ILLINOIS POLLUTION CONTROL BOARD
January 16, 1973

ENVIRONMENTAL PROTECTION AGENCY)
)
) #72-343
v.)
)
MEADOWLARK FARMS, INC.)

DELBERT HARSCHMEYER, ON BEHALF OF ENVIRONMENTAL PROTECTION AGENCY
JAMES B. BLEYER, MARION, ON BEHALF OF RESPONDENT
JON M. CASSADY, INDIANAPOLIS, INDIANA - CO-COUNSEL FOR RESPONDENT

OPINION AND ORDER OF THE BOARD (BY SAMUEL T. LAWTON, JR.):

Complaint was filed against Respondent alleging that it caused, threatened or allowed the discharge of contaminants, including but not limited to, acid water, coal fines and iron on various dates including, but not limited to, December 15, 1971, January 7, 1972, February 15, 1972, May 19, 1972 and June 16, 1972 so as to cause or tend to cause water pollution, in violation of Sec. 12(a) of the Environmental Protection Act. (Ill. Rev. Stat. 1971, Ch. 111-1/2, Sec. 1012 (a)). The complaint alleges that the substances discharged will settle to form putrescent or otherwise objectionable sludge deposits which may be detrimental to bottom biota, in violation of Sec. 1.03(a) of SWB-14, effective pursuant to Sec. 49(c) of the Act. Respondent is further alleged to have discharged materials in such a degree as to create a nuisance in violation of Rule 103(c); caused or allowed materials attributable to said discharges in concentrations or combinations which are toxic or harmful to human, animal, plant or aquatic life, in violation of Rule 1.03 (d) of SWB-14; caused or allowed said discharges to cause the pH to be below 6.0 in violation of Rule 1.05(b) of SWB-14; caused or allowed unnatural sludge or bottom deposits, unnatural color or turbidity, in matter and concentrations of a nature toxic or harmful to human, plant or aquatic life, or other than natural origins so as to cause a fish kill in violation of Rules 203(a) and 402 of the Water Pollution Regulations; and caused or allowed the concentration of iron, manganese, sulphate and total dissolved solids to exceed the level set forth in Rule 203(f) of the Water Pollution Regulations, all in violation of Rules 203(f) and 402 of the Water Pollution Regulations.

Respondent (Meadowlark) is a corporation registered in Indiana and doing business in the State of Illinois (Stipulation R.5). Respondent is owner of the surface rights of the property alleged to be the source of violation. It is not clear from the record

whether the mineral rights are owned by Mine Equipment Leasing Company and Walter and Susana Unsel or have been transferred to other parties. (Complainant's Exhibits 1 and 2). Respondent is a wholly-owned subsidiary of American Metal Climax, Inc., and has been since October 31, 1969. American Metal Climax, Inc. has a division known as Amax Coal Company (Amax) which operates coal mines. The function of Meadowlark is to hold and manage land reserves of its parent company, both before and after Amax has completed mining operations. (Respondent's Exhibit C).

According to Respondent, Meadowlark is primarily in the business of farming. It either operates the farms itself or if the land is not sufficiently large to constitute an economical farm unit, it attempts to lease the land to local farmers. The land in question was previously owned by the Peabody Coal Company which engaged in mining operations on this parcel (Respondent's exhibit C). The size of this parcel is 160.76 acres. Meadowlark acquired its interest in the property (commonly known as Peabody 43) on November 7, 1967. Because Meadowlark considered the parcel to constitute less than an economical farming unit, it leased out the land to a local farmer, James Teal, who operated a hog and cattle farm on the premises during 1968 and 1969. The lease was terminated in 1970 and the premises have remained idle since that time. Neither American Metal Climax, Inc. nor any of its subsidiaries owns the mineral rights of the parcel at the present time. However, Amax has an operating mine located within several miles of the property in the seam that runs through this parcel. Mining of this site is anticipated in the future. (Respondent's Exhibit C).

Peabody Coal Company operated Peabody 43 for approximately ten years, beginning in 1944 (R. 40 and 46). That mining created the gob that is still in evidence today (R. 44). Neither American Metal Climax, Inc. nor any of its subsidiaries including Respondent has owned the coal seam or operated the mine at the subject property.

Sufficient evidence was presented to establish that the pollution had its source on property in question. There is a receiving waterway on the property that drains into Brushy Creek. On June 16, 1972, a fishkill was recorded in Brushy Creek which had its uppermost limits at the ditch (R. 96). The cause of the fishkill is the water which was quite acid having a pH between three and four (R. 97). Dissolved oxygen was 6 mg/liter and sufficient to support fish life. (R. 98). Aquatic life, including fish, were in evidence upstream of the point of discharge into Brushy Creek. Dead fish were found in an area along 7,500 feet downstream of the point of discharge (R. 94). Examination of the Brushy Creek showed that the stream bed was mainly fine sand and gravel, but the bed contained coal fines and a reddish precipitate (R. 125). Respondent admits that the fishkill was caused by acid mine drainage from Peabody 43 (Resp. Brief). The value of the fish was placed at $141.66.

