ILLINOIS POLLUTION CONTROL BOARD

March 22, 1973

ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	
vs.	)	PCB 72-403
	)	
PRODUCERS MINING INC., HOLLY MINING CORPORATION, RIALTO COAL SALES CORPORATION AND ORLAN COX,	)	
	)	
Respondents.	)	

Mr. Delbert Haschemeyer, Assistant Attorney General for the EPA
Mr. Paul T. Austin and Mr. Paul I. Fleming, Attorneys for Respondents Holly Mining Corporation, Producers Mining, Inc. and Rialto Sales Corporation
Mr. Jack Williams, Attorney for Respondent Orlan Cox

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

This case deals with the property known as Holly Mining Site #1 located near Tunnel Hill in Johnson County. Respondent Cox, owner of the land, leased the property in June, 1970 to Rialto Coal Sales Corporation and Producers Mining Inc. who in turn leased to Holly Mining Corporation.

The Environmental Protection Agency filed its Complaint on October 13, 1972 alleging that the three corporate Respondents: a) caused, threatened or allowed the discharge of acid mine water, coal fines and metals on March 17, 1971, May 19, 1971, October 6, 1971 and December 27, 1971 so as to cause water pollution of Cedar Creek and an unnamed tributary of Cedar Creek in violation of Section 12(a) of the Act,b) deposited coal stock piles on the land in such a place and manner so as to create a water pollution hazard in violation of Section 12(d) of the Act; c) caused coal fines, which settle and form objectionable sludge deposits, to be present in the unnamed tributary and Cedar Creek in violation of Rule 1.03(a) and (d) of SWB-14. The Agency alleges that Rialto and Producers Mining actively mined the property, as lessors, knew or in the exercise of ordinary care should have known that Holly's activities could cause water pollution; and had a responsibility to prevent harm to the public resulting from such activity. Respondent Cox was alleged to have failed to exercise ordinary care as owner to prevent water pollution and was charged with a violation of Section 12(a) of the Act.

Numerous motions must be resolved before the substantive aspects of the case can be decided. Motions to Dismiss were filed on behalf of all Respondents. The Motion on behalf of Respondent Cox alleges that: the Agency Complaint fails to state a cause of action as a matter of law; the Complaint fails to allege any act or omission to act on the part of Cox; the Complaint states conclusions without any supporting ultimate facts; and the Environmental Protection Act (specifically, Sections 31, 32 and 33) is unconstitutional.

Respondent Cox asserts that the Illinois Pollution Control Board was vested by Section 31 of the Act with absolute and arbitrary discretion in violation of Article IV, Section 1 of the Illinois Constituion; Section 31, 32 and 33 attempt to give judicial powers to an administrative board in violation of Article VI, Section 1 of the Illinois Constitution; the Act violates the due process clause, Article I, Section 2 of the Illinois Constitution in that Respondent is denied a full hearing before a single judge, master or other tribunal which may see the witnesses, weigh the testimony and determine their credibility; the Act deprives defendants of a jury trial and that only a jury is entitled to determine the amount of any penalty to be assessed against Defendant.

We find Respondent Cox's Motion for Dismissal in all respects without merit. The Complaint specifically charges Cox with ownership of the property in question. Count 4 alleges that, as owner of the property, Cox knew or in the exercise of ordinary care should have known, that the activities of the Companies to which he leased the property could result in water pollution. Four specific dates are listed on which Section 12(a) of the Act was alleged to have been violated by Cox. Board Procedural Rule 304(c) states: "The Complaint shall contain a reference to the provisions of the law or regulations of which the Respondents are alleged to be in violation; a concise statement of the facts upon which the Respondents are claimed to be in violation; and a concise statement of the relief which the Complainant seeks." We believe the Agency Complaint complied with these provisions. Complainants are required by our Rules to prove their cases not in the Complaint, but during the course of a public hearing.

