ILLINOIS POLLUTION CONTROL BOARD
March 20, 1980

ENVIRONMENTAL PROTECTION AGENCY, Complainant, v. MINERALS MANAGEMENT CORPORATION, a District of Columbia corporation; IRWIN NESTLER, BROMLEY K. SMITH, JR.; JAMES M. DAY; and DENNIS P. BIXLER, Respondents.	)	PCB 79-58

MR. STEPHEN GROSSMARK, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF THE COMPLAINANT.

MR. DENNIS P. BIXLER, MR. IRWIN NESTLER AND MR. BROMLEY K. SMITH APPEARED PRO SE.

OPINION AND ORDER OF THE BOARD (by Dr. Satchell):

This matter comes before the Board upon a complaint filed March 19, 1979 by the Environmental Protection Agency (Agency) naming as Respondents Minerals Management Corporation (MMC), a District of Columbia Corporation, Irwin Nestler (Nestler), Bromley K. Smith, Jr. (Smith), James M. Day and Dennis P. Bixler (Bixler). On June 12, 1979 an amended complaint was filed. The Respondents operated a coal refuse processing and recovery operation on the abandoned St. Ellen mine site near O'Fallon, St. Clair County. The complaint alleges violations of §§9(a), 9(c), 12(a) and 12(b) of the Environmental Protection Act (Act), Rule 502 of Chapter 2: Air Pollution Control Regulations and Rules 201, 501(a)(1) and 502 of Chapter 4: Mine Related Pollution. A hearing was held in Belleville on October 29, 1979. Members of the public attended but did not comment. On December 3, 1979 the Agency filed a motion for leave to amend complaint to conform to the proof and second amended complaint. Since there is no objection, the motion is granted. Complainant's December 3, 1979 motion for leave to file its closing argument six days late is also granted.

On September 10 and 11 the Agency filed, pursuant to Procedural Rule 701, motions for sanctions against Respondents MMC, Nestler and Smith. The motions allege that the Agency served interrogatories on these Respondents in June. These were not answered by the date specified. On August 3 the Hearing Officer ordered the Respondents to answer by September 7, 1979. Smith and Nestler contended that they responded to the interrogatories by certified mail on June 28, 1979 (R. 11). These were received by the Board, but the Agency contends that it received no copies until a couple of weeks before the hearing (R. 12). Smith indicated he had receipts showing service, although these were not introduced into evidence. There was confusion because of the withdrawal of Smith and Nestler's attorney. Since it appears that the Agency in fact received the papers well in advance of the hearing, the motion for sanctions is denied.

There is testimony that MMC was adjudicated bankrupt on June 20, 1979 (R. 310, 317; Motion of July 18, 1979). The bankruptcy court was given notice of the hearing but the trustee or receiver did not appear (R. 9). There is no suggestion in the record that proper service of process was not obtained on the Secretary of State or registered agent of the corporation prior to the bankruptcy. However, it is suggested that the Board has no jurisdiction over MMC (R. 316). The individual Respondents have no authority to sign pleadings for MMC or assert its rights after the bankruptcy (R. 9). However, assuming a motion to dismiss MMC is before the Board, it is denied. The Board further finds MMC in default pursuant to Procedural Rule 327.

On April 2 and 10, 1979 Smith, Nestler and James M. Day filed motions to dismiss. Among other things these Respondents objected to service of process upon them outside of the State of Illinois. The motions were denied by Order of the Board on April 26, 1979. Parties objecting to personal jurisdiction must file a special appearance pursuant to §20 of the Civil Practice Act (Ill. Rev. Stat. ch. 110, §20). Since the Respondents included with their motions grounds for dismissal other than lack of personal jurisdiction, the motions were general appearances by which Respondents voluntarily submitted to the Board's jurisdiction, rendering the jurisdictional questions moot. Respondent James M. Day was, however, dismissed on the Agency's motion in an Order entered September 20, 1979.

