COMMONWEALTH

OF

PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

1975

COMMONWEALTH
OF
PENNSYLVANIA

CONTAINING
CASES DECIDED
BY THE

PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DURING THE
CALENDAR YEAR

1975

PRINTED IN 1979

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1975

Chairman .... PAUL E. WATERS

Member .... JOSEPH L. COHEN

Member .... JOANNE R. DENWORTH

1975

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FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1975.

This Environmental Hearing Board was created by the Act of December 3, 1970, P.L. 834, which amended the Administrative Code of 1929, Act of April 7, 1929, P.L. 177, *as amended*. The Act of December 3, 1970, commonly known as "Act 275", was the Act that created the Department of Environmental Resources. Section 21 of that Act, §1920-A of the Administrative Code, provides as follows:

> "§1921-A Environmental Hearing Board
>
> (a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," or any order, permit, license or decision of the Department of Environmental Resources.
>
> (b) The Environmental Hearing Board shall continue to exercise any power to hold hearings and issue adjudications heretofore vested in the several persons, departments, boards and commissions set forth in section 1901-A of this act.
>
> (c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified.
>
> (d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have the power to grant a supersedeas.
>
> (e) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall include time limits for taking of appeals, procedures for the taking of appeals, location at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board.

(f) The board may employ, with the concurrence of the Secretary of Environmental Resources, hearing examiners and such other personnel as are necessary in the exercise of its functions.

(g) The Board shall have the power to subpoena witnesses, records and papers and upon certification to it of failure to obey any such subpoena, the Commonwealth Court is empowered after hearing to enter, when proper, an adjudication of contempt and such order as the circumstances require."

In addition, the Board hears civil penalties cases pursuant to The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §691.1, *et seq.* and the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended,* 35 P.S. §4001 *et seq.*

Although the Board is made, by §62 of the Administrative Code, an administrative board within the Department of Environmental Resources, it is functionally and legally separate and independent. Its members are appointed directly by the Governor, with the consent of the Senate. Its secretary[1] is appointed by the Board with the approval of the Governor. The department is a party before the Board in most cases[2] and has even appealed decisions of the Board to Commonwealth Court.

The first members of the Board were Michael H. Malin, Esquire of Philadelphia, Chairman; Paul E. Waters, Esquire of Harrisburg; and Gerald H. Goldberg, Esquire of Harrisburg. In December of 1972, Michael H. Malin resigned to return to private practice, and Robert Broughton, Esquire, a professor of law at Duquesne University of Law School was appointed Chairman on January 2, 1973, and served until December 31 of 1974, when he was succeded by Joanne R. Denworth, Esquire of Philadelphia, on the Board and Paul E. Waters was named Chairman. Gerald H. Goldberg left, also to return to private practice, in June of 1973, and Joseph L. Cohen, Esquire, an associate professor of health law at the Graduate School of Public Health, University of Pittsburgh, was appointed on December 31, 1973, to replace him. On July 25, 1977, Joseph L. Cohen resigned to take the position of Administrative Law Judge with the

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1. The current Secretary of the Board is M. Diane Smith, who was appointed on April 1, 1976.

2. The one exception has been appeals from decisions of municipalities and county health departments under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended,* 35 P.S. §750.1, *et seq.* That exception was eliminated for the future by amendments to the Pennsylvania Sewage Facilities Act enacted July 22, 1974, (Act 208).

Pennsylvania Public Utility Commission and Thomas M. Burke Esquire of Pittsburgh, was appointed and confirmed on October 25, 1977, to fill the vacancy. Member Joanne R. Denworth resigned from the Board on May 23, 1979.

The range of subject matter of the cases before the Board is probably best gleaned from a perusal of the index and the cases themselves in this and subsequent volumes.

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

DAEMON C. STRICKLER, et al and
City of Lebanon, et al, Intervenors

Docket No. 73-304-W and 73-314-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By The Board--(Issued--January 3, 1975)

This matter comes before the Board as an appeal from a refusal by the Department of Environmental Resources (hereinafter "DER"), of a request made by the City of Lebanon (hereinafter "City"), to cease fluoridation of the municipal water supply pursuant to a Resolution of Council.

DER considered the beneficial effects of fluoride on the teeth of the young, and declined to permit discontinuance of the preventive health measure.

Daemon Strickler and other citizens (hereinafter "Appellants"), appealed the decision of DER and the City intervened in the proceedings. A number of physicians and dentists of the City also intervened.

A hearing was held before our Brother, Paul E. Waters, Esquire, a member of this Board. His proposed adjudication was not concurred in by a majority of the Board. We all concur in his Findings of Fact, which are set forth in his dissent, and are incorporated herein by reference.

To state our conclusion initially, it seems to us that the transfer to DER of the functions of the Department of Health and the Secretary of Health in administering the Water Supply Law, Act of April 22, 1905, P. L. 260, as amended, 35 P. S. §§711-715, included the power to take into consideration all factors that

[illegible] Secretary and Department of Health in issuing waterworks permits or approving amendments to already issued waterworks permits. These factors include effects on the public health and the prevention of disease, and based on these, DER properly disapproved the request to discontinue fluoridation.

To reach this conclusion we start with §2109(b) of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §539(b):

> "(b) To issue water works permits, and stipulate therein the conditions under which water may be supplied to the public, <u>and</u> to administer sections one, two, and three of the act, approved the twenty-second day of April, one thousand nine hundred and five (Pamphlet Laws, two hundred and sixty), entitled 'An act to preserve the purity of the waters of the State for the protection of the public health,' its amendments and supplements." (Emphasis supplied.)

The quoted provision on its face indicates two powers: First, to issue waterworks permits, with appropriate conditions. Second to administer the Water Supply Law, <u>supra</u>. The <u>prima facie</u> indication of two separate powers is born out by analysis, even though the Water Supply Law, <u>supra</u>, does also set forth the power to issue permits for public water supplies. If one reads all of the Water Supply Law, <u>supra</u>, one is struck by the limited powers given to the Secretary of Health[1] by that statute. It speaks to a time when public health, and the relation of water supply to public health, were seen narrowly. The primary focus of the Water Supply Law, <u>supra</u>, appears to be on the safety and purity of the source of supply, not on the operation of water treatment plants. The public health powers, for example, relate to whether the "source of supply" may be prejudicial to the public health, not whether the combination of the source of supply and the treatment works are prejudicial to the public health. One may gather that treatment possibilities—at least treatment possibilities perceived by the legislature—were rather primitive in 1905. Furthermore, the permit required is for construction or physical alteration of a waterworks, not for its continuing operation once constructed. In essence it is a plumbing permit.

The power of the Department of Health to stipulate "conditions under which water may be supplied to the public" thus appears to be a related but never-

---

1. Then Commissioner of Health.

[illegible] continuing [illegible]tion of the water treatment plant as well as the source and the plumbing faciliti[illegible]. It is additional to the power to administer the Water Supply Law, supra,—additional and complementary.

We note, as has our Brother Waters, that there is no legislative standard explicitly stated relative to that power. However, in Water and Power Resources Board v. Green Springs Co., 394 Pa. 1, 145 A.2d 178 (1958), our Supreme Court decided that such a legislative standard might be found by considering the purpose of a statute, as gleaned from the context of the entire statute. Considering the focus of this second, complementary power of the Department of Health—on the continuing operation of water treatment facilities—to find a legislative intent to relate the power of public health and disease prevention appears plausible. This conclusion is supported by ordinary principles of statutory construction. When the power to stipulate "conditions under which water may be supplied to the public" is considered in the context of, not so much the entire Administrative Code of 1929, but primarily those sections that relate to the powers of the Department of Health, it is clear that the legislature intended that the conditions must be such as to protect the public health and prevent disease. This is clear from the enumeration of all the powers and duties of the Department of Health in §2102 of the Administrative Code of 1929, supra, 71 P. S. §532, but especially subsection (a) thereof, which gives the Department of Health the power, and the duty,

> "(a) To protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease;"

We conclude that, within the holding of the Green Springs case, supra, there was an adequate specification of a legislative standard in the Administrative Code of 1929 to render the power of the Department of Health, under §539 of the Administrative Code of 1929, to "stipulate . . . the conditions under which water may be supplied to the public" valid.[2]

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2. We disagree with the urging of counsel for the City of Lebanon, here, that the sole place where such a purpose may be sought is in the Water Supply Law, supra.

ment of Health, the approval of a condition that the City's water supply be fluoridated would be valid not only on the ground that it represented a finding that fluoridation did not represent a hazard to public health, but also on the ground that it protected the public health and represented the most efficient and practical means for the prevention and suppression of disease--the disease being dental cavities and infections resulting therefrom.

The requested change in this case, the discontinuance of fluoridation, is analogous to an application for an amendment of a permit. It is an application to have a condition that was approved, as protecting the public health, eliminated. The mere fact that the Department of Health did not seek, and DER has not sought, to require generally the fluoridation of public water supplies is not relevant to

to the present case. Whether the Department of Health had that power, or DER has that power, is not now before us. What is before us is whether the Department of Health had the power, and DER has the power, to refuse to approve a water supply permit change that would remove an existing permit condition that serves to protect the public health and prevent disease. The power to approve a condition that would prevent disease must carry with it the power to disapprove a deletion of a condition which, because the deletion would promote disease (instead of preventing it), would be the opposite of protecting the public health.

But was this broader power, to approve or disapprove conditions or changes in conditions on this basis, given to DER? We think so. Section 1901A(7) of the Administrative Code of 1929, supra, 71 P. S. §510-1(7), gave DER all the powers and duties of

> "(7) The former Commissioner of Health and the Department of Health by the act of April 22, 1905 (P.L. 260), entitled "An act to preserve the purity of the waters of the State, for the protection of the public health;"

Section 30 of the Act of December 3, 1970, P. L. 834,[3] 71 P. S. §510-103, abolished all bureaus and divisions of the Department of Health relating to the administration of the Water Supply Act, supra, and transferred their functions to DER. In addition, subsection (6) of §1901A provides as follows:

---

3. The Act that created DER, commonly known as "Act 275".

"The Department of Environmental Resources shall, subject to any inconsistent provision in this act contianed, continue to exercise the powers and perform the duties by law heretofore vested in and imposed upon:

. . .

"(6) The Department of Health and the Secretary of Health in so far as such powers and duties pertain to the control of nuisances from grounds, vehicles, apartments, buildings and places within the Commonwealth, to the sanitary condition of tenements, lodging and boarding houses, to management of the sanitary affairs of the Commonwealth, the issuance of waterworks permits and to the control of water pollution;" (Emphasis supplied.)

The powers referred to are not, again on their face, identical to the powers granted DER under subsection (7) of §1901A. Parallel to the dual grant of authority to the Department of Health under §2109 of the Administrative Code of 1929, quoted supra, the power transferred under subsection (6) quoted supra, was, we believe, intended by the legislature to effect a transfer not only of the power to administer the Water Supply Law, supra, but also the power to "stipulate ... the conditions under which water may be supplied to the public".

Just as, under that power, the Department of Health might have refused to approve a permit amendment deleting previously approved fluoridation on the grounds that the protection of public health and prevention and suppression of disease required such action, so may DER now do the same.

This conclusion, based on a technical analysis of the various relevant legislative provisions, is in accordance with the conclusion we would be led to by broader considerations of legislative intent. Viewing this case out of the context of the fluoridation dispute for the moment, with all the emotion that dispute has engendered, it seems to us illogical to conclude that the legislature transferred, in bulk, the powers, duties, and functions of the Department of Health in this area to DER, but nevertheless did not transfer the power to consider the public health implications of all phases of the permit granting process. It is possible that the legislature might have such an intent, but that would seem (a) improbable, and (b) not in the public interest. For both of these reasons we think that a legislative expression of intent to exclude considerations of public health and disease prevention from the water supply permit process of DER ought to be clear before it is concluded that such an intent existed.

Thus we are led to conclude [illegible] general grounds that the [illegible] did not intend to exclude DER from considering the public health and disease [illegible]tion implications of the water supply permit process, and second on specific [illegible] grounds that the legislature did affirmatively intend DER to have power to consi[illegible] public health and disease prevention in that process.

We conclude that the action of DER in this case was proper, supported by substantial evidence, and in accordance with law.

We would add our agreement with our Brother Waters in quoting Judge Wood in Commonwealth v. Williamsport Municipal Water Authority, 56 D&C 2d 791 (1972):

> "We are not insensitive to the aversion many people feel toward such measures as the use of a public water supply for a purpose as that here concerned. In our view the problem of fluoridation is [ultimately] one for resolution by the legislature [by legislation directed specifically to that dispute]."

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal.

2. The Legislature by the Act of December 3, 1970, P. L. 834, transferred certain powers and duties formerly invested in the Department of Health to the Department of Environmental Resources regarding permits for public water supply systems.

3. Among those powers was the power to stipulate the conditions under which water might be supplied to the public, in accordance with the legislative standard that any such conditions must be designed to protect the public health and/or carry out the most efficient and practical means for the prevention of disease.

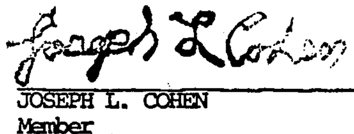
4. The action of the Department of Environmental Resources in denying approval of the requested authority for the City of Lebanon to discontinue fluoridation of that City's water supply was supported by substantial evidence and was within the powers of the Department.

O R D E R

AND NOW, this 3rd day of January, 1975, the action of the Department of Environmental Resources in refusing to permit the City of Lebanon to discontinue the fluoridation of that City's public water supply is sustained, and the appeals of Daemon C. Strickler, et al, are hereby dismissed.

