

ILLINOIS POLLUTION CONTROL BOARD
February 14, 1975

ENVIRONMENTAL PROTECTION AGENCY,)	
Complainant,)	
)	
v.)	PCB 72-332
)	
LEE KIDD,)	
Respondent,)	

MR. DELBERT HASCHEMEYER, appeared on behalf of the Environmental Protection Agency;
MR. DAYTON L. THOMAS, appeared on behalf of Mr. Kidd.

OPINION AND ORDER OF THE BOARD (by Mr. Dumelle):

The Environmental Protection Agency (Agency) filed a complaint on August 8, 1972 alleging that Mr. Kidd had violated the Environmental Protection Act (Act), Sanitary Water Board's Rules and Regulations (SWB) and the Water Pollution Regulations. Two days of hearing were held in Harrisburg, Saline County, on September 27 and October 31, 1972. An Interim Opinion and Order of the Board was issued on December 5, 1972 which requested that the parties submit recommendations as to a course of action and/or penalties the Board should consider in this case. On February 6, 1973, the Agency submitted a recommendation on the course of action pursuant to the Interim Opinion and Order.

The Agency alleges that Mr. Kidd has caused, threatened, and allowed the discharge of certain mine wastes so as to cause water pollution in violation of Section 12(a) of the Act, to form an objectional sludge deposit in violation of Rule 1.03(a) of SWB-14 and Rule 203(a) of the Water Pollution Regulations, to have caused toxic concentrations or combinations of substances in violation of Rule 1.03(d) of SWB-14 and Rule 203(a) of the Water Pollution Regulations, and to have caused the pH to drop below 6.0 in violation of Rule 1.05(b) of SWB-14 and Rule 203(b) of the Water Pollution Regulations.

Mr. Kidd owns approximately 560 acres of land located in Saline County (R. 52). The land in question was formerly owned by the Blue Bird Coal Company (R. 70). Both underground and surface mine operations were conducted on the site. In addition to the mines, Blue Bird operated a coal washing facility on the site until 1957 (R. 70). Mr. Kidd testified that Blue Bird Coal Company asked him if he wanted to buy the Blue Bird mine site back in 1957 (R. 70). Mr. Kidd proceeded to purchase the land in question in 1957 from the Blue Bird Coal Company. Mr. Kidd purchased a quit claim deed in the property for \$3,500.00 (R. 75). Mr. Kidd paid the Blue Bird Coal Company \$1,000.00 down and signed a note for the remainder. In return, the Blue Bird Coal Company executed a quit claim deed to Mr. and Mrs. Kidd (Agency Exhibit 18). Subsequently, Mr. and Mrs. Kidd were divorced without a property settlement (R. 71). Therefore, Mrs. Kidd apparently owns one-half of the property in question (R. 71).

The Blue Bird Coal Company sought and obtained an easement from Mr. and Mrs. Kidd to allow it to remove coal washer reject deposits, carbon or sludge from the strip pits (Respondent Exhibit 4). On December 1, 1957, Mr. and Mrs. Kidd granted Blue Bird Coal Company an easement to allow Blue Bird access to the New York Central Railroad right-of-way, which ran across the land (Respondent Exhibit 3). Both of these easements were to last for a period of ten years. Blue Bird Coal Company described the washer rejects and carbon located in the strip pits as personal property belonging to Blue Bird Coal Company (Respondent Exhibit 4).

Mr. Kidd farms approximately 100 of 560 acres he purchased from Blue Bird Coal Company (R. 53). In addition to this farming, Mr. Kidd conducts a trucking business (R. 53). Part of Mr. Kidd's business activities is salvaging carbon or coal slurry from the abandoned mine area on his property (R. 53). Mr. Kidd removed approximately 15,000 tons of carbon during both 1970 and 1971 (R. 59). Mr. Kidd used a bulldozer to push the carbon into an area where he could load it with the use of a drag-line onto trucks (R. 55). As part of this operation, Mr. Kidd pumped water, from what called the carbon salvage pit, between two dams which he constructed (R. 57 and 58). Mr. Kidd testified that he did not pump very much water because he stayed above the water line when removing carbon (R. 59).