The opinion of an expert was that game fish could survive in the waterway (R. 133). In previous years, bass, crappie and bluegill fish were present in the stream (R. 37). During the dry flow periods, reddish precipitate has been more in evidence (R. 36). Fish apparently live in the pools of the stream during that period (R. 36-48). However, the fish in the tributary are usually observed dying during this period (R.37). Attempts to use this water for agricultural purposes have resulted in the destruction of the crop (R.38).

The Respondent argued that the receiving waterway in question was, by definition, an intermittent stream and thus unable to support fish life. Intermittent stream is defined by SWB-14, Rule 1.02 as one that "flows only in direct response to rainfall." Based on the evidence we conclude that the stream does have reduced or no flow times during the dry periods (R. 35). However, as stated above, the tributary flows most of the year, does sustain aquatic life, and thus is controlled by Rule 1.05.

Respondent's parent corporation has taken action to prevent acid discharges on other property it owned. Respondent states that it first was made aware of the "pollutional discharge problem at Peabody 43 by Illinois Environmental Protection Agency through a letter addressed to Meadowlark Farms, Inc. dated June 27, 1972..."(Respondent's Exhibit C). At that point, Respondent began a study of the problem including legal aspects, abatement methods and costs, the effect of pollutional discharge on Brushy Creek watershed and the history of Peabody 43 acid mine drainage problem. (Respondent's Exhibit C).

Respondent initiated an abatement program on October 1, 1972. It consisted of "shaping and compacting the refuse and covering it with fror three to four feet of borrow material". The area would be subsequently re-vegetated and the run-off would be diverted around the area. The cost of the project is estimated at $40,000 (Respondent's Exhibit C).

Respondent asserts that it does not have ownership and control over the property "from which the discharge originates". Respondent's semantical argument finds its source in the division of ownership rights to the property in question. We believe that the function of holding and managing the surface rights of this property is the same as the ability to control the surface. The case Respondent cites, Smoot v. Consolidation Coal Company of St. Louis, 114 Ill. App. 514 (1904) in support of its contention that the gob pile belongs exclusively to the holder of the mineral estate is not persuasive to absolve it of liability based on control and dominion.

We are not so much concerned with the refinements of ownership of the gob pile as much as with the capability of controlling its pollutional discharge. Respondent cannot be selective about what aspects of the surface right are under its control. The burdens must be accepted with the benefits. Lacking a strong affirmative showing

of legal inability to control the gob pile emissions, Respondent is held liable for control of the pollution source. Respondent has exercised control over the source as described above and Respondent has not shown how this control would be legal if the mining waste was not Respondent's property, or subject to its control.

We find it hard to understand why Respondent was unaware of the problem during the five years in which it was the owner of the property. By Respondent's admissions alone, the gob pile occupied 18 acres of the property. (Respondent's Exhibit C). Even a circumspect survey of the property would have disclosed its existence. Respondent's parent corporation has had great familiarity with similar situations and should have been aware of the implications.

We find that Respondent has violated Section 12(a) of the Act by causing and allowing the discharge of contaminants so as to cause water pollution of Brushy Creek and its tributaries. Respondent also has violated the SWB-14 regulations as charged in the complaint. Respondent has allowed the discharge of toxic material in concentrations toxic or harmful to human, plant or aquatic life so as to cause a fish-kill, in violation of Rules 203(a) and Rule 402 of the Water Pollution Regulations. We order Respondent to cease and desist the discharge of contaminants into tributaries of Brushy Creek, and to submit a plan for the abatement of mine waste discharges to the Agency and the Board within 20 days of the date of this Order. Respondent shall post a bond in the amount of $40,000 to insure the completion of the project to abate run-off from the refuse located on Respondent's property, within 120 days of the date of this order. Respondent is assessed a penalty in the amount of $141.66 for the violation of the Act and the Water Pollution Regulations. A more extensive penalty might be appropriate but we are more concerned with prospective compliance and believe any monies could be better spent to this end.

IT IS THE ORDER of the Pollution Control Board:

1. Respondent shall cease and desist the pollution of Brushy Creek and its tributaries, so as to cause water pollution, as defined in the Environmental Protection Act and shall cease the discharge of acid and other mining wastes, in violation of Sections 12(a) and the regulations promulgated thereunder;

2. Respondent shall, within 10 days of the entry of this Order, pay to the State of Illinois for deposit in the Fish and Game Fund in the State Treasury, the sum of $141.66, representing the reasonable value of the estimated fish kill on June 16, 1972. Penalty payment by certified check or money order payable to the State of Illinois shall be made to: Fiscal Services Division, Environmental Protection Agency, 2200 Churchill Drive, Springfield, Illinois 62706.

3. Respondent shall submit to the Environmental Protection Agency and the Board, a program for the abatement of mine waste discharges from its property, particularly its gob pile, within 30 days from the date of this order and shall abate such conditions pursuant to such plan as submitted, within 120 days from the date of this order.

4. Respondent shall post with the Environmental Protection Agency, within 35 days from the date of this order, a bond or other security in the amount of $40,000 in a form satisfactory to the Agency, which shall guarantee the installation and operation of the abatement procedures pursuant to program required to be submitted by paragraph 3 of this order. The bond shall be mailed to: Fiscal Services Division, Environmental Protection Agency, 2200 Churchill Drive, Springfield, Illinois 62706.

I, Christan Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order was adopted on the 4th day of January, A. D. 1973, by a vote of 5 to 0.

Christan L. Moffett