ENVIRONMENTAL HEARING BOARD

ROBERT BROUGHTON
Chairman



JOSEPH L. COHEN
Member

DATED: January 3 , 1975

DISSENTING OPINION

By Paul E. Waters, Member (Issued January 3, 1975)

FINDINGS OF FACT

1. The City is a municipal corporation organized and existing under the laws of Pennsylvania as it relates to Cities of the Third Class.

2. The City operates a public water supply under Water Supply Permit No. 3869502 issued pursuant to the Act of April 22, 1905, P. L. 260, as amended, 35 P. S. §711 et seq. ("Water Supply Law").

3. Water Supply Permit No. 3869502 was issued on February 19, 1970, by the Pennsylvania Department of Health, which then administered the Water Supply Law.

4. Pursuant to Resolution No. 171, Sessions 1966-1967, (March 27, 1967) of the Council of the City of Lebanon and Module 12 of the City of Lebanon's Water Supply Application, Water Supply Permit No. 3869502 authorized and required fluoridation at the new water treatment plant.

5. The new water treatment plant began operation on September 15, 1972, and fluoridation commenced on November 27, 1972.

[illegible]

[illegible]

are maintained in the range of 0.7 to 1.2 mg/l at the time water enters the City's distribution system. The concentration of fluoride in the water at the point of entry to the City's distribution system does not significantly exceed concentrations of 1.2 mg/l.

7. On January 19, 1971, the Department of Environmental Resources assumed administration of the Water Supply Law and related powers of the Department of Health pursuant to Article XIX-A, §§1901-A and 1918-A of the Administrative Code added by the Act of December 3, 1970, P. L. 834, 71 P. S. §§510-1 and 510-18.

8. In accordance with Resolution 191, Sessions 1972-1973, (January 8, 1973) of the Council of the City of Lebanon, on January 12, 1973, the City Clerk requested that the permit for the Lebanon City Water Supply be revised to provide for the removal of fluoridation. The request was assigned Application No. 3873501 by DER.

9. By letter dated September 6, 1973, the Department refused the City permission to discontinue fluoridation.

10. In acting upon the City of Lebanon's application the Department consulted with the Pennsylvania Department of Health on the public health issue involved.

11. Fluoridation of a public water supply at approximately one part per million ("ppm") is recognized as an efficient and economical public health measure recommended by the Pennsylvania Department of Health.

12. Approximately 5.3 million people in Pennsylyania drink fluoridated water.

13. A prime public health benefit associated with fluoridation of a public water supply at approximately 1 ppm is an approximate 65% reduction in dental cavities ("caries").

14. Discontinuation of fluoridation of the City's water supply can be accomplished without any modification of the water works system and without affecting potability of the water.

15. Dental Caries is probably the most prevalent disease in America.

16. Alternate methods of making fluoride available to a population, such as topical application of fluorides and addition of fluoride to milk, are not as efficient and economical public health measures as addition of fluoride to a public water supply.

17. Distribution of fluoride tablets is much less efficient and economical as a public health measure than addition of fluoride to a public water supply.

18. Fluoridating a public water supply at approximately one ppm is safe from a medical standpoint.

19. There has been no increase in sickness or death rate in Lebanon since fluoride was introduced into the City water supply.

DISCUSSION

The fluoride issue has been discussed, debated and adjudicated for so many years it is surprising that this matter should, at this late date, find its way to my desk.

At the outset, let me say that the case of Commonwealth v. Williamsport Municipal Water Authority, 56 D & C 2nd appeared at first blush to be determinative of the issue before us. Upon closer scrutiny, however, it appears the task was not to be that easily completed, and that in fact, this is a case of first impression. In Williamsport, supra, an equity action, the Lycoming County Court did enjoin the City from removing fluoride from the water supply. It was there clear, however, that it was only pursuant to the broad equity powers of the Court and its interest in preserving a positive health measure, that the injunction, sought by private citizens, and the Department of Health, was granted.[4] Suffice it to say that this Board has no such equity powers.

If the only question before us was whether or not fluoride added to the water supply at low levels is beneficial in preventing cavities in young children,

4. The Court, although mentioning almost as an afterthought that the Department's Regulations had not been followed and no permit issued, was not called upon to decide the question before us.

our answer would be unequivocal.[5] Again, this is not the task actually before us.

The City contends that DER was not authorized by the law to refuse to permit it from removing fluoride from its public water supply. Let us look at the statutes: Section 3 of the Water Supply Law, Act of April 22, 1905, P. L. 260, (35 P. S. 713) provides:[6]

> "No municipal corporation, private corporation, company, or individual shall construct waterworks for the supply of water to the public within the State, or extend the same, without a written permit, to be obtained from the Commissioner of Health if, in his judgment, the proposed source of supply appears to be not prejudicial to the public health. The application for such permit must be accompanied by a certified copy of the plans and surveys for such waterworks, or extension thereof, with a description of the source from which it is proposed to derive the supply; and no additional source of supply shall subsequently be used for any such waterworks without a similar permit from the Commissioner of Health."

Pursuant to this authority above indicated, DER passed certain regulations to carry out the purpose of the legislative grant of authority. These are found in 25 Pa. Code 109.21 and 109.22 and provide in pertinent part:

> "(a) Deviation from approved plans or specifications affecting the treatment process or quality of water shall be approved by the Department in writing before such change is made.
>
> "(b) No treatment process or protective measure shall be added to, altered or discontinued without securing written approval from the Department."

In addition, DER was given the power of the Department of Health contained in the Administrative Code §2109, 71 P. S. 539 (b):

> "(b) To issue water works permits, and stipulate therein the conditions under which water may be supplied to the public, and to administer sections one, two, and three of the act, approved the twenty-second day of April, one thousand nine hundred and five (Pamphlet Laws, two hundred and sixty), entitled 'An act to preserve the purity of the waters of the State for the protection of the public health,' its amendments and supplements." (35 P. S. 713 above quoted.)

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5. It is.

6. The enforcement powers under this Act were transferred from the Department of Health to DER in 1971.

[illegible]

for the action of DER. There are however two problems.

First, it must be kept in mind, that our Constitution does not permit the legislature to delegate its law making powers to other governmental agencies.[7] It has been held that a legislative body cannot delegate its function of making laws, directly or indirectly to any other body or governmental agency regardless of the urgency, necessity or gravity of the situation. See Holgate Bros. Co. v Bashore 1936, 331 Pa. 225; Wilson v. School District of Philadelphia 1937, 328 Pa. 225.

In Water & Power Resources Bd. v. Green Springs Co., 394 Pa. 1, the Supreme Court said:

> "While the legislature cannot delegate the power to make a law, it may where necessary, confer authority and discretion in an administrative tribunal in connection with the execution of the law. Belovsky v. Redevelopment Authority, 357 Pa. 329. However, such authority and discretion may not be conferred by the legislature except under the limitations of a prescribed standard or standards under which the authority and discretion are to be exercised."

In upholding the constitutionality of the Water Obstructions Act over a challenge that it was an improper delegation of authority, the Court went on to say. . .

> "Both the statutory language and the circumstances surrounding its passage indicate the legislative purposes and why the regulation of water obstructions was necessary."

Turning again to the language from which DER draws its alleged authority, it is clear that the Water Supply Law, supra, invests DER with the power to grant permits under the act, where

> ". . .the proposed source of supply appears to be not prejudicial to the public health."

Conversely, it would seem clear that a permit could properly be refused where the source of supply is prejudicial to the public health. There is no question that this power was delegated properly to the Department of Health and was subsequently transferred by the legislature to DER.

The Administrative Code (71 P. S. 539), the other statutory nail upon which DER would hang its hat, delegates the authority to issue water work permits,

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7. Article II, Section 1 "The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."

". . .stipulate therein the conditions under which water may be supplied to the public, and to administer sections one, two and three of the Act approved April 22, 1905 (supra)."

Does this language give absolute discretion to DER unlimited by the guidelines imposed as to safety of the source of supply, potability and other matters specifically mentioned in the statutes? There are two possibilities. Either the language quoted was intended to be a delegation of authority within the guidelines set out in the related statutes, in which case it is a proper delegation, or it is unlimited and, therefore, an unconstitutional delegation because it has no

". . .limitations of a prescribed standard or standards under which the authority and discretion are to be exercised." [8]

Favoring, as we must, a construction which upholds the constitutionality of an Act we believe the former situation pertains. In further support of this construction, we note that the 1968 amendment to the Water Supply Law of 1905 also makes specific reference only to "adequate supplies of safe water". [9]

The second problem is that if, as we have suggested, the legislature has delegated no authority to DER regarding altering or discontinuing a particular function of the water treatment plant unrelated to safety, quantity, and purity of the water, clearly DER cannot by its own regulation invest itself with this authority, i.e., legislate under the guise of regulating.

It is therefore our conclusion that there is no authority given DER by the statutes upon which DER relies, to promulgate a regulation permitting it to refuse to allow a municipality to discontinue adding fluoride to its water supply.

DER, apparently recognizing the legal dilemma above outlined, urges us to

---

8. Water and Power Resources Bd. v. Green Springs Co. 394 Pa. 1.

9. Act of 1968, July 1, P. L. 290:
(a) In order to ensure the furnishing of adequate supplies of safe water to the public, the Department of Health may take action as hereinafter provided to assure the potability of water, and, if need be, the maintenance of proper treatment equipment by every permittee.

(b) Whenever the Department of Health finds any permittee is failing to meet such standards of proper potability, or, if need be the maintenance of proper treatment equipment as are necessary to assure a potable supply to the public, it may order the permittee to make correction thereof within sixty days. On failure of the permittee to make any such ordered correction, the Department of Health may apply for an order in the court of common pleas of the county where the permittee is located to take over the permittee's water supply and water treatment facilities for such period of time as may be necessary to make any such correction. In every such case, the costs of court action and expenses incident to making any such correction shall be borne by the delinquent permittee as shall be ordered by the court.

[illegible]

Administrative Code [illegible], 71 P. S. [illegible], ? as though they were transferred to

DER. The key provision to this argument is the following:

> "The Department of Health shall have the power, and its duty shall be: (a) to protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease."

It is clear to us that although this authority might be sufficient to authorize the Department of Health to seek an injunction to prevent the removal of fluoride from a water supply,[10] it was never transferred to DER.

The majority opinion engages in a new process of statutory construction heretofore unknown to me. There is no doubt that the statutory power given to the Department of Health to "...employ the most efficient and practical means for the prevention and suppression of disease." ... was not transferred specifically to DER. The majority nevertheless finds a general intent to invest this authority (which incidentally, still remains in the Department of Health) in DER by finding that the legislature intended to confer some portion of this authority upon DER. It is of course clear that DER does have the authority to prevent disease as that relates to the need for water purity. But there is something else altogether involved in this case. Carrying the majority position to its ultimate conclusion, DER can now make future <u>medical</u> decisions on broad based public immunization programs or whatever, so long as the public water supply is the delivery vehicle. More importantly, once the prevention program is begun in a particular municipality, they may <u>never</u> be able to discontinue it!! I don't believe our legislature ever, ever intended it to do this when the water works permit program was transferred from the Department of Health.

I would therefore be constrained to sustain the appeal, on the limited grounds above indicated. We would add our word of agreement with Judge Wood, who said at the conclusion of his opinion in the Williamsport case, <u>supra</u>:

> **"We are not insensitive to the aversion many people feel toward such measures as the use of a public water supply for a purpose as that here concerned. In our view the problem of fluoridation is one for resolution by the legislature."** [11]

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10. Even if the Department of Health had issued the order to the City of Lebanon based on the above authority, this Board would have no jurisdiction to review it. We have no necessity to decide whether the Department of Health prior to the 1971 transfer of authority to DER could have issued the refusal here in question.

11. It is a mystery to me how the majority can agree with Judge Wood's statement when they have just decided -- at length -- that the legislature has ALREADY resolved this very issue.

1. The Board has jurisdiction over the parties and subject matter of this appeal.

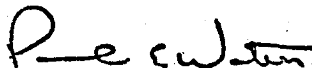
2. The Legislature in 1971 transferred certain powers and authority formerly invested in the Department of Health to the Department of Environmental Resources regarding permits for public water supply systems.

3. The Department of Environmental Resources was never invested with the general health powers conferred upon the Department of Health to "prevent diseases by the most efficient and practical means" by the Administrative Code of 1929, §2102 (71 P. S. 532).

4. The Department of Environmental Resources does not have the authority by virtue of the Act of April 22, 1905, P. L. 260, (35 P. S. 713), or the Administrative Code, §2109 (71 P. S. 539) to prevent a municipality from removing fluoride from its public water supply.

5. The regulations of the Department of Environmental Resources must be construed to give the Department no authority beyond that statutorily delegated to it by the legislature, and they must follow the guidelines of that authority delegation.

In closing, I would sustain the appeal of Daemon Strickler, et al, and the City of Lebanon, Intervenor, and order the Department of Environmental Resources to grant the permit applied for by the City of Lebanon in a manner consistent with this opinion.



PAUL E. WATERS
Member

DATED: JANUARY 2, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

WILLIAM J. PAINTER

Docket No. 74-162-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member-(Issued January 17, 1975)

This matter is before the Board on an appeal by William Painter from an order by the Department of Environmental Resources issued to Appellant on July 10, 1974. The order of the Department directed Appellant not to "re-rent" certain dwelling units, owned by him, until said units satisfied the requirements of the order. For the reasons set forth below we uphold the order of the Department and dismiss this appeal.