The individual Respondents were officers or directors of MMC, which held the permit and operated the site (Comp. Ex. 9). The complaint alleges that the individuals violated the Act through control of MMC's actions. The evidence discloses that they were actually on the site and in direct control of day to day operations, which is ample to create liability (R. 189, 200). The Agency suggests that this result is dictated by Section 3(i) of the Act--the definition of "person." The argument is that the named Respondents were the "legal representatives or agents" of MMC. The Board rejects this argument. The individuals are without a doubt "persons" within the meaning of the Act, regardless of their relationship with MMC. The Act proscribes various activities of persons which cause pollution. It makes no difference whether the person utilizes an inanimate tool to cause pollution or instructs his own employees or the employees of a corporation which the person controls. [EPA v. Collins Improvement Company, Inc., et al., PCB 75-126, 19 PCB 221, 224 (1975).]

The following is a summary of the allegations of the second amended complaint:

Count	Act/Rule	Summary
I	§12(b)	Construction or operation of a facility capable of causing or contributing to water pollution in violation of permit conditions.
II	§12(b) Rule 201 of Ch. 4	Conducting mining operations outside of permitted area.
III	§12(a) Rule 501(a)(1) of Ch. 4	Failure to notify the Agency within thirty days of cessation of mining.
IV	§12(a) Rule 502 of Ch. 4	Closing down a mine or mine refuse operation which the operator does not intend to reopen without a permit to abandon.
V	§§9(a) and (c) Rule 502 of Ch. 2	Causing or allowing open burning of mining materials and causing or tending to cause air pollution.

Count I

The St. Ellen mine site is an abandoned slope mine. MMC conducted a coal refuse recovery operation on gob piles located near

the mine entrance (R. 47). MMC sought to recover coal left from earlier operations with less efficient equipment. Beginning in January, 1977 MMC conducted preliminary discussions with the Agency resulting in an application and a permit issued April 4, 1977 (R. 35, 45, 82, 110; Comp. Ex. 1). A supplemental permit was issued August 29, 1977 (R. 38, 45; Comp. Ex. 2).

MMC proposed to dispose of the rejects remaining after the recovery operation by supplying it to the U. S. Bureau of Mines for use in backfilling nearby underground mines to prevent subsidence. Special Condition #2 of the permit reads as follows:

> All rejects from the coal recovery operation are to be removed from the mine site by the U. S. Bureau of Mines. All refuse not removed from the site shall be graded and covered with a minimum of two feet of non-acid producing material and vegetation established (Comp. Ex. 1).

At the hearing the Agency introduced a notarized letter from the Bureau of Mines concerning its relationship with MMC (R. 287; Comp. Ex. 10). Between December 17, 1976 and July 28, 1977 the Bureau discussed the project with MMC but had had no further contact after that date. MMC represented in Schedule MC of the permit application that details of removal of refuse by the Bureau of Mines "should be completed by March 15, 1977" (Comp. Ex. 1). The Bureau of Mines never entered into an agreement with MMC on removal of refuse from the site. Letters from the Bureau to MMC were introduced but not admitted into evidence (R. 294, 300, 312; Smith's Ex. 2, 3). On July 31, 1978 MMC in a letter to the Agency requested modification of its permit to remove the reference to the Bureau of Mines (R. 307; Smith's Ex. 1). Apparently an application followed on August 9, 1978. The Agency responded with a request for information on October 6, 1978 and a denial on October 26, 1978 (R. 325; Comp. Ex. 14, 15).

On cross-examination of the Agency's witnesses Respondents sought to establish that special condition #2 contained alternative provisions for rejects--they could be removed by the Bureau of Mines or graded and covered at MMC's election (R. 59, 62, 97). However, a reading of the application, especially Attachment D, indicates that MMC represented to the Agency that the refuse piles

would be removed by the Bureau of Mines (R. 122, 127; Comp. Ex. 1). The condition was based on this understanding and the provision for grading and covering that which was not so removed was not intended to allow an alternative mode of routine operation. Respondents waited a full year after their last contact with the Bureau of Mines before applying for a supplemental permit, even though they were informed that the subsidence project was terminated (R. 116, 304).

