ILLINOIS POLLUTION CONTROL BOARD

May 24, 1973

ENVIRONMENTAL PROTECTION AGENCY, Complainant, vs. KENNETH MARTIN, JR. and MICHAEL MARTIN, Respondents.	)	PCB 71-308
	)	and
ENVIRONMENTAL PROTECTION AGENCY, Complainant, vs. PEABODY COAL COMPANY, Respondent.	)	PCB 72-328

Delbert Haschemeyer and Larry Eaton, Assistant Attorneys General for the EPA
Daniel Hall, Attorney for Peabody Coal Company
Charles W. Phillips, Attorney for Kenneth Martin, Jr. and Michael Martin

OPINION AND ORDER OF THE BOARD (by Mr. Henss)

These two enforcement cases involve water discharges from coal mining sites in southern Illinois and have been consolidated for hearing. The action against the Martins commenced with a Complaint filed in October 1971 by the Environmental Protection Agency. The Martins, as owners of an abandoned mine known as Peabody No. 47 located at Harco in Saline County, are alleged to have caused, threatened or allowed the discharge of contaminants into streams including Harco Branch, Brushy Creek, Bankston Creek and the middle fork of the Saline River. These discharges and the resulting water pollution are alleged to be violations of Sections 12(a) and (d) of the Environmental Protection Act and Rules 1.03(a), (c) and (d), 1.05(b) and (d), and 1.07 of SWB-14.

Complaint against Respondent Peabody Coal Company was filed in August 1972 alleging pollutional discharges from Peabody's Will Scarlet mine located in Saline and Williamson Counties. The Complaint charges that on seven specific dates and numerous prior and subsequent dates, Peabody operated the mine facilities in such manner as to violate Sections 12(a), (c) and (d) of the Environmental Protection Act, certain sections of SWB-10 and SWB-14 and Chapter III and Chapter IV of the Pollution Control Board Rules and Regulations. The streams affected by the mine discharges in this Complaint were said to be "an unnamed creek", Sugar Creek and the south fork of the Saline River.

Initially these two cases fit the pattern of other litigation which has recently been submitted to us involving mining operations in southern Illinois. A number of old abandoned mine sites are owned by individuals who do not have the resources to clean up their properties. In some cases we have found it beneficial to the Illinois environment to let large companies which are under prosecution for their own violations conduct abatement work on these non-owned abandoned sites in lieu of the payment of monetary penalties. (EPA vs. Kienstra Concrete, PCB 72-72 and EPA vs. Bell & Zoller Coal Company, PCB 72-258).

In the Martin case, the Agency filed a Motion for Stay 9 days after filing the Complaint. The case was not activated again until November 29, 1972 when there was a Motion for Consolidation with the Peabody case. Subsequent recitals in the Martin case revealed that "the Respondents acknowledge that water pollution existed as alleged in the Complaint" (Stipulation p. 4), but the Martins had never operated the mine and "effective work to control or abate the pollutional discharges involved would require an expenditure of funds far in excess of Respondent's means and financial capacities" (Stipulation p. 3)

Peabody, subject to serious charges for pollution at Will Scarlet mine, obviously had resources to abate the pollution coming from Peabody No. 47 the property now owned by the Martins, and it appeared that all of the ingredients were present for a Bell & Zoller type settlement.

This action, however, has taken a different twist and we must reject the settlement. A brief recital of facts is important to an understanding of the complexities of these two cases.

The roughly 229 acres of land upon which the Peabody No. 47 mine is located was acquired by Kenneth Martin, Sr. by quit-claim deed on July 28, 1959. Upon his death, control of the land went to his wife Velma Martin and sons, Kenneth Jr. and Michael. Mining

operations by Peabody Coal Company terminated prior to July 28, 1959 and were not reactivated by the Martins. The Martins, however, have entered into a contract with a firm known as Ferrells Coal Reclaiming Company for the removal of slurry which remained on the surface of the ground following the Peabody operations. The Martins will receive 20¢ per ton for the slurry removed.

Although the date that Peabody acquired the Will Scarlet mine is not entirely clear, the record does show surface mining operations were conducted throughout the area during the 1960s by a Stonefort Coal Company. A December 24, 1965 letter from the Sanitary Water Board refers to pollutional water discharges at the Will Scarlet Mine, and this prompted Stonefort Coal to initiate an abatement program. This abatement included the backfilling of abandoned deep mine workings, erection of earthen levees, alteration of the Saline River channel, installation of a treatment system to neutralize waste from the preparation plant, and the covering of all active and future pits with spoil material. Monthly progress reports were to be submitted on the work performed under the abatement program.

The Sanitary Water Board questioned several aspects of the abatement program but generally approved of the Stonefort plans. It appears that until June 1967 the Sanitary Water Board considered Stonefort Coal to be making satisfactory progress. Correspondence indicates that the Peabody acquisition of Stonefort probably occurred around June 1967.

Peabody continued the abatement program and for a time it continued to have SWB approval. Then, on January 30, 1968 the Sanitary Water Board warned Peabody of possible legal action because of new pollutional discharges and failure to submit required status reports. This letter also suggested, among other things, that Peabody: 1) design a system for collection of contaminated water, 2) develop mining methods in the new pits that would leave only nontoxic pits and spoils and thereby reduce pollutional drainage, and 3) develop a system of ditches and dikes to collect drainage which had been discharging into Grassy Creek and then pump this polluted water into the process water system to be treated and used. A series of meetings followed this letter and led to correction of most of the problems at the facility.

Still later in 1968 Peabody, with the help of the Sanitary Water Board, obtained a Federal grant of $472,400 for a research project to reduce pollution at Will Scarlet. The project was entitled "Lime/Limestone Neutralization of Acid-Mine Drainage".

Throughout this period Peabody appeared to be in compliance with SWB requirements.

