ILLINOIS POLLUTION CONTROL BOARD
April 16, 1987

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 83-163
LARRY BITTLE d/b/a Southern Recycling, a dissolved Illinois corporation, WILLIAM GAMBER, LEONARD C. BITTLE, and J. MAX MITCHELL,	)	
Respondents.	)	

MR. GREIG SIEDOR, MR. JOSEPH MADONIA, MR. MARK LAROSE AND MS. LISA ELIN MORENO APPEARED ON BEHALF OF THE COMPLAINANT.

MR. RON OSMAN APPEARED ON BEHALF OF RESPONDENTS LARRY BITTLE d/b/a Southern Recycling, WILLIAM GAMBER, AND LEONARD MITCHELL.

MR. DON JOHNSON APPEARED ON BEHALF OF RESPONDENT J. MAX MITCHELL.

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board upon the November 8, 1983, Complaint filed by the Illinois Environmental Protection Agency ("Agency"). The Complaint was subsequently amended on March 1, 1984, and hearings were held on February 17-20 and April 1-3[1], 1986, in Benton, Illinois. The Complaint alleges violations of sections 12(a), (b), and (f) of the Environmental Protection Act ("Act"), violations of sections 302.201, 302.204, 302.208, 309.102, 403.102, 406.105, 406.106(b), and 407.104 of the Board's regulations, and violations of Rules 201 (now section

[1] The seven days of hearing which were conducted in this case resulted in the production of eight volumes of transcription. The first two volumes represent transcription of the February 17, 1986, hearing. The second of these was not paginated consecutively from the first. The remaining volumes, however, were paginated consecutively from the third. Therefore, all references to the first transcript will be indicated by "Tr. 1 at _____" and to the second by "Tr. 2 at _____", while references to the other transcripts will read simply "R. at _____".

402.101), 502 (now section 405.102), 601(a) (now found in section 406.101), and 606(b) (now found in section 406.106) of Chapter 4 of the Board's prior system of regulations.

The procedural history of this case is lengthy and complex, and for the sake of clarity will not be recounted in full in this Opinion. Counsel for Larry Bittle d/b/a Southern Recycling, Leonard Bittle, and William Gamber raised two preliminary motions at the February 17, 1986, hearing in this matter, however, and in addressing itself to these motions the Board must detail those portions of the procedural history which are relevant to these motions. Therefore, a selective description of the procedural background of this case is contained in the following discussion of the facts.

BACKGROUND

In 1978, J. Max Mitchell, owner of a parcel of land in Franklin County, Illinois, commonly referred to as the Peabody No. 18 coal mine site, was approached by Larry Bittle d/b/a Southern Recycling[2] ("SR"). Larry Bittle, Leonard Bittle, and

[2] Respondents Larry Bittle, Leonard Bittle, and William Gamber are individually alleged to have been affiliated, in various ways, with Southern Recycling, a dissolved Illinois corporation, during the period in which they or Southern Recycling or both allegedly engaged in an illegal carbon recovery operation at the Peabody No. 18 site. If in fact an illegal carbon recovery operation is found to have existed, a primary issue for the Board to determine will be whether Larry and Leonard Bittle and William Gamber conducted such activities in their individual capacities, or whether they acted solely in behalf of Southern Recycling and thus enjoyed immunity from any personal liability relating to corporate activities. In order to simplify the description of the activities relating to the Peabody No. 18 site, these three Respondents will be referred to by name, without reference to them "doing business as Southern Recycling". The Board is cognizant, however, of these Respondents' contentions that they were doing business as Southern Recycling at all times during which the carbon recovery process was in operation.

William Gamber were interested in operating a carbon recovery[3] process on the site, and on November 2, 1978, they reached a series of agreements with Mitchell[4] that provided for the lease of the property to SR and them in their individual capacities for that purpose (R. at 687-689, Agency Exhibits[5] 1 and 2). Carbon recovery took place at the site for approximately a month in the fall of 1978, and then in the spring, summer, and fall of 1979 (R. at 733). No carbon recovery has taken place at the site since that time.

At the time the lease agreement pertaining to the Peabody No. 18 site was entered into (November, 1978), the ownership of SR shares was evenly divided between Larry Bittle, Leonard Bittle, and William Gamber (R. at 1040). In 1979, 40 percent of the corporation was sold to other individuals; Larry Bittle, Leonard Bittle, and William Gamber each retained 20 percent shares (R. at 1042; Bittle Exhibit[6] 18).

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[3] "Carbon recovery" is a process sometimes undertaken at sites on which coal mining once took place. If former mine sites are older in nature, there often exists a great deal of refuse material present. This material, which may be coarse or fine in character, was produced as a by-product of the coal washing process which took place at the time of the original mining (Tr. 1 at 30-31, 49). The coarse material, consisting of large chunks of coal and rocks, is commonly referred to as "gob". The fine material is actually produced as a result of the waste water flowing away during the coal washing process. This wash water, which generally flows into a holding or "slurry" pond, contains small particles of coal ("coal fines"). As these fines settle, the pond gradually fills and eventually becomes unable to hold very much water (Tr. 1 at 49-50). The carbon recovery operation which took place on the site at issue in this case concentrated on recovery of coal fine material, initially from the slurry pond area of the site and later from other areas of the site as well. (Tr. 1 at 39-40, 45-47).

[4] This is actually something of a simplification, as the lease agreement between the parties here was entered into by Mitchell and his wife Virginia (as owners) and John and Melody Turner (as lessees) as parties of the First Part, and SR, Larry and Leonard Bittle, and William Gamber as parties of the Second Part. Of the parties of the First Part to the lease agreement, only Mitchell himself has been made a Respondent in this action.

[5] Hereinafter referred to as "A. Ex.".

[6] Hereinafter referred to as "B. Ex.".

RELATED LITIGATION

On July 3, 1979, the People of the State of Illinois by William J. Scott, then Attorney General, filed a complaint in the Circuit Court of Franklin County on behalf of the Agency against SR and Larry Bittle (Mitchell Exhibit[7] 12). The complaint sought preliminary and permanent injunctions enjoining SR and Larry Bittle from conducting carbon recovery operations at the Peabody No. 18 site. The Circuit Court denied the motion for preliminary injunction on July 12, 1979 (Id.). SR and Larry Bittle filed a motion to strike and dismiss the complaint on July 24, 1979 (Id.). After granting the Agency several extensions of time for reply, the Circuit Court eventually ordered the Agency to reply to the motion to strike and dismiss by September 14, 1979 (Id.). The Agency never responded, but did file a motion for leave to amend complaint, and an amended complaint, on December 2, 1981 (Id.). The Circuit Court dismissed the complaint with prejudice, and denied the motion for leave to amend, on July 26, 1982 (Id.).

Mitchell filed an action of his own in the Franklin County Circuit Court on September 30, 1982 (M. Ex. 13). His complaint, filed against SR and Larry Bittle, Leonard Bittle, and William Gamber, sought termination of the November 2, 1978 lease agreement pertaining to the Peabody No. 18 site due to the alleged breach by the Defendants there of certain provisions of that agreement (Id.). The Defendants never entered an appearance in that action, and judgement was entered for Mitchell on November 18, 1982, for the relief he requested.

PRELIMINARY MATTERS

Motions to Dismiss

Respondents Larry Bittle, Leonard Bittle, and William Gamber made two oral motions to dismiss at the beginning of the first hearing held in this matter. Essentially similar motions have been previously adjudicated by the Board.

The first motion requests dismissal of Leonard Bittle and William Gamber from this action on the basis of res judicata and that they were improperly made parties to this case (R. at 11-15). On February 9, 1984, the Board struck the same motion for reason of late filing.

[7] Hereinafter referred to as "M. Ex.".

The second motion to dismiss offered by these Respondents requests that the Agency be prohibited, on the basis of res judicata, from prosecuting any violations alleged to have occurred at the site prior to July 26, 1982. On that date the Franklin County Circuit Court dismissed with prejudice an action brought in that forum by the People against SR and Larry Bittle (People v. Southern Recycling Co. and Larry Bittle, No. 79-CH-35). The complaint in that matter alleged that the site had been operated without a permit from November 23, 1978, until July 3, 1979, and then abandoned without a permit as well. On February 9, 1984 the Board ruled on a similar motion, and struck that portion of the instant complaint containing similar allegations[8], to the extent that they were alleged to have occurred between November 23, 1978, and July 3, 1979.

The Board has not been persuaded that its February 9, 1984, rulings on the two earlier motions similar to the ones now renewed were erroneous. Therefore, both of the motions to dismiss made orally by Respondents Larry Bittle, Leonard Bittle, and William Gamber at the February 17, 1986, hearing are denied.