FINDINGS OF FACT

1. Appellant is William J. Painter, Box 498, Avella, Pennsylvania, an owner of a duplex dwelling unit known as House 24-25, in the Village of Strida, Cross Creek Township, Washington County, Pennsylvania.

2. Appellee is the Pennsylvania Department of Environmental Resources (hereinafter "DER") which administers, inter alia, §§1917-A and 1919-A of the Administrative Code of 1929, Act of April 9, 1929, P. S. 177, as amended 71 P. S. §5 et seq.

3. On May 7, 1974, Appellee, on the basis of previous inspection and investigation, issued an order to the then owner of House 24-25, George Michaels, setting forth certain conditions alleged to exist in and around said property, finding said

conditions to constitute a public nuisance and ordering their abatement. Said order was never appealed by George Michaels.

4. Sometime between the issuance of the aforesaid order of May 7, 1974, and July 10, 1974, the date of DER's order to Appellant in this case, the Appellant purchased the aforesaid premises, House 24-25, in the Village of Cross Creek Township, Washington County, Pennsylvania, from the said George Michaels. Previous to the purchase from Michaels, Appellant was the agent on the property. In fact, Appellant signed the postal receipt for the certified mail letter containing the departmental order of May 7, 1974, to George Michaels.

5. After an inspection by personnel of the Department of House 24-25 on July 8, 1974, at which time the said premises were vacant, the Department issued on July 10, 1974, an order to Appellant not to rent House 24-25 as living accommodations to any persons before compliance with the order of May 7, 1974, a copy of which was attached to the order of July 10, 1974. The latter order, addressed to William J. Painter, had the following provision set forth in bold face type:

> "You are hereby notified that you may not re-rent these dwelling units until you have complied with the abatement order issued you on May 7, 1974 (copy enclosed) and notified this office for a re-inspection."

6. At the time of the issuance of the July 10, 1974, order to Appellant, there existed at House 24-25, Village of Strida, Cross Creek Township, Washington County, Pennsylvania, the following dilapidated conditions:

a. The house was in a general state of disrepair.

b. There was no water supply serving the house.

c. The paper on the walls and ceilings in the house was peeling off.

d. Electrical wiring was exposed and hanging from the ceiling.

e. The windows and doors were in a state of disrepair: Neither windows nor doors were air tight; panes of glass were missing from the windows which were in deteriorating frames and in need of reglazing.

f. The roof on the premises was leaking.

g. Many rooms had no electrical outlets.

h. The stairs had no handrail.

i. The floors on the front and rear porches were badly sagging and there were many missing floor boards.

j. There was an excessive accumulation of refuse and garbage in the rear yard of the premises.

k. The kitchen and living room coal stoves had inadequately sealed vents at the chimney flue connection.

l. There were no rain gutters or downspouts on the structure.

m. A creek polluted with sewage overflowed into the cellar of the premises causing two feet of septic effluent to stagnate in the cellar.

n. The indoor premises contained exposed lath and missing plaster.

o. The outdoor privy was badly out of plumb and was subsiding into the ground. There was human excrement found on the privy seat, the floor and the outside of the privy. The pit of the privy was filled to ground level with human excrement and the said excrement was seeping from the pit over the ground.

p. The foundation of the house was out of plumb and leaning.

q. The cellar door frame had broken loose.

r. The floors of the premises leaned toward the center of the house.

s. The house was infested with rats.

t. There was a hole through the foundation in the basement.

7. The aforesaid conditions existing in and about the premises in question constitute a hazard to health, safety and welfare.

8. Appellant made no serious effort to abate the conditions set forth in the departmental order of May 7 or July 10, 1974.

DISCUSSION

The conditions of the property are so bad as to leave no question in the minds of the members of this Board that a nuisance detrimental to health exists and that DER was justified in issuing an abatement order to Appellant. Appellant does not seriously contest that his premises is in the condition described in the order of May 7, 1974, nor does he contest the validity of the departmental order of July 10, 1974. Appellant's reason for appealing the order of DER of May 10, 1974, is his claim that departmental personnel prevented

him from repairing the premises in question. There is no credible evidence to support this contention. Appellant made no serious effort to comply with the order.

We construe the departmental order of May 7, 1974, to be incorporated by reference in the order of July 10, 1974, and properly the subject matter of this appeal. DER would have the Board rule that the May 7, 1974, order, not having been appealed within the appeal period, became final and not subject to review. While this is not a substantial issue in this case, we note that the earlier order was directed against Appellant's predecessor in title. While the order may be binding upon George Michaels, to whom it was issued, we are unable to concur with DER that it is also binding upon the present Appellant to whom it was not issued. We conclude, therefore, that with respect to Appellant the substance of the order of May 7, 1974, was incorporated into the departmental order to him of July 10, 1974, and, therefore, is properly before this Board.

There is no question that DER has predicated its order upon a state of facts constituting a public nuisance. That it had the power to do so, see <u>Elias v. Environmental Hearing Board</u>, 10 Pa. Commonwealth Ct. 489, 312 A.2d 486, 489(1973

The only question in this case is whether DER could order Appellant not to re-rent the affected dwelling units until they had been found on reinspection to comply with the requirements of the abatement order of May 7, 1974, which have, as noted above, been incorporated into the July 10, 1974, order. We believe, under all the facts of this case, that the order not to re-rent pending compliance determination is a valid means of carrying out the responsibilities of DER in this area of housing code violations. Re-renting under the circumstances of this case is tantamount to occupation of the premises. We find no reason why DER could not order these premises not to be occupied until in compliance with a validly issued departmental order.

<u>CONCLUSIONS OF LAW</u>

1. The Board has jurisdiction over the subject matter and the parties herein.

2. Sections 1917-A and 1919-A of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §51 <u>et seq</u>., confer upon

DER the authority to order the abatement of conditions and nuisances detrimental to health and, for the purpose of invoking this authority, to ascertain in the first instance whether a given set of circumstances constitute a nuisance detrimental to health.

3. There is substantial evidence produced in this proceeding to the effect that the premises of Appellant, which form the subject matter of the departmental orders of May 7 and July 10, 1974, were on the said dates and all times thereafter maintained in a condition of filth, uncleanliness, dilapidation and disrepair as to be a nuisance detrimental to health and properly subject to an order of abatement.

4. The departmental order issued on May 7, 1974, to Appellant's predecessor in title, when first issued did not become legally binding upon Appellant; however, by attaching a copy of said order to the order of July 10, 1974, and predicating the order of July 10, 1974, on the former order, said order of May 7, 1974, became incorporated into and an integral part of the departmental order to Appellant issued on July 10, 1974.

5. Given the circumstances of this case, DER was within its legal authority under §§1917-A and 1919-A of the Administrative Code of 1929, supra, to order Appellant not to re-rent House 24-25 in the Village of Strida, Cross Creek Township, Washington County, Pennsylvania, until such time as the Department determines that Appellant had complied with the order of DER under date of May 7, 1974.

6. There was no substantial or credible evidence produced on the record in this proceeding which tended to show that personnel of DER in any way obstructed Appellant from complying with the departmental orders of May 7 and July 10, 1974.

ORDER

AND NOW, this 17th day of January, 1975, the action of the Pennsylvania Department of Environmental Resources from which Appellant, William J. Painter, took an appeal in this matter is hereby sustained and the appeal dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: January 17, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of: :

SOUDERS AND SOUDERS, et al :

v. : Docket No. 74-118-W

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES, Appellee, and
HEMPT BROS., INC., Intervenor :

ADJUDICATION

By Paul E. Waters, Member (Issued January 17 , 1975)

This matter comes before the Board as an appeal from the issuance of a permit to Hempt Bros.,Inc. (hereinafter Intervenor), to conduct surface mining in Fairview Township, York County, Pennsylvania, pursuant to the Surface Mining Conservation and Reclamation Act, Act of November 30, 1971, P.L. No. 147,as amended 52 P.S. 1396.1.

The Department of Environmental Resources (hereinafter DER), issued the permit over protest from Appellants, adjacent landowners, who alleged that the quarry operation would with attendant blasting damage the aesthetic value of the area, and that there was inadequate compliance with the law regarding reclamation activities upon completion of the operation.

FINDINGS OF FACT

1. On July 30, 1973, the Intervenor herein applied to DER for a permit to conduct surface mining operations in Fairview Township, York County, Pennsylvania.

2. The proposed surface mining operation would comprise a limestone quarrying operation on a tract of land presently owned by the Intervenor which is in close proximity to the Pennsylvania Turnpike in Fairview Township, York County.

3. Prior to making application for a permit to conduct quarrying operations the Intervenor received on January 17, 1973, the approval of the Fairview Township Board of Adjustment to operate a quarry at the proposed site.

4. The Intervenor's application, Application No. 4873SM11, contained the necessary maps, plans, photographs, engineering and geological information and documentation as required by 52 P. S. §1396.4 and DER's Rules and Regulations promulgated thereunder.

5. During the pendency of the application, the Appellants requested a hearing to oppose the Intervenor's application.

6. DER conducted a lengthy fact finding hearing on January 23, 1974, in which every witness for the Appellants was allowed to voice opposition, and letters from a number of individuals were considered.

7. DER's Hearing Examiner, after giving due consideration to the objections raised by the Appellants and the testimony offered by the Intervenor's witnesses, filed detailed written recommendations with the Department, recommending that special conditions be imposed on the permit.

8. After receiving additional engineering and geological evaluations from its own experts and having given due consideration to all of the factors set out in the Surface Mining Conservation and Reclamation Act, 52 P. S. §1396.1, et seq., DER issued a surface mining permit to the Intervenor which became effective May 17, 1974.

9. This permit contained a list of conditions with which the Intervenor is required to comply, including substantially all of the recommendations made after the hearing attended by Appellants.

10. The area in which the proposed quarrying site is located and in which the Appellants reside, is zoned for agricultural uses which, under the Fairview Township zoning laws, would permit a quarrying operation.

11. Only nine homes in the area surrounding the proposed quarrying operation would have a view of the quarry. All of these nine homes are South of the Pennsylvania Turnpike which would therefore be between these homes and the quarry operation.

12. Of the nine homes which would have a view of the proposed quarrying site, only five of them are within a radius of 2,000 to 3,000 feet of the proposed quarrying site, and none of them are less than 2,000 feet from the proposed quarrying site.

13. The presence of another operating Hempt Bros. Quarry in Camp Hill has had no effect, whether it be short term or long term, on the value of real estate in the immediate vicinity of the quarry, and not even on the value of those homes overlooking it in Green Lane Farms.

14. The Green Lane Farms development which is adjacent to another Hempt Bros. quarry is a subdivision, which arose subsequent to the time the quarrying operation had been established and wherein the homes command a high price.

15. Some of these homes in the vicinity of the Camp Hill Quarry are much closer to the operations of that quarry than any of the homes in the vicinity of the proposed Hempt quarrying site in Fairview Township.

16. The proposed quarrying operation will have no major or substantial impact on property values in the vicinity of this operation, especially in light of its temporary nature.

17. The earth barriers around the proposed quarrying site will be planted as they are formed with either crown vetch or multi-flower rows which would give these earth barriers a green surface.

18. While there was not a timetable set forth in the plan with respect to a planting program, DER required that, as the overburden is stripped, it be planted by the next planting season in order to avoid any erosion or sedimentation problems.

19. While there was no detailed timetable with respect to the time in which the crushing plant would be dismantled after the cessation of the quarrying operation, the regulations require that this be completed within six months after termination of the quarrying operation.

20. This timetable is further supplemented by the fact that reclamation, as required under Special Condition 14 attached to the permit, shall be accomplished with the progress of the mining operation to the highest degree possible. If DER therefore felt that reclamation wasn't concurrent with the operation being conducted, it would require the operator to perform reclamation work.

21. DER does not require the submittal of a timetable for reclamation because the reclamation is to be concurrent with the mining operation, and it cannot dictate how fast the mining operation should proceed; only that the reclamation must be concurrent, and their standards are that within six months of each step the reclamation has to be accomplished. In order to insure this result, DER's regulations require that backfilling or restoration equipment remain on site until restoration is accomplished.

22. According to all recognized damage criteria, the recorded vibrations from the test blasts were below that necessary to cause structural damage to even old prestressed plaster, normally the weakest construction material, at the instrumentation stations, in the immediate vicinity of the stations, or beyond the stations, in the same general direction. Therefore, during normal blasting operations within the conditions set forth in the Intervenor's permit, the structures in the vicinity of the quarry will not be exposed to possible damaging blasting vibrations or be affected by blasting vibrations.

23. A foot was stamped on the ground in the immediate vicinity of the seismograph located on the sidewalk in front of one of the residences. The maximum particle velocity measured as a result of that foot stamping was .460"/second exceeding

test by 13 times.

DISCUSSION

The Appellants allege that the burden of proof in this case should, by virtue of Article I, Section 27[1] of the Pennsylvania Constitution be placed upon the Permittee, Intervenor Hempt Bros.,Inc. They reach this conclusion because of remarks made on the floor of the State General Assembly prior to passage of the amendment, but during a speech thereon. It is true that such statements deserve consideration when there is need for the construction of ambiguous language.[2] This amendment however is silent on the question. We therefore turn to the Rules of Procedure which govern the conduct of proceedings before the Board. Our Rules provide as follows:

> "§21.42 A private party appealing an action of the Commonwealth acting through the Department of Environmental Resources shall have the burden of proof and burden of proceeding in the following cases unless otherwise ordered by the Board....(c) where a party who is not the applicant holder of a license or permit from the Commonwealth protests its issuance or continuation."