The constitutional issues presented have all been previously considered and denied (EPA vs. Granite City Steel, PCB 70-34; EPA vs. Modern Plating Company, PCB 70-38 and 71-6). More recently, the Illinois Appellate Court (3rd District) denied the appeal of C. M. Ford who had been penalized $1,000 for land pollution violations (PCB 71-307) and had raised the same arguments.

The final issue raised by Respondent Cox deals with liability of the landowner to prevent pollution in Illinois. The lease does

not relieve him of the obligation to comply with the law. Section 12(a) of the Act provides that no persons shall "cause, threaten or allow the discharge of any contaminants into the environment so as to cause or tend to cause water pollution in Illinois..." (emphasis added). For not prohibiting or controlling such polluting activities on land where he exercises a landowner's normal rights, the owner must share liability. When it is within his power to abate or prevent the pollution and he fails to do so, it is fair to say that he "allowed" it.

The Board remains of the opinion that the Act is constitutional and for the additional reasons stated above denies all Motions to Dismiss.

A Motion to suppress evidence illegally obtained was filed on behalf of Producers Mining,Holly Mining and Rialto. The evidence gathering activities they complain of all occurred in 1972 and do not reflect on this Complaint. Without deciding on the merits of the allegations we deny the Motion as moot.

At the close of testimony on behalf of the Environmental Protection Agency, a Motion to Dismiss Respondent Cox because of failure to provide ownership was filed. Robert Lane, President of Rialto, testified as an Agency witness that Rialto and Producers had a lease for the property from Cox (Jan. 1973, R. 28). This testimony and the lease agreement imply ownership and we deny the Motion to Dismiss. Also, both Respondents moved for a directed verdict on the grounds that the Agency had failed to prove its case. We deny all Motions filed at the close of the EPA case.

Testimony reveals that Rialto and Producers obtained a joint lease from Cox on June 30, 1970 for land said to contain low sulfur coal. This land was later leased to Holly Mining Company, with financial backing from Rialto for mining of the coal. After producing a nominal amount of coal, the President of Holly Mining, Mr. Charles Hallett, disappeared. Producers Mining became insolvent. Rialto, holding worthless stock of Producers Mining and having secured notes on the financing of equipment for Holly, alleges that it suffered the loss of a large sum of money, although the exact amount was not disclosed. After disposing of the equipment, Rialto engaged the services of Big Ridge Coal Company to complete coal stripping and provide reclamation. Big Ridge started its work subsequent to the dates of the Agency investigation.

Agency Investigator Gordon testified that he visited the site on March 17, 1971. He observed a watery discharge flowing from a coal pile on the northeast side of the site and another discharge from a water pit on the northwest side (Jan. 1973, R. 54). Gordon testified that about 10 gallons per minute cumulate flow discharged

from the site and flowed in a northeast direction toward Cedar Creek (Jan. 1973, R. 55). Samples were taken from both discharge points. However, Gordon did not ascertain on this date that the discharge waters actually reached the unnamed tributary or Cedar Creek (Jan. 1973, R. 62) and did not sample the tributary or Cedar Creek.

Another Agency Investigator inspected the site on May 19, 1971. Investigator Bishop testified that he observed drainage from the coal pile located on the east side of the site. Evidence indicates that the only sample taken on this date was of the drainage from the water pit on the west side. Bishop returned on October 6, 1971 and observed the drainage from the east side coal pile, from which he took a sample. He testified that the coal pile appeared to be the source of the discharge (R. 86) and that he observed no flow above the coal pile. Bishop testified that he observed light orange colored water and deposits at the confluence of the mine drainage stream and the tributary (R. 92). Photographs taken at the site appear to substantiate the testimony concerning the colored water discharge and deposits in the stream bed. Atrorneys for Respondents vigorously objected to the introduction of the photographs on the basis that they were isolated photographs, and did not show a single overall photograph of the mining operation. The investigator identified the exhibits as photographs of the Respondent's property and therefore they are admissable.