Liability of Respondent J. Max Mitchell

The Agency and Mitchell differ in their views of the liability accruing to Mitchell as a result of the carbon recovery operation which was conducted on his property, the Peabody No. 18 site. The Agency states that the standard to be applied to property owners and lessors is one of an affirmative duty to control or prevent environmental violations occurring on the property, if the owner or lessor is in a potential position to control the activities on the property (Complainant's Closing Brief[9], p. 44, citing EPA v. James McHugh Construction Co., PCB 71-291, 4 PCB 511 (1972) and EPA v. Thompson Oil Company, PCB 75-475, 32 PCB 3 (1978)). The Agency contends that the lease agreement pertaining to the carbon recovery operation, and more specifically paragraphs 6 and 16[10] of that agreement, gave Mitchell the ability to control the actions of the lessees (A. Closing Brief, p. 45).

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[8] These allegations were found in Counts V and VI of the original complaint in this case.

[9] Hereinafter "A. Closing Brief".

[10] Paragraph 6 required the lessees to comply with "all local, County, State and Federal Governmental Laws, Rules, and Regulations" during the carbon recovery operation; paragraph 16 reserved to the lessors the right to terminate the contract upon the lessees' failure to, inter alia, "perform any of the covenants" of the contract.

Mitchell admits that he was at all times during the period in question owner of the Peabody #18 site. However, he raises two arguments in support of his position that all responsibility for violations at the site should be imposed on the other Respondents. First, he argues that Board and Appellate Court decisions are "less than clear concerning the standard to be applied to an owner-lessor or whether such a non-active participant should be held responsible at all" (Brief of Respondent J. Max Mitchell[11] at 18). Second, Mitchell disputes the Agency's assertion that he had the ability to control or prevent environmental violations at the site (Id. at 18-19).

An examination of the case law relevant to the issue of owner-lessor liability is necessary in order to respond to Mitchell's contentions. The Board has long held that the Act imposes an affirmative duty on persons in positions of potential control to take action to prevent pollution. Environmental Protection Agency v. James McHugh Construction Company, PCB 71-291, 4 PCB 511, 513 (1972). The Board has previously determined that lessors have such a duty if they are in a position to control the activities occurring. Environmental Protection Agency v. Thompson Oil Company, PCB 75-475, 32 PCB 3, 9 (1978). The test used by the Board to determine liability in both of the above-cited cases was one of reasonableness; i.e., that a person is liable if it was reasonable for him to have exercised control in order to prevent pollution. A determination using this standard will necessarily be dependent upon the particular circumstances of each individual of each individual case.

The requisite control which would impose liability on the landowner does not automatically stem from the lessor-lessee relationship. Ownership of land, used pursuant to a lease, is alone not sufficient to support the imposition of liability upon the lessor for actions of the lesse.

In Environmental Protection Agency v. Lake County Grading Company, PCB 81-11, 58 PCB 75 (1984), the Board indicated, in dicta, that lessor control, hence liability, is not automatically presumed from a lessor-lessee relationship. In that case, the lessee-operator of a sanitary landfill was found to have violated numerous sections of the Act and regulations. Although the lessors of the site were not named as Respondents in the case, the Board stated tht the lessors were "merely the landowners who lease the land to [the lessee] and [they] do not have any control over the operations of [the lessee]." Lake County Grading Company at 77. Such an aside indicates that a lessor does not necessarily control a lessee's operations. Therefore, in order to find the requisite control, the Board needs to look at the particular relationship at issue.

[11] Hereinafter "M. Brief".

The Illinois Appellate Courts have held that the Environmental Protection Act (Act) is malum prohibitum; no proof of guilty knowledge or mens rea is necessary in order to support a finding of guilt. Paul Hindman v. Pollution Control Board, 42 Ill. App. 3d 766, 769 (5th District 1976); Meadowlark Farms, Inc. v. Pollution Control Board, 17 Ill. App. 3d 851, 861 (5th District 1974); Bath, Inc. v. Pollution Control Board, 10 Ill. App. 3d 507 (4th District 1973).

In Bath, the owner-lessor of a landfill had been found by the Board in violation of a rule concerning the burning of refuse. The petitioners claimed that the finding of violation was an error due to the fact that the petitioners never caused or intended the burning. The court, in upholding the Board's finding, stated that "[i]t is not an element of a violation of the rule that the burning was knowing or intentional. We hold that knowledge, intent, or scienter is not an element of the case to be established by the Environmental Protection Agency upon the issue of burning." Bath, 294 N.E.2d at 781.

The reasoning in Bath was also adopted by the Court in Hindman. In that case, Hindman, the petitioner, was an operator-lessee of a landfill. He, too, was found in violation of the Act and rules concerning refuse burning. Hindman similarly claimed that he did not cause nor intend the fire and that as a consequence, he did not violate the Act. The court followed Bath and affirmed the Board's finding of violation. Citing Meadowlark Farms, the court stated, "other authorities have adopted the Bath standard and have concluded that the Environmental Protection Act is malum prohibitum, there being no proof of guilty knowledge or mens rea necessary to support a finding of guilty." Hindman 42 Ill. App. 3d at 769.

Meadowlark Farms concerned the violation of Section 12(a) of the Act due to the discharge of contaminants into a creek from iron pyrite mining refuse piles. The petitioner, who owned the land on which the piles were located, had been found by the Board in violation of the Act. The refuse piles were the result of a mining operation that had taken place on the land prior to the petitioner's ownership. The court affirmed the Board's findings that the petitioner had ownership of the surface rights of the property which was the source of the violation, that the evidence showed that the pollution had its source on that property and that fish were killed, and that the petitioner had the capability of controlling the pollutional discharge. The court, after discussing Bath, found that the same reasoning applied to Meadowlark Farms, Inc., i.e., "that knowledge is not an element of a violation of 12(a) and lack of knowledge is no defense." Id. at 862. The court consequently found the petitioner there in violation of Section 12(a) of the Act and certain water pollution regulations.

Although knowledge of wrongdoing is not necessary for a finding of violation of the Act, it is one factor which the Board may look to in order to assess whether the lessor could have reasonably exercised control over the lessee in order to prevent pollution.

Mitchell argues that the Board has not adopted a clear standard with regard to the liability applicable to owner-lessors. In support of his position, Mitchell cites three cases. However, these cases do not refute the standard set forth in James McHugh Construction Company and Thompson Oil Company.

The first case cited by Mitchell is Environmental Protection Agency v. City of Waukegan, PCB 71-298, 3 PCB 301 (1971), which involved an Agency enforcement action brought against multiple parties as a result of the improper operation of a landfill. The "owner" of the facility in question was a bank, which held the property as trustee in a land trust. The Board in that case held that this kind of ownership, which does not entail decisionmaking concerning the use of the property, does not support the imposition of liability for violations occurring on the site. Waukegan at 304. Such a holding is consistent with a control based standard.

Mitchell also relies on Environmental Protection Agency v. Wasteland, Inc., PCB 81-98, 48 PCB 1 (1982). In that case, which also involved violations stemming from the improper operation of a landfill, the lessor of the site was fined $2,000 while the operator was fined $75,000. The Wasteland decision does not contradict the general rule of lessor liability in those instances where the lessor could have reasonably exercised control to prevent pollution. Rather, the case indicates that where a lessor does not actively participate in the violations and only errs in his inaction, a differing standard may be applied to him in the assessment of a penalty.

In addition, Mitchell cites Environmental Protection Agency v. Lake County Grading Company, PCB 81-11, 58 PCB 75 (1984), which was discussed above. In that case, the lessors of the site were not named as Respondents. In dicta, the Board stated that the lessors did not have any control over the operations of the lessee. However, such a statement does not necessarily preclude the possibility that in certain instances a lessor may have control over the operations of the lessee.

Having discussed the standard applicable to the issue of to lessor liability, the Board can now turn to the facts of the instant case. Essentially, the Board must determine 1) whether Mitchell had control over the mine recovery operations to the extent that he could have prevented violations of the Act and 2) whether it was reasonable for him to exercise such control.

The Agency claims that two paragraphs of the lease give Mitchell control over the operations, to such a significant extent, that he may be found to have incurred liability in this case. Paragraphs 6 and 16 of the lease agreement pertaining to the site gave Mitchell the power to immediately terminate the lease if the lessees failed to comply with all "local, County, State and Federal Governmental Laws, Rules, and Regulations..." during operations at the site. Such clauses in a lease give the lessor a certain amount of control over the lessor-lessee relationship. However, this control only manifests itself in the termination of the lease, and the lease can be terminated by the lessor only after the lessee has already violated laws or regulations. That is, these two clauses alone do not grant the lessor control over the actions of the lessee prior to the lessee's wrongdoing. Other than the use of coercion, by threatening to terminate the lease, the lessor does not have the power to mold the lessee's behavior according to the lessor's wishes. Even threatening to terminate the lease may not influence the actions of the lessee, particularly since termination may involve court action. Consequently, these two clauses alone are not sufficient for one to conclude that the lessor had the ability to prevent the lessee from causing pollution.