Mr. Armen Asaturians, an Agency surveillance engineer, conducted five days of surveillance and sampling on Mr. Kidd's property. Mr. Asaturians collected water samples on

each of these five days from various points on the land owned by Mr. Kidd and in the water courses as they left Mr. Kidd's property. Agency Exhibit 1 contains a sketch prepared by Mr. Asaturians which is useful in examining the points from which water samples were obtained, photographs taken and understanding testimony which utilized this exhibit.

Three drainage courses lead from Mr. Kidd's property in question. An examination of Agency Exhibit 1 shows that one watercourse, which drains the eastern portion of the refuse pile, extends from Agency sampling point 8 through Agency sampling point 6 where the watercourse passes under a public road. A second drainage area drains the impoundment behind a dam located at Agency sampling point 3 and extends west and south to Agency sampling point 4. This second drainage area represents surface drainage from the western portion of the refuse pile. A third drainage area extends from the overflow of the water backed up behind the dam located at Agency sampling point 3. This overflow flows south along the western portion of the refuse pile into a strip pit marked with the letter M on Agency Exhibit 1. From this pit, the drainage flows under an east-west public road through a culvert marked P on Agency Exhibit 1. Drainage then enters what is labelled the carbon salvage pit. Mr. Kidd has constructed two dams across the carbon salvage pit which are located with the letters A and B on Agency Exhibit 1. The lower portion of the carbon salvage pit is the location of Agency sampling point 11. Drainage from the carbon salvage pit and from the strip pit marked with the letter Q combine at what is Agency sampling point 9 in the southeastern corner of Agency Exhibit 1. From this point drainage flows beneath a public road eastward past what is Agency sampling point 10. From an examination of Agency Exhibit 1 it is clear that water quality samples taken at Agency sampling points 3, 6, and 10 would indicate the quality of water which passes from land owned by Mr. Kidd in each of the three drainage areas. An analysis of Agency Exhibits 2 through 6, shows that the water quality samples taken at these three sampling points all have the following range in characteristics:

pH	2.6 to 2.7
Iron	170 to 2,100 ppm
Manganese	20.2 to 66.4 ppm
Free Acidity	300 to 2,02 ppm
Total Acidity	1,060 to 7,350 ppm
Total Hardness	1,260 to 1,700 ppm
Specific Conduct- ance	3,700 to 16,000 micromhos
Total Solids	4,900 to 14,000 ppm
Sulfate	2,600 to 8,700 ppm

In addition to water quality samples, Mr. Asaturians also took numerous photographs at the various sampling points indicated on Agency Exhibit 1. The location of the various photographs which were admitted into evidence are indicated in blue with the Agency Exhibit number inside a circle on Agency Exhibit 1. An examination of these photographs shows bottom deposits varying from yellow to rusty orange in the watercourse which flows through the carbon salvage pit and black bottom deposits in the watercourse that flows east from the refuse pile (Agency Exhibits 11, 15, and 17). Agency Exhibit 13 depicts a pump located at the upper dam on the carbon salvage pit. Agency Exhibit 14 shows a pump located at the lower dam on the carbon salvage pit. Mr. Asaturians testified that on July 1, 1971 the pump depicted in Agency Exhibit 13 was operating and discharging water into the area between the two earthen dams and was flowing out of a small opening located in the lower dam depicted in Agency Exhibit 14 (R. 32).

Because of the essentially un rebutted testimony presented by Mr. Asaturians, the water quality samples taken, and the photographic exhibits, the Board finds that the Agency has established that violations of Section 12(a) of the Act occurred. Mr. Asaturians' testimony and the photographs which show the yellowish, rusty-orange and black colored bottom deposits establish that a violation of Rule 1.03(a) of SWB-14 and Rule 203(a) of the Water Pollution Regulations also existed. The water quality analyses submitted establish that a violation of Rule 1.03(d) of SWB-14 and Rule 203(a) of the Water Pollution Regulations occurred in that the values reported are in a range which are toxic to aquatic life. Water quality samples taken also establish that the pH in the water-course was below 6.0 which establishes a violation of Rule 1.05(b) of SWB-14 and Rule 203(b) of the Water Pollution Regulations.

