ILLINOIS POLLUTION CONTROL BOARD
January 7, 1982

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Complainant,	)	
v.	)	PCB 80-214
JAMES JOBE, d/b/a Peacock Coal Company, Respondent.	)	

MS. CHRISTINE ZEMAN, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF THE COMPLAINANT;
MR. ROBERT L. BUTLER, ATTORNEY AT LAW, APPEARED ON BEHALF OF THE RESPONDENT.

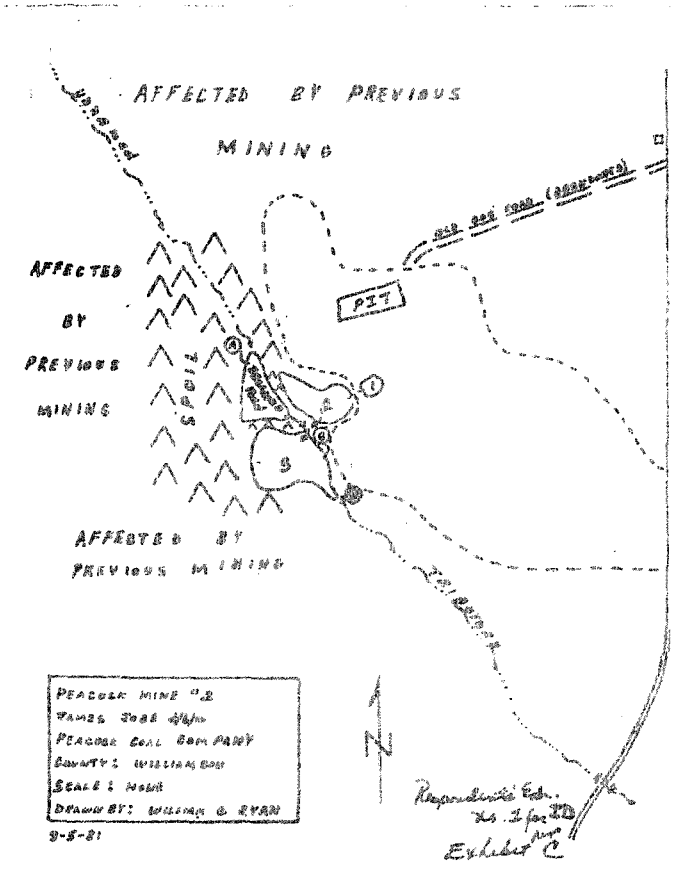
OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board on a November 17, 1980 complaint filed by the Illinois Environmental Protection Agency (Agency) alleging that James Jobe had violated the Environmental Protection Act (Act) and the Board's Chapters 3 and 4: Water Pollution and Mine Wastes, respectively. Hearings were held on April 23, April 24, and May 22, 1981 at which both parties presented testimony and exhibits. At the close of Complainant's case, Jobe moved for dimissal (3R. 218). That motion is hereby denied.

The Agency alleges that Jobe violated the "no-discharge" condition of his mine-related permit issued by the Agency to Jobe for Peacock Mine #2, which is located southeast of the Village of Crab Orchard in Williamson County. It further alleges that Jobe failed to obtain a required NPDES permit for the point source discharge of wastewater from a holding pond to an unnamed tributary of the Saline River. Finally, it alleges that Jobe's discharge violated the effluent standards of (old) Chapter 4: Mine Wastes, for acid, iron and pH.

The parties stipulated to the admission of certain facts and documents (R. 5-7 and Comp. Ex's 1 and 2) which narrow this case to two issues: whether the discharge of wastewater from Peacock Mine #2 was into a water of the State, and whether such discharges violated effluent criteria as alleged.

At all relevant times Jobe owned 39 acres of land in a valley southeast of Crab Orchard which had been previously mined for coal by both surface and underground mining. The surrounding area consists of several hundred acres which has been similarly mined. A ditch which is an unnamed tributary of the South Fork of the Saline River, flows diagonally across Jobe's property from the northwest to the southeast. About midway along the ditch is a body of water formed as a result of previous mining operations (Pond No. 3 or freshwater lake). Some 6-8 feet above Pond No. 3 and near this same ditch is another body of water usually referred to as an "isolated pond" or "isolated lake." Slightly to the north and east, respectively, of these two bodies of water lies "sediment pond #2" (See Resp. Ex. 1, R. 60, 79, 83, 122, 194, 207, and 271, and 3R. 224*). This Pond No. 2 lies immediately west of the permitted site and allegedly receives wastewater from Pond No. 1 which is on-site and receives wastewater pumped from the pit area where the mining is done (see diagram).



