BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A & M BY-PRODUCTS, INC., Appellant, v. NORTHWEST AIR POLLUTION AUTHORITY, Respondent.	PCHB Nos. 84-270, 84-290, 84-291, 84-321, 84-322, 85-46, 85-47, and 85-48 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

After extensive pre-hearing procedure, these consolidated matters came on for formal hearing before the Pollution Control Hearings Board on April 22, 25, and 26, 1985, in Bellingham, Washington, and on April 29, 1985, in Mt. Vernon, Washington. Sitting for the Board were Lawrence J. Faulk, Gayle Rothrock, and Wick Dufford. Mr. Dufford presided.

The cases are appeals of eight notices of violation and attendant civil penalties directed to appellant for the alleged violation of odor control regulations. The penalties total $6,500. Also under

appeal is the validity of an order calling for appellant to cease operations until odor reduction satisfactory to respondent is accomplished.

Appellant was represented by its attorney Brian L. Hansen. Respondent was represented by its attorney Kenneth J. Evans. Leslie Mitchell provided transcribing services.

Witnesses were sworn and evidence taken. Exhibits were offered and examined. The Board conducted a site view on April 22, 1985. From the testimony and record, the Board makes these

FINDINGS OF FACT

I

Northwest Air Pollution Agency (NWAPA) is a municipal corporation with responsibility for conducting a program of air pollution prevention and control in a multi-county area including Whatcom County, the locale of the asserted violations in these cases. A certified copy of NWAPA's regulations was made part of the record.

II

A & M By-Products, Inc., operates a fish waste processing plant which produces fish meal used as an ingredient in poultry and trout feeds. It also produces fish oil.

The plant is located in a draw just off the "Y" Road along the north fork of Anderson Creek on the side of Stewart Mountain, east of the City of Bellingham and south of the Mt. Baker Highway. The site was heavily forested and remote from residential development when the company first located there in 1949.

To the north and west is agricultural land. Over the years since A & M started operations, more and more homes have been located on this land, indicating a gradual trend toward a suburban type of neighborhood rather than a strictly rural one.

III

Numerous residences are located within radii of 3/4 to 1 1/2 miles of the plant along Kelly Road, Sand Road, Mt. Baker Highway and Squalicum Lake Road. About three years ago, Scott Paper Company clear cut a large amount of the forested land between the A & M Plant and the nearby residential and farming area.

IV

Prior to 1983, the plant operated as a rendering plant for all kinds of livestock. Fish were only occasionally handled.

In January of 1983, flooding of Anderson Creek at the plant site destroyed the major part of the installation and equipment. The operation shut down and was not reopened until April of 1984. The reopened plant was substantially a new facility. It processes only fish wastes.

Since the resumption of operations, complaints about odors have increased significantly.

V

Charles Helms is the founder and president of A & M By-Products. He presided over operations all the years the original plant at the site was in operation. Until the flood, there was no significant odor control equipment.

However, the new fish processing facility was designed with an odor control system and a new manager, Robert Johnston, was brought on board to run it.

Glen Hallman is the control officer of NWAPA and has been so since the agency's creation. He has spent thirty-one years in the air pollution control field. His first visit to the A & M By-Products plant was in 1954, over thirty years ago.

VI

On March 9, 1983, before reopening, A & M filed a "Notice of Construction and Application for Approval" with NWAPA in relation to the equipment and facilities to be installed and operated at the plant site.

On April 21, 1983, by means of two letters, NWAPA advised A & M of its approval of the facility subject to various conditions of operation. The conditions imposed stringent "freshness" standards for material to be processed and called for installation of an odor scrubber system.

The agency explicitly specified that the operation, in addition to the detailed conditions imposed, "meet all other applicable air pollution control regulations."

VII

As to the odor scrubber system, NWAPA approved the following, based on the plans submitted by A & M:

> A two-stage plenum scrubber with a minimum collection flow of 15,000 acfm shall be installed in accordance with plans prepared by James P. Cox, PhD., dated

March 10, 1983. This two-stage wet scrubber shall have a minimum scrubbing solution flow through both stages of 230 GPM.