Respondents further attempted to establish that the permit contained no time schedule for removing or covering the rejects (R. 57). A reading of the entire permit indicates that this was to be continuous over the life of the permit. However, even if Respondents' argument is accepted, the permit expired April 4, 1979 with the rejects not covered or graded (Comp. Ex. 1).

Smith testified that "at the time of issuance of the permit and throughout the entire operational history of the site, all first wash rejects were planned to be recycled," (R. 290). Material was to be stored to be processed a second time, apparently after more efficient processing equipment was installed (R. 61, 97, 117, 226, 234). Smith's statement of intent was accepted by the Hearing Officer for the limited purpose of §33(c) (R. 292). If MMC either intended to run the rejects again through the existing plant or one to be constructed, this is not the procedure contemplated in the application and permit.

Special Condition #1 provided that there should be no discharge of process water from the facility. Water from the processing plant was to be discharged into a series of settling ponds from which make up water was to be pumped back to the processing plant (Comp. Ex. 1). Testimony was given concerning a discharge which occurred on September 7, 1977 (R. 88, 242; Comp. Ex. 11). A further discharge occurred in April, 1978 (R. 89, 108, 125). Apparently one of these resulted from actions of R. W. Harmon Bus Company on land adjacent to MMC's site. Any process water discharge from MMC would be a breach of permit condition regardless of any contaminants in the water.

Bixler was president of MMC and signed the permit applications (Comp. Ex. 1). He lived in the Belleville area; whereas, Nestler and Smith commuted from Washington, D.C. (R. 200). During the early phases of the operation he was manager of the site (R. 189, 211, 249). In November, 1977 Bixler was relieved of his position as manager and barred from the site (R. 319; Bixler Ex. 2). On November 23, 1977 he was removed from his position as president and a director of MMC (Bixler's Ex. 1, 3).

Bixler was directly responsible for the violations of Special Condition #2 from April through October 1977. The Board therefore finds him in violation of §12(b) of the Act for this period. However, the record is unclear as to exactly when the Bureau of Mines definitely indicated that they would not accept the refuse. It is possible that the operations during this period may have been undertaken in good faith on the assumption that the Bureau of Mines would eventually take the refuse which was accumulating. There is testimony by a former Agency employee that MMC made prompt efforts to correct deficiencies during Bixler's tenure (R. 94, 106). In January 1979 he assisted the Agency in putting out fires on the site (R. 151, 161). Therefore the Board will assess no penalty against Bixler. Since the remaining counts involve events subsequent to November, 1977 they will be dismissed with regard to Bixler.

Count II

Count II alleges violation of §12(b) of the Act and Rule 201 of Chapter 4 by conducting mine operations outside the permitted area. Rule 201 requires a permit for mining operations. The charge is that by mining adjacent to, but outside of the permitted area, the Respondents were mining without a permit. It should be noted that under the proposed revisions to Chapter 4 mining activities outside the permit area but adjacent to it will ordinarily be on the same facility. If a permit is held for the facility, mining outside the permit area will be a breach of condition but will not amount to mining without a permit (See R77-10, Proposed Order, December 13, 1979). However, under the existing Chapter 4 the allegation is sufficient to constitute violation of Rule 201.

The permit specifies that it "specifically covers only the area designated as Phase I on the map included in the application" (R. 53, 58, 63; Comp. Ex. 1). The map attached to Complainant's Exhibit 1 consists of a group of photocopies taped together. Apparently the top of the map faces west. Phase I is indicated by a dark, solid line and includes the north gob pile. Phase 2 is indicated by a dotted line and includes the west and most of the east gob piles. Phase 1 of the operation was to utilize an existing Standley Coal Washing Plant located between the east and north gob piles in the south half of the Phase 1 area (Attachment A, Comp. Ex. 1).

