penalties to this Board.

VIII

There is no evidence that any one of the events in question, by itself, directly caused injury to human health, plants, animal life or property, or unreasonbly interfered with the enjoyment of life and property. However, Puget Chemco's operation is located in a federally designated nonattainment area for total suspended particulate matter. This means the national ambient air quality standard for such material (promulgated by the U.S. Environmental Protection Agency) has not been attained and maintained in the area. The standard was established at a level selected for the protection of public health. Accordingly, any significant addition of particulate to the ambient air in the area has the <u>potential</u> for detriment to health, property or enjoyment.

Appellant did not controvert the facts evidenced by the PSAPCA inspector's observations in any instance.

IX

The appeal in PCHB No. 84-245 was dated August 27, 1984, and was filed after receiving the Notice and Order of Civil Penalty on August 9, 1984. PSAPCA received this appeal on August 29, 1984. However, it was not stamped-in as received by the Board until September 11, 1984. Thirty days from the date appellant got the Notice was September 8, 1984, a Saturday. The next business day was Monday, September 10, 1984.

The mail delivered to the Board's outside post office box during the last days of August and the first week of September was not picked up until September 11, 1984, due to an oversight. Because the appeal arrived at PSAPCA's office so early and appellant sent all copies out at approximately the same time, the Board believes that this appeal was received at the Board's offices prior to September 11 and simply remained in the post office box for a number of days before it was picked up and logged in.

X

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

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. RCW 43.21B.

II

PSAPCA's motion to dismiss PCHB No. 84-245 is denied. Under Finding of Fact IX, the appeal was filed within the thirty-day period provided for by law. RCW 43.21B.120.

III

Section 9.15 of PSAPCA's Regulation I reads, in pertinent part, as follows:

> SECTION 9.15 AIRBORNE PARTICULATE MATTER
>
> It shall be unlawful for any person to cause or allow:
>
> (a) particulate matter to be handled, transported or stored...in such a manner that particulate matter is emitted in sufficient quantities and of such characteristics and duration as is, or <u>is likely to be, injurious</u> to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property. (Emphasis added.)

This formulation parallels the definition of "air pollution" itself in the underlying statute, RCW 70.94.030(2), and properly encompasses not only emissions which cause demonstrable harm, but also emissions of a character and duration which create <u>a harmful potential</u>. (<u>See Kaiser Aluminum v. Pollution Control Hearings Board</u>, 33 Wn. App. 352, 355, 654 P.2d 723 (1982),

IV

The emissions in question were in each case observed for a substantially greater duration than would be required for an opacity violation. The emissions were of particulate, which is of a character sufficiently dangerous to be the subject of a national ambient air standard directed toward the protection of human health. The

inspector who made the observations was an experienced Agency employee with years of exercising judgment in the visual assessment of emissions. His assessment that the emissions were sufficient to adversely impact the ambient air was unrebutted. The emissions occurred in an area where the national health-oriented ambient air standard has not been attained and maintained. (See 40 CFR 81.348.)

Under all the circumstances, we conclude that Section 9.15 of Regulation I was violated by appellant on each of the instances charged. The emissions were of a character and duration as is likely to cause harm.

V

Because we conclude the violations of Section 9.15 of Regulation I have been made out, it is unnecessary for us to consider the allegations that the same actions violate WAC 173-400-040(8).

VI

We are influenced in these cases by the strict liability nature of the Washington Clean Air Act. Explanations do not operate to excuse violations. Air contaminant sources are expected to operate in conformance with the statute and with all applicable regulations adopted pursuant thereto. An agency approval of the construction of a new air contaminant source is not a "learner's permit." It is an order providing for operation in compliance with the law. RCW 70.94.152.

VII

Explanatory matters are, however, relevant to the questions of how

much the penalty should be for any particular violation. The appropriateness of the amount is a matter involving consideration of factors bearing on reasonableness. These include:

a. the nature of the violation;

b. the prior behavior of the violator;

c. actions taken after the violation to solve the problem.

VIII

Here PSAPCA assessed the maximum statutory amount available to it in each instance. RCW 70.94.431. However, no direct adverse consequences were shown. Further, although the prior history and the violations themselves show a recurring pattern of similar difficulties, there is evidence that throughout, the company was expending considerable time and money in an effort to achieve correction. The fugitive emission problems detected were not shown to rise to a level of concern greater than ordinary opacity violations. Yet, had the later been asserted, the penalty could not have exceeded $400 per day.

Looking at the entire array of facts and circumstances, the imposition of penalties for the statutory maximum here appears excessive. A penalty of $400 for each of the violations charged would be appropriate.

IX

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

From these Conclusions the Board enters this

ORDER

The violations asserted by the notices of civil penalty appealed from are affirmed. The penalties assessed in such notices are each vacated as to the amount in excess of $400. For the five violations charged, penalties aggregating $2,000 are affirmed.

DATED this 25th day of February, 1985.

POLLUTION CONTROL HEARINGS BOARD

2/25/85

LAWRENCE J. FAULK, Chairman

WICK DUFFORD, Lawyer Member

GAYLE ROTHROCK, Vice Chairman