However, once Mitchell knew that the operations were violating the Act, he could have exercised his ability to terminate the lease and take steps to prevent further violations and correct current ones. Mitchell's control over the mining operations was limited to his ability to terminate the lease. According to the provisions of the lease, he could only exercise this control, after the lessees violated any "local, county, state and Federal Governmental Laws, Rules and Regulations...." It would certainly be unreasonable for him to exercise his control -- terminate the lease -- prior to having any knowledge that the lessees were violating the Act. On the other hand, it is quite reasonable to expect him to exercise control once he knew or reasonably should have known of the violations.

In the instant matter, Mitchell had no reason to believe the lessees were initially operating in violation of the Act. The Bittles had experience with this type of operation and the lease specified that they were to obtain the necessary permits and operate within the provisions of the environmental regulations. He had no reason to suspect that the Bittles had not obtained the required permits. In July of 1979, Agency officials requested Mitchell to provide information on the lease, and he informally learned of the Attorney General's suit over the alleged violations of the Act. At this point in time, a prudent man would have begun looking into the situation. Operations at the site terminated in October of 1979, and Mitchell should have familiarized himself with the condition of the site and the implications of the conditions. In July of 1982, the Attorney

General moved to include Mitchell as a party to its 1979 suit. That same month the circuit court dismissed the suit with prejudice. Only then did Mitchell take action to cancel the lease with the Bittle group -- an action which was taken on September 30, 1982. The lease was cancelled in November of 1982. Mitchell waited far too long to actively investigate the conditions at the carbon recovery site. After the lease was cancelled, Mitchell was in sole possession of the site and clearly knew that the Agency believed violations had occurred and were continuing. He was capable of taking affirmative steps to control the problems at the site and should have done so.

The Board therefore concludes that it was reasonable to have expected Mitchell to take action in this instance to prevent the continuing violations. The record indicates that as early as July 10, 1979, Mitchell had reasons to expect that violations were occurring on the site (R. at 285-286). In sum, the Board finds that Mitchell shares responsibility for whatever violations occurring subsequent to July 10, 1979, are found in relation to the Peabody #18 site.

Mitchell also contends that, for reasons of estoppel and laches, the Agency should "be estopped from asserting now matters which could have been litigated in 1979" (M. Brief at 14). Mitchell states that it is "unfair" to assert liability against him "at such late date", given the Agency's unsuccessful prosecution of the prior case against SR and Larry Bittle in the Franklin County Circuit Court (Id.).

The Agency, in response, argues that "the equitable defenses of laches, estoppel and waiver cannot be invoked in cases involving public rights and the exercise of governmental functions, unless extraordinary circumstances are present", and that "(t)his general prohibition of equitable defenses becomes absolute ... in environmental cases which concern protection of the public health and welfare" (A. Rebut. Brief at 24). In support of these positions, the Agency cites People ex rel. Scott v. Chicago Thoroughbred Exterprises, Inc., 56 Ill. 2d 210, 306 N.E. 2d 7 (1973) and Tri-County Landfill v. Pollution Control Board, 41 Ill. App. 3d 249, 353 N.E. 2d 316 (2nd Dist. 1976).

The Board finds that the present action is not unfairly brought against Mitchell, and therefore finds that the issues of laches and estoppel are inapplicable to the case at bar. The Board need not, and therefore does not, today address the more general issue of whether equitable defenses may be invoked in environmental cases involving public rights and the exercise of governmental functions.

Liability of Larry Bittle, Leonard Bittle, and William Gamber

The Agency has brought action in this matter against Larry Bittle, Leonard Bittle and William Gamber as individuals, and not in their capacities as officers and/or agents of SR. SR, in fact, was never made a Respondent to this action. The Agency alleges that these Respondents are liable for the violations at the site because of their personal involvement in, and control over, the day to day activities of the carbon recovery operation (A. Closing Brief at 40). The Agency stresses that it has therefore not attempted to "pierce the corporate veil" in the presentation of its case (Id.), and contends that there can be no reason to shield from civil liability corporate officers who are personally involved in or directly responsible for statutorily proscribed activity (Id., citing United States v. Pollution Abatement Services of Oswego, Inc., 763 F.2d 133, 135 (2d Cir. 1985).

In support of this position, the Agency has shown the following: these three Respondents all signed the lease agreement for the site in their personal capacities[12] (R. at 689, A. Ex. 1 and 2), and similarly signed the installment note required by the lease agreement[13] (R. at 712-713, A. Ex. 2); interest earned on the escrow account created by the lease agreement was paid to Larry Bittle individually and deposited into his personal account (R. at 715-716, A. Ex. 3); William Gamber took instructions from Larry Bittle (R. at 861), ran the day to day operations at the site (R. at 849), and was seen operating earthmoving equipment and thereby physically participated in the carbon recovery operation at the site (Tr. 1 at 40 and 45, Tr. 2 at 34); Larry Bittle, while trying to be at the site "most every day" (R. at 733), appeared at the site "a couple of times a week" and talked to William Gamber "pretty close to every day" concerning the operations at the site (R. at 860-861); Larry Bittle also authorized construction of the holding ponds on the site (R. at 746-747), later authorized repair work done to the berms around those ponds (747-748), and paid for these repairs out of his personal funds (R. at 749-751).

Respondents Larry Bittle, Leonard Bittle and William Gamber contend that they cannot be individually liable for any violations at the Peabody No. 18 site because the site was operated by SR, a corporation which they allege was fully funded and viable during the time the carbon recovery operation took place (R. at 1258 and 1264). Moreover, they assert that in order

[12] Larry Bittle also signed this agreement in his capacity as President of S.R

[13] No one signed this document as representative of SR.

to prove them individually liable, the Agency must "pierce the corporate veil" but did not do so because SR was never made a Respondent to this action (R. at 1265). Finally, they argue that the Agency offered no proof that they are individually responsible for the violations committed at the site (R. at 1265).

The Board has consistently held that the corporate form cannot shield an individual from personal liability where he participates in activities at asite on a day to day basis. Environmental Protection Agency v. Minerals Management Corporation, PCB 79-58, 37 PCB 521 (1980); Environmental Protection Agency v. Collins Improvement Company, Inc., PCB 75-126, 19 PCB 221 (1975). This approach is premised on the fact that individuals fall within the definition of "persons" as it is defined in Section 3 of the Act, and the Act proscribes various activities of persons which cause pollution. For the purpose of establishing violations of the Act or regulations adopted thereunder, "(i)t 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". Minerals Management Corporation at 523.

The Board finds the Agency has convincingly shown that Larry Bittle and William Gamber were intimately involved in the everyday operations of the site. The Board will, therefore, hold them individually liable for whatever violations may be found to stem from the carbon recovery operation. Regarding Leonard Bittle, while he was in a position to influence the course of events, his involvement was peripheral. The Board notes that he had no "hands on" role in the operation of the site (R. at 831), was occasionally consulted on big decisionns, and only visited the site during the first week of operations and once thereafter. (R. at 735, 831, 832, 836, 837).

While Leonard Bittle might not have actually caused the violations, he did allow them. For these reasons, the Board on balance concludes that Leonard Bittle may be held in violation. However, due to the limited nature of his involvement in relation to the other partners he will not be held liable for any costs of site cleanup or penalty.

Motion to Amend Complaint

On June 23, 1986, the Agency filed a motion to amend its First Amended Complaint for the stated purpose of "encompass(ing) evidence of violations continuing since the filing of the First Amended Complaint, and to thereby conform to the proof presented at trial". Certain of the testimony presented by the Agency at hearing consisted of observations made by Agency inspectors during visits to, and flights over, the site subsequent to the filing of the Complaint.

Within the same June 23, 1986, motions, the Agency also requests the Board to allow amendment of the First Amended Complaint by interlineation, in order to change a date found in Count III from "March 21, 1981" to "March 12, 1981".

Larry Bittle, Leonard Bittle, and William Gamber objected, on July 21, 1986, to that portion of the motion which seeks to amend the complaint in order to reflect continuing violations. They argue that the process of amending complaints is controlled by Ill. Rev. Stat. ch. 110, par. 2-618 (sic)[14], and that the section allows a complainant "on just and reasonable terms" to amend a complaint. They contend that the proposed amendment here is not just and reasonable because they "have no way of answering the proposed amendment to the Complaint inasmuch no specific times, dates, or violations are alleged" and also because they were prejudiced and surprised by the introduction, at hearing of evidence not covered by the pleadings.