(a) The first stage scrubber shall be in continuous use when any of the retorts (cookers) or grease processing facilities are in operation. The liquid scrubbing solution shall contain a minimum circulation solution concentration of 80 ppm of CHI-X™ odor control chemical and at all times have a pH of less than 4.5, or contain some other equally effective chemical.

(b) The second stage scrubber shall be in continuous use using plain water whenever the first stage is operating except under excessive odor producing conditions due to a plant operation upset, unanticipated excessive odors emitted from the second stage scrubber or the ambient air temperature at the plant exceeds 75° F. Under such exceptional conditions, sodium hypochlorite shall be added to the plain water in the second scrubber and be maintained at a minimum concentration of 0.17% by weight as measured by a standard chlorine test method.

(c) All surfaces in contact with emissions or scrubbing solution shall be made of fiberglass or metal coated with an epoxy material or some other approved material that is resistant to the corrosive action of said emissions or scrubbing solution.

(d) The scrubber induction fan shall have a minimum capacity of 15,000 acfm.

(e) Scrubbing solution pumps - There shall be one pump for each scrubber stage and shall be made of stainless steel, nylon, ceramic materials or other approved materials that will be corrosive resistant to the scrubbing solution. Each pump shall have a rating of at least 115 GPM. All piping used in connection with the scrubber solution pumping system shall be PVC or equal.

VIII

From the outset of resumed operations in April of 1984, the new

installation encountered odor control problems. Two Notices of Violation were issued. Then in mid-May, appellant's consultants ran tests to analyze the emissions and evaluate the effectiveness of chemicals sprayed into the odorous gas stream. They concluded that

> ...[f]or the conditions encountered between May 16th and 18th, the total emissions without control chemicals in the scrubber are intense, exceeding at times not only olfactorily obnoxious but toxic levels.
>
> The scrubbing chemical STYREX completely flattened emission variations and effectively eliminated incoming emission vapors and, over a period of hours, reduced build ups contained in the scrubbing water from previous operations.
>
> Clearly, the equipment and chemical STYREX are effective control measures....

The consultants, however, noted that "water-soluble amines are being carried over into the scrubber" and recommended the addition of a condensor to the system between the retorts and the scrubber.

IX

All went well from May to early August; then odor complaints began to multiply.

On August 10, 1984, at 9:10 p.m., Mr. Hallman received a complaint from the Sand Road area concerning odors. Arriving at the Sand Road-Mt. Baker Highway intersection about 25 minutes later, the control officer confirmed a strong and objectionable odor. He detected the same odor in varying degrees of severity at several other locations nearby.

He proceeded to the A & M plant and perceived the same odor there. A problem at the plant with the operation of the chemical

feeder pump was documented. Later, the plant manager conceded that the undetected underloading of one of the retorts had on this occasion resulted in the severe overcooking of the ground fish, resulting in a more odorous discharge to the scrubber than normal.

In connection with the event, the agency received complaint forms from five persons. They variously described the odors as persistent, offensive, putrid, nauseating, offensive and so foul as to cause physical illness. Several said it was necessary to close all the open windows of their homes, although it was a warm summer night. In some cases the smell invaded the house before the windows could be closed. Three of the complainants testified to such reactions at the hearing.

As a result of his investigation, Hallman issued Notice of Violation No. 1269, and, subsequently assessed a civil penalty of $250 on August 27, 1984. Mr. Helms appealed to this Board by letter postmarked September 19, 1984. The appeal was assigned PCHB No. 84-270.

X

On September 18, 1984, Julie O'Shaughnessy, a NWAPA inspector, arrived at the Sand Road-Mt. Baker Highway intersection at 8:55 a.m. in response to an odor complaint. She detected a musty fishy odor there and approximately 100 yards farther up the Sand Road. She found the odor offensive, so strong as to necessitate efforts at avoidance. She proceeded to the A & M plant and smelled the same odor there. After her inspection she found it necessary to shower and change clothes.