We therefore conclude that the burden of proof properly rests with the Appellants.

The major thrust of this appeal centers upon the cited constitutional amendment and whether the mandates thereof have been properly observed by DER in issuing the permit. In order to make this determination we must find out how the actions of DER fit in with the guidelines set for us in the leading case of Payne v. Kassab, 11Pa. Commonwealth Ct. 14, 312 A2d 86 (1973) wherein it is decided that

> "The Courts role must be to test the decision, under review of a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?"

We will discuss each of the three requirements, in turn, keeping in mind upon whom the burden of proof rested.

The single allegation of violation of statute concerns the inadequacy of the time table of the reclamation plan filed with DER by the Intervenor.[3]

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1. "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people. (Adopted May 18, 1971.)"

2. Act of 1937, May 28, P.L. 1019.

3. The statute provides: "(2) Reclamation Plan. A complete and detailed plan for the reclamation of the land affected. Except as otherwise herein provided, or unless a variance for cause is specially allowed by the department as herein provided, each such plan shall include the following: (F) A detailed timetable for the accomplishment of each major step in the reclamation plan, and the operator's estimate of the cost of each such step and the total cost to him of the reclamation program;"

The time table plan is, in fact, as detailed as could reasonably be expected given the fact that much of the reclamation work must be done concurrent with operations. The real concern seems to be that the Intervenor will leave a large unattractive structure or scarred areas long after the work is completed on the site. We are satisfied that this was never proposed by the Intervenor, has not been consented to by DER, and is an enforcement problem if and when it is to be any problem at all.[4]

The second question which the Payne case indicates must be answered is: "Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?" In order to answer this question we have reviewed the evidence in an effort to determine what if anything the Intervenor can do, short of having no quarrying operation at all, which would give a more aesthetically pleasing nature to the permitted activity. I find no positive or concrete ideas or avenues which are open to the Intervenor that can better preserve Appellants Article I rights than the present proposal to build an earthen barrier and keep the necessary blasting within safe limits.[5]

Moving to the third and final Payne concern: "Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?" There is a question as to whether this test is properly applicable to private as opposed to public property usage. It raises Fourteenth Amendment questions which we will not attempt to answer at this time, inasmuch as they have not been raised by Intervenor.

The record does not explore the extent of benefit which will likely be derived from the quarrying operation. We can only take note of the usual and well known uses to which stone can be put. Coupled with this is the inference that the Intervenor would not be engaged in these proceedings unless it intended to operate the quarry at a profit. We are of course impressed by the fact that this is to be a temporary operation.[6] In addition we have serious doubt whether even temporary economic

---

4. There are bonding requirements which serve the very enforcement purpose above outlined.

5. Appellant does not contend that the Surface Mining Conservation and Reclamation Act is itself unconstitutional.

6. The estimated time for completion of the quarrying operations was stated to be three years.

damage [7] will be done to the nine homeowners living closest to the proposed quarry. There will be an effect on the aesthetic value for the present occupants and this concern is not unjustified or unfounded. But weighing this, as we must, against the benefits that can reasonably be expected from the operation, it is clear that DER did not abuse its discretion in granting the permit.

The same guidelines applied to the Intervenor's blasting proposal lead to the same conclusions. The Intervenor conducted a number of test blasts on the site and the unchallenged and overwhelming evidence was that the proposed blasting for the quarry operation will be safe for all structures in the area. If the tests and calculations regarding the blasting safety turn out to be inaccurate, we are not unmindful of the fact that our decision does not in any way abrogate the substantive rights of the adjoining property owner to be recompensed for any and all actual damage to their property.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this proceeding.

2. The action of DER in granting the permit to Intervenor Hempt Bros., Inc. is consistent with the concept of "controlled development" of natural resources--rather than no development.

3. There has been no violation of Article 1, Section 27 of the Pennsylvania Constitution, and all statutes and regulations have been complied with in the issuance of a surface mining permit to Intervenor.

ORDER

AND NOW, this 17th day of January, 1975, the action of DER in issuing a surface mining permit to Hempt Brothers, Inc., Intervenor, is hereby sustained, and the appeal of Souders and Souders, t/a Souder Brothers, et al is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS, Chairman

JOSEPH L. COHEN, Member

JOANNE R. DENWORTH, Member

7. We are surprised, but impressed, by the evidence indicating no value loss to homes located near one of the Intervenor's other quarry operations.

DATED: JANUARY 17, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

WILLIAM E. NASH and JULIA NASH, his wife

Docket No. 74-040-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member--Issued January 27, 1975.

This matter is before the Board on the appeal of William E. and Julia Nash, husband and wife, from the action of the Department of Environmental Resources of the Commonwealth of Pennsylvania in refusing to grant the Appellants certain exceptions to the sewer connection ban which the Department of Environmental Resources imposed upon the sewerage system of the Borough of Lansdale, Montgomery County, Pennsylvania. Appellants desire relief from the ban in order to acquire building permits from the Borough of Lansdale which would permit them to build custom built homes on a subdivision which they own in the Borough.

FINDINGS OF FACT

1. Appellants, William E. Nash and Julia Nash, his wife, reside at 125 Laurel Lane, Lansdale, Montgomery County, Pennsylvania. William E. Nash is engaged in the construction of custom residential homes in the Borough of Lansdale.

2. Appellee is the Department of Environmental Resources of the Commonwealth of Pennsylvania, (hereinafter "DER"), and is that agency of the Commonwealth charged with the administration and enforcement of the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1 et seq.

3. On February 16, 1973, Appellee, through its Regional Sanitary Engineer, C. T. Beechwood, issued an order to the Borough of Lansdale, Montgomery County, Pennsylvania, by which the Borough was ordered to prohibit any additional discharge into its sanitary sewer system or treatment facilities without written authorization from DER, except that such prohibition shall not apply to connections to approve sewers which will serve new construction for which building permits were issued prior to the date of the receipt of the said order.

4. DER, Appellee herein, has adopted a policy of granting exceptions to sewer connection bans, which policy is set forth in the Sanitary Engineering Policy and Procedure Manual of DER. This policy is stated as follows:

> "1. Where building permit for new construction was issued by the municipality prior to or on the date of receipt of the ban.
>
> "2. Where the connection will serve an existing occupied dwelling built prior to the date of receipt of the ban.
>
> "3. Where the connection will result in no increase in sewer flows to overloaded facilities."

5. Sometime during the year 1969 Appellants acquired a tract of land at the east end of the Borough of Lansdale, between Lansdale Avenue and Vine Street and between 6th and 4th Streets. This tract of land is known as the "Gillinder tract". After the acquisition of this tract Appellants applied to the Borough of Lansdale for approval of a subdivision plan for this tract. The subdivision plan was approved by the Borough on October 26, 1969. The subdivision contained 17 lots, building permits for two of which were acquired by Appellants prior to the institution of the sewer connection ban by DER.

6. On or about February 22, 1971, the Borough of Lansdale made application to DER for a permit for a sewer extension to serve the Gillinder tract acquired by Appellants for which previous subdivision approval had been granted by the Borough. In response to the said application, DER, through its Regional Sanitary Engineer, C. T. Beechwood, issued the Borough of Lansdale a permit no. 4671406 for the construction of said sewer extension.

7. Subsequent to the approval by the Borough of the subdivision plans for the Gillinder tract and revisions thereof, Appellant William E. Nash entered into a subdivision agreement with the Borough for the development of the tract and made a land acquisition loan in the amount of $130,000.00 on September 23, 1970, which loan included approximately $68,000.00 pledged for public improvements on the tract.

Of the funds so pledged, approximately $12,000.00 remained in escrow as of the date of the hearing. The total amount owed by Appellant on the loan, including the escrow sum, is approximately $70,000.00 to $80,000.00 as of the date of the hearing. These sums are exclusive of interest which is at the rate of 9% per annum. In addition, Appellant is paying approximately $2,700.00 a year for real estate taxes on the 15 lots of the subdivision which have not been sold.

8. On January 30, 1974, Appellants requested DER to grant exceptions from the sewer connection ban of February 16, 1973, to permit the connection of 15 sewer laterals to the Borough's sewer system. Said request was denied by DER, acting through C. T. Beechwood, its Regional Sanitary Engineer, by letter dated February 8, 1974.

9. With respect to the 15 lots for which Appellants sought and were denied by DER exceptions from the sewer connection ban, Appellants were not in possession of any building permits from the Borough of Lansdale prior to the effective date of the sewer connection ban.

10. During the calendar year 1973 there were 21 properties in the Borough of Lansdale which were demolished and the land on which they stood converted to parking facilities. The number of lavatories in these properties totaled 23. Eight of these properties with a total of nine lavatories were demolished prior to the institution of the sewer connection ban in the Borough of Lansdale, Montgomery County, Pennsylvania.

11. During the calendar year 1973 the Borough of Lansdale issued 210 building permits, despite the fact that on February 16, 1973, DER issued the sewer connection ban to the Borough.

12. Because of the fact that in 1973 the Borough issued 210 building permits, an unspecified number of which necessarily involved connections to the sewage treatment facilities of Lansdale, it is impossible to determine from the state of the record whether the number of such connections was more or less than the number of sewer disconnections resulting from the 1973 demolitions to which reference has been made above. It therefore cannot be determined whether the projected flows of sewage from the 15 properties for which Appellants request sewer connection ban exceptions would not result in an increase in sewer flows to the Lansdale Borough sewage treatment plant.

DISCUSSION

On February 16, 1973, under the authority of the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1 et seq., DER issued an order to the Borough of Lansdale, Montgomery County, Pennsylvania, requiring it to accept no further sewer connections to its sewerage facilities unless so permitted by DER. The reason for issuing the ban was that the sewage treatment facilities of the Borough of Lansdale were hydraulically overloaded, thereby resulting in discharges of raw or inadequately treated sewage to the waters of the Commonwealth in controvention of its permit conditions. There is currently before the Board an appeal pending initiated by the Borough of Lansdale to contest the validity of the order of DER instituting the sewer connection ban. The present Appellants are Intervenors in that proceeding which is docketed as Borough of Lansdale v. Commonwealth of Pennsylvania, Department of Environmental Resources, E.H.B. Docket No. 73-057-C. The intervention of Appellants in that case was for the purpose of contesting the validity of the ban instituted by DER.

The subject matter of this Adjudication is an appeal by Mr. and Mrs. Nash from the action of DER in refusing them exceptions to the sewer connection ban imposed on the Borough of Lansdale for the benefit of 15 of 17 lots of a subdivision in the Borough owned by Appellants.

Appellants are engaged in the business of custom home construction in the Borough of Lansdale, Montgomery, Pennsylvania. Some time in 1969 they purchased the "Gillinder tract" in the Borough of Lansdale for development as a residential community. They applied for and obtained approval of the Borough to subdivide the property into 17 separate parcels of land. Appellants have expended substantial sums of money in attempting to improve this subdivision, and have borrowed considerable sums in order to build and sell custom dwellings in the subdivision. As a consequence of departmental action in imposing the sewer connection ban on the Borough of Lansdale and the refusal of DER to grant exceptions to Appellants with regard to the 15 lots on their subdivision, the Appellants are not able to realize a return on their investments and, moreover, are incurring heavy interest costs and real estate taxes in respect to these 15 lots.

Appellants contend that they are entitled to an exception from the sewer connection ban for the following reasons:

1. The issuance of a permit to the Borough of Lansdale for a sewer extension to serve Appellants' subdivision, which permit was granted to the Borough by DER in 1971, confers upon Appellants a vested right to connect to that extension irrespective of the issuance of the sewer connection ban.

2. Appellants are entitled to the requested exceptions for the reason that they fall within the policy of DER in granting such exceptions.

3. The circumstances attendant to Appellants' subdivision are equitably equivalent to the policy of DER in granting exceptions to sewer connection bans.

Appellants claim that they have acquired a vested right to connect to the sewer system of the Borough of Lansdale and that this right accrued prior to the imposition of the sewer connection ban of February 16, 1973. They base their claim upon the following facts, all of which occurred prior to the imposition of the sewer connection ban:

1. The Borough of Lansdale gave approval to the Appellants' subdivision plan,

2. Appellants entered into an agreement with the Borough of Lansdale and First Federal Savings and Loan Association of Lansdale under which the Nash's borrowed approximately $68,000.00 and pledged the same for public improvement on the subdivision project,

3. Appellants directed and constructed all necessary public improvements on their subdivision, and

4. DER granted the Borough a permit for a sewer extension to serve Appellants' subdivision.

Regardless of the nature of the legal rights acquired by Appellants vis-a-vis the Borough of Lansdale, these rights cannot stand against valid exercises of the police power. DePaul v. Kauffman, 441 Pa. 386, 272 A.2d 500 (1971). As the Court stated in DePaul, supra, at 272 A.2d 504:

> "It has long been recognized that property rights are not absolute and that persons hold their property 'subject to valid police regulation, made, and to be made, for the health and comfort of the people. * * *' Nolan v. Jones, 263 Pa. 124, 131, 106 A.235, 237 (1919). . . ."

With regard to any claim based upon impairment of contractual obligations, the language of the Court in DePaul, supra, at 272 A.2d 506-507 is dispositive:

> " . . . it must be borne in mind that 'the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as * * * are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.' Home Bldg. & Loan Ass'n v. Blaisdell,290 U.S. 398, 437, 54 S. Ct. 231, 240, 78 L.Ed. 413 (1934). This Court has itself recognized that '[t]he constitutional protection of the obligation of contracts is necessarily subject to the police power of the state, and therefore a statute passed in the legitimate exercise of the police power will be upheld by the courts, although it incidentally destroys existing contract rights. * * *'" Zeuger Milk Co. v. Pittsburgh School District, 334 Pa. 277, 280, 5 A.2d 885, 886 (1939) . . ."