Investigator Bishop returned to the site on December 27, 1971 and took additional photographs and a number of water samples. Two of the EPA's laboratory samples raise serious doubt of the validity of the Agency charges. A comparison of the quality of Cedar Creek about 300 feet above the mine site and about 300 feet below the alleged discharge points reveals the following:

Analysis	Above	Below
Ph	4.8	5.6
Total Solids	188 mg/l	162 mg/l
Iron	0.6 "	0.2 "
Manganese	1.3 "	0.6 "
Sulfate	110 "	95 "
Hardness	98 "	84 "
Alkalinity	--	4 "
Total Acidity	36 "	20 "

In all cases the water quality improved below the mine. In that area there were no other discharges to Cedar Creek (EPA Exhibit #13). This paradox was not discussed during Agency testimony and neither was the fact that investigators sampled Cedar Creek only once during the entire period of alleged violations.

Testimony was introduced that some earlier mining activity had taken place at the site. Apparently some exploratory mining had been performed in 1965 by a person identified only as John Weibel.

Were it not for the testimony of Investigator Bishop that he had observed orange water and bottom deposits at the confluence of mine discharge and tributary to Cedar Creek we would be inclined at this point to find in favor of Respondents based on the Agency's own evidence.

Mr. Charles Medvick, Land Reclamation Division of the Illinois Department of Mines and Minerals, testified that he had visited the site on June 20, 197 in the company of officials from Rialto and Big Ridge (R. 203). This meeting was held at the request of the officials in order to determine the work needed pursuant to the surface mining laws. Subsequent visits and a $2,000 performance bond led to the approval of a reclamation plan by the Department of Mines and Minerals on January 2, 1973. Mr. Medvick testified that he was satisfied that the operator has a reasonable opportunity to achieve his plan (Jan. 1973, R. 214). The Board also notes that reclamation activities were started some four months before the Agency Complaint was filed.

Orlan Cox testified that according to the lease agreement he was to have received 35¢ per ton of coal but that he had in fact not received his first 35¢ (R. 231). However, there was no testimony that Mr. Cox would not receive payment in the future. Cox admitted that he had not visited the site for at least a year before receiving the Agency Complaint (R. 232). This reveals his indifference to the method of mining and the possibility of pollution from the mine.

It is the Opinion of this Board that Respondents Producers Mining, Inc., Holly Mining Corporation and Rialto Sales Corporation are guilty of violations of Rule 1.03(a) and (d) of SWB-14 and Section 12(d) of the Act for creating a water pollution hazard. We are of the opinion that a violation of Section 12(a) of the Act was not proven by the Agency. There was not sufficient proof that contaminants were actually discharged so as to cause water pollution. Since, the only charge against Orlan Cox was for violation of that statute we are compelled to dismiss the action against him.

We believe that only nominal fines are justified by the weight of evidence presented. Considering all the facts, we assess a fine of $500 each against Holly Mining Corporation, Producers Mining, Inc. and Rialto Coal Sales. These fines are in addition to the clean up and reclamation provisions required in our Order.

ORDER

It is ordered that:

1. All charges against Respondent Orlan Cox are dismissed.

2. Holly Mining Corporation shall pay to the State of Illinois the sum of $500 for the violations found in this proceeding by April 20, 1973. Rialto Sales Corporation shall pay to the State of Illinois the sum of $500 for violations found in this proceeding by April 20, 1973. Producers Mining, Inc. shall pay to the State of Illinois the sum of $500 for violations found in this proceeding by April 20, 1973. Penalty payment by certified check or money order payable to the State of Illinois shall be made to: Fiscal Services Division, Illinois EPA, 2200 Churchill Drive, Springfield, Illinois 62706.

3. Respondents shall cease and desist from all violations found in this Opinion.

4. Holly Mining Corporation and Rialto Coal Sales Corporation shall submit to the Environmental Protection Agency, a program for the abatement of pollution found in this Opinion, within 35 days from the date of this Order and shall file monthly reports with the Agency detailing progress toward completion of its abatement program.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order was adopted this 22nd day of March, 1973 by a vote of 4 to 0.

Christan L. Moffett