*Transcripts of the April 23 and 24 hearings are numbered consecutively from 1 to 320 while the May 22 hearing transcript begins with p. 170. Therefore, references to the last transcript will be in the form of (3R. pp.).

Jobe was engaged in the business of mining coal pillars as well as coal left from the previous mining operation (R. 15). The violations alleged result from this activity.

Jobe argues that the Agency has failed to prove that there was any discharge to a water of the State. He argues that this must be true because there is no proof that any water from Jobe's mine site ever reached the South Fork of the Saline River. The Agency, however, alleges that the discharge was to the unnamed tributary and that the tributary is a water of the State as well as the South Fork (R. 94, 213 and Ex. 2, ¶13).

Section 3(ii) of the Act defines "Waters" to mean "all accumulations of water, surface and underground, natural,and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State."

Section 104 of Chapter 3: Water Pollution, (which is made applicable to Chapter 4 by Rule 200 of Chapter 4) limits the Act's definition by excluding "sewers and treatment works."

Jobe admitted prior to hearing "that the unnamed tributary to the South Fork of the Saline River traversing the Peacock Mine #2 site is an accumulation of water which is neither a treatment works nor [a] sewer" (First Request for Admission, para. 13; Resp. Response, para. 1). Recognizing that it is not bound by Jobe's admission of a legal conclusion, the Board finds that the unnamed tributary falls under this expansive definition of a water of the State. While the Board has in some cases limited this definition on a case by case basis, the facts of this case demonstrate that the unnamed tributary is properly considered a water of the State.

In Meadowlark Farms, Inc. v. PCB, 17 Ill. App. 3d 851, 308 N.E. 2d 829 (1974), the Court affirmed the Board's finding of pollution of waters of the State where those waters consisted of an intermittent tributary of Bushy Creek (an intermittent stream). Also, in C.B.E. v. Stepan Chemical Co., PCB 74-201, 15 PCB 445 (February 14, 1975), the Board found "that an intermittent water course does exist and that waters of the State flow through the culverts...[and] this intermittent stream...is deserving of the same protection as Cedar Creek" (C.B.E., supra, at 459). Other cases which have considered this issue include Allied Chemical Corp. v. EPA, PCB 73-382, 11 PCB 379 (February 28, 1973) and Armak Co. v. EPA, PCB 79-153, 37 PCB 543 (March 20, 1980), among others. These cases give rise to what has been referred to as an "industrial ditch" exception.

While the cases are not entirely consistent, which is to be expected of "case-by-case" decisions, certain factors do recur in the decisions, most notably:

1. Whether the stream or ditch is a natural depression or waterway rather than artificially constructed or maintained;

2. Whether there is public access to or use of the waters; and

3. Whether the waters support aquatic life.

Further, it is clear that the designation of a water of the State is not determined by whether the stream or ditch is intermittent or whether it flows over public or private property, though these factors may well affect the above-noted factors.

In this case Jobe does not contend that the "ditch" or "unnamed tributary" was artificially constructed or maintained. Further, the testimony and exhibits indicate that the stream meanders to the South Fork of the Saline River, which indicates a natural waterway (Resp. Ex. 1 and R.194 and 203). Certainly, the tributary was not constructed by Jobe since it starts upstream of his site.

The tributary extends for 3-5 miles prior to reaching the South Fork of the Saline River, traversing property not owned by Jobe (R. 194 and 203). This is the only evidence in the record as to the public access except that "a portion of" this segment runs through previously mined areas (R. 203-4) and passes under a roadway (Resp. Ex. 1). From this the Board can conclude only that there may be public access.

Unfortunately, the record is even more deficient regarding aquatic life in the unnamed tributary. The only evidence upon which the Board could base any finding consists of photographs, all of which were taken in or near the Jobe's site (Compl. Ex's. 4,11,13,15,22 and 28-34), and which show no indication of aquatic life in that area. This evidence is insufficient, however, to support any finding regarding the tributary as a whole, or of the state of the tributary prior to Jobe's operations.