An Agency inspector testified that on May 5, 1978 mining operations were going on outside of Phase 1. Operations were inside Phase 2 and also outside of both Phase 1 and Phase 2 (R. 256, 273). An inspection of May 25, 1978 disclosed similar operations (R. 258, 280, 283). There is no indication of operations outside

of Phase 1 in inspections made on July 11 and August 22, 1978 (R. 260). The Agency conducted aerial surveillance on August 28, 1978 (R. 262; Comp. Ex. 13). There is testimony that operations were being conducted to the southwest of the old washer plant. This would be near the boundary between Phase 1 and Phase 2. However, there is no indication of which phase operations were in (R. 266). On cross-examination an Agency witness marked locations on a map identified as Smith's Exhibit 1. This map was not offered or received into evidence and is not included with the exhibits forwarded by the Hearing Officer (R. 274, 283).

The evidence therefore establishes operations outside of the Phase 1 during May, 1978. On May 25, 1978 the Agency held a meeting with Smith to discuss this (R. 258). Smith testified that at all times the processing and equipment utilized on the site were within Phase 1 under the permit except for a slurry operation for material removed from the northwest corner of the site. He testified that operations "were ceased" in that area and a "supplemental permit was filed with the Illinois Environmental Protection Agency" (R. 306). Smith introduced a letter to the Agency, dated July 31, 1978 which requested a supplemental permit to cover areas "inadvertently left off the basic site plan as filed" (R. 307; Smith's Ex. 4). On rebuttal an Agency inspector testified that the slurry circuit of the second processing plant was outside Phase 1 and virtually to the extreme of the Phase 2 area (R. 327). The Board therefore finds that operations occurred outside Phase 1 in violation of §12(b) of the Act and Rule 201 of Chapter 4 during the period from May 5 through July 31, 1978.

Count III

Count III alleges violations of §12(a) of the Act and Rule 501(a)(1) of Chapter 4, which reads as follows:

> Within thirty days of the cessation of mining or all mine refuse disposal operations, unless caused by a labor dispute or mechanical failure, the operator shall notify the Agency.

In September, 1978 Smith and Nestler held a meeting with a creditor bank in St. Louis. After that meeting, on September 25, 1978 the sheriff pulled most of the equipment off the site (R. 202, 232). The last pay day was September 5, 1978 and the work force was laid off on September 26, 1978 (R. 203). Some employees remained until early or mid-October to guard the site. There has been

no further mining activity since September 25, 1978 (R. 208). At that time the plant was operable, although the remaining equipment in the condition it was in was not sufficient to feed refuse into the plant (R. 233, 238). The Agency has received no notification of cessation of operations (R. 270). The Board therefore finds that Nestler, Smith and MMC failed to notify the Agency of cessation of operations substantially as alleged in Count III.

Count IV

Count IV charges that Respondents violated §12(a) of the Act by abandoning the site without obtaining an abandonment permit as required by Rule 502 of Chapter 4, which reads as follows:

> . . . if an operator closes down a mine or mine refuse operation and . . . an operator does not intend to reopen the operation, the operator shall, within one year of the date of close-down, obtain a permit to abandon.

Rule 103(a) defines "abandon" as follows:

> "Abandon" is to close down a mine or mine refuse area with no intention to reopen said area; . . . A mine or mine refuse area which has been inoperative for one year shall be rebuttably presumed to be abandoned.

There was a cessation of operations on September 25, 1978. On October 18, 1978 an Agency inspection found no personnel on the site. The power had been disconnected and a hole cut in the wall of the office trailer to remove an air conditioner (R. 268). An inspection of December 21, 1978 revealed smoldering fires (R. 184). On January 24, 1979 there were three active fires in piles on the site (R. 139). Mr. Thomas Pinnell, Chief Inspector for the Department of Mines and Minerals, sorted through debris on the floor of the vandalized office trailer to find a purchase order with MMC's Washington, D.C. address and phone number (R. 144). The phone number had been disconnected. Nestler and Smith were eventually contacted after federal agencies referred the State to Bixler (R. 147).