J. Max. Mitchell also objects to the Agency's motion to amend for the purpose of reflecting continuing violations. Mitchell so objected within his brief filed on October 9, 1986. Mitchell believes that Section 103.210 of the Board's Procedural Rules controls where the Agency's motion should be granted. Section 103.210 reads in full as follows:

Section 103.210 Amendment and Variance

a. Proof may depart from pleadings and pleadings may be amended to conform to proof, so long as no undue surprise results that cannot be remedied by a continuance.

b. At any time prior to commencement of hearing and prior to the close of hearing, the Hearing Officer may upon motion of a party permit a supplemental pleading setting forth continuing transactions or occurrences which have continued or occurred subsequent to the date of the filing of the initial pleading or any amendment thereto, so long as no undue surprise results that cannot be remedied by a continuance.

Mitchell states that the amendment cannot be allowed pursuant to Section 103.210, since the motion was made two months after the close of hearing and also because no supplemental pleading was filed. Mitchell further argues that it would be

[14] The section dealing with the process of amending complaints is actually Ill. Rev. Stat. ch. 110, par. 2-616.

inappropriate to allow the amendment because of its "fundamental unfairness" to the Respondents.

The Agency states that the only reason it presented evidence of continuing violations was for the purpose of demonstrating that the threat of water pollution continues to increase with the passage of time, and not to claim or suggest any new violations (Complainant's Rebuttal Brief[15] at 10). The Agency's position is that this evidence reflects continuing violations of Section 12(a) of the Act (Id.).

The Agency argues that, where necessary, its amended complaint actually alleges continuing violations beyond the date of its filing. Nevertheless, the Agency says it filed its motion to amend "in an attempt to silence the Respondents' claims that the Complaint should be amended" (Id.).

The Board finds that no undue surprise should result from allowing the Agency to amend its complaint in the manner requested, and so therefore grants the Agency's June 23, 1986, motion to amend complaint. It is intuitive that violations of Section 12(a) could continue at the site to this day, since no action has been taken there to abate the threat of water pollution from the large volume of acidic water stored in the ponds there. As the proof presented at hearing, as well as the motion to amend, pertain only to continuing 12(a) violations, neither can be found to have surprised the Respondents.

Moreover, 35 Ill. Adm. Code 103-210 allows proof to depart from pleadings, and for pleadings to be amended to conform to proof, so long as no undue surprise results that cannot be remedied by a continuance. Respondents did not at any time ask for a continuance of this matter. Additionally, the Agency's intention to present evidence of violations occurring after the filing of the complaint first became apparent at the February 20, 1986, hearing held in this docket (R. at 464-467). Respondents had, therefore, adequate opportunity to present evidence in rebuttal to allegations of continuing violations since additional days of hearing took place on April 1, 2, and 3, 1986. Respondents did not request an additional day of hearing for the purpose of submitting rebuttal testimony either.

As a consequence of granting the motion to amend, the Board need not address the Agency's allegation that by its express language the Agency's First Amended Complaint alleges continuing violations. The Board also notes that that portion of the June 23, 1986, motion to amend requesting amendment by interlineation is granted.

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[15] Hereinafater "A. Rebut. Brief".

Admissibility of Agency Reports

At hearing, all of the Respondents repeatedly objected to the introduction into evidence of Agency inspection and laboratory analysis reports concerning the site (see, for example, R. at 84-87, 109-110, 115-118). Respondents argued there that the inspection reports should not be admitted as business records, and that the laboratory analysis reports should likewise be excluded from the record because they are also not business records, as well as because no foundation was laid for their admission and no testimony regarding the chain of custody of the samples was offered[16].

Respondent Mitchell later admitted that the Agency's laboratory procedures were "adequate" to conduct the tests that were performed (R. at 561), and that the Agency reports are admissible as business records (M. Brief, p. 18).

The Board notes, for the sake of addressing any continuing objections to the admissibility of these reports, that Agency inspection and laboratory analysis reports are certainly admissible in cases before the Board. This is specifically established by 35 Ill. Adm. Code 103.208, and more generally by 35 Ill. Adm. Code 103.204(a). These sections read as follows:

> **Section 103.208 Admission of Business Records in Evidence**
>
> Any writing or record, whether in the form of any entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event. To be admissible the writing or record shall have been made in the regular course of any business, provided it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business", as used in this rule,

[16] Roy Frazier, Laboratory Manager of the Agency's Champaign, Illinois, laboratory, later testified at hearing regarding, inter alia, the chain of custody procedures used by the Agency and the validity of the test results achieved by the Agency (R. at 530-609).

includes business, profession, occupation, and calling of every kind.

Section 103.204 Admissible Evidence

a) The Hearing Officer shall receive evidence which is admissible under the rules of evidence as applied in the Courts of Illinois pertaining to civil actions except as these rules otherwise provide. The Hearing Officer may receive evidence which is material, relevant, and would be relied upon by reasonably prudent persons in the conduct of serious affairs provided that the rules relating to privileged communications and privileged topics shall be observed.

Moreover, the practice of characterizing Agency reports as "business records" and admitting them into the record of a Board proceeding on that basis has been previously upheld. City of Highland v. Pollution Control Board, 66 Ill. App. 3d 143, 383 N.E. 2d 692 (5th Dist. 1978). The inspection reports and laboratory analyses offered by the Agency were therefore correctly admitted into evidence by the Hearing Officer.

VIOLATIONS ALLEGED AND BOARD FINDINGS

Count I

Count I of the Agency's First Amended Complaint alleges that Larry Bittle, Leonard Bittle, and William Gamber caused or allowed the deepening of the slurry pond and the construction of a sedimentation pond and two holding ponds at the site (First Amended Complaint[17], p. 3), and that these activities have brought about the threat of water pollution in violation of Section 12(a) of the Act (F. Amen. Complaint, p. 9). The Agency also alleges, in Count I, that J. Max Mitchell is similarly responsible for the alleged Section 12(a) violation due to his status as owner of the site (Id.).

The sedimentation pond and the two holding ponds which presently exist on the site were built after the carbon recovery process was initiated. Agency inspectors first observed the ponds on October 22, 1979 (Tr. 2 at 69-71). Joseph Wesselman, an

[17] Hereinafter referred to as "F. Amen. Complaint".

Agency inspector during the period in question[18] who visited the site on that date, testified that he had not given anyone at the site permission to construct the ponds, and that in fact he indicated to the site personnel at that time that any construction of ponds would require Agency permits prior to their being built (Id. at 72-73).

The ponds were allegedly built in response to a cease and desist order issued against SR by the Office of Surface Mining (R. at 238). The order was ostensibly intended to bring about action to alleviate the run-off of acidic water from the areas at the site which had been disturbed during the carbon recovery operation. The two holding ponds were built in the natural drainage way of the slurry pond; the southernmost holding pond receives flow from the slurry pond, and discharges intermittently into the northernmost holding pond (F. Amen. Complaint, p. 3). The northernmost holding pond discharges into an unnamed tributary to the Middle Fork of the Big Muddy River, which in turn discharges to the Middle Fork of the Big Muddy River approximately one mile from the northernmost holding pond. (Id.).

The Agency asserts that this two pond "treatment system" seriously worsened the threat of environmental harm resulting from the activities at the site, in that it caused an enormous volume of water to accumulate and become even more acidic than it originally was (A. Closing Brief, p. 14). No discharge point was ever constructed for either of the holding ponds (Tr. 1 at 91-92). Thus, water will accumulate in the ponds until they overflow their berms at the points of lowest elevation (Id. at 91). The Agency contends that during all other times the fact that the water in the ponds had no outlet caused it to become more acidic (Tr. 2 at 82). The Agency explains that as the water remains in contact with the pyritic material (within the coal refuse), oxidation occurs which breaks down the pyritic material into various compounds including acids, thereby making the water more acidic (Tr. 1 at 86-87). The Agency further states that as evaporation occurs in the ponds, the concentration of the water's acidity increases (Tr. 2 at 82-83), and that the elevated acidity increases the likelihood of berm erosion and subsequent failure of the containment structures (Tr. 1 at 101-102). Specifically, the Agency says the increased acidity promotes erosion by killing any vegetation growing around the pond(s), and also by breaking down organic material in the berms and thereby destabilizing them (Id.).

[18] Mr. Wesselman is presently an environmental engineer for Old Ben Coal Company.