In connection with this event, the agency received complaint forms from five persons. The odors were described as horrible, permeating, exceedingly unpleasant, and of such strength that windows had to be kept closed. In one case clothes hung outside to dry had to be rewashed. The offensive odors were originally experienced the prior evening and persisted all night until the inspector arrived. All of the complainants testified at the hearing to their reactions.

As a result of her investigation, O'Shaughnessy issued Notice of Violation No. 1276. Subsequently, on October 3, 1984, a civil penalty of $250 was issued in regard to this Notice. This was appealed on October 19, 1984, and became PCHB No. 84-291.

XI

On October 5, 1984, in response to an odor complaint, Mr. Hallman arrived in the vicinity of the Rome Grange on Mt. Baker Highway at 8:45 p.m. He smelled a strong, obnoxious fish-type odor. The same odor was detected on the Sand Road.

He arrived at the A & M plant at 9:05 p.m. The same obnoxious odor was present, both in the waste water tank storage area and at the top of the scrubber.

Six citizen complaints were filed. The smell was described as terrible, horrendously obnoxious, foul, abusive. One complainant said, "My barn smelled like A & M By-Products had been doing their processing inside of it instead of one mile away." Five of the complainants testified to their reactions at the hearing. The offensive odors lasted all day and into the evening on this occasion.

As a result of his investigation, Hallman issued Notice of Violation No. 1281, and, subsequently assessed a civil penalty of $1,000 on October 15, 1984. This was appealed on October 19, 1984, and became PCHB No. 84-290.

XII

On October 9, 1984, NWAPA's control officer sent an Order to the A & M By-Products. The order stated, in pertinent part:

> ...Since you started up the operation of this rendering plant again this year in early April, after installing an odor scrubber, there have been times when significant obnoxious odors have been emitted and numerous complaints received. Five Notices of Violation, including this last Notice, have been issued. The Authority has received many complaints about alleged odor emissions at numerous other times.
>
> During June and July, 1984, it appeared you had your odor control facilities and measures worked out and had reduced odor bearing gas emissions to the atmosphere to a reasonable minimum. Since the middle of August, however, the number of complaints have been increasing and we have been forced to issue three Notices of Violation and assess a penalty for these violations. These actions have not had the desired effect, that is to cause you to operate your control facilities and implement other needed measures to prevent emission of obnoxious odors that are occurring with increasing frequency and that give rise to many legitimate odor complaints and violate NWAPA Regulation, Section 535 - Odor Control Measures.
>
> Therefore, I hereby issue you the following Order pursuant to NWAPA Regulation Section 121 - Orders and RCW 70.94.221:
>
> 1) No additional raw materials shall be received at your rendering plant located at 4350 North "Y" Road, Bellingham, Washington for rendering or processing one day after receipt of this Order, and;
>
> 2) Any raw materials on the plant site when this Order is received shall be rendered or processed

as soon as possible with the least emission of odorous substances reasonably possible but in no event more than three (3) days after receipt of said Order, and:

3) The rendering plant shall not be operated again until you can adequately demonstrate to me that the plant can and will be operated in such a manner to reduce the emission of odor bearing gases to the atmosphere to a reasonable minimum and that any odorous emission into the ambient air will not threaten the health and/or the safety of persons in the vicinity of the plant and/or prevent the enjoyment and use of their property.

XIII

On October 16, 1984, Mr. Hallman arrived at Squalicum Lake Road at about 7:30 p.m. in response to an odor complaint. He perceived a strong, fishy odor which he found sufficiently objectionable to categorize as a nuisance. He detected the same odor along the "Y" Road.

He proceeded down the plant access road and smelled the same odor there. He observed the plume coming out of the odor scrubber being carried to the point of access road where the smell was strongest. At the plant itself, odors from fugitive odor sources were not severe.

One of the complainants testified to a rotten fishy smell, clearly distinct from barnyard and garbage smells. The smell was strong enough to cause an effort to take refuge indoors with closed windows.

