

ILLINOIS POLLUTION CONTROL BOARD  
July 26, 1971

ENVIRONMENTAL PROTECTION AGENCY )  
 )  
 ) #70-10  
 v. )  
 )  
 )  
 TRUAX-TRAER COAL COMPANY AND )  
 CONSOLIDATION COAL COMPANY )

THOMAS McMAHON, ATTORNEY FOR ENVIRONMENTAL PROTECTION AGENCY  
BILL F. GREEN, CARBONDALE, ILLINOIS, ATTORNEY FOR RESPONDENTS

OPINION OF THE BOARD (BY MR. LAWTON):

On June 9, 1971, the Board entered an Opinion and Order setting forth that:

"On February 17, 1971, an Opinion and Consent Order was entered by this Board as a consequence of an enforcement action brought against Truax-Traer Coal Company and Consolidation Coal Company, which had alleged that during the period from May 25, 1970 through June 3, 1970, Respondents had polluted the Little Muddy River and the Big Muddy River watersheds by discharging polluted water from its coal mines, in violation of Sanitary Water Board Act and Regulation SWB 14 of the Sanitary Water Board Rule 1.03(d), which regulation remained in force and effect pursuant to Sections 49 and 50 of the Environmental Protection Act.

"As a result of the Consent Order, a penalty in the amount of \$3,750.00 was assessed against Consolidation Coal Company and Truax-Traer Coal Company for the fishkill resulting from the polluttional discharge of the Burning Star Slope Mine owned by Respondents, which penalty has been paid to the Illinois Department of Conservation. The Order also contained the following provisions:

- "(2) This proceeding shall remain open for consideration of a possible order relative to a program to minimize the likelihood of any recurrence of polluttional discharge from the Burning Star Slope Mine. Any variance petition filed by Respondent shall be consolidated in this cause. The Pollution Control Board retains jurisdiction of this proceeding for the holding of such further hearings and for the entry of such cease and desist and other order as shall be appropriate to assure compliance with all relevant statutory provisions and regulations.

- (3) Respondents by this Consent Order are not foreclosed from challenging the propriety of any future order entered by the Pollution Control Board.
- (4) The parties hereto shall submit to the Board within thirty days from the date hereof, their proposals for abatement and control of any polluttional discharges from the Burning Star Slope Mine. The Board will schedule such further hearings upon notice to the parties as shall be appropriate in the premises.'"

The Opinion further noted that:

"Notwithstanding the express directive to both parties set forth in the above order, nothing has been received to date from the Environmental Protection Agency relative to a proposal for abatement and control of polluttional discharges from the Burning Star Slope Mine. On March 17, 1971, this Board received a document captioned 'Petition for Variance', filed by Consolidation Coal Company, reciting the history of ownership of the property, the details of which are not necessary for this decision and order." After setting forth that the operation had been abandoned before the enactment of the Environmental Protection Act and the acquisition of title by Respondent, Consolidation Coal Company, of which Truax-Traer Coal Company is an operating division, the alleged Petition for Variance requests the entry of an Order, which, in effect, would absolve Respondent from any responsibility with regard to the operation of its properties, on the grounds that the alleged violations resulted from circumstances and conditions pre-dating Respondent's acquisition of title and before the enactment of the Environmental Protection Act, and further asks that the Environmental Protection Act be held not to apply to mining operations conducted by Respondent's predecessor in title.

We held that the document filed by Consolidation Coal Company was not a variance petition in any sense of the word, but rather sought a declaratory judgment that the Act does not apply to Petitioner's operation. Accordingly, we entered the following Order:

- "1. That the petition for variance, be and the same is hereby dismissed for the reasons above set forth.
2. That the Environmental Protection Agency is directed to file, within 20 days from the date hereof, a full and detailed report of its proposals to achieve abatement of the polluttional discharges above-described, or, in the alternative, an amended enforcement action

providing for the entry of a cease and desist order against Respondents, pursuant to either of which this Board will conduct further hearings as appropriate."