At hearing the Agency submitted as exhibits numerous reports detailing the findings from the many water samples which were taken at the site. Samples were taken of, inter alia, water from each of the two holding ponds. The results of the pond sampling[19] are as shown below:

Southernmost Holding Pond

	Iron (mg/l)	ROE (mg/l)	TDS/EC[20] (mg/l)	pH	Alkalinity (mg/l)	Acidity (mg/l)
12/3/80	665	8,080	3,700	2.3	0	5,200
3/12/81	677	10,230	3,500	2.5	0	5,200
8/29/83	820	13,967	--	2.4	10	8,100

Northernmost Holding Pond

	Iron (mg/l)	ROE (mg/l)	TDS/EC (mg/l)	pH	Alkalinity (mg/l)	Acidity (mg/l)
3/4/80	760	9,200	3,000	2.8	0	4,600
4/8/80	5,500	7,500	2,700	2.8	0	3,300
4/16/80	820	6,340	2,800	2.8	0	3,900
6/19/80	510	7,740	3,300	2.6	0	4,000
12/3/80	470	7,510	3,700	2.3	0	4,900
12/11/80	455	9,440	3,700	2.5	0	4,600
3/12/81	548	9,310	3,400	2.5	0	4,800
5/14/81	400	6,940	2,500	2.5	0	3,600
5/19/81	--	3,340	1,750	2.7	0	1,800
1/6/82	225	4,030	2,290	2.5	10	2,900
1/25/83	190	--	--	3.0	10	1,680
8/29/83	280	6,393	--	2.3	10	3,700
3/12/84	330	--	--	2.9	10	2,500
3/27/84	250	--	--	2.9	10	2,000
2/4/86	--	--	--	2.7	0	4,200

[19] These results are drawn from A. Ex. 23, 24, 26, 30, 33, 34, 36, 38-40, 43(a) and (b), 45, and 46(a) and (b).

[20] The Board will refer to this parameter as "TDS". The Agency reports refer to it as both "TDS" and "TS". The Board further notes that this manner of expressing the level of total dissolved solids was derived through the use of the electrical conductivity (hence "EC") method.

The Board's water quality and effluent standards for these parameters are as follows:

	Iron (mg/l)	ROE (mg/l)	TDS (mg/l)	pH	Alkalinity (mg/l)	Acidity (mg/l)
Water Quality	1.0		1,000	6.5-9.0	--	--
Effluent	2.0	--	--	6.0-9.0	--	--

Count I, as paraphrased above, alleges that Respondents' activities at the site have brought about the threat of water pollution in violation of Section 12(a) of the Act. Section 12(a) states:

> No person shall:
>
> cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

Section 3(d) of the Act defines "contaminant" as:

> any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

Section 3(nn) of the Act defines "water pollution" as:

> such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

Since the water in the holding ponds certainly meets the broad definition of "contaminant" as that term is defined in the Act, the Board's determination of whether a Section 12(a) violation exists in this instance turns on the question of whether the discharge of water from the ponds can be characterized as water pollution. An examination is therefore necessary of those materials in the record which pertain to the

existing and projected environmental impacts resulting from discharges from the ponds.

Testimony regarding environmental impact was presented at hearing by two witnesses: Robert Hite, Supervisor of the Agency's Marion Monitoring Subunit, and Dr. Martin Kelly, who is also employed by the Agency at that Marion office.

Mr. Hite testified that as the pH of a body of water drops below 6.0, observable impacts occur. He stated that at a pH level of 5.5, there will be a decrease in both the number of fish species and the population within each species that will be able to survive (R. at 633), and that at a pH of 5.0 the fishery will be drastically reduced if not eliminated (R. at 634). Mr. Hite added that virtually no snails or leaches can survive a pH of below 5.7, and that below a pH of 4.5 most crustaceans will perish (Id.). Finally, he noted that almost no aquatic organisms can live in waters having pH of below 3.0, with the exception of one form of tolerant midge (R. at 635).

Mr. Hite theorizes that if half of the estimated twelve million gallons of water held in the slurry pond and both holding ponds was discharged within a brief period of time during low flow conditions, a "massive" fish kill would result in the Middle Fork of the Big Muddy (R. at 645). He says the flow conditions in the Middle Fork are "slow and pondent" due to the low gradient of the area (R. at 638). This characteristic decreases the buffering capacity of the stream, and under this scenario would result, according to Mr. Hite, in the slug of acidic water moving very slowly and dispersing very gradually in the Middle Fork (R. at 644). He predicts that the pH of the Middle Fork would drop to levels of 3.5 to 5.0 for as far as three miles downstream of the point where the unnamed tributary joins the Middle Fork (R. at 645). Mr. Hite admits, however, that if a discharge consisting of half of the water in the ponds occurred when the Middle Fork was at flood stage, the stream would suffer "very little, if any" adverse impact (R. at 659).

Mr. Hite's testimony included discussion of a major fish kill which occurred on the Middle Fork in 1973. That incident was apparently caused by a discharge from another mine site, during low flow conditions, of water similar in character to that at issue in this case. Mr. Hite, who personally observed the affected reach of the Middle Fork some six weeks after the discharge, recalled that thousands of fish perished and that he observed pH levels in the Middle Fork of 4.0 to 4.5 for several miles downsteam from the point of impact (R. at 646-647).

Dr. Martin Kelly presented testimony at hearing regarding the results of a biological survey he conducted on the Middle Fork of the Big Muddy on June 7, 1984 (R. at 806; see A. Ex. A-8). The intent of the study was to document, if possible, the

consequences of any drainage from (the Peabody No. 18) area on the receiving stream by looking at the macroinvertebrates in the stream (Id.). However, Dr. Kelly was not able, through the mechanism of this study, to ascribe any affects to the Middle Fork from drainage emanating from the site because the unnamed tributary extending from the northernmost pond to the Middle Fork was largely dry at the time the study was conducted (R. at 810).

Dr. Kelly did note that he could not rule out the possibility that discharges from the ponds regularly impact the Middle Fork. He stated that the potential for adverse impact is present due to the poor water quality of the ponds (R. at 817)[21].

On the date of his study Dr. Kelly observed that the unnamed tributary did hold water in several pooled areas, though, so it was to one of these areas that Dr. Kelly directed his work (Id.). Sampling he conducted on the largest such pool showed only one organism living in association with the bottom, that being chironomids (R. at 811). Dr. Kelly noted that chironomids are known to be tolerant of polluted conditions, and are often associated with mine discharge (R. at 811-812). He added that although under pooled conditions one would generally not expect to find too many organisms because water quality decreases, he nevertheless would have expected to find worms and other organisms, as well as chironomids, in this pool (R. at 812).

On the basis of the aforementioned testimony, the Board is persuaded that discharges from the ponds would "cause or tend to cause water pollution..." as is prohibited by Section 12(a) of the Act. The Board now turns to the remaining question to be determined in relation to Count I, that being whether Respondents' activities have "cause(d) or threaten(ed) or allow(ed)..." the discharge of water from the ponds.

Agency inspectors have documented, on occasions too frequent to completely recount here, the existence of breaches in the ponds causing the discharge of water from them (see, for example, Tr. 2 at 23, Tr. 2 at 54, Tr. 2 at 59-60, Tr. 2 at 83, R. at 13). Moreover, the Agency contends that the breaches in the ponds cause them to deteriorate further and lose their structural stability (A. Closing Brief, p. 16; Tr. 2 at 94), making it

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[21] The Board notes that adverse impact to the Middle Fork stemming from discharges from the site has been documented. Joseph Wesselman testified that he observed coal fine material on the banks of the Middle Fork at the mouth of the unnamed tributary. He suggested that deposition of this material would negatively effect both the vegetation and macroinvertebrate communities that reside along the banks of the Middle Fork (R. at 213).

inevitable that they fail and release their contents completely (A. Closing Brief at 16).

The Board finds that the activities of Larry Bittle d/b/a Southern Recycling, William Gamber, and J. Max Mitchell in this matter have caused, allowed, and presently threaten the discharge of contaminants into the environment in violation of Section 12(a) of the Act. In reaching this conclusion, the Board has taken into consideration the factors enumerated in Section 33(c) of the Act. The Board has also considered the fact that the ponds have apparently not yet failed, even though operations ceased at the site more than seven years ago. This notwithstanding, it has been shown not only that discharges from the ponds have occurred, but also that the potential release of the large volume of water stored in the ponds threatens the environmental integrity of the Middle Fork of the Big Muddy. The existence of a Section 12(a) violation in this case is therefore supported by both actual and threatened discharge.