Regardless of the foregoing principles, however, we do not believe that Appellants had a vested right to connect to the sewer system of the Borough of Lansdale. We are of the opinion that the nature of this interest is a conditional privilege at best. See: Commonwealth of Pennsylvania, Department of Environmental Resources v. Borough of Carlisle and Carlisle Borough Sanitary Sewer Authority, and Borough of Carlisle and Carlisle Borough Sewer System Authority v. Commonwealth of Pennsylvania, Department of Environmental Resources, (No. 1748 C. D. 1973 and 1774 C. D. 1973, issued December 27, 1974), in which the Court stated:

> " . . . The DER order in question merely restricted issuance of new sewer permits in which property owners now have no property right whatever. More accurately, property owners may be said to possess a mere privilege of utilizing a sewage collection system of the municipality upon obtaining a permit which is issued under limited conditions. . . ." (Footnote omitted).

Inasmuch as the matter now before this Board is an appeal from the action of DER in denying Appellant's request for sewer connection ban exceptions, we are not at liberty in this proceeding to inquire as to the validity of the ban itself. F. & T. Construction Co., Inc. v. Department of Environmental Resources, 6 Commonwealth Ct. 59, 293 A.2d 138 (1972).

Because of the foregoing considerations it cannot be said that the sewer connection ban imposed on the Borough of Lansdale by DER on February 16, 1973, could not constitutionally interfere with Appellants 'rights' to connect to the Borough of Lansdale sewer system. We must now inquire, however, whether Appellants are entitled to connect to the Lansdale sewer system by virtue of established departmental policy granting exceptions from sewer connection bans or by the policy of this Board to grant such exceptions where the facts of the case indicate circumstances equitably indistinguishable from those under which the departmental policy would grant an exception.

Because Appellants are in the business of constructing custom built homes, they are unable to acquire building permits with respect to any parcel of land unless

and until they have plans and specifications with respect to a proposed building on such parcel. While they do build some custom built homes for speculation, the majority of their building depends upon acquiring customers for whom they build homes according to their customers'wishes. Thus, the Borough of Lansdale will not grant them building permits for custom built houses unless they have the plans and specifications therefor. Inasmuch as this depends upon acquiring customers and settling upon individually determined building plans rather than building according to a predetermined model on a mass basis, Appellants are effectively precluded from obtaining building permits from the Borough of Lansdale for all their lots at one time. Because of the nature of their business, Appellants were unable to obtain building permits from the Borough of Lansdale for their entire subdivision prior to the imposition of the sewer connection ban. In fact, out of 17 lots in the subdivision, they were only able to obtain 2 permits prior to the imposition of the ban. It is acknowledged that when they applied for the exceptions to the ban in 1974 they were not in possession at that time of building permits for lots for which they were asking that exceptions be granted. Clearly, Appellants are not entitled to exceptions for their 15 lots for the reason that they were not in possession of valid building permits prior to the imposition of the ban in regard to these lots.

Inasmuch as Appellants are engaged in the business of new home construction, they were not able to qualify under another policy of DER whereby an exception would be granted "where the connection will serve an existing occupied dwelling built prior to the date of receipt of the ban." Appellants tried to bring themselves within another policy of DER whereby DER would grant an exception to a sewer connection ban where the connection will result in no increase in sewer flows to the overloaded facilities. The evidence introduced by the Appellants to support this contention consisted of showing that during the year 1973 there were demolished within the Borough of Lansdale 21 structures having within them a total of 23 lavatories. These structures were totally demolished and the land on which they formerly stood is now parking lots. Appellants then argue that the 15 lots for which they seek exceptions to the sewer ban, when homes are built upon them, will not contribute more sewage flows to the Borough treatment plant than existed on the date the ban was imposed.

We cannot accept Appellants' contentions for the facts of the case do not bear them out. Appellants have the burden of proving their entitlement to an exception. F. & T. Construction Co. v. Department of Environmental Resources, supra. The evidence clearly indicates that during the year 1973 the Borough issued 210 building permits. Admittedly not all of these building permits resulted in additional sewer connections. However, no substantial evidence was produced tending to show that the granting of these 210 building permits would not result in additional sewage flows over and above those which were terminated by the demolition of the 21 structures to which reference was made above. Absent such a showing we cannot even consider whether Appellants are entitled to exceptions based upon this stated policy. Clearly, on this issue, Appellants have not sustained their burden.

Moreover, we are of the opinion that this exception does not permit the interpretation Appellant advances. The Department has interpreted this exception to be available only with regard to the same parcel of land. Thus, for example, where an existing structure on a particular parcel of land is destroyed, this exception allows another structure to be erected and sewage facilities provided where there would be no increase in the amount of sewage flowing to the already overloaded system. It does not permit, under the Department's interpretation, the transfer of sewer connection privileges from one parcel of land to another, as suggested by Appellants. We are inclined to accept the Department's construction of its own policy in this regard. Therefore, even if Appellants prove that the expected sewage flows from the 15 lots would not exceed the flows from the properties in other parts of the Borough which were destroyed, they would not be entitled to sewer ban exceptions for that reason.

Appellants invite the Board to create an exception for them because, according to their expert witness, the sewage flows from the 15 lots would be "de minimis" insofar as adding to the pollution flow to the waters of the Commonwealth is concerned. We are persuaded by DER's argument, however, that to allow an exception on this basis would totally undermine the policy of DER in imposing sewer connection bans. This invitation we decline to accept.

Appellants claim they have been prejudiced by the fact that they are builders of custom homes and that therefore they cannot obtain building permits for their entire subdivision at one time. Therefore, they argue, that consideration of their method of conducting their business should incline the Board to fashion an exception for them. We declined to do that: See Commonwealth v. Moon Nurseries, Inc. E.H.B. Docket No. 72-395 (issued December 31, 1973). We adhere to our decision in Moon on these issues for the reasons stated therein. We stated in Moon:

> "We understand Moon and BACS to be contending, first, that by the very nature of their home building operation they were precluded from obtaining building permits prior to the date when this sewer connection ban was imposed. They distinguish this circumstance from the situation where some entity, not a custom builder of homes, could have sought and obtained building permits soon after receipt of subdivision approval and sewer extension and construction authorization. They also allege, in support of their first contention, that by the very nature of their business they were required to spend considerable sums in site preparation prior to finding a purchaser. They allege that the amount of this investment may actually be much greater than that of a contractor who, before he finds a purchaser, prepares the site, obtains building permits and completes his construction.
>
> "They assume that the reason why the Department will consider an exception when a building permit has been obtained prior to the imposition of the ban is that the Department has recognized the fact that a builder has made a substantial commitment in reliance upon his building permit. Moon and BACS reason that they have made as much, if not more of a commitment, in reliance upon the fact that they were notified by the Township that the Department had issued Water Quality Management Permit No. 0970423 to the Authority, by the terms of which the Authority was authorized to construct pump stations, sewers and appurtenances and to discharge treated sewage to the waters of the Commonwealth.
>
> * * *
>
> "We have considered the first contention and we hold that this Board will not create a new ground for an exception to a sewer connection ban based upon the distinction between a custom home building operation and an operation which is not, or based alone upon the ordinary ramifications of that distinction. In the first place we would be "opening the Door" to a plethora of claims by home builders who, for obvious reasons, would insist that no sewer connection ban would ever be applicable to them because they were custom home builders. Such claims could certainly defeat the purpose for which the ban was intended and could lead to great confusion and uncertainty. In the second place, we are persuaded that a custom home builder should be held to the date when a building permit is granted in determining whether an exception is granted to him since he certainly has an opportunity to find his purchasers at a stage no earlier in his development plans than his non-custom home builder counterpart."

Finally, we decline to create an exception based upon the water quality permit issued to the Borough of Lansdale in 1971 which authorized the construction of a sewer extension to serve the Appellants' subdivision. In doing so, we note our discussion above regarding vested rights and the police power. Further, we have

reviewed our Adjudication in Moon Nurseries, Inc., supra, and have reconsidered our discussion therein relative to whether a permit for a sewer extension granted a municipality to serve a given subdivision would create a vested right in the owner of the subdivision to connect the lots in his subdivision to the municipal sewer system irrespective of the issuance of a sewer connection ban. In doing so, we deem it appropriate to reformulate our position in this regard.

What is commonly designated as a "sewer connection ban" derives from the authority of DER under the provisions of the Clean Streams Law, supra, to prohibit further sewer connections (§203(b), 35 P. S. §691.203(b)) and to require conduct, previously not requiring a permit, to be subject to permit (§402,35 P. S. §691.402). Moreover §202 of the Clean Streams Law, supra, provides in relevant part as follows:

> "No municipality or person shall discharge or permit the discharge of sewage in any manner, directly or indirectly, into the waters of this Commonwealth unless such discharge is authorized by the rules and regulations of the board or such person or municipality has first obtained a permit from the department."

25 Pa. Code §91.33 provides as follows:

> "(a) A permit will not be required for the discharge of sewage or industrial wastes into a sewer, sewer system or treatment plant which has been approved by a permit from the Department, provided that the sewer, sewer system or treatment plant is capable of conveying and treating the discharge and is operated and maintained in accordance with the permit and applicable orders, rules and regulations.
>
> "(b) No person or municipality may authorize or permit the added discharge of sewage or industrial wastes into a sewer, sewer system, or treatment plant owned or operated by such person or municipality without written authorization from the Department if such person or municipality has previously been notified by the Department that the sewer, sewer system, or treatment plant is not capable of conveying or treating additional sewage or industrial wastes, or is not operated or maintained in accordance with the permit or applicable orders, rules and regulations."

The law and the regulations of DER make it abundantly clear that DER has the authority to ban sewer connections to an overloaded sewage treatment facility. Moreover, the regulations are clear that while a permit is not required for the discharge of industrial wastes into a sewer system or treatment plant which has been approved by departmental permit, under certain conditions, a permit for the added discharge of sewage and industrial waste into such a system is required where DER has previously notified the municipality that the sewer system or treatment plant is not capable of conveying or treating additional or industrial wastes . . . .

It is, therefore, indisputably clear that when DER imposed a sewer connection ban on the Borough of Lansdale, the Borough was no longer in a position to accept new connections to its system except as such connections were specifically authorized by departmental permit. Thus, while Appellants did not require a permit prior to February 16, 1973, to connect to the Borough of Lansdale sewer system, thereafter they were required to do so subsequent to that date. The process of granting exceptions to the ban is in reality a permit issuing process authorized under 25 Pa. Code §91.33(b).

This process being explicitly authorized under the law and regulations, this Board has a responsibility to fashion its Adjudications so that clearly enunciated and strong public policy embodied in statutory and regulatory provisions of the Commonwealth are not likely set aside for insubstantial reasons. For the foregoing reasons, we are of the opinion as follows:

1. That a permit granted to a municipality for a sewer extension to serve a given subdivision within such municipality does not in and of itself confer upon the owner of the subdivision the unrestricted right to connect to that sewer extension.

2. The right of a subdivision owner to require connections for his subdivison to a municipal sewer system is subject to proper police power exercises by the Commonwealth.

3. The only basis upon which the Commonwealth may be required to permit an exception to a previously imposed sewer connection ban is through such action by the Commonwealth as to amount to an estoppel against the Commonwealth from refusing to grant a permit for an exception.

We believe that in the exercise of its police power neither the Commonwealth nor an agency thereof can be estopped except for cogent reasons. Otherwise, properly enacted exercises of the police power could be easily subverted. This Board chooses to defer to DER under proper legislative authority where DER has the undoubted right to take action. If DER in dealing with a party actively misleads that party to its detriment this Board will issue an exception to a sewer connection ban where the policy of DER and the previously enunciated policy of the Board do not allow it.

We feel that this case does not present those overriding issues of fairness and estoppel which would preclude the Commonwealth from enforcing the sewer connection

ban as against Appellants. The equities in this case in favor of the Appellant are similar to those in F. & T. Construction Co., Inc. v. Department of Environmental Resources, supra. In light of that opinion and in light of the fact that the elements of estoppel are not present in this case, we refuse to overrule DER in this instance.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter and the parties herein.

2. The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1 et seq. authorizes DER to impose sewer connection bans upon municipal sewerage systems where such system receives raw sewage in excess of its designed capacity, causing overloads to the system and discharges of raw and/or inadequately treated sewage into the waters of the Commonwealth.

3. Regardless of whether a party has a vested right or a contractual right to connect to a given municipal sewerage system prior to the institution by DER of a sewer connection ban, the imposition of such ban prior to the exercise of said "right" of connection validly precludes the connection to the sewerage system without prior approval of DER, where no building permit has been issued.

4. All vested and contractual rights of private parties are held subject to the valid exercise of the state's police power.

5. A party requesting exceptions to a sewer connection ban has the burden of establishing his entitlement thereto, and, failing to do so, has no valid basis for relief before this Board.

6. Appellants herein offered no evidence which would entitle them to an exception under the policy granting exceptions from sewer connection bans established by DER or by this Board.

7. The evidence presented by the Appellants does not establish a set of circumstances equitably indistinguishable from those circumstances under which exceptions to sewer connection bans are permitted by DER or this Board .