As a result of his investigation, Hallman issued Notice of Violation No. 1284 and, subsequently assessed a civil penalty of $1,000 on October 30, 1984. This was appealed on November 28, 1984, and became PCHB No. 84-321.

XIV

On October 22, 1984, Mr. Hallman arrived at Squalicum Lake Road at about 7:50 p.m. in response to an odor complaint. He could smell there what he termed a "fishy, rendering odor." In his view it was intense enough to be termed a nuisance. The smell became even stronger as he proceeded toward the A & M plant down the "Y" Road. On arriving at the plant he could see the plume coming out of the odor scrubber and being carried toward the"Y" Road gate entrance to the plant access road.

Five complainants testified in relation to this event. The odors were described as bad, offensive, a terrible stink, foul, rotten. The smell was said to interfere with yard work and made it necessary to close windows to enjoy being indoors. The odor was described as different from dairy smells, and objectionable.

As a result of his investigation, Hallman issued Notice of Violation No. 1285, and, subsequently assessed a civil penalty of $1,000 on November 8, 1984. This was appealed on November 28, 1984, and became PCHB No. 84-322.

XV

On March 2, 1985, at about 9:55 p.m., Mr. Hallman detected strong fishy odors on Mt. Baker Highway where Anderson Creek crosses. He was responding to a complaint. He found the odors highly objectionable, rating them at 7 on an odor scale of 1 to 10. Driving up Sand Road he changed his rating to 8. He termed the odors: "The worst I have smelled for quite some time." Again on the Mt. Baker Highway near the

Rome Grange, he assigned an 8.

He proceeded to the A & M plant and on the access road experienced the same smell. At the plant he observed the plume from the scrubber being carried toward the access road where he smelled the odor.

Complainants described the odors as nauseous, offensive, obnoxious, and an interference with use of property. Three of the complainants testified at the hearing to their reactions.

As a result of his investigation, Mr. Hallman issued Notice of Violation No. 1299 and, subsequently assessed a civil penalty of $1,000 on March 19, 1985. This was appealed on April 5, 1985, and became PCHB No. 85-46.

XVI

On March 7, 1985, Mr. Hallman, responding to an odor complaint, detected a strong fishy obnoxious odor "with an odor level of about 8 on an ascending scale of 1 to 10." He described it as "about as strong an odor as I have smelled when fish only was being processed." The time was 8:30 p.m. and he detected the smell by Rome Chapel on Mt. Baker Highway to about 1,000 feet beyond toward the Sand Road. He experienced the same odor about 20 minutes later at level 7 from Rome Chapel up Squalicum Lake Road to within about 500 feet of the North "Y" Road.

Proceeding toward the A & M plant, he smelled the same intensely offensive smell on the gravel access road leading in. The plume from the scrubber was visible as it was being carried toward the area on the access road where the odors were so strong.

Various complainants described the odors as an awful smell, rotten and nauseous. One of these, who testified at the hearing, described the odor as penetrating her home if windows are open, and severe enough to cause curtailment of outdoor activities. The 7th of March was her birthday, and she said, she made the mistake of leaving an upstairs window open. All her guests complained.

As a result of his inspection, Hallman issued Notice of Violation No. 1301, and, subsequently a civil penalty of $1,000 on March 19, 1985. This was appealed on April 5, 1985, and became PCHB No. 85-47.

XVII

On March 9, 1985, Mr. Hallman arrived at the Rome Grange on Mt. Baker Highway, at about 9:35 p.m. in response to an odor complaint. From there to the end of the Sand Road he smelled a fishy, obnoxious odor which he rated as 8 on a 1 to 10 scale.

Again, on proceeding toward the plant he smelled the same odor on the gravel access road. Th scrubber plume was visible and being carried toward the access road where he encountered the odor.

Complainants described the odors as obnoxious, nauseating, irritating and nasty. One said he could not work outside. Another that he could not enjoy his residence in a normal fashion. Three tesified at the hearing about their response.