Count II

Count II alleges that all of the Respondents caused or allowed discharges from the slurry pond on June 27 and July 10, 1979; from the northernmost holding pond on April 8 and 16, 1980; and from the southeast corner of the site on July 12 and October 22, 1979, to enter waters of the state in violation of Rules 601(a) and 606(b) of the Board's Rules and Regulations, Chapter 4: Mine Related Pollution, and that this thereby violated Section 12(a) of the Act. The Board notes that its Rules and Regulations no'longer exist in that format, due to codification which became effective on August 21, 1981. Additionally, both Rules 601(a) (now contained in Section 406.101) and 606(b) (now contained in Section 406.106) have been substantively amended subsequent to the time of codification. However, the Board believes it appropriate to adjudicate the allegations under the law which existed during the period in question. Therefore, the Board will apply the standards of Rules 601(a) and 606(b) in this instance.

The Agency contends that on June 27 and July 10, 1979, effluent was discharged from the slurry pond to the unnamed tributary of the Middle Fork, in violation of Rules 601(a) and 606(b) and hence in violation of Section 12(a) of the Act. Joseph Wesselman testified that on June 26 he observed seepage coming from beneath a culvert that had been installed in the north wall of the slurry pond (R. at 22-23), and that on July 10 he saw discharge from the same area, though the culvert had by that time been removed (R. at 40-41).

The results of samples of the slurry pond discharge taken by Mr. Wesselman on June 27[22] and July 10, 1979, are found in A. Ex. 9(a), 9(c), and 12(a), and are as follows:

	Iron (mg/l)	pH	Alkalinity (mg/l)	Acidity (mg/l)
6/27/79	4,000	2.5	0	26,200
7/10/79	2,344	2.6	0	21,700

The Agency also asserts that Rules 601(a) and 606(b) were violated as a consequence of discharges from the northernmost holding pond to the unnamed tributary to the Middle Fork on April 8 and April 16, 1980, which were allegedly caused or allowed by the Respondents. Mr. Wesselman testified that on April 8, 1980, he observed a breach in, and concomitant discharge through, the eastern levee of the northernmost pond (Tr. 2 at 83-86). Mr. Wesselman also testified that he observed a discharge from the same area during an April 16, 1980, site visit (Tr. 2 at 89-94).

The results of samples taken by Mr. Wesselman of the discharge flowing through the breach in the eastern levee of the northernmost pond on April 8 and April 16, 1980, are found in A. Ex. 24 and 26 and are as follows:

	Iron (mg/l)	pH	Alkalinity (mg/l)	Acidity (mg/l)
4/8/80	5,500	2.8	0	3,300
4/16/80	820	2.8	0	3,900

The final assertion of the Agency in Count II is that the Respondents caused or allowed runoff from the southeast corner of the site to enter a County ditch and thence an unnamed tributary to Ewing Creek, both waters of the state, in violation of Rules 601(a) and 606(b) and hence in violation of Section 12(a) of the Act. Mr. Wesselman testified at hearing that he observed flow from the site in the ditch on July 12 and October 22, 1979 (Tr. 2 at 47-51 and 69-75).

[22] Mr. Wesselman did not take any water samples during his June 26, 1979, site visit. Rather, he returned the following day for that purpose (Tr. 2 at 27).

The results or samples taken by Mr. Wesselman on July 12 and October 22, 1979, of the runoff from the southeast corner of the site are found in A. Ex. 13 and 21 and are as follows:

	Iron (mg/l)	pH	Alkalinity (mg/l)	Acidity (mg/l)
7/12/79	16.75	3.6	0	870
10/22/79	86	3.8	0	180

Rule 601(a) stated in pertinent part that:

> "Compliance with the aforestated Regulations notwithstanding, any operator of a mined or mine refuse area shall comply with the effluent standards of Sec. 606(a) hereunder, with respect to all natural or man-made discharges, including land run-off, from said area. Said discharge sources shall include, but are not limited to, mechanical pumpages, pit overflows, spillways, drainage ditches, seepage from a mined or mine refuse area, sewage works, outfalls and other effluent discharge pipes or sewers..."

Rule 606(b) stated in pertinent part that:

The following levels of contaminants shall not be exceeded:

Acid	(total acid shall not exceed total alkalinity)
Iron (total)	7 mg/liter
pH	range 5-10 [not subject to averaging]
Total suspended solids	50 mg/liter (to be met only when treatment facilities are otherwise provided to meet the above contaminant levels).

The Board finds that as a consequence of their activities in this matter, Larry Bittle d/b/a Southern Recycling, William Gamber, and J. Max Mitchell caused or allowed the above mentioned discharges to occur, and that these discharges violated Rules 601(a) and 606(b) as the levels of Acid, Iron (total), pH, and Total Suspended Solids exceeded the limitations for these parameters prescribed by Rule 606(b). The Board therefore finds that these Respondents violated Rules 601(a) and 606(b) of former Chapter 4 and Section 12(a) of the Act.

Count III

Count III alleges that all of the Respondents caused or allowed discharges from the northernmost holding pond on seven occasions between December 3, 1980 and January 25, 1983, and from the sedimentation pond on December 3, 1980, May 14, 1980, and January 6, 1982, to enter waters of the state in violation of 35 Ill. Adm. Code 406.106(b) and Section 12(a) of the Act.

The Agency asserts that on seven occasions, effluent was discharged from the northernmost holding pond to the unnamed tributary to the Middle Fork, in violation of Sections 406.106(b) of the Board's mine related water pollution regulations and 12(a) of the Act. Joseph Wesselman testified that on December 3 and 11, 1980, March 12, May 14 and 19, 1981, and January 6, 1982, he observed the discharge of effluent through the breach in the eastern levee of the northernmost holding pond (R. at 13, 21-22, 37-39, 51, 59, and 68). Mr. Gary Minton, an Agency inspector, testified that he observed discharge from this breach during a visit to the site on January 25, 1983 (R. at 418).

Samples of this discharge taken by Messrs. Wesselman and Minton on the dates of the aforementioned observations are found in A. Ex. 33, 34, 36, 38, 39, 40, 43(a), and (b), and provide the following data:

	TSS (mg/l)	Iron (mg/l)	pH	Alkalinity (mg/l)	Acidity (mg/l)
12/3/80	--	470	2.3	0	4,900
12/11/80	40	455	2.5	0	4,600
3/12/81	50	548	2.5	0	4,800
5/14/81	100	400	2.5	0	3,600
5/19/81	--	--	2.7	0	1,800
1/6/82	--	225	2.5	10	2,900
1/25/83	--	190	3.0	10	1,680

The Agency also states that Section 406.106(b) and hence Section 12(a) of the Act were violated by discharges, allegedly caused or allowed by the Respondents, of effluent from the sedimentation pond at the site, which flowed into a County ditch and then to an unnamed tributary of Ewing Creek, all waters of the State. Mr. Wesselman testified that on December 3, 1980, and May 14, 1981[23], he observed such discharge from the sedimentation

[23] The Agency's first amended complaint lists this date as May 14, 1980, but it is obvious from the evidence presented that the Agency intended it to be May 14, 1981.

pond (R. at 13, 51)[24]. Mr. Wesselman took samples of this discharge, and the results, which are contained in A. Ex. 33 and 38, are as follows:

	TSS (mg/l)	Iron (mg/l)	pH	Alkalinity (mg/l)	Acidity (mg/l)
12/3/80	--	265	2.4	0	1,400
5/14/81	48	125	2.6	0	940

Section 406.106(b) states in pertinent part that:

Constituent	STORET Number	Concentration
Acidity	00435	(total acidity shall not exceed total alkalinity)
Iron	01045	3.5 mg/l
pH	00400	(range 6-9) [not subject to averaging]
Total Suspended Solids	00530	3.5 mg/l

The Board finds that as a consequence of their activities in this matter, Larry Bittle d/b/a Southern Recycling, William Gamber, and J. Max Mitchell caused or allowed the above mentioned discharges to occur, and that these discharges violated Section 406.106(b) as the levels of Acidity, Iron (total), pH, and Total Suspended Solids exceeded the limitations established for these parameters by Section 406.106(b). The Board therefore finds that these Respondents violated Section 406.106(b) of the Board's mine related water pollution regulations, as well as Section 12(a) of the Act.

Count IV

Count IV alleges that all of the Respondents caused or allowed discharges from the northernmost holding pond to the unnamed tributary to the Middle Fork, which caused the unnamed tributary to contain levels of chemical constituents in excess of

[24] Count III of the Agency's first amended complaint alleges that a discharge from the sedimentation pond occurred on January 6, 1982. However, no testimony to this effect was presented at hearing, and Mr. Wesselman's report of the inspection he conducted on that date mentions no such discharge.

the limitations established for those constituents by 35 Ill. Adm. Code 302.201, 302.204, and 302.208. Count IV further alleges that because these sections were violated, 35 Ill. Adm. Code 406.105 and Section 12(a) of the Act were also violated.