8. The policy of DER with respect to sewer ban exceptions is a reasonable policy.

9. Appellants are not entitled to sewer connection ban exceptions for their 15 lots on their subdivision for which they made application.

O R D E R

AND NOW, this 27th day of January, 1975, the action of the Pennsylvania Department of Environmental Resources in denying Appellants 15 exceptions to the sewer connection ban of the Borough of Lansdale is hereby sustained and the appeal dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: January 27, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of: :

RONALD E. FREEZER and GEORGE L. WOODS :

Docket No. 74-164-W :

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
LYCOMING COUNTY SANITARY COMMITTEE

A D J U D I C A T I O N

BY: Paul E. Waters, Chairman (Issued--January 31, 1975)

This matter comes before the Board as two appeals from the refusal of on-lot sewage disposal permits to Appellants Ronald E. Freezer and George L. Woods by the Lycoming County Sanitary Committee in consultation with the Department of Environmental Resources.

The original application for permits was denied May 8, 1974, to Appellant Woods and, on July 12, 1974, a permit issued to Appellant Freezer was revoked. Because of new regulations and a claim by the Appellants that an employee of the County having charge of the permits was biased and the fact that he had left the employment of the County, new applications were accepted for the same lots in Fairfield Township. The new sanitary administrator for the County inspected the deep pits to again determine the suitability of the sites for on-lot systems. A hearing was held by the County Committee and again the permits were denied based on the soil conditions.

On August 26, 1974, the new county sewage enforcement officer examined the deep test pits on the sites. On Appellant Freezer's lot extensive mottling[1]

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1. "Mottling is, in simplest terms, a variation in the coloring of soils. When that variation shows a concentration of redder colors in some spots, and grayer colors in others–a variation in "chroma", in particular–it will almost invariably be due to segregation of iron compounds from other components in the soil, and especially segregation of reduced (ferrous) iron compounds from oxidized (ferric) iron compounds. Iron compounds in the soil in the presence of air for any extended period of time will oxidize to the ferric state; ferric compounds are generally red. If the water table rises to a given level for prolonged periods of time, say eighteen inches, . . . then the relative absence of oxygen produces reducing conditions, and the ferric compounds are changed to ferrous compounds. Ferrous compounds are generally grayer–of a lower chroma. The ferrous compounds tend to migrate, and collect in nodules; when the water table drops, many of these nodules will be exposed to air, and oxidize to ferric iron. Nodules that for some reason the air did not reach, and areas of the soil from which much of the iron had earlier migrated, will appear gray." Fabiano v. Commonwealth, EHB Docket No. 73-051-B (issued August 1, 1973).

was discovered from thirteen to seventy-one inches. In addition there were coarse rock fragments of 25-30% by volume. On the basis of this evidence the permits were denied in August 1974. Similar conditions were discovered on Appellant Woods' lot, and this evidence satisfies us that there is a seasonal high water table which makes the lots unsuitable for a standard on-lot sewage system.

The Regulations of the Department require that on-lot systems be installed where there is a minimum of four feet from the bottom of the system to ground water or rock formations.[2]

The Appellants' entire case rested upon one Edwin Koppe, a consulting geologist of Harrisburg, Pennsylvania. The problem is, that this witness was never called to testify and we do not have the benefit of his direct testimony and cross examination.[3] If he had been present and, as Appellants suggest, would have said all of the things which they allege regarding soil suitability, perhaps we would reach a different result.

On the record as it is before us, the Appellants have the burden of proving that they are entitled to permits, by substantial evidence. They have failed.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal.

2. The Lycoming County Sanitary Committee has properly denied the on-lot sewage disposal permits requested by Appellants in Fairfield Township, Lycoming County, Pennsylvania.

3. Appellants have failed to carry their burden of proving that the denial of on-lot sewage disposal permits was arbitrary, unreasonable or otherwise contrary to law.

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2. Title 25 of the Rules and Regulations of the Department of Environmental Resources, Chapter 73, Rule 73.11 (c) and (d) provide:

"(c) The maximum elevation of the seasonal ground water table or perched water table, as determined by direct observation of the water table or by the presence of soil mottling shall be at least four feet below the bottom of the aggregate to be used in the subsurface absorption area.

"(d) Rock formations and impervious strata shall be at a depth at least four feet below the bottom of the aggregate to be used in the subsurface absorption area. For purposes of this subsection, rock formations shall be deemed to be rock which is so slowly permeable that it prevents downward passage of effluent, or rock with open joints or solution channels which permit such rapid flow that effluent is not renovated. This includes masses of shattered rock fragments with insufficient fine soil to fill the voids between the coarse fragments."

3. The examiner did everything possible to assist Appellants in bringing this important testimony before the Board. A number of recesses were taken for the express purpose of locating the missing witness.

ORDER

AND NOW, this 31st day of January, 1975, the appeals of Ronald E. Freezer and George L. Woods are hereby dismissed.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: January 31, 1975

llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

MILL SERVICE, INC.

Docket No. 74-253-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member--Issued January 31, 1975.

This matter is before the Board on appeal from the action of the Department of Environmental Resources (hereinafter "DER") in issuing an order to Appellant, Mill Service, Inc., on November 18, 1974, revoking Appellant's industrial waste permit and ordering it to cease operation of its industrial waste facility in South Huntingdon Township, Westmoreland County, Pennsylvania. Contemporaneous with filing the appeal, Mill Service petitioned the Board for a supersedeas, a hearing on which petition was held on November 21, 1974, and another continued hearing on November 23, 1974. The writer of this Adjudication refused to grant the petition.

On the 20th day of December, 1974, a hearing on the merits of the appeal was held, at the end of which the parties stipulated on the record that the Board could issue an Adjudication in this matter prior to the receipt of the notes of testimony. This was done in the interest of expediting the disposition of this matter, it being understood that the parties by so doing would not in any way waive any of their legal rights with respect to the Adjudication or an appeal therefrom.

FINDINGS OF FACT

1. Appellant, Mill Service, Inc., is a corporation organized and doing business under the laws of Pennsylvania. Appellant operates an industrial waste treatment facility in South Huntingdon Township, Westmoreland County, Pennsylvania, for the treatment of acid waste products of the steel industry.

2. Appellee is the Pennsylvania Department of Environmental Resources which is charged by law with the administration and enforcement of the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1 et seq.

3. In the operation of Appellant's facility, spent pickling liquor is collected from steel plants and transported to Appellant's facility by means of tank trucks. The incoming acid with a pH of one to two is temporarily held in acid storage on Appellant's property. The acid is then transferred to a mixing tank where a lime slurry is added intended to bring the mixture to a pH of approximately nine. The resulting slurry is then transferred to one of the three existing lagoons on Appellant's property.

4. On February 27, 1974, Appellant made application to DER for a waste water permit which authorized the operation of its waste treatment facilities and envisioned the building of an additional lagoon to the existing three lagoons, and the removal of sludge from the lagoons to a landfill on Appellant's property. The Appellant's intention in applying for the said permit was to abandon existing lagoons number two and three and to abandon their use. When lagoons number two and three are sufficiently dry, they will be regraded so that the existing embankment of lagoon number one will be strengthened and that smooth surface contours will be provided to prevent erosion of the surface of the ground. Thus, the application contemplates the use of two lagoons--lagoon number one and proposed lagoon number four to hold the treated effluent from the treatment plant. Periodically, sludge will be removed from the lagoons and be deposited on a proposed landfill on Appellant's property. Through the process of evaporation, the removal of sludge and the recirculation of waste water through the treatment facilities Appellant intends that there be no discharge to the waters of the Commonwealth from its operation.

5. Sometime in the middle of 1973, the breast on Appellant's lagoon number three collapsed and needed repair. During the repair a pipe was inserted in it

approximately two to three feet below the top. This pipe was designed to permit liquid to flow from lagoon number three when the contents of the lagoon reached the level of the pipe. The placing of the pipe in the side of the lagoon was designed as a stabilizing mechanism to prevent the lagoon from collapsing again. At the time that the pipe was installed or soon thereafter, there was a small pond created to take the drainage from the pipe whenever it occurred. Although the pipe was permitted to remain in the breast of the lagoon until late November 1974, the pond associated with it was removed sometime in 1973.

6. Although the Appellant knew that there was an existing pipe in lagoon number three which if unplugged would discharge waste waters if the contents in the lagoon were at least at the level of the pipe, Appellant did not reveal the existence of this pipe to DER when it made application for a permit.

7. On August 13, 1974, DER issued to Appellant Water Quality Management Permit No. 6574202 in response to Appellant's application therefor of February 27, 1974. This permit had appended thereto six consecutively, alphabetically lettered special conditions. One such condition (condition F) provided that the permit does not approve any discharge from the site. It further required that should it appear that an overflow of water from the basins or lagoons to the waters of the Commonwealth will take place, it was necessary for Appellant to secure prior approval for such discharge from DER. Application for such approval was to be made at least six months prior to the anticipated date of discharge.

8. On November 14, 1974, a member of DER, in response to a complaint, went onto the property of Appellant for the purpose of ascertaining whether there was a discharge from Appellant's operation into the waters of the Commonwealth. Upon investigation, he ascertained that there was a wooden plug, apparently removed from the pipe, laying next to the pipe. He also found that the inlet end of the pipe in the lagoon was concealed with rocks.

DER, on being apprised of the discharge from lagoon number three on Appellant's property into Sewickley Creek revoked Appellant's permit on November 18, 1974, and in the order of revocation ordered Appellant to cease its operations from that time on until such time as Appellant shall have received a new permit from DER.

9. Subsequent to the receipt of the order of revocation, probably between the period of November 18, 1974, and November 23, 1974, Appellant caused the pipe to be rendered inoperative.

DISCUSSION

Appellant, Mill Service, Inc., for many years prior to 1974 operated a waste treatment facility in South Huntingdon Township, Westmoreland County, Pennsylvania, for the treatment of stunt pickle liquor from steel plants in and around the Pittsburgh area. Appellant would carry the liquor wastes in tank trucks from the steel plants to its facility and deposit the pickling liquor into acid storage tanks prior to treatment. From these storage tanks the liquor was transported to Appellant's treatment facility which contained a lime slurry designed to neutralize the acid in the pickling liquor. The effluent from the treatment plant was then transported to one of three lagoons on Appellant's property. In one of these lagoons, lagoon number three, there was inserted in its breast about two or three feet below the rim of the lagoon a pipe to discharge the contents of the lagoon if the contents rose to a point equal to the height at which the pipe was located. This pipe was put in the lagoon after the breast of the lagoon had collapsed and was in need of repair. It was placed therein as a stabilizing device so that the lagoon would be emptied of some of its contents prior to filling to a threatening height. Below the pipe on the outside of the lagoon, there was constructed a small pond to receive the effluent from the pipe. Although the pipe was not removed, the pond was dismantled sometime in 1973.

On or about February 27, 1974, Appellant made application to DER for a waste water management permit which was designed to permit the continued operation of its waste treatment facilities and to provide for the construction of a new lagoon, lagoon number four, and strengthen lagoon number one. Lagoons number two and three would be emptied of their contents and no longer used for the storage of waste. In connection with this application, Appellant also made application to DER for a permit to operate a landfill which would contain the sludge from the lagoon wastes. After several revisions of the application, Appellant was granted a waste water management permit by DER. It was also granted a permit to conduct a landfill on its property to dispose of the sludge. The solid waste disposal permit for the landfill is not in contention in this case.

In none of the application documents filed with DER in respect to its waste water management permit did Appellant ever reveal to DER that there was a pipe in lagoon number three which was designed to drain off waste water from that lagoon when its contents reached the level of the pipe. It is fair to assume from the evidence in this matter that DER, had it known of the existence of this pipe, would have demanded additional assurances from Appellant with respect to lagoon number three. There is no credible testimony in the record which satisfactorily explains why the existence of this pipe was not revealed to DER, especially when the application to DER for the waste water treatment permit represented that the operation of the plant would not result in a discharge of waste waters to the waters of the Commonwealth.

DER issued Appellant Waste Water Management Permit No. 6574202 on August 13, 1974. Thereafter, on November 14, 1974, Appellants had a discharge of acid waste from the pipe in lagoon number three which discharge entered into a small tributary of Sewickley Creek then to Sewickley Creek, waters of the Commonwealth. This discharge resulted from the dislogding of a wooden plug from the pipe and from the fact that the contents in lagoon number three reached a level at least as high as the pipe. On November 18, 1974, DER revoked Appellant's permit and ordered it to cease its operations as of the date of revocation until such time as it is in possession of a new waste water management permit from DER.

Appellant claims that DER had no legal authority to revoke its permit on the basis of the aforesaid discharge and to order it to cease operating its treatment facilities. It claims that a contract entered into by representatives of DER and Appellant on March 15, 1974, precluded DER from taking any action against Appellant in the nature of a permit revocation and a cease and desist order. Moreover, Appellant claims that incidents such as the one occurring on November 14, 1974, which it characterizes as an irregular and isolated incident, cannot form the basis of a permit revocation under the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1 et seq. With each of these contentions we must disagree. With regard to the contract, Appellant maintains that paragraph 11 of the contract precludes DER from revoking the permit and ordering Appellant to cease operations. That provision reads as follows:

> "It is agreed between the parties that the purpose of this Agreement is to set forth the procedure for obtaining an industrial waste permit in order to comply with the provisions of the Act. It is further understood that the Department shall waive its right to institute civil proceedings against Mill Service for civil penalties or injunctive relief during the time period this Agreement is in effect and its provisions complied with."