Thus, the Board finds that Jobe has failed to demonstrate that the unnamed tributary falls under the "industrial ditch" exception and that the unnamed tributary is a water of the State and should be afforded appropriate protection. Further, since the unnamed tributary runs into and discharges from Pond No. 3, that pond must be considered an accumulation of water which is also a water of the State.

Jobe further contends that the Agency has failed to prove discharge to a water of the State in that no showing was made that the intermittent stream contained water at the time of discharge. However, since the Board considers Pond No. 3 to be, in effect, an accumulation of water within the tributary, and since there is no indication the Pond No. 3 was ever dry, this argument must also fail. In addition, Section 12(d) of the Act proscribes the deposition of "any contaminants upon the land in such place and manner as to create a water pollution hazard." Clearly, the discharge of contaminants to a dry

stream bed cannot be allowed where that stream is expected to have water running in it at a future date. The remaining issue before the Board, then, is whether Jobe discharged contaminants to these waters in violation of effluent criteria as alleged.

William C. Ryan, an Illinois Environmental Protection Specialist working for the Agency, testified that he inspected Jobe's site on August 2, 1978, at which time he observed a six-inch pump pumping pit water into Pond No. 1 which was discharging to Pond No. 2 (R. 27). He further observed Pond No. 2 discharging to Pond No. 3 and from there to the unnamed tributary (R. 28). He sampled these latter two discharges (R. 28). The sample of the Pond No. 3 discharge was found to have a pH of 4.4, total iron content of 1.1 mg/l, and an estimated flow of 50-60 gpm (gallons per minute) (Compl. Ex. 7A). While this discharge is indicated to be from the fresh water pond, that body of water is also referred to as Pond No. 3 (Compl. Ex. 16). The sample of the Pond No. 2 discharge showed a flow of 25-30 gpm, iron of 31 mg/l, a pH of 6.3, no alkalinity and acidity of either 55 or 75 (Compl. Ex. 6A).

Ryan testified to similar discharges on August 8, 1978, from each pond and into the unnamed tributary (R. 36-7). No samples, however, were taken at that time.

The remainder of Ryan's evidence concerning the discharges at Jobe's site, as well as supportive laboratory reports which were entered as exhibits, is summarized by the table on the following page.

Jobe attempts to show that "Ryan contradicts himself ad nauseum ad infinitum" (Resp. Br. 6). However, for the most part his testimony appears consistent. Given that his testimony goes back as much as three years, and further given the number of visits to the site, the length of time which had passed prior to his testifying, and the confusing and inconsistent terminology used to describe the waters in and near Jobe's site, it is not surprising to find some apparent inconsistencies. However, any inconsistency in Ryan's testimony is more than overcome by the exhibits which are generally clear and understandable.

In Count I Jobe is charged with having discharged wastewater from a point source at Peacock Mine #2 to the unnamed tributary of the South Fork of the Saline River in violation of Special Condition 1 of his permit, and thereby in violation of Section 12(b) of the Act and Rule 206 of Chapter 4: Mine Wastes. That permit condition allowed no discharge from the site to waters of the State (Compl. Ex. 1B).

On July 19, 1978, Ryan observed water being pumped from the pit to Pond No. 1, which in turn was discharging to Pond No. 2 (R. 16-17 and Compl. Ex. 4). On August 2, 1978, he observed similar discharges and a discharge from Pond No. 2 to Pond No. 3, a water of the State (R. 28). The discharge from Pond No. 2 was channelized, and, therefore, a point source.