35 Ill. Adm. Code 406.105[25] provided, in pertinent part:

> In addition to the other requirements of this part, no mine discharge or nonpoint source mine discharge shall, alone or in combination with other sources, cause a violation of any water quality standards of Subtitle C, Chapter 1 Water Pollution.

35 Ill. Adm. Code 302.201 and 302.204 state in full as follows:

Section 302.201 Scope and Applicability

Subpart B contains general use water quality standards which must be met in waters of the State for which there is no specific designation.

Section 302.204 pH

pH shall be within the range of 6.5 to 9.0 except for natural causes.

35 Ill. Adm. Code 302.208 provides in pertinent part that:

> The following levels of chemical constituents shall not be exceeded:

Constituent	Concentration (mg/l)
* * *	* *
Iron (total)	1.0
* * *	* *
Manganese	1.0
* * *	* *
Sulfate	500.0
* * *	* *
Total Dissolved Solids	1000.0

[25] This section was renumbered to Section 406.202 and amended at 8 Ill. Reg. 13239, effective July 16, 1984. Since the alleged violations of this section occurred prior to the effective date of Section 406.202, the Board finds it appropriate to evaluate the conduct in question in light of the requirements of Section 406.105.

The Agency contends that on December 11, 1980, and March 12 and May 14 and 19, 1981, effluent was discharged from the northernmost holding pond to the unnamed tributary of the Middle Fork. Joseph Wesselman testified that on those dates, he observed discharges from the breach in the northernmost holding pond to the unnamed tributary to the Middle Fork (R. at 21-22, 24, 51, and 59). During site inspections on those dates, Mr. Wesselman collected water samples from the unnamed tributary to the Middle Fork, at a point approximately one-quarter mile downstream from the breach in the northernmost holding pond. The data derived from this sampling is compiled in A. Ex. 34, 36, 38, and 39, and consists in part of the following:

	Iron (mg/l)	ROE (mg/l)	TDS/EC (mg/l)	pH	Manganese (mg/l)	Sulfate (mg/l)
12/11/80	455	9,080	3,600	2.6	40	6,100
3/12/81	439	8,640	3,300	2.6	43.2	5,250
5/14/81	375	6,315	2,800	2.6	28	3,850
5/19/81	---	3,260	1,800	2.7	--	2,300

The Board finds that as a consequence of their activities in this matter, Larry Bittle d/b/a Southern Recycling, William Gamber, and J. Max Mitchell caused or allowed the aforementioned discharge to occur, and that these discharges were in violation of Sections 302.204, 302.208, and former Section 406.105. The Board cannot find the Respondents in violation of Section 302.201, as alleged by the Agency, because that section only describes the scope of the matters addressed in Subpart B of Part 302 and does not in and of itself contain any standard or limitation which might be violated. Consequently, the Board finds the aforementioned Respondents to have violated 35 Ill. Adm. Code 302.204 and 302.208, former Section 406.105, and Section 12(a) of the Act.

Count V

Count V alleges that Larry Bittle d/b/a Southern Recycling, William Gamber, and Leonard Bittle recovered coal fines from the slurry pond at the Peabody No. 18 site without an operating permit, in violation of Section 12(b) of the Act and Rule 201 of the Board's Rules and Regulations, Chapter 4: Mine Related Pollution. As noted above, the Board's Rules and Regulations no longer exist in that format. However, for the same reasons as given above, the Board will apply the standards of Rule 201 to the conduct alleged by this Count.

The Agency alleges that on July 5, 10, 12, 19, 23, and 30, August 3, and September 7, 1979, Larry Bittle d/b/a Southern Recycling, William Gamber, and Leonard Bittle actively engaged in the recovery of coal fines from the slurry pond at the site without an operating permit. Joseph Wesselman testified that he

observed the recovery of coal fines at the site on July 5, 10, and 19, and September 7, 1979 (Tr. 2 at 33, 36, 52, and 68). The Board notes that the record does not substantiate the Agency's allegations that carbon recovery was observed on the other alleged dates (see Tr. 2 at 48, 55-60; also, there is no mention in the record of an Agency inspector visiting the site on July 23, 1979). Nevertheless, there is adequate evidence in the record to support the Agency's contention that carbon recovery took place on the site (see, for example, Tr. 1 at 39-40, 45, and 7).

Section 12(b) of the Act provides that:

> No person shall:
> * * *
> Construct, install or operate any equipment, facility, vessel, or aircraft capable of causing or contributing to water pollution, or designed to prevent water pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit.

Former Rule 201 of the Board's Rules and Regulations provided that:

> It shall be unlawful for an operator, unless he holds a permit therefore from the Agency, to open, reopen, or abandon any mine or mine refuse area, or, six months after the effective date of these Regulations, to conduct any mining operation or dispose of any mine refuse.

Former Rule 103(m) of the Board's Rules and Regulations defined "mining" as:

> the extraction from natural deposits of coal, clay, fluorspar, gravel, lead, sand, stone, zinc or other minerals by the use of any mechanical operation or process; or the recovery of said minerals from a mine refuse area but does not include dredging operations or drilling for oil or natural gas. The term includes both surface and underground mining.

Respondent Larry Bittle admitted at hearing that neither he personally nor anyone representing SR ever submitted to the Agency an operating permit application pertaining to the carbon recovery operation (R. at 753-754). Moreover, Larry Bittle acknowledged that he was aware, during the time that carbon recovery was ongoing, that an Agency permit was needed for the operation (R. at 752) because Agency personnel had communicated this to William Gamber (Id.).

The Board finds that the carbon recovery operation conducted at the site was undertaken without an operating permit granted by the Agency, as required by Section 12(b) of the Act and former Rule 201. The Board consequently finds Larry Bittle d/b/a Southern Recycling and William Gamber to have violated Section 12(b) of the Act and former Rule 201.

Count VI

Count VI alleges that Respondents Larry Bittle d/b/a Southern Recycling, William Gamber, and Leonard Bittle abandoned their carbon recovery operation at the Peabody No. 18 site without a permit to abandon, in violation of Rules 201 and 502 of the Board's Rules and Regulations, Chapter 4: Mine Related Pollution, and 35 Ill. Adm. Code 407.104. As noted above (see p. 19), the Board's Rules and Regulations were codified effective August 21, 1981, so Rules 201 and 502 have not existed in their prior form since that time. However, for the same reasons that were given previously, the Board will apply the standards of Rules 201 and 502 to the conduct alleged in this Count.

The Agency asserts that on numerous dates between 1979 and 1982, Agency inspections of the site revealed that no carbon recovery work was underway there (see, for example, Tr. 2 at 76, R. at 7-9, 23, 36, 51, and 66). In fact, Joseph Wesselman, the Agency inspector who visited the site twenty times between December 14, 1979, and January 6, 1982, testified that he saw no evidence after December 14, 1979 that carbon recovery was continuing at the site (Tr. 2 at 79).

Larry Bittle testified at hearing that in May of 1980 he participated in the decision to cease operations at the site (R. at 753). He also stated that no application was ever made for a permit to abandon the site (R. at 753-754).

Rule 201 stated in pertinent part that:

> It shall be unlawful for an operator, unless he holds a permit therefore from the Agency, to...abandon any mine...

Rule 502 stated in pertinent part that:

> After the effective date of these Regulations, if an operator closes down a mine or mine refuse operation and its mineable reserves have been depleted or an operator does not intend to reopen the operation, the operator shall, within one year of the date of the closedown, obtain a permit to abandon. In order to obtain a permit to abandon, the operator shall execute all

> procedures reasonably necessary to prevent future air and water pollution or violation of Part VI hereunder.

35 Ill. Adm. Code 407.104 states in full that:

> The requirement of a permit to abandon contained in Rule 502 of old Chapter 4, effective May 23, 1972 shall continue to apply to operators of mines opened prior to the effective date of this Subtitle D, Chapter I until such time as such operator shall have been issued under this Subtitle D, Chapter I a valid permit containing an abandonment plan.

In light of the lack of activity at the site since late 1979, the Board finds that the carbon recovery operation has been improperly abandoned without a permit. The Board therefore finds Larry Bittle d/b/a Southern Recycling and William Gamber in violation of former Rules 201 and 502, as well as 35 Ill. Adm. Code 407.104.

Count VII

Count VII alleges that on numerous dates between 1980 and 1982, all of the Respondents caused or allowed the discharge of effluent from the northernmost holding pond and the sedimentation pond, both point sources, without an NPDES permit in violation of Section 12(f) of the Act and 35 Ill. Adm. Code 309.102 and 403.102.