As a result of his investigation, Hallman issued Notice of Violation No. 1302 and, subsequently assessed a civil penalty of $1,000 on March 19, 1985. This was appealed on April 5, 1985, and became PCHB No. 85-48.

XVII

In all cases involving the above Notices of Violation no agency enforcement action was taken unless at least two complaints were received. The purpose of the investigation in each instance was to determine the intensity and duration of the odor, to evaluate whether it was objectionable, and to identify the source, after considering the character of the odor and the various possibilities in light of the observed meteorology at the time.

In each case under appeal the odor in the neighborhood where the complaints were made was like the odor experienced at the plant. In each case the plant was operating. In each case the meteorology was right for the odors to have traveled from the plant to the complaint site. In each case the odors were far more intense than the normal smells to be expected in this still-predominantly rural area. In each case they were highly disagreeable. In each case the duration was in excess of a half hour.

XVIII

We find that the cause in fact of the odors which were the subject of the notice of violation at issue was emissions from appellant's plant. We find further that these odors on the dates in question invaded neighboring properties with such offensive characteristics of such duration as to interfere unreasonably with the enjoyment of life and property.

XIX

Appellant argues that A & M was not the cause of the odors

complained of and suggests other sources: the Cedarville sanitary landfill which sometimes receives crabshells; farm spreading operations; home wood heating systems; outdoor burning; and a container load of fish meal, owned by others which is sitting on property near the A & M plant.

We are not persuaded that the evidence points to any of those alternative sources. Particularly as to the landfill, the site lies at a greater distance from the complainants' homes than does the A & M plant; usual wind direction is not toward the areas of the complaints; the wind direction on the dates in questions does not appear appropriate for the landfill to be the origin of the smells; no complaints were lodged by persons living closer to the landfill.

XX

Appellant sought to instill the notion that the complainants might have been confused about what they smelled. Each of the complainants who testified said he or she was able to distinguish the fishy smell emitted by the A & M plant from other agricultural or residential smells. Mr. Hallman testified to the same ability.

No one who testified to the offensiveness of the odors was shown to be of idiosyncratic sensibilities. Indeed, the numerous complaints which the control officer or members of his staff were able to verify represent a kind of informal odor panel, judging the strength and foulness of the stench.

XXI

Appellant advocated the use of sophisticated equipment and

objective means to measure the intensity and offensiveness of the odors. However, no instrument other than the human olfactory sense has been devised to measure the quality of odors. Nor is the assignment of a qualitative description a purely subjective matter.

There was unanimity among the complainants about the noisome character of the smells. NWAPA independently verified this perception in every case where a violation was asserted.

XXII

The principal source of odors at the A & M plant is emissions from the retorts, emissions which are conducted through the scrubber system. However, certain other fugitive odor sources exist and may, to some degree, contribute to the overall problem. These include wash-down water in outdoor tanks, material awaiting processing stored on the receiving room floor, the initial by-product of the process and a number of grease traps. As to these, A & M has not followed all of the recommendations of their consultants, leading to a rupture in the relationship with Dr. Cox.

XXIII

The odor scrubbing system installed at the A & M plant was expected to reduce smells to the point where neighboring landowners would not find them offensive. The company and its consultants have from time to time attempted adjustments in an effort to improve the system. The recommended condenser was finally installed around the first of the year in 1985.

XXIV

Methods of emission control adequate to the task of securing compliance with applicable odor regulations are known and available. Extremely sophisticated means such as negative pressure buildings and three stage scrubbers could be installed at great expense. But it was not shown that technological adjustments achievable at more moderate cost could not be used.

For example, the full-time addition of a second scrubbing stage in sequence with the first, using essentially the present installation, was not shown to be impractical. Moreover, the compound STYREX now being employed is not presently in wide use. It is a relatively new compound consisting of food grade products and may be regarded as experimental in comparison with chemicals of proven odor reduction capability in rendering plants, such as sodium hypochlorite.

