BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF CHAE HWAN CHO, Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 85-52 and 85-75 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal of two Notices and Orders of Civil Penalty for violation of PSAPCA's Regulation I for emitting opaque smoke which interferred with a neighbor's enjoyment of life and property, came on for formal hearing before the Board August 7, 1985, at Seattle, Washington. Seated for and as the Board were Lawrence J. Faulk, Wick Dufford, and Gayle Rothrock (presiding). Lynn Tarry, court reporter, recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined and admitted. Argument was heard. From the testimony, evidence, and

contentions of the parties, the Board makes these

FINDINGS OF FACT

I

Respondent, pursuant to RCW 43.21B.260, has filed with this Board a copy of its Regulation I, of which we take judicial notice.

II

On December 26 and 28, 1984 and again on March 7, 1985, complaints from a neighboring residence whose home is 20 feet away from appellant's home, were filed with respondent PSAPCA about dense rolling smoke coming out of appellant's chimmney and coming over under house eaves and into the backyard. The complainant asserted this caused him distress (burning eyes, stomach distress) and interfered with his enjoyment of his good health and his property. This same neighbor asserted he had complained to PSAPCA about this kind of event on as many as 64 occasions. The properties are in south Seattle.

III

On each of three occasions, noted above, inspectors from respondent agency visited the two adjoining properties and properly positioned themselves to observe the chimmney and smoke. They each noted white-grayish smoke emitting of such density and duration as to exceed the 20% opacity limit for more than three minutes in any one hour. The smoke did rise and roll over onto the neighbor's property. Photos were taken and visible emissions worksheets were filled out.

In each instance, the inspector attempted to contact appellant at his home and succeeded in contacting the neighbor at his home. In

each case, a field notice of violation was left at appellant's home; telephone and personal contact having not been successful.

IV

At some time up to three years ago, the appellant and his neighbor had discussions about the offending smoke coming from the Orley wood insert fireplace fires in appellant's home. These fires are the only source of heat appellant elects most of the time due to the cost of electric or gas residential heating.

As a result of discussions, appellant increased the height of his chimmney by approximately two feet in an attempt to gain more loft for the smoke and a different dispersion pattern. That apparently was not successful.

V

Appellant believes he purchased a quality airtight wood insert. He had it installed by an authorized dealer about two or three years ago and, it seemed to be working alright and not putting out an unusual amount of smoke.

No evidence or testimony was presented to indicate appellant had the insert rechecked by the authorized dealer for its performance. Apparently, no advice or information on chimmney height or angle or outlet was made available to him by knowledgeable sources.

Appellant cannot ascertain a new course of action which would resolve the smoke problem, short of ceasing use of his fireplace or removing the wood insert.

VI

PSAPCA contacted appellant and asked him to come to a meeting in downtown Seattle at PSAPCA's offices to discuss the smoke problem and the field notices of violation. Much discussion occurred at the February 22, 1985 meeting. Appellant contended that no correction could be made but advised that he usually does not operate the wood insert "stove" during daylight hours and he uses only cord wood and a few newspapers to start a fire. He was advised by PSAPCA officials that a wood insert tends to cause a greater amount of smoke due to lack of combustion air in the fire. Additionally, he was advised that the meeting did not prevent the agency from pursuing further enforcement action.

For whatever reason, Chae Hwan Cho was surprised when the agency elected to levy penalties for the incidents on December 26 and 28, 1984.

VII

On March 12, 1985, respondent PSAPCA issued formal Notice and Order of Civil Penalty for $50 to appellant for the matters observed on December 26, 1984. He appealed that to this Board on April 10, 1985.

VIII

Thereafter on April 12, 1985, the respondent agency issued appellant a second Notice and Order of Civil Penalty for the smoke incident of December 28, 1985. This time the penalty was levied at $100. Appellant appealed the penalty on May 10, 1985. Each of the

penalty orders alleged violation of both the opacity standard and nuisance clause, prohibiting emission of any air contaminent which interfers with enjoyment of life and property.

IX

Any Conclusion of Law hereinafter determined to be a Finding of Fact is hereby adopted as such.

From these Facts the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 43.21B and 70.94 RCW.

II

The statutory basis for the violations at issue is found in the Washington Clean Air Act, chapter 70.94 RCW. The statute contains no provisions which generally exempt the operation of domestic fireplaces or wood stoves in residences from air pollution control regulations adopted under its authority. See RCW 70.94.011, 70.94.040, 70.94.141.

Where such exemption has been intended with respect to particular requirements, the legislature has expressly so stated. RCW 70.94.152, 70.94.770. See also RCW 70.94.041. We conclude, therefore, that the violations asserted from the source in question are within the coverage of the statute.

III

Appellant violated Section 9.03(b) as alleged, on December 26 and 28, 1985 by causing or allowing an air emission of dense smoke in

excess of the limits established by Regulation I. This regulation o. PSAPCA is only inapplicable to motor vehicles and aircraft. (See Reg. 1, Section 9.03(f)).

IV

Appellant violated Section 9.11(a) by allowing smoke to become a nuisance to a neighboring residence, thus interfering with enjoyment of life and property there. No source catagories are excluded from section 9.11.

PSAPCA has rarely, if ever before, used its prosecutorial discretion to penalize a homeowner for excessive smoke from wood burning in a residential fireplace and its effects. We agree that formal enforcement in matters of this kind should be initiated very sparingly and then only where alternative approaches to correct a clearly demonstrated problem have been tried and proven unsuccessful.

