

ILLINOIS POLLUTION CONTROL BOARD

July 12, 1973

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

ORDER OF THE BOARD UPON PETITION FOR RECONSIDERATION (by Mr. Henss)

The parties have jointly filed a Petition for Reconsideration and Modification of our Opinion and Order of May 24, 1973. They request that we now approve the settlement which was earlier rejected by the Board on the ground that the settlement proposal here is similar to that we approved in EPA vs. Bell & Zoller, PCB 72-258. It is quite different. In Bell & Zoller we held that in an enforcement case, Respondent's voluntary abatement of pollution not caused by him would be considered in lieu or in mitigation of monetary penalty. We made essentially the same holding in EPA vs. Kienstra Concrete PCB 72-72. Neither the Bell & Zoller nor the Kienstra case involved a variance.

The settlement presented to us in the instant case is different from Bell & Zoller in that a variance is involved. There are also other differences, but in their Petition for Reconsideration the parties concentrate on showing that we misunderstand their "condition precedent" and that in actuality there is no trade-off involving a variance at the Will Scarlet Mine. If that is so, the

parties will surely have no objection to resubmitting the settlement in a better form. At the present time we are faced with the following provisions.

Section V of the Settlement provides for an ancillary contract whereby Peabody will abate pollution at abandoned Peabody Mine #47, now owned by Martin. This ancillary contract "will contain the following essential terms, or alternatives thereto:

1. Condition precedent that the agreed enforcement order presented with this Stipulation and of the variance requested by Peabody by its responsive pleading in this matter, will be approved and granted by the Board before commencement of work...."

Section VI is entitled "Variance Required" and specifies a variance at the Will Scarlet Mine from the mine drainage effluent limitations, the variance to be renewed year to year until 1980. The final paragraph of the Stipulation includes this language:

"It is further expressly understood that the foregoing Stipulation is null and void except for paragraph I-IV, and may not be considered or used as admissions nor introduced as evidence in any proceedings until and unless a variance petition filed by the Respondent, Peabody Coal Company, is granted in substantially the form requested and unless and until the legality of the agreement referred to in paragraph V and the terms of the variance referred to in paragraph VI of this Stipulation and Agreement is indicated to be legal either via an Opinion from the Attorney General of the State of Illinois or by a declaratory action filed in and determined by the appropriate Circuit Court of the State of Illinois".

This seems to us a clear statement that Peabody would not perform pollution abatement work at abandoned Peabody #47 unless it received a variance from the effluent limitations at Will Scarlet Mine.

We repeat that variances are not to be included in such bargaining.

If the parties do not really intend to include a variance in the bargaining, we encourage them to resubmit this settlement to us in a document without this and other language we have found objectionable. It should be possible to delete all reference to

the variance since Peabody has now withdrawn its variance petition. The variance was initially requested in this action but was subsequently continued by Peabody in PCB 73-58. Peabody's withdrawal of their variance in 73-58 we construe to be a withdrawal of the variance requested herein. With the removal of the variance request a Bell & Zoller settlement is now possible.

The Motion for Reconsideration and Modification is denied.

I, Christan L. Moffett, Clerk of the Pollution Control Board, hereby certify the above Order was adopted this 12th day of July, 1973 by a vote of 4 to 0.

Christan L. Moffett