XXV

However, it is not clear whether the cause of the malodorous emissions from the plant is technological or operational. In all but one of the instances under review, appellant asserts there were no operational problems. But, we are not convinced that monitoring of the performance of the system is adequate to demonstrate the absence of operational shortcomings. For example, no meter for measuring the flow of chemical feed into the scrubbing system was in place when the excessive odor events occurred.

XXVI

Thus, appellant did not prove that it has exhausted all reasonable

means, whether technological or operational, for the effective control of the pollution involved.

XXVII

NWAPA's control officer testified that as of the hearing, the agency had received 202 complaints from 38 persons concerning foul odors in the Kelly Road, Sand Road, Mt. Baker Highway, and Squalicum Lake Road areas, since the A & M plant started up again in April 1984. He noted that five notices of violation were issued to A & M from 1974 to the time of the flood and that ten had been issued to them since reopening.

XXVIII

Any Conclusion of Law which is 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 the parties and the subject matter. Chapter 43.21B and 70.94 RCW

II

The purpose of chapter 70.94 RCW (the State Clean Air Act) is for regional air authorities, such as NWAPA, to carry out a "program of air pollution prevention and control" within their areas of jurisdiction. RCW 70.94.011.

The "air pollution" to be prevented and controlled is defined as the

> presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or which unreasonably interfere with enjoyment of life and property. RCW 70.94.030(2).

The term "air contaminant" includes fumes, vapor, gas and "odorous substance." RCW 70.94.030(1).

III

Regional air authorities are empowered to adopt rules "implementing this chapter and consistent with it," and to "issue such orders as may be necessary to effectuate the purposes of this chapter." RCW 70.94.141(1)(3).

Written notice of a violation of the statute or any regulation thereunder "may include an order that necessary corrective action be taken within a reasonable time." RCW 70.94.211.

Violations of the statute or any regulation thereunder are also subject to sanction by civil penalty "in an amount not to exceed one thousand dollars per day for each violation." RCW 70.94.431(2).

IV

Any corrective order issued by an air authority is stayed pending final determination of any hearing unless a separate order removing the stay is obtained. RCW 70.94.223

Civil penalties, if appealed, are not final until affirmed "in whole or part" by this Hearings Board. RCW 70.94.431(3).

V

The violations asserted in the instant cases relate to Sections

530 and 535 of NWAPA's regulations and WAC 173-400-040(4) of the state's general air pollution regulation. These read as follows:

SECTION 530 - GENERAL NUISANCE

530.1 A person shall not discharge from any source whatsoever quantities of air contaminants in sufficient quantities and of such characteristics and duration as is likely to be injurious or cause damage to human health, plant or animal life, or property; or which unreasonably interfere with enjoyment of life and property of a substantial number of persons.

SECTION 535 - ODOR CONTROL MEASURES

535.1 Effective control facilities and measures shall be installed and operated to reduce odor-bearing gases or particulate matter emitted into the atmosphere to a reasonable minimum.

535.2 The Board or Control Officer may establish reasonable requirements that the building or equipment be closed and ventilated in such a way that all the air, gases and particulate matter are effectively treated for removal or destruction of odorous matter or other air contaminants before emission to the atmosphere.

535.3 The ambient air shall not contain odorous substances, such as (but not limited to) hydrogen sulfide, mercaptans, organic sulfides and other aromatic and aliphatic compounds in such concentration or of such duration as will threaten health or safety or prevent the enjoyment and use of property.

WAC 173-400-040. General Standards for maximum emissions. All sources and emission units are required to meet the emission standards of this chapter....

(4) Odors. Any person who shall cause or allow the generation of any odor from any source which may unreasonably interfere with any other property owner's use and enjoyment of his property must use recognized good practice and procedures to reduce these odors to a reasonable minimum.

We interpret the "reasonable minimum" in both Section 535 and WAC 173-400-040(4) to be a level at which unreasonable interference with another's use and enjoyment of property does not and is not likely to occur. Section 530 embodies essentially this same standard when "a substantial number of persons" are affected.