EXHIBIT NUMBER	RECORD CITATION	OBSERVATION DATE	DISCHARGE POINT	IRON (mg/l)	pH (units)	TOTAL ACIDITY (mg/l)	TOTAL ALKALINITY (mg/l)	FLOW (gpm)
3	R. 17	7/19/78	Pond #1	65.0	6.5	55	0	75-100
5A	R. 26-29	8/2/78	Pond #1	100.0	6.3	75	0	50-60
6A	R. 26-29	8/2/78	Pond #2	31.	6.3	55*	0	25-30
7A	R. 26-29	8/2/78	Pond #3	1.1	4.4	20	0	50-60
8,9,10	R. 39-44	2/1/79	Pond #2	14.6	5.8	45	0	50-60
18, 19A	R. 67-72	6/13/79	Pump hose	71.	6.2	0	28	50-60
18, 20A	R. 67-72	6/13/79	Pond #1	79.	6.3	0	95	50-60
18, 21A	R. 67-72	6/13/79	Pond #2	57.	6.4	0	95	50-60
23, 24	R. 78-84	11/2/79	Pond #2**	0.4	7.2	0	200	--
23, 25	R. 78-84	11/2/79	Isolated Lake	27.2	3.4	310	0	--
23, 26	R. 78-84	11/2/79	Pond #3	7.8	6.0	0	140	--
27	R. 84-87	10/22/80	Pit	70.	3.0	640	0	none

*55 mg/l appears to be the concentration indicated and is so indicated by the Agency (Ag. Brief at p. 14), but this may be 75 mg/l since the laboratory analysis form is ambiguous.

**Mr. Ryan indicated uncertainty as to the location of this sampling point.

Similar observations were made on August 8, 1978 (R. 36, 37 and 40), August 11, 1978 (R. 38), February 1, 1979 (R. 39-40, 44-48 and Compl. Ex. 11), April 12, 1979 (R. 63), June 13, 1979 (R. 70), and June 18, 1979 (R. 73-74). Each time he observed a discharge from Pond No. 1 to Pond No. 2, he also observed a discharge from Pond No. 2 to either Pond No. 3 or the existing stream, including April 21, 1979 (R. 63), June 13, 1979 (R. 70 and Compl. Ex. 22), and June 18, 1979 (R. 73-74).

Ryan's testimony is also supported by that of Perry L. Pursell, Surface Mining Reclamation Specialist with the Office of Surface Mining (R. 282), and Jobe himself. Ryan testified to having observed similar flows on June 25, 1979 (R. 284-289 and Compl. Exs. 28-30) and September 13, 1979 (R. 295-296). Jobe himself testified that water from Pond No. 2 "could escape into No. 3 if it got high enough" (3R. 235).

Therefore, the Board concludes that Jobe did violate the no-discharge provisions of his permit on the dates indicated above.

In Count II Jobe is charged with discharging from a point source without an NPDES permit. Jobe does not contest the fact that he had no such permit, and based upon the same evidence considered under Count I, above, the Board finds that Jobe has discharged without the required NPDES permit in violation of Sections 12(b) and 12(f) of the Act, Rule 901 of Chapter 3: Water Pollution, and Rule 206 of Chapter 4: Mine Wastes.

In Count III Jobe is charged with having violated the effluent criteria for acid, total iron and pH as set forth in Rule 606(a) of the Board's (old) Chapter 4. Based upon the data from the table above, the Board finds that Jobe has violated the effluent criteria for each of the contaminants alleged on one or more of the dates alleged.

First, the Agency has proven that Jobe violated the 5-10 pH requirment of Rule 606 on August 2, 1978 by discharging water of pH 4.4 from Pond No. 3 to the unnamed tributary. However, the Board cannot find violations of the pH limitation on November 2, 1979 or October 22, 1980 in that there is insufficient proof of discharge.

Second, the Agency has proven that Jobe violated the 7.0 mg/l limitation for iron in the effluent discharged from Pond No. 2 to the unnamed tributary or Pond No. 3 on August 2, 1978; February 1, 1979; and June 13, 1979, at concentrations of 31, 14.6 and 57 mg/l, respectively. The Board cannot find violations on other dates due to inadequate proof of discharge.

Third, the Agency has proven that Jobe discharged waters into waters of the State in which total acidity exceeded total alkalinity on August 2, 1978 (from both Pond No. 2 and Pond

No. 3) and on February 1, 1979 in violation of Rule 606. These discharges contained total acidity of 55, 20 and 45, respectively, all with zero total alkalinity.