Such appears to be the case here. While it is obvious that appellant's neighbor has become a chronic complainer about smoke invading his property, the evidence shows that on the dates in question, his complaints had independent verification.

When homes are as close together as those of appellant and complainant, the possibility of reaction to dense smoke increases exponentially. One's level of expectation and experience with fireplace fires and smoke also affects the nuisance factor. When close proximity and high expectation of trouble exists, some physical placement of the smoke source must be changed and/or the smoke must be reduced in density and intensity; otherwise the source must be

extinguished altogether.

IV

The purpose of civil penalties is not primarily punitive but rather to achieve compliance by changing behavior. Here using part of the money to achieve an alteration in the smoke source would serve the purpose of statute law better than payment of the entire $150 in penalties levied. A portion of the penalties should be suspended so appellant's funds can be devoted to having the smoke source checked, analyzed, and changed in some fashion. Only one-third of the penalties need be left intact to achieve the deterrence objectives of the law.

VI

Any Finding of Fact hereinafter found to be a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board makes this

ORDER

PSAPCA Notices and Orders of Civil Penalty No. 6226 and 6241 are affirmed; provided, however, that $100 is suspended on condition that appellant not violate respondent's regulations for six months from the date of entry of this Order.

DONE this 5th day of September, 1985.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock

GAYLE ROTHROCK, Chairman

See Dissenting Opinion

LAWRENCE J. FAULK, Chairman

Wick Dufford

WICK DUFFORD, Lawyer Member

LAWRENCE J. FAULK - DISSENTING OPINION

I write separately because I believe the result reached by the majority is unreasonable, unjust to this citizen, and certainly not required by law.

In this case, we have a citizen being fined for burning untreated wood in his fireplace. The fireplace insert was installed by a professional. The Department of Ecology made an inspection and observed the start-up of the fireplace and found that the smoke level was acceptable. The appellant extended the length of the chimney in an attempt to alleviate the problem. There is nothing short of not using his fireplace that would completely eliminate the problem.

This is the first case before this Board where the Agency is applying the opacity standard to a fireplace in a single family home. This Board is required to find a technical violation of the opacity standard. However, for this Board to fine a citizen for burning his fireplace seems to me to be the height of injustice.

In determining whether a fine should be sustained against this citizen, the surrounding facts and circumstances are relevant. Factors bearing on reasonableness must be considered. These include:

(a) the nature of the violation;

(b) the prior behavior of the violation; and

(c) actions taken to solve the problem.

Appellant Chae Hwan Cho burned untreated wood in his fireplace insert, that caused a technical violation of the law. He has had no

previous violations and his prior behavior indicates a willingness to minimize the problem. He extended the chimney to help solve the problem.

On the record before us, I would conclude that assessing a penalty against Mr. Cho is not justified.

In the broader view, I note with deep concern that the opacity standard is being applied to fireplaces in single family homes. The record of appeals before this Board indicates taht the Agency has refrained from applying the opacity rule to single family homes from the time of its inception until now. Though not labeled as such, the opacity standard has traditionally been applied as a limit for institutions or industry, and not single family homes.

The Clean Air Act sets apart single-family homes so far as outdoo fires are concerned. RCW 70.94.770. It is doubtful that this incident would be subject to opacity limits had the same fire occurred outdoors. Regulation I, Section 8.09 and 8.10. The spirit of setting apart single family homes has been, until now, upheld through the apparent non-application of the opacity standard to fireplaces.

If the Agency believes that the time has come to commence regulation of fireplaces in single family homes, this abrupt change in policy by which opacity rules suddenly become enforced is not the way to proceed. Rather, a period of public notice should preceed this policy change. In addition, the Agency should adopt rules specifically addressing fireplace regulation in single family homes to determine if they would be more suitable than the industrial opacity

rule.

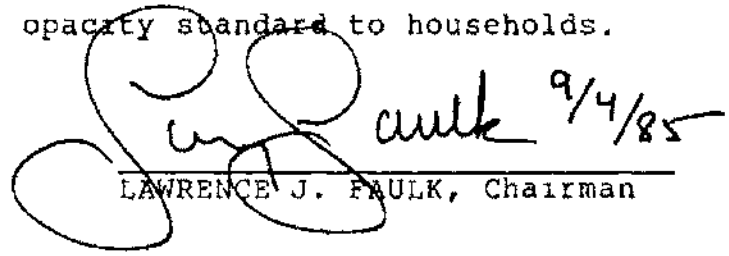
The Legislature will be disappointed to learn that in enacting the Clean Air Act and subsequent amendments, it was allowing a government agency to fine people for burning wood in their fireplace and causing some smoke to be emitted. And I think its disappointment will continue unabated when it discovers that the majority of this Board has upheld the penalty. The policy for regulation of emissions from fireplaces in single family homes surely is an appropriate matter for consideration by the Legislature.

Finally, one has to ask what is the result of this decision. In my view, this Board has given a license to local air agencies to fine people for opacity violations from their fireplaces. It doesn't make any sense to me.

The public interest would be better served if efforts to inform citizens of proposed restrictions were more than perfunctory in matters so basic to the management of households as burning wood in fireplaces.

In any event, it is our job to interpret and apply the statutes in a manner that furthers justice. I believe the greater justice is accomplished by finding for the appellant.

Therefore, I would find that a technical violation of the Clean Air Act has occurred and vacate the penalties, because PSAPCA should not be applying an industrial opacity standard to households.



LAWRENCE J. FAULK, Chairman