The result is that all these formulations establish the level defined as "air pollution" in RCW 70.94.030(2) as the level at which an odor violation occurs. Such violations, then exceed not only standards set by the regulations, but also directly offend the underlying statute. RCW 70.94.040.

VI

We conclude that the evidence shows a violation of each of the regulatory sections quoted in the preceding paragraph and of the State Clean Air Act itself as to each of the Notices of Violation appealed. We deem the pleadings to be amended to conform to the proof.

Accordingly, we hold that the imposition of civil penalties under RCW 70.94.431 was authorized in each instance.

VII

RCW 70.94.152 empowers air agencies to require a notice of construction whenever a new air contaminant source is to be established. The enlargement, replacement or major alteration of a source is construed as establishing a new source.

The process set forth for new sources calls for the precise type and supplier of control equipment to be selected by the company. The air agency is to evaluate the plans and determine whether the facility

> will be in accord with applicable rules and regulations in force pursuant to this chapter and will provide all known, available and reasonable methods of emission control.

If the agency determines the affirmative, an "order of approval" is to be issued which

> may provide such conditions of operation as are reasonably necessary to assure the maintenance of compliance with this chapter and the applicable ordinances, resolution, rules and regulations adopted pursuant thereto.

VIII

The new source review process is intended as an effort to head off problems before they occur. An "order of approval," however, does not somehow give a source immunity from enforcement for violating applicable regulations or the statute.

Air contaminant sources are expected to operate in conformance with the law. If the prediction of compliance held forth by a facility's plans does not prove correct in actual operation, the citizenry is not required to tolerate the injury; rather the burden is on the company which causes violations to take corrective action.

An agency "order of approval" of the operation of a new air contaminant source is not a "learner's permit. It is an order providing, as here, for operation in compliance with all applicable air pollution control regulations. Puget Chemco, Inc. v. PSAPCA, PCHB Nos. 84-245, et sec. (February 25, 1985).

Therefore, any substantive violation is, as a matter of law, a violation of any "order of approval" for a source, and the issuance of such an order cannot operate in any sense as a defense.

IX

It is true that RCW 70.94.152 includes a technology standard in the language "all known, available and reasonable methods of emission control." The installing of modern control equipment may be required even where performance will be better than the limits of substantive regulations. Weyerhaeuser Co. v. SWAPCA, 91 Wn. 2d 77, 586, P.2d 1163 (1978). But where achievement of the normally applicable technology standard produces performance worse than such regulatory limits, the character of the system installed, no matter how advanced, is no excuse for violation of the limits.

The State Clean Air Act is a strict liability statute. The only mechanism created to excuse causing "air pollution" or violating a requirement for the control of emissions is a variance, which can be granted on the ground that

> there is no practicable means known or available for the prevention, abatement or control of the pollution involved... RCW 70.94.181(3)(a).

Thus, here, even if the appropriate technology standard had been met, no excuse for the violations was established because no variance was obtained. See Continental Grain v. PSAPCA, PCHB No. 85-78, et sec. (October 14, 1985).

X

The regulations applied to the instant violations, with their emphasis on unreasonable interference with the enjoyment of life and property, are similar to the traditional definition of a nuisance. See RCW 7.48.010; King County Department of Public Works v. PSAPCA,

PCHB No. 84-295, et sec. (June 7, 1985). However, this fact does not bring the traditional balancing of equities, a hallmark of nuisance law, to bear on the question of whether violations have occurred.

The State Clean Air Act shows that the Legislature has already struck the balance it intends to be enforced in this state. "Air pollution" is defined in nuisance-type terms, but causing it is flatly illegal. RCW 70.94.040. Violating air pollution control regulations is similarly forbidden outright. RCW 70.94.431. The utility of appellant's business or his particular economic situation are not a part of the statutory equation. Cf. Sittner v. Seattle, 62 Wn.2d 834, 384 P.2d 859 (1963).