While the Board is not in a position to enforce contractual obligations, it is clear that Mill Service never complied with paragraph seven of the said agreement which requires Mill Service to provide a construction and performance surety bond in the amount of $100,000 to DER as obligee for the purpose of securing the faithful performance of the terms and conditions of the waste water management permit within ten days from the date of issuance of said permit. Were the Board to be inclined to take jurisdiction over contractual matters, which it is not, it would hold that the failure to comply with paragraph seven resulted in the breach of the agreement according to the terms of paragraph 19 thereof. However, we are of the opinion that the agreement, drafted by able counsel representing the parties, never intended that DER forego revocation proceedings for violation of the permit condition.

Appellant claims that §610 of the Clean Streams Law, supra, does not authorize the action taken by DER in this case. This section provides in relevant part as follows:

> "The department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. Such orders shall include, but shall not be limited to, orders modifying, suspending or revoking permits and orders requiring persons or municipalities to cease operations of an establishment which, in the course of its operation, has a discharge which is in violation of any provision of this act. Such an order may be issued if the department finds that a condition existing in or on the operation involved is causing or is creating a danger of pollution of the waters of the Commonwealth, or if it finds that the permittee, or any person or municipality is in violation of any relevant provision of this act, or of any relevant rule, regulation or order of the board or relevant order of the department: Provided, however, That an order affecting an operation not directly related to the condition or violation in question, may be issued only if the department finds that the other enforcement procedures, penalties and remedies available under this act would probably not be adequate to effect prompt or effective correction of the condition or violation." (Emphasis added.)

Appellant would have us read the proviso in the above quoted passage precludes the issuance of the order of revocation dated November 18, 1974. However, the proviso only can come into operation when the operation in question is not directly related to the condition or violation in question. Clearly, however, the operation of Appellant's facility is directly related to the discharge occurring

on November 14, 1974. To hold otherwise would be to give that provision of the Clean Streams Law, supra, a construction not clearly evident from its terms.

Appellant further claims that paragraph 21 of the general conditions of the permit specifically permit sporadic discharges. We cannot concur in this construction of that permit condition. But even if, we accept the construction placed upon paragraph 21 by Appellant, it would be unreasonable to apply it to intentional discharges. Perhaps, sporadic, unintentional discharges which cannot be foreseen with the exercise of due diligence might come within the ambit of this condition. However, we do not have such a case before us. The fact that the intake of the pipe was secreted and that the plug was obviously pulled from the pipe all lead to the conclusion that the discharge was intentional. Moreover, the existence of the pipe was for the purpose of permitting a discharge when the lagoon contents reached the level of the pipe. To characterize this discharge as unintentional would be to reward deception and to invite widespread disregard of the Clean Streams Law, supra.

Inasmuch as the pipe was installed before the permit application was made, Appellant should have revealed the existence of the pipe to DER. If DER then issued Appellant the permit under these conditions, then Appellant could, with more justice, argue that the discharge was not a violation either of the permit or the Clean Streams Law, supra. Further, attempted compliance with special condition "F" of the permit by seeking departmental approval for a contemplated discharge from lagoon number three. It, however, did none of these things. It is fairly evident that the actions of Appellant were calculated risks it took in the expectation that the discharge from lagoon number three would not be discovered.

The Appellant also contends that the Clean Streams Law, supra, does not authorize revocation of a permit for an isolated and irregular incident. We do think that the penalty chosen in this case by the Department is quite harsh and borders on being excessive. Although §610 of the Act gives the Department very wide discretion in fashioning enforcement orders to carry out the provisions of the Act, we think that that section must be constituted as requiring the Department to select from the alternative remedies that are available to it, a remedy that is reasonable and appropriate in the particular circumstances. It was undoubtedly not intended, for instance, that under this section the Department could close

down an operation (which is the concomitant of revocation) for a single, accidental discharge of several drops of pollutant. There is certainly some question here whether it is "necessary" to put Mill Service out of business in order to carry out the provisions of the Act--particularly when the pipe has been dismantled so that the danger to the waters of the Commonwealth, at least from that source, has been removed and under the permit the third lagoon itself was to be abandoned. In our judgment substantial civil and/or criminal penalties would have been more appropriate to the offense and the object of environmental restitution where an isolated discharge such as this has been shown.

However, since the Department had reason to conclude that the existence of the pipe was intentionally concealed from it and that the discharge was intentional, we think that revocation of the permit was not an abuse of discretion in this case. In coming to this conclusion we are influenced by the fact that, if the Department had discovered the pipe or the discharge prior to its issuance of the permit, it could clearly have withheld the permit under §609 of the Act on the ground that "the said violation demonstrates a lack of ability or intention on the part of the applicant to comply with the law or with the conditions of the permit sought". Thus, revocation of the permit simply put the Appellant in the position it would have been in but for the duration of its deception. Viewed in that light and considering the broad authority that the Department has to insure that the provisions of the Clean Streams Law, supra, are carried out, we do not think that revocation was too extreme a measure in this case. We hope, however, that when and if the Appellant re-submits its permit application, the Department will act on it promptly and fairly. Although Appellant did not present any evidence in support of its economic and environmental usefulness, it seems likely that, if operated properly, Appellant's industrial waste facility would be both economically and environmentally beneficial.

With regard to Appellant's contention that it is unconstitutional to revoke a permit without a hearing prior to the revocation, Commonwealth Court in Commonwealth v. Borough of Carlisle, et al (No. 1748 C. D. 1973, Issued December 27, 1974); and Commonwealth v. Derry Township, 10 Pa. Commonwealth Ct. 619, 314 A.2d 868, (1973) has already ruled that the provisions of §1921-A(c) of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, as amended 71 P. S. §51 et seq. do not offend the due process clauses of the Federal or Pennsylvania onstitutions. Under such circumstances, it would be inappropriate for this Board to hold otherwise.

Moreover, such alleged unconstitutionality only could affect the order prior to the hearing and determination of this matter on the merits. Whatever unconstitutionality there may have been was rectified by the hearing before this Board.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter and the parties herein.

2. The discharge of acidic material from Appellant's lagoon number three was an intentional act on the part of Appellant.

3. The discharge of liquid wastes from Appellant's lagoon number three on or about November 14, 1974, was a direct violation of Appellant's waste water management permit and a cause for revocation thereof under the provisions of the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended 35 P. S. §691.1 *et seq*.

4. Section 610 of the Clean Streams Law, *supra,* authorizes DER to order the cessation of operations which are directly related to a pollutional condition or violation of the Clean Streams Law, *supra*.

5. The discharge from Appellant's lagoon number three on or about November 14, 1974, was directly related to the operation of Appellant's waste treatment facility.

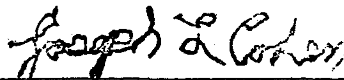
6. DER did not violate the Clean Streams Law, *supra*, in revoking Appellant's permit to operate its waste treatment facility in South Huntingdon Township, Westmoreland County, Pennsylvania.

ORDER

AND NOW, this 31st day of January, 1975, the action of the Department of Environmental Resources in revoking the waste water management permit issued to Mill Service, Inc., on August 13, 1974, and ordering Mill Service, Inc., to cease its operations, is hereby sustained and the appeal of Mill Service, Inc., is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Chairman Paul E. Waters did not participate in the decision in this case.



By: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: January 31, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

METZGER AND PCS

v.

MONTOURSVILLE BOROUGH

and

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 74-147-C

ADJUDICATION

By Joseph L. Cohen, Member--Issued February 7, 1975.

This matter is before the Board on the appeals of Carl L. Metzger and PCS Building Corporation from the actions of the Borough of Montoursville, Lycoming County, Pennsylvania, in refusing the grant of Appellants' permits for on-lot sewage disposal facilities on properties owned by Appellant Metzger. The Borough of Montoursville took no active part in this proceeding. The Department of Environmental Resources (hereinafter "DER") contends that Appellants in this case have not met their burden of proof necessary to show their entitlement to the permits for which they made application. Appellants, however, contend that although their applications do not meet the requirements of the departmental regulations, nevertheless they should be granted permits for the reason that the proposed on-lot sewage disposal facilities will neither pollute the waters of the Commonwealth nor otherwise be detrimental to public health. For the reasons cited below, these appeals are hereby dismissed.

FINDINGS OF FACT

1. Appellants in this matter are Carl L. Metzger of the Borough of Montoursville, Lycoming County, Pennsylvania, and PCS Building Corporation duly organized under the laws of the Commonwealth of Pennsylvania.

2. The Appellee, Borough of Montoursville, Lycoming County, Pennsylvania, is the permit issuing authority for on-lot sewage disposal permits under the provisions of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, as amended, 35 P. S. §750.1 et seq.

3. Intervenor is DER which is authorized under the provisions of the Pennsylvania Sewage Facilities Act, supra, to adopt rules and regulations setting forth standards for on-lot sewage disposal facilities and is also authorized to administer the provisions of the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1 et seq.

4. Appellant Metzger is the owner in fee of building lots in the Borough of Montoursville, Lycoming County, Pennsylvania, at 1215 Nicely Avenue and 1215 Weaver Street.

5. On April 17, 1974, Appellant Metzger filed with Appellee an application, Application No. 185091, for a permit to construct an on-lot sewage disposal facility on premises 1215 Nicely Avenue in the Borough of Montoursville. On May 16, 1974, PCS Building Corporation filed with Appellee an application, Application No. 185093, for a permit to install an on-lot sewage treatment facility on the property 1215 Weaver Street.

6. The sewage officer of the Borough of Montoursville, Appellee herein, refused to issue permits responsive to the aforesaid applications by Appellants. Thereafter, Appellants appealed the decisions of the Borough sewage officer to the Borough council. The Borough council upheld the decisions of the sewage officer by notices of determination under dates of May 24, 1974, and July 2, 1974. In these notices of determination signed by Frederick Y. Dietrick, Esquire, attorney for the Borough, it is stated that the Borough council believes that the present regulations of DER and its standards of enforcement are ambiguous, impractical, unfair and confiscatory.

7. On June 17, 1974, Appellant Metzger filed with the Environmental Hearing Board an appeal from the determination of the Borough council of Montoursville which upheld the action of the Borough sewage officer in refusing a permit responsive to the aforesaid application of Appellant Metzger. On July 10, 1974, Appellant PCS Building Corporation filed with this Board an appeal from the determination of the Borough council of Montoursville which upheld the action of the sewage officer of the Borough in denying a permit for an on-lot sewage disposal facility responsive to the corporation's application.

8. The sewage disposal facilities proposed in Appellants' application consisted of a septic tank and "seepage" pit to be installed on each lot. The proposed septic tanks were to have a capacity each of 900 gallons; the seepage pits to which each septic tank was to be connected were to have a diameter of 8 feet and to be at least 12 feet in depth. Each seepage pit was to be lined with 8-inch cinderblocks with holes in these blocks lying horizontal. The cinderblocks would extend the entire depth of the seepage pits and form an inner wall of the circumference of the pits.

9. The manner in which the proposed sewage disposal facilities would work is that the effluent from the septic tanks would drain into the seepage pits and the same would be absorbed into the surrounding soil through the cinderblock holes and through the bottom of the seepage pits.

10. There is a perched water table approximately two feet below the surface of the ground upon which the sewage disposal facilities have been proposed to be installed. As proposed in the application, the seepage pits would intercept the perched water table.

11. 25 Pa. Code §73.11 provides, in pertinent part, as follows:

> "(c) The maximum elevation of the seasonal ground water table or perched water table, as determined by direct observation or by observation of soil mottling shall be at least four feet below the bottom of the excavation for the leaching area. Rock formations and impervious strata shall be at a depth greater than four feet below the bottom of the excavation.
>
> "(d) Rock formations and impervious strata shall be at a depth at least four feet below the bottom of the excavation for the subsurface absorption area. For purposes of this subsection rock formations shall be deemed to be rock which is so slowly permeable that it prevents downward passage of effluent, or rock with open joints or solution channels which permit such rapid flow that effluent is not renovated. This includes masses of shattered rock fragments with insufficient fine soil to fill the voids between the coarse fragments."

12. The proposed sewage disposal facilities do not conform to 25 Pa. Code §73.11(c) in that the perched water table is not more than four feet below the bottom of the excavation to be used in the absorption area. It is impossible from the evidence to determine the characteristics of the soil four feet below the bottom of the excavation of the absorption area and hence whether the proposed seepage pits are in compliance with 25 Pa. Code §73.11(d).

DISCUSSION

Section 21.42 of the Rules of Practice and Procedure before the Board impose the burden upon Appellants to show their entitlement to a permit in this case. This, Appellants have failed to do. The proposed sewage disposal facilities for which Appellants seek permits admittedly do not conform to the requirements of 25 Pa. Code §73.11(c) and (d). Thus they are clearly not entitled to a permit on the basis of this provision of the regulations.

Recognizing that their proposals do not conform to the provisions of the applicable regulations, Appellants then contend that their proposed facilities should nevertheless be permitted for the reason that the proposed facilities will neither pollute the waters of the Commonwealth or otherwise be hazardous to public health. Appellants contend that in such circumstances either the rules and regulations relating to permitted sewage disposal facilities are not intended to be all inclusive, or, if they are, they are unconstitutional as applied to the facts in this matter.

It is not necessary for the Board to reach these contentions raised by Appellants either with regard to the scope of the regulations or their constitutionality. Appellants have failed to meet their burden of showing that the effluent conducted to the seepage pits from the septic tanks will be properly renovated prior to reaching waters of the Commonwealth. Without such a showing, the Board cannot make a determination with respect to the issues raised by Appellants.