Having found the above violations to have occurred, the Board weighed the evidence presented to determine if Mr. Kidd had caused, threatened, or allowed the discharge, (the mine waste,) so as to be responsible for the above violations. Three water courses flow from Mr. Kidd's land (Agency Exhibit 1). In examining whether Mr. Kidd has caused, threatened, or allowed the violations which exist in each of the three waterways, the Board will treat each waterway separately.

In a decision upholding the Board's finding of a violation of Section 12(a) of the Act by an owner of the surface of land from which acid mine drainage was flowing from a mine refuse pile, the Fifth District Appellate Court held that,

"[t]he unquestioned pollution (acid mine drainage) proves sufficiently that the petitioner allowed the discharge

within the meeting of Section 12(a)" (Meadowlark Farms, Inc. v. Pollution Control Board, 17 Ill. App. 3d 851, 858, 308 N.E. 2d 829, 836 (February 22, 1974)).

In a subsequent case the Fifth District applied the Meadowlark test and upheld the Board's finding that a respondent allowed a violation by stating that:

"the discharges were accidental and not intentional, or that they occurred in spite of Petitioner's efforts to prevent them, is not a defense as urged by Petitioner" (Freeman Coal Mining Corp., v. Illinois Pollution Control Board, 313 N.E. 2d 616, 621, (June 28, 1974)).

Applying the Meadowlark and Freeman decisions to the present case, the Board finds that Mr. Kidd had a quit claim deed to the property in question and paid the taxes on the property (R. 71 and Agency Exhibit 18). Mr. Kidd owned or exercised control over the surface from which the acid mine drainage occurred in the drainageway which flows in a north and east direction from refuse pile. Thus, the Board finds that Mr. Kidd allowed the violations to occur in this drainageway. The Board also finds for these same reasons that Mr. Kidd has allowed the violations to occur in the drainageway which flows from the western side of the refuse pile in a west and south direction. In addition to the ownership or control of the surface, the record clearly establishes that Mr. Kidd has operated a pump which enlarged the flow of the grossly polluted water from the carbon salvage pit to the drainage area that flows in a south and east direction from Mr. Kidd's property. In addition, Mr. Kidd has constructed two dams and engaged in carbon salvage operations in this drainage area. For these reasons, the Board finds that Mr. Kidd has caused and allowed the violations to occur in this drainage area.

In the prior Interim Order, the Board asked the Agency to examine the possibility of bringing the former owner, Blue Bird Coal Company, before the Board. Several questions remain unanswered in this record in that the relationship between Blue Bird Coal Company and Mr. Kidd is not very clear. The record establishes that Mr. Kidd worked for Blue Bird Coal Company for a number of years prior to the closing of the mine in 1957. Blue Bird Coal Company asked Mr. Kidd if he wanted to buy back the land in question. Blue Bird Coal Company sought and got two easements for undetermined consideration. Blue Bird Coal Company described the coal slurry or carbon as personal property, and yet Mr. Kidd proceeded to remove and sell the coal. Rather than order Blue Bird Coal Company to be brought in as a party and remand the case for further hearing, the Board has decided to terminate the present proceedings and leave any future litigation regarding this site open to a new proceeding.

In the prior Interim Opinion and Order, the Board found that the cost of correction was an impossible cost for the Board to require of a person of Mr. Kidd's economic status. The Agency admitted that an abatement program for the entire 460 acres would be beyond Mr. Kidd's financial means (Agency Recommended Course Of Action). Having fully considered all the facts and circumstances bearing upon the reasonableness of the discharges to the three tributaries, in accordance with Section 33(c) of the Act, the Board finds that Mr. Kidd should cease and desist from any future carbon salvage operations without complying with existing environmental regulations, including the obtaining of necessary permits from the Agency. The Board agrees with the Agency's recommendation not to assess a penalty in this case.

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


ORDER

The Pollution Control Board hereby finds Mr. Kidd to have violated Section 12(a) of the Environmental Protection Act; Rules 103(a), (c), and (d) and Rule 105(b) of SWB-14; and Rules 203(a) and (b) of the Water Pollution Regulations.

Mr. Kidd is hereby ordered to cease and desist from further carbon salvage operations without obtaining necessary permits from the Environmental Protection Agency.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 14th day of February, 1975 by a vote of 4-0.


Christan L. Moffett, Clerk
Illinois Pollution Control Board