On June 25, 1971, the Board received a report from the Environmental Protection Agency reciting, in substance, the foregoing events. The report then makes the following statement:

"Apparently, the Board had anticipated a full and detailed abatement proposal from the Agency as a result of the Original Board Order, regardless of the nature of the companies response to that Order. The Agency's understanding of the Original Board Order, however, was that the companies would file a valid Variance Petition, which would by necessity include a proposed program of the type which the Board now Orders the Agency to propose."

The Agency's understanding of the Board's decision set forth in the first sentence quoted is correct and it is difficult to understand at this late date why that was not pursued. The original complaint filed by the Agency sought the entry of a cease and desist order against continued polluttional discharge in the Little Muddy and Big Muddy watershed. Testimony taken at the time of the settlement agreement suggested that while the immediate source of the polluttional discharge resulting in the fishkill had been abated, an ongoing program of pollution control was necessary for the area under consideration and the Agency would anticipate a definitive program from the company in this respect. Lacking this, it was anticipated that the Agency would take the initiative to force the achievement of this program.

The Agency, in its report, has now submitted a proposal which it states contains "the steps necessary to abate a particular pollution problem" and submits the following proposal to the Board "to achieve the abatement of the subject polluttional discharges:

- "1. The companies shall cease and desist all polluttional discharges from the Burning Star Mine.
2. The companies shall locate and identify all possible points of discharge.
3. The companies shall conduct surveillance of all identified points of discharge as frequently as may be necessary to insure that no discharge causes a violation of the Environmental Protection Act or Regulations effective thereunder.
4. The companies shall report to the Agency within 30 days the location of all identified possible points of discharge.

5. The companies will report to the Agency the time, location, amount, and duration of any discharge which occurs, regardless of whether or not it is deemed to cause a violation of the Environmental Protection Act or Regulations effective thereunder.
6. The companies shall submit a quarterly report to the Environmental Protection Agency which details its surveillance activities, and the results thereof."

The Agency's proposal is comparable to one previously submitted by the Company to the Sanitary Water Board. An Order of the character proposed by the Agency could only be entered after a full hearing on the original complaint or modified complaint or upon a petition for variation filed by the companies. While the foregoing proposal may be meritorious, it cannot be instigated on the Board's initiative alone. The Agency's report adds the following:

"The Agency recommends that the Board terminate these proceedings as soon as possible. The Agency, pursuant to its normal surveillance duties, is conducting periodic inspections of the mining property in question. If any such inspection discloses that a violation may exist, the Agency will bring an appropriate enforcement proceeding. The continued pendency of the existing proceedings, particularly in light of the fact that the operative events occurred prior to July 1, 1970, will only serve to complicate any subsequent enforcement proceeding."

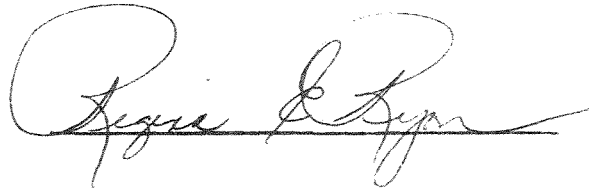
While the Board is reluctant to dismiss this proceeding, there does not appear to be any suitable alternative available. The Companies have not filed for variance and the Agency does not appear disposed to pursue its enforcement action. Accordingly, we dismiss proceeding #70-10, being the original enforcement action. Such dismissal is without prejudice to either party to pursue such further and additional action as shall be appropriate. The variance petition, #71-54, has been previously dismissed by our June 9, 1971 order.

This Opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

The complaint filed in case entitled "Environmental Protection Agency v. Truax-Traer Coal Company and Consolidation Coal Company", #70-10, be and the same is hereby dismissed without prejudice.

I, Regina E. Ryan, Clerk of the Board, certify that the Board has approved the above Opinion and Order this 26~~th~~ day of July, 1971.

A handwritten signature in cursive script, reading "Regina E. Ryan", written over a horizontal line.