Although the processing plant was operational after cessation, the equipment on the site was inadequate in the condition it was in to feed refuse to the plant (R. 233, 238). Sometime prior to that date the city had shut off water service for failure to pay the bill. Input of fresh water into the system was necessary for operation of the old plant (R. 196). MMC had not paid its employees for two weeks and owed other creditors (R. 202, 207).

At the time of the hearing the site had been inoperative for more than one year. It is therefore presumed abandoned. Smith's testimony that he conducted negotiations to recapitalize MMC from October, 1978 through April, 1979 is not sufficient to persuade the Board that the operation was not in fact abandoned on September 25, 1978 (R. 310). Respondents' objection that the first amended complaint was filed less than one year after the abandonment is rejected (R. 311). This is irrelevant since the hearing occurred more than one year after the close-down. Since no permit to abandon has been obtained, the Board finds Nestler, Smith and MMC in violation of §12(a) of the Act and Rule 502 of Chapter 4 substantially as alleged in Count IV.

Count V

Count V alleges violation of §9(a) of the Act, which proscribes emission of contaminants into the atmosphere so as to cause or tend to cause air pollution or to violate standards adopted by the Board. The evidence is insufficient to find a violation of §9(a). Count V also alleges violation of §9(c) and Rule 502 of Chapter 2: Air Pollution Control Regulations by causing or allowing open burning.

On December 21, 1978 an Agency inspector found a small pile of reclaimed coal smoldering on the site (R. 185). On January 24, 1979 Mr. Pinnell found three spontaneous combustion fires burning on the site (R. 139). Two fires were in processed coal piles containing sixty and seventy-five tons of coal. The third was a pile of fines which was 60-70% coal (R. 140). When Nestler was contacted he said he wouldn't do anything because they didn't have any money (R. 151). The fires were extinguished under Department of Mines and Minerals supervision by a local contractor at a cost of $3500 which was provided by the federal government (R. 152).

Mr. Pinnell, as an expert witness, testified that it was necessary to take certain measures to prevent coal piles from spontaneously igniting when exposed to air and water. New coal mines protect processed coal from the elements by storage in a silo. Where this is not available it is necessary to continuously move and compact coal piles (R. 134, 159, 169). The Board finds that Nestler, Smith and MMC caused or allowed open burning through their actions in creating coal piles which were susceptible to spontaneous combustion, through their failure to take steps to prevent spontaneous combustion and through their failure to take steps to extinguish the fires. These Respondents are in violation of §9(c) and Rule 502 of Chapter 2 substantially as alleged in the complaint.

The complaint alleges that combustion of mine refuse occurred "during a period beginning on or about December 15, 1978 and ending on or about January 6, 1978"* Respondents objected to the testimony concerning January 24, 1979 since fires occurring on this date were not alleged in the complaint. The Hearing Officer deferred to the Board ruling on the relevancy of this testimony (R. 168). The Agency did not attempt to remedy this with its amendment to conform to proof.

The Agency offered testimony that there was fire on the site on December 21, 1978 within the time period alleged (R. 185). The fires were a consequence of Respondents' acts and omissions. In paragraph 15 of Count V the Agency alleged that there have been no measures taken to prevent air pollution "since on or about October 1, 1978." This allegation was sufficient to inform Respondents of a continuing violation up to the date of the complaint. The testimony concerning the fires of January 24, 1979 will be considered only as affecting the penalty under §33(c) of the Act and as cumulative evidence that Respondents' acts and omissions could result in open burning.

Section 33(c) and Penalty

A former Agency inspector testified that the entire St. Ellen site was a serious environmental problem (R. 85). However, most of this problem was present before Respondents came onto the site. The recovery operation sought to reclaim valuable but discarded coal. Had the operation proceeded as planned, it would have eliminated a large potential source of pollution, provided material to the subsidence program and reclaimed the land for other productive uses. However, Respondents could have taken technically practicable and economically reasonable measures to minimize the discharges and emissions during and after their operation.