Jobe argues strongly that the pH measurements do not correspond properly with values for total acidity and total alkalinity and that they are "worthless for any purpose" (Resp. Br. 8-10). Jobe overstates this argument while overlooking the explanations offered by both Agency Lab Managers, John Craig and Frank Schmidt. John Craig explained that mine wastes often show such variance between pH and acidity (R. 236 and 250). This is due to the variance in metals found in mine waste samples, such that pH may not be determinative of the total acidity or total alkalinity (R. 236 and 250-252). Frank Schmidt explained that the acidity tests are actually more accurate than pH tests to determine acid (R. 269-272). Further, while Jobe cites Standard Methods For the Examination of Water and Wastewater for the proposition that "the practical pH scale extends from 0, very acidic, to 14, very alkaline, with 7 corresponding to exact neutrality at 25 c.", he fails to acknowledge the following sentence which states that whereas alkalinity and acidity "are measures of the total resistance to pH change or buffering capacity of a sample, pH represents the free hydrogen ion activity" (Standard Methods, 14th Edition, p. 460). Thus, rather than lending support to Jobe's contention that there is some sort of direct relationship between pH and alkalinity and acidity, this recognized text clearly differentiates the concepts, and supports the cited testimony of Craig and Schmidt.

Finally, Jobe argues that Jobe's discharges "could not have measureably increased the prior existing contamination of iron or acid or lowered the PH (sic) factor" (Resp. Br. 13). Such an argument cannot be upheld. Nowhere in the Act or the Board's rules is it made a defense to unlawful discharge that the waters into which the discharge is made are already polluted. (see Rules 401 and 402 of Chapter 3).

Having found sufficient proof of each of the violations alleged, and upon consideration of the factors enumerated under Section 33(c) of the Act, the Board finds that a penalty should be imposed to aid in enforcement of the Act.

While there is no direct showing of injury to, or interference with the protection of the health, general welfare and physical property of the people, such injury can be presumed. The intent of the Act is to "restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them" (Section 2(b) of the Act). In recognition of that principle the effluent standards have been set at economically achievable levels to avoid all but reasonably necessary amounts of pollutants from entering waters of the State. Therefore, discharges exceeding those levels cause unacceptable degradation. However, the violations of pH and acidity are not great. On the other hand, iron levels are far above standards and may well have caused damage.

The social and economic value of the pollution source is unquestioned, as is the suitability of the site to its location. The site and the surrounding area have been previously mined, there is no indication of downstream uses of the unnamed tributary running through the site, and the whole area typically has acid run-off (3R. 286-288). Further, Jobe has now ceased his mining operations at the site, has reclaimed the area and seeded it, substantially improving the previously barren acreage (3R. 259-262).

On the other hand, it is also unquestioned that it was technically practicable and economically reasonable for Jobe to eliminate the discharges. Some of the abatement procedures were proposed by Jobe himself in his second permit application which showed no discharge. He never built the proposed ditches and allowed the ponds to become filled with sediment, thereby reducing their storage capacity (R. 70, 76, 196-197, 303, 3R. 184 and Comp. Ex. 1D, Standard Condition 5, and Compl. Ex. 11). Treatment measures were also available (3R 188).

Most importantly, Jobe showed a blatant disregard for the necessity of operating his site in accordance with his permit requirements. He admits having said "you do what you have to do to mine coal" (R. 296, 3R. 240). That statement flies in the face of one of the mainstays of an effective environmental control program in the State: voluntary compliance. All Jobe had to do was what he said he would do. If that became overly burdensome, he could have attempted to modify his permit. However, he did neither, and that cannot be tolerated. In terms of the penalty which will be assessed, the possible harm which can flow from a failure to abide by the State's permitting procedures must be added to the direct environmental consequences of Jobe's actions. For this reason the Board will assess a penalty of $2,000.

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

ORDER

1. James Jobe is hereby found to have violated Sections 12(b) and 12(f) of the Environmental Protection Act, Rules 206 and 606(a) of (old) Chapter 4: Mine Wastes, and Rule 901 of Chapter 3: Water Pollution;

2. Jobe shall cease and desist all such violations; and

3. Within 45 days of the date of this Order, Jobe shall pay, by certified check or money order payable to the State of Illinois, a penalty of $2,000 which is to be sent to: Illinois Environmental Protection Agency, Fiscal Services Division, 2200 Churchill Road, Springfield, Illinois 62706.

IT IS SO ORDERED.
D. Anderson concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 1st day of January, 1981 by a vote of 4-0.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board