Section 12(f) of the Act states in pertinent part that

> No person shall:
> * * *
> Cause, threaten or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, waters to any sewage works, or into any well, or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under Section 39(b) of this Act,...

Section 3(d) of the Act defines "contaminant" as

> any solid, liquid or gaseous matter, any odor or any form of energy from whatever source.

35 Ill. Adm. Code 309.102(a) states in full as follows:

Section 309.102 NPDES Permit Required

a) Except as in compliance with the provisions of the Act, Board regulations, and the CWA, and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into the waters of the State from a point source or into a well shall by unlawful.

35 Ill. Adm. Code 403.102 states in full as follows:

Section 403.102 NPDES Permits Required of Certain Dischargers

Except as in compliance with the provisions of the Act, Board regulations, the FWPCA and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into the waters of the state from a point source or into a well shall be unlawful.

The Board previously discussed the evidence presented at hearing regarding the discharges from the northernmost holding pond to the unnamed tributary of the Middle Fork (see pgs. 19-21), and those from the sedimentation pond to a County ditch and then to an unnamed tributary of Ewing Creek (see p. 22). There is no dispute that those discharges occurred. The Board additionally finds that there is no question but that those discharges contained "contaminants" as that term is defined in Section 3(d) of the Act.

There is no evidence in the record that an NPDES permit was ever obtained for the discharges in question. For that reason, the Board finds Larry Bittle d/b/a Southern Recycling, William Gamber, and J. Max Mitchell in violation of Section 12(f) of the Act and 35 Ill. Adm. Code 309.102 and 403.102.

CONCLUSION

The Board believes that the conduct exhibited by the Respondents in this case illustrates a serious disregard for the environment in general, and more specifically for the statutory and regulatory standards applicable to the carbon recovery operation undertaken here. For those reasons, and after consideration of the factors enumerated in Section 33(c) of the Act, the Board believes the imposition of penalties will be necessary (discussed below) in this case.

Regarding the Section 33(c) factors, the Board makes the following observations. The threat to the environment from this pollution source has been exhaustively detailed above. The recovery of carbon from former mine sites serves a social and economic value when properly conducted. The carbon provides an energy source and its removal from former mines enhances the environment. However, an improper recovery operation creates an environmental threat. In the instant case, the beneficial aspects of recovering 60,000-70,000 tons of carbon (R. at 1117) are minor in comparison to the environmental threat which has been created. The recovery operation took place on land which had been previously stripmined and to that extent is a suitable activity for that location. Carbon removal can be a positive step towards strip mine reclamation. Finally, the Board notes that there are technically and economically reasonable methods for controlling emissions from mine sites. The problem in this matter stems from the fact that they were not used, and the appropriate permits were not obtained.

PENALTIES

Larry Bittle must bear considerable responsibility for the violations which occurred as a consequence of the carbon recovery operation. Though he and William Gamber made all of the daily operational decisions, it was widely recognized that Larry Bittle was the "boss" (Tr. 1 at 40). The Board will therefore impose a penalty of $15,000 on Larry Bittle. The penalty shall be reduced to $3,000, however, should an Agency-approved remedial plan for the site be implemented and completed within the time limitations established by the Board's Order, below.

William Gamber is also culpable for the violations which occurred in this matter, for he did actively participate in the decisionmaking regarding operations conducted at the site. However, his was a lesser role than was Larry Bittle's, and was one in which he was cast as something of an employee as well as operator. The Board will therefore impose a penalty of $5,000 on William Gamber. The penalty shall be reduced to $1,000, however, should an Agency-approved remedial plan for the site be implemented and completed within the time limitations established by the Board's Order, below.

J. Max Mitchell is significantly responsible for the threat to the environment which now exists in the form of the great volume of ponded water on his property. Mr. Mitchell had the power to control the actions of the other Respondents, as he could have terminated the lease due to the lessees' failure to comply with the applicable environmental regulations. He failed to do so until substantial environmental damage had been done, and moreover received more than $100,000 under the provisions of the lease (see A. Ex. 1). The Board will therefore impose a

penalty of $15,000 on J. Max Mitchell. The penalty shall be reduced to $3,000, however, should an Agency-approved remedial plan for the site be implemented and completed within the time limitations established by the Board's Order, below.

REMEDIAL PLAN

One of the forms of relief which the Agency seeks in its first amended complaint is the imposition upon the Respondents of a requirement that they prepare, submit, and implement a plan, acceptable to the Agency, for the permanent abatement of the threat of water pollution which presently exists at the site as a consequence of the carbon recovery operation which took place there. The Board believes there is substantial merit in this idea, but is taking it one step further by offering the incentive of a reduced penalty to the Respondents should they succeed in implementing such a plan within the time limitations established by the Order below. The contingency of the amount of penalty ultimately imposed upon the Respondents does not in any way make the remedial plan requirement optional or discretionary to Respondents; they will be jointly and severally responsible, under the terms of the Order, to prepare, submit, and implement an Agency-approved remedial plan for the site.

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

ORDER

It is the Order of the Board that:

1. Respondents Larry Bittle d/b/a Southern Recycling, William Gamber, and Leonard Bittle have violated Sections 12(a), (b), and (f) of the Environmental Protection Act, 35 Ill. Adm. Code 302.201, 302.204, 302.208, 309.102, 403.102, 406.105, 406.106(b), and 407.104, and Rules 201, 502, 601(a), and 606(b) of the Board's former Rules and Regulations.

2. Respondent J. Max Mitchell has violated Sections 12(a) and (f) of the Environmental Protection Act, 35 Ill. Adm. Code 302.201, 302.204, 302.208, 309.102, 403.102, 406.105, and 406.106(b), and Rules 601(a) and 606(b) of the Board's former Rules and Regulations.

3. Respondents Larry Bittle d/b/a/ Southern Recycling, William Gamber, Leonard Bittle and J. Max Mitchell shall cease and desist from further violations of the Act.

4. Respondents Larry Bittle d/b/a Southern Recycling, William Gamber, and J. Max Mitchell shall prepare and submit to the Agency within 90 days from the date of this Order a plan, acceptable to the Agency, for the permanent abatement of the threat of water pollution which presently exists at the site as a consequence of the carbon recovery operation which took place there. The plan shall address remedial actions to be taken in response to each of the violations found by the Board to exist. Respondents shall submit the plan to the following persons:

Ms. Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Ms. Lisa Moreno
Attorney
Illinois Environmental Protection Agency
2200 Churchill Road
Springfield, Illinois 62706

5. Within 60 days after receiving the Agency's approval of the remedial plan, Respondents Larry Bittle d/b/a Southern Recycling, William Gamber, and J. Max Mitchell shall implement said plan fully.

6. Respondents Larry Bittle d/b/a/ Southern Recycling, William Gamber, and J. Max Mitchell shall be jointly and severally responsible for preparing, submitting, and implementing an Agency-approved remedial plan, in accordance with the requirements described above.

7. Respondent Larry Bittle shall, by certified check or money order payable to the State of Illinois and designated for deposit into the Environmental Protection Trust Fund, pay a civil penalty of $15,000. Said penalty shall be reduced to $3,000, however, should an Agency-approved remedial plan for the site be fully implemented and completed within the time limitations established by this Order. Within 30 days after implementation of the remedial plan, but in no event later than 180 days from the date of this Order, Larry Bittle shall pay the civil penalty owed by him under the terms of this Order to:

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

8. Respondent William Gamber shall, by certified check or money order payable to the State of Illinois and designated for deposit into the Environmental Protection Trust Fund, pay a civil penalty of $5,000. Said penalty shall be reduced to $1,000, however, should an Agency-approved remedial plan for the site be fully implemented and completed within the time limitations established by this Order. Within 30 days after implementation of the remedial plan, but in no event later than 180 days from the date of this Order, William Gamber shall pay the civil penalty owed by him under the terms of this Order to:

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

9. Respondent J. Max Mitchell shall, by certified check or money order payable to the State of Illinois and designated for deposit into the Environmental Protection Trust Fund, pay a civil penalty of $15,000. Said penalty shall be reduced to $3,000, however, should an Agency-approved remedial plan for the site be fully implemented and completed within the time limitations established by this Order. Within 30 days after implementation of the remedial plan, but in no event later than 180 days from the date of this Order, J. Max Mitchell shall pay the civil penalty owed by him under the terms of this Order to:

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

10. The Agency shall notify the Board as to whether an Agency-approved remedial plan has been implemented within the time limitations prescribed by this Order.

IT IS SO ORDERED.

Joan Anderson concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 16th day of April, 1987, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board