Smith contended he had no money with which to fight the spontaneous combustion fires (R. 151). However, two of the piles were processed coal and one was 60-70% coal fines (R. 140). Since this was the end product of Respondents' operations it seems likely that it could have been sold or at least given away in exchange for haulage. In his brief Smith contends that the coal was not actually salable (Smith's Brief, 8). The Board will disregard this and all other factual assertions in the brief which are not supported by the record.

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*The Respondents have conceded that this is a typographical error which should read "January 6, 1979" (R. 164).

The site was in close proximity to a residential area (R. 254). Mr. Pinnell was able to detect the odor a quarter mile from the site (R. 139). Furthermore, the uncontrolled fires threatened to ignite the large gob piles in the vicinity. It would have been almost impossible to extinguish the fires that could have resulted (R. 158).

The Agency actually learned of the cessation of mining activities within one month (R. 267). The damage to the public from failure to notify is therefore minimal. However, the failure to obtain an abandonment permit and take steps to properly close the facility has resulted in injury to and interference with the protection of the health, general welfare and physical property of the people. Besides the fires, there was a potential for uncontrolled discharges from the site. One of MMC's employees testified that a dam constructed on the site was unsound (R. 197, 288). A former employee testified that in the weeks following the cessation there was "a lot of polluting going on."

During an inspection of the abandoned site in November 1978 Mr. Pinnell observed teenagers playing on the gob piles. They also discovered an open mine shaft about 250 feet deep (R. 141). On cross-examination Smith sought to establish that the Department of Mines and Minerals had ordered MMC to leave the shaft open (R. 172). However, such matters as this should have been provided for in an abandonment permit. Having considered §33(c) of the Act the Board finds that a monetary penalty of $5000 is necessary to aid enforcement of the Act.

The evidence indicates that MMC is in bankruptcy and that Smith and Nestler no longer control the corporation or the site. It would therefore be impossible for them to apply for an abandonment permit or to take steps to properly close the site. The Board will therefore assess a monetary penalty only against the individual respondents. MMC will be ordered to cease and desist violating the Act and Rules, to apply for an abandonment permit and to post a performance bond. There is testimony that seventy to eighty acres of the site was actually disturbed (R. 272). If this is to receive the two feet of final cover material required by the permit, some 242,000 cubic yards of earth must be moved. Therefore a bond in the amount of $250,000 will be required.

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

ORDER

1. Respondent Dennis P. Bixler is in violation of §12(b) of the Environmental Protection Act but no fine will be assessed and all other counts dismissed with respect to this Respondent.

2. Respondents Irwin Nestler, Bromley K. Smith, Jr. and Minerals Management Corporation are in violation of §§9(c), 12(a) and 12(b) of the Environmental Protection Act, Rule 502 of Chapter 2: Air Pollution Control Regulations and Rules 201, 501(a)(1) and 502 of Chapter 4: Mine Related Pollution.

3. Respondent Minerals Management Corporation shall cease and desist violating the Environmental Protection Act and Board Rules.

4. Within thirty-five days of this Order, Respondent Minerals Management Corporation shall make application to the Environmental Protection Agency for an abandonment permit for the site. Respondent shall make such supplemental applications as may be necessary for permit issuance. Upon issuance of an abandonment permit, Respondent shall post a performance bond in the amount of $250,000 with security acceptable to the Agency, conditioned on proper execution of its duties under the abandonment permit.

5. Within thirty-five days of the date of this Order, Respondents Irwin Nestler, Bromley K. Smith, Jr. and Minerals Management Corporation shall, by certified check or money order payable to the State of Illinois, pay a joint and several civil penalty of $5000 which is to be sent to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
Springfield, Illinois 62706

IT IS SO ORDERED.
Mr. Werner Dissented. Mr. Goodman Concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 20th day of March, 1980 by a vote of 3-1.

Christan L. Moffett pw
Christan L. Moffett, Clerk
Illinois Pollution Control Board