However, some of the data submitted by the Agency in the form of Group Exhibits now indicates that water quality at certain locations near Will Scarlet does not meet current standards. Peabody acknowledges that there were water discharges from the Will Scarlet Mine on the dates alleged in the Complaint, but denies that the discharges were in violation of the Regulations. Respondent states that the various discharges were caused by: a) failure of routine pumping, b) failure of an earthen dam, c) intermittent overflow from an impoundment, d) seepage through a levee, e) overflow from an impoundment while pump replacement was in progress. It is stated that all of these difficulties have been remedied by this date.

The parties ask us to approve a settlement. Under the proposal which is now submitted to us Peabody will spend at least $600,000 for abatement of pollution coming from the abandoned Peabody No. 47. The time is not specified for the performance of this abatement work. After the expenditure of some $600,000 by Peabody, Martin might contribute some of the profits from its slurry removal operation toward further abatement. The proposal is extremely vague in that respect.

Peabody would necessarily make much larger expenditures for abatement at the Will Scarlet mine which it is now actively mining. Total expenditures at Will Scarlet are estimated to be in excess of $15 million over a period of some seven years. According to Exhibit E filed by the Peabody Coal Company, if the mine continues to operate "the pollution abatement costs could be offset by increased coal prices". Even if the mine ceases to operate the pollution control costs will be in excess of $11 million.

However, Peabody's agreement to perform the abatement work at abandoned Peabody No. 47 is subject to some strange conditions. For one thing, Peabody agrees to accomplish additional work beyond the $600,000 level "upon condition that the Environmental Protection Agency obtain a full and complete option in Peabody at no cost to Peabody to all rights, title and interest in the lands which are the subject of the contract". (Stipulation p. 5) Just how and under what authority this State agency would go about delivering the lands including mineral rights to Peabody "at no cost to Peabody" is not discussed.

The most unusual feature of the Stipulation is a "condition precedent" which we believe precludes our acceptance of the

agreement. It is stated as an "essential" part of the settlement that before Peabody will abate the pollution at abandoned Peabody Mine #47, this Board must approve a variance for Peabody in its operation of the Will Scarlet Mine. The variance petition (Peabody Coal Company vs. EPA 73-58) requests a variance from Rule 502(a), Rule 605 and Rule 606, Chapter IV Mine Related Pollution Regulations. These Rules deal with the procedure for closing down a mine, prohibit the violation of Water Quality Standards and establish effluent criteria. In Peabody's petition, (PCB 73-58) it is contemplated that the variance would be extended from year to year until the closing of the Will Scarlet Mine in 1980. Other details of the proposed variance are given but we will not discuss them further at this time since our decision will have to await a hearing on the variance petition.

The same petition also includes an appeal by Peabody from a permit denial for various operations at the Will Scarlet Mine.

We reject that part of the settlement which requires issuance of a variance prior to the undertaking of the pollution abatement program. Rejecting that feature we therefore, must reject the entire settlement. Section 35 of the Environmental Protection Act specifies that variances may be granted upon proof that compliance with any Regulation or Order of this Board would impose an arbitrary or unreasonable hardship. We will await such proof. We have previously stated in Kienstra that we are eager to provide that atmosphere which will result in the cleaning up of the polluted mining areas in Illinois. We have indicated our willingness in certain cases to forgo monetary penalties in order to obtain a sound abatement program. This can, in some cases, be an inducement to action which will result in a better environment.

It is difficult for us to see, however, how the quality of the environment might be enhanced by trading a known amount of existing pollution for an unknown quantity of future pollution. How could the public interest be served by allowing Peabody seven years of pollutional discharges in return for a promise to clean up the discharges from a mine it had abandoned earlier? We have no alternative but to direct that the case proceed to a hearing in due course and that we be supplied with a proper transcript of the testimony or a new stipulation and settlement agreement.

We do not prejudge the variance request. If proof is made, consistent with statutory requirements, that an undue hardship exists then a variance will be granted. We wish to clear the air in advance of hearing, however, as to the grounds for the granting of a variance. A trade of the nature attempted here is not acceptable.

In order to facilitate the further disposition of this matter, we will rule on some procedural points. On December 18, 1972 Peabody filed a Third Party Complaint asking for indemnity from nine parties. The parties added were: County of Williamson; Robert Mausey, Jr.; U. S. Department of Interior, Forest Service; George Barnes; Lee Kidd; Brown Brothers Excavating; Williamson County Highway Department; Val G. Walker; and Rodney G. Choate. Some of these Third Party Respondents moved to dismiss the Third Party Complaint stating as one of the grounds that there is no basis under the Environmental Protection Act for asking this Board to order indemnification. On January 23, 1973 we stated that the Motion to Dismiss would be taken with the case since a hearing had already been held and we were then awaiting receipt of the transcript of testimony. Now that a further hearing is contemplated we will dispose of this procedural matter by ordering the Third Party action dismissed without prejudice as to all Third Party Respondents. A reading of the Complaint and Answer shows very clearly that the issues may be decided without the addition of Third Parties. Any request for indemnity must be decided in a court of law. If Peabody or the Environmental Protection Agency or any individual wants to pursue an action before this Board against those nine individuals, the pleadings will have to be brought within the framework of the Environmental Protection Act, and any monetary penalties imposed by this Board for violation of the Statute or Regulations will be paid to the State of Illinois and not to Peabody.

ORDER

It is ordered that:

1. The proposed settlements are rejected and the cases shall be scheduled for hearing. Either a transcript of testimony taken at the hearing or a new settlement agreement shall be submitted for our consideration.

2. The Third Party Complaint for Indemnity is dismissed without prejudice as to all Third Party Respondents.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order was adopted this 24th day of May, 1973 by a vote of 4 to 0.