Therefore, principles of nuisance law are not apposite here insofar as the violations are concerned. Traditional defenses such as "coming to a nuisance" do not apply.[1]

XI

Appellant urges that the regulations A & M has violated contain no ascertainable standard of conduct to which they can reasonably be expected to conform. We note that nuisance-type standards have been enforced for centuries. They have not proven too unclear for practical compliance. See generally, Rodgers, Environmental Law,

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1. Even if this defense were appropriate, it would probably not succeed in this case. See Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 Pac. 306 (1924); Jones v. Rumford, 64 Wn.2d 559, 392 P.2d 808 (1964).

Secs. 2.1 through 2.11 (West 1977).

Insofar as this argument may be an attack on the validity of the rules as applied, we conclude that they are reasonably consistent with the statute they are intended to implement. See Kaiser Aluminum v. PCHB, 33 Wn.App. 352, 654 P.2d 723 (1982).

But the suggestion of vagueness is at bottom, a constitutional issue. We have no authority to answer constitutional questions. Yakima Clean Air Authority v. Glascam Builders, 85 Wn.2d 255, 534 P.2d 33 (1975).

Therefore, we express no judgment about appellant's denial of due process assertion. For the same reason we render no opinion about his equal protection claim.[2]

XII

The law in this state is not settled as to the effect of testimony that during normal operations no violations occur. See Chemithon Corp. v. PSAPCA, 19 Wn.App. 689, 577 P.2d 606 (1978). If such testimony is believed, it is essentially a defense to the fact of a violation. However, we have found that facts constituting violations did occur. Moreover, we were not convinced, on the record presented, that operations were in all respects normal at the times of violation, given the insufficiency of monitoring equipment in place.

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2. For a decision dealing with the so-called agricultural exemption of RCW 70.94.640, see Kummer v. SCAPCA, PCHB No. 84-249, et sec. (October 10, 1985).

XIII

As to the amount of civil penalty for any particular violation, we look to 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.

XIV

Here the violations were more serious than merely exceeding numerical emission standards. Direct adverse consequences to human beings and their enjoyment of property were shown. Prior history and the violations themselves show a recurring pattern of similar problems. Although the company has made an effort to make its reopened facility an up-to-date operation from the pollution control standpoint, its commitment to success in this regard has been less than overwhelming. Since the violations at issue, it has been largely content to rest on the assertion that the problem is coming from somewhere else.

Looking at the entire array of facts and circumstances, the penalties imposed in these cases appear reasonable.

XV

The Order issued on October 9, 1984, is however a different matter. That Order explicitly commands A & M to cease operations until adequate odor control measures are demonstrated to NWAPA's control officer.

Such a direct "shut-down" order may well be beyond the authority

of the agency to issue and beyond the authority of this Board to enforce. The statute deals with injunctive relief in a separate section, providing there for actions to be brought in Superior Court. RCW 70.94.425.

We need not, however, decide this jurisdictional question here. We need not do so, because we conclude that such a sweeping sanction, on this record, cannot be sustained under the order-authorizing provisions of RCW 70.94.141(3) and RCW 70.94.211. These sections empower the agency to issue orders which are "necessary" in light of the statute's purpose. That purpose, most simply, is to prevent "air pollution."

We do not believe that all possible avenues for finding a technical or operational solution to the odor problem in question have been exhausted. We were not convinced that compliance is a practical impossibility. We think that A & M, like Avis, should try harder. But until it is clearly demonstrated that there is no reasonable alternative to shutting this business down, the standard of "necessity" to support an order to such effect has not been met.

XVI

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 in the Notices of Violation appealed from are affirmed. The penalties assessed in such notices are likewise affirmed. The "shut-down" order of October 9, 1984, is reversed and shall be of no further force or effect.

DATED this 16th day of October, 1985.

POLLUTION CONTROL HEARINGS BOARD

WICK DUFFORD, Lawyer Member

GAYLE ROTHROCK, Vice Chairman

10/16/85

LAWRENCE J. FAULK, Chairman