For the foregoing reasons it is apparent that Appellants have not shown their entitlement to permits for sewage disposal facilities from the Borough.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter and the parties herein.

2. Whenever a municipality refuses to issue a sewage disposal facilities permit to an applicant therefor, and the applicant thereafter appeals to this Board, the applicant has the burden of proof in showing his entitlement to such a permit.

3. The Appellants herein have not met their burden of proof in showing their entitlement to a permit for the installation of on-lot sewage facilities on the properties subject to their applications.

4. The Borough of Montoursville properly and legally refusedto issue permits to Appellants for the installation of on-lot sewage facilities on their properties.

ORDER

AND NOW, this 7th day of February, 1975, the actions of the Borough of Montoursville, Lycoming County, Pennsylvania, in refusing to grant Appellants Carl L. Metzger and PCS Building Corporation permits to install on 1215 Weaver Avenue, and 1215 Nicely Street, Montoursville Borough, Lycoming County, Pennsylvania, are hereby sustained and the appeals are hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

By

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: February 7, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

MONONGAHELA AND OHIO DREDGING COMPANY

Docket No. 72-388-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

DISSENTING OPINION

By Joseph L. Cohen, Member--Issued February 20, 1975

I dissent from the Adjudication in this matter for the reason that the action of the Department herein, in my opinion, does not constitute an Adjudication within the meaning of the Administrative Agency Law, Act of June 4, 1945, P. L. 1388, as amended, 71 P. S. §1710.1, et seq.

Section 2 (a) of the Administrative Agency Law, supra, defines the term "Adjudication" as follows:

> "'Adjudication' means any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities or obligations of any or all of the parties to the proceeding in which the adjudication is made, but shall not mean any final order, decree, decision, determination or ruling based upon a proceeding before a court, or which involves the seizure or forfeiture of property, or which involves paroles, pardons or releases from mental institutions. As amended 1963, July 31, P.L. 425, §1."

Thus, to be an Adjudication the action of the Department must in some manner affect the personal or property rights, privileges, immunities or obligations of Appellant. Webster's Seventh New Collegiate Dictionary defines the verb "affect" as follows:

> " . . . 2: to produce a material influence upon or alteration in . . ."

Black's Law Dictionary (Rvsd. 4th Ed.) defines the term as follows:

> "To act upon; influence; change; enlarge or abridge; often used in the sense of acting injuriously upon persons and things. . ."

Thus, the term "affect" means, in context of the Administrative Agency Law, supra, to alter or modify the rights, privileges, immunities or obligations of persons subject to State action.

In order, therefore, for the departmental order to be an Adjudication, it must have modified or altered Appellant's rights, privileges, immunities or obligations. Under the provisions of §2, Act of June 25, 1913 P. L. 555 as amended, 32 P. S. §681 et seq., it is unlawful:

> " . . . to construct any dam or other water obstruction; or to make or construct, or permit to be made or constructed, any change therein or addition thereto; or to make, or permit to be made, any change in or addition to any existing water obstruction; or in any manner to change or diminish the course, current, or cross section of any stream or body of water, wholly or partly within, or forming a part of the boundary of, this Commonwealth, except the tidal waters of the Delaware River and of its navigable tributaries, without the consent or permit of the Water and Power Resources Board, in writing, previously obtained, upon written application to said board therefor. . . . "

Violations of the 1913 Act, commonly known as the "Water Obstructions Act", are declared to be misdemeanors (§7) and subject to the penalties therein imposed, and by virtue of §8 thereof capable of being restrained through injunctive proceedings. Thus, if Appellant were creating water obstructions without the consent of the Department, it would be in direct violation of the provisions of the 1913 Act. The "Order" of the Department which directs Appellant to cease dredging operations until such time as it obtains a permit from the Department, is merely declarative of the 1913 Act. It, therefore, cannot be said to "affect" any legally protected interest of the Appellant or obligation existing previous to the date the order was issued. This being the case, whatever else the departmental "order" is, it surely is not an Adjudication within the meaning of the Administrative Agency Law, supra.

The Adjudication in this matter proceeds on the assumption that if the departmental action is not subject to collateral attack, it is an Adjudication within the meaning of the Administrative Agency Law, supra. This characterization of the jurisdictional issue presupposes the question to be decided—whether the action of the Department in this instance constituted an Adjudication within the terms of the Administrative Agency Law, supra. If, as I have argued, it does not constitute an Adjudication, the departmental action may be subject to collateral attack. Thus, whether it is subject to collateral attack depends upon whether the action is an

Adjudication as above defined. The Adjudication of the Board in this matter "puts the cart before the horse".

To state my position succinctly, it is as follows:

1. The Board may only review departmental actions which are in the nature of Adjudications as that term is defined in the Administrative Agency Law, supra.

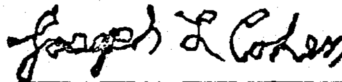
2. To be an Adjudication, an action must modify or alter pre-existing legally protected interests or obligations of a party.

3. Where an action of the Department requires a party to cease and desist violating the law, such an order is not an Adjudication for the reason that it does not alter or modify the party's pre-existing legal obligations or interests.

4. Therefore, the Board does not have jurisdiction to review such departmental action.

For the foregoing reasons I cannot acquiesce in the Adjudication and therefore dissent.

ENVIRONMENTAL HEARING BOARD



JOSEPH L. COHEN
Member

DATED: February 20, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
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In the Matter of:

G. R. THEBES

Docket No. 74-021-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Paul E. Waters, Chairman Issued, March 7, 1975

This action comes before the Board as a Complaint for Civil Penalties based on the alleged acts of pollution by open burning by Defendant, G. R. Thebes, owner and operator of a landfill in New Bloomfield, R. D. #1, Perry County. The Department of Environmental Resources, hereinafter "Department" brings this action pursuant to the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, §35 P. S. 4009.1.

FINDINGS OF FACT

1. The Defendant in this civil penalty proceeding, Mr. G. R. Thebes, owns and operates a sanitary landfill in Centre Township, Perry County, which is located approximately a half-mile to three-quarters of a mile north of the town of New Bloomfield.

2. On December 22 and 23, 1971, the Department conducted an inspection of the said landfill and observed open burning, in violation of the Solid Waste Rules and Regulations (25 Pa. Code §75.98). Inspection reports for these two days, indicating a condition and violation, were sent to Mr. Thebes by certified mail.

3. On August 14, 1972, an investigation by a representative of the Department revealed another open burning violation of which [illegible] was als

informed by mailing him a certified copy of the Inspection Report which had noted thereon the violation.

4. On April 25, 1973, Mr. Orwan, a representative of the Department, observed open burning, and evidence of past open burning, at the site of the landfill. These observations were included in an Inspection Report which was sent to Mr. Thebes.

5. Other inspections by a representative of the Department at the landfill site revealed evidence of past burning of solid wastes in the form of ashes located on the landfill site. The dates of these observations are May 21, 1973, September 12, 1973, and July 10, 1973.

6. Defendant also received letters dated May 9, 1973, and November 5, 1973, from representatives of the Department advising him of the illegality of the practice of open burning.

7. Mr. Thebes has not caused the trash on the location to be covered on a daily basis, thereby affording an opportunity for fires to be more easily started than if the Regulations were complied with.

8. Specific instances of open burning in violation of 25 Pa. Code §129.14(b) wherein emissions and malodors were detectable off the property lines and were causing interference with the reasonable enjoyment of life and property, occurred on the following dates:

(a) August 19, 1973
(b) September 7, 1973
(c) September 21, 1973
(d) October 13, 1973
(e) October 27, 1973
(f) November 29, 1973
(g) December 8, 1973
(h) September 2, 1973
(i) September 15, 1973
(j) October 12, 1973
(k) October 26, 1973
(l) November 3, 1973
(m) December 7, 1973

9. The emissions and malodors generated by the open burning incidents describes above were of such nature, quantity and quality as to interfere with the reasonable enjoyment of surrounding property owners and, specifically, to interfere with a nearby resident one Jabobs' reasonable enjoyment of property on those dates on which the illegal ommissions were observed.

10. The Carson incinerator, which testimony indicated was located near the site of the Thebes landfill, has never been documented to have been in violation of the Rules and Regulations of the Department insofar as emissions from its stack are concerned; in fact, it was observed to be in compliance when investigated by a representative of the Bureau of Air Quality and Noise Control.

11. If an incinerator such as the "Carson incinerator" is properly operated within the framework of the Regulations, there will not be an odor or smoke problem from the incinerator.

12. The incinerator was not the cause of the smoke and odor problems related by the witnesses for the Commonwealth in this case.

13. The area surrounding the Thebes landfill is woodland and relatively undisturbed countryside with appreciable scenic value.

14. The Defendant regularly dumps hot ashes from the incinerators on the landfill site, which ashes have been known, in the past, to cause fires by igniting the refuse at the site.

15. On two occasions, fires at the landfill site caused the woods to ignite.

16. Defendant and his son, a partner in the landfill operation, have regularly made a practice of allowing those who dump on the landfill to proceed unattended to the site without the supervision of any employees merely by supplying them with a key at the office, some distance away from the actual site of the landfill.

17. Defendant's operation routinely fails to cover each day's trash with clean fill, as prescribed by the Regulation and, in doing so, knowingly and openly violates the Rules and Regulations of the Department regarding operation of its sanitary landfill.

18. In failing to supervise the dumping operation, Defendant and his associates knowingly and openly violated the Rules and Regulations of the Department

which requires an operator be on hand at the site during all dumping operations.

19. Hot ashes are sometimes delivered and deposited at the landfill site when there are no employees of Mr. Thebes there to supervise.

DISCUSSION

The evidence in this case may fairly be described as overwhelming on the question of violations of the Air Pollution Control Act and its Regulations, The Regulations provide that:

> "(b) No person shall cause, suffer, or permit the open burning of any material in any area outside of air basins in such a manner that any of the following occur:
> "(1) The emissions are visible, at any time, at the point such emissions pass outside the property of the person.
> "(2) Malodorous air contaminants from the open burning are detectable outside the property of the person.
> "(3) The emissions interfere with the reasonable enjoyment of life or property.
> "(4) The emissions cause damage to vegetation or property.
> "(5) The emissions are or may be deleterious to human or animal health."

Defendant, G. R. Thebes has so consistently violated the above provisions that it is difficult for the Board to conclude that it has been other than intentional. The single feature of this case which entitles the Defendant to any considerations of leniency in the imposition of a Civil Penalty, is the fact that the most recent violations seem to be much fewer in number than heretofore.

The attitudes of both Defendant and his counsel seem to be that they take this matter a little too lightly. The Board feels compelled, therefore, to introduce some seriousness into the proceedings, and perhaps cause Defendant to reassess the importance of his neglect of our environmental regulations. It should be observed that the right to clean air and an aesthetic environment has now been elevated to constitutional level in this State. We must enforce the law with the same vigor to which Defendant would deem himself entitled if a neighbor of his would deprive him of a consitutional right.

There have been so many violations over so long a period of time that we have listed only the most flagrant.

As we move now to the difficult task of translating pollution into dollars, we are not unmindful of the testimony regarding substantial investment in

equipment and the other hardships faced by Defendant in his landfill operation.

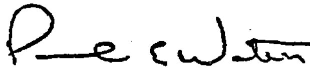
Considering all of the testimony and the most recent efforts to bring the landfill into compliance, we are inclined to impose a penalty of a minimum of $150.00 per day for each of the thirteen violations.

ORDER

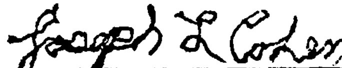
AND NOW, this 7th day of March, 1975, in accordance with Section 35 of the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, §35 P. S. 4009.1, Civil Penalties are assessed, against Defendant, G. R. Thebes in the amount of One Thousand Nine Hundred Fifty Dollars ($1,950.00).

This amount is due and payable into the Clean Air Fund immediately. The Prothonotary of Perry County is hereby ordered to enter this penalty as a lien against any private property of the aforesaid Defendant G. R. Thebes, with interest at the rate of six (6) percent per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

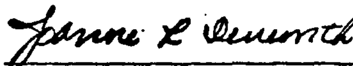
ENVIRONMENTAL HEARING BOARD



BY: PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member



JOANNE R. DENWORTH
Member

DATED: March 7, 1975
llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

ANNIE M. WARNER HOSPITAL

Docket No. 74-184-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

A D J U D I C A T I O N

By Paul E. Waters, Chairman (Issued March 7, 1975)

This matter comes before the Board as an appeal from the refusal by the Department of Environmental Resources, hereinafter "DER", to grant an exception to a sewer connection ban issued to the Gettysburg Municipal Authority on October 31, 1973. Appellant, Annie M. Warner Hospital, desires to build a new medical facility addition, and the sewer line would connect to the present sewer system serving the older hospital structure.

FINDINGS OF FACT

1. Appellant, Annie M. Warner Hospital, is a non-profit public health facility located in Gettysburg, Adams County, Pennsylvania.

2. On October 31, 1973, DER issued an order banning additional discharges into the Gettysburg Municipal Authority sewer system because of an overload of the plant capacity.

3. On February 20, 1974, the Gettysburg Municipal Authority notified Appellant that a proposed new building, which was to be separate from an existing building already receiving sewer service, would not be served unless this was authorized by DER.

4. On June 25, 1974, Appellant applied to DER for an exception to the

sewer ban order of October 31, 1973, for the new medical service facility sewer discharge connection.

5. On July 19, 1974, DER denied the Appellant's request for an exception on grounds that it did not come within any of the recognized exceptions of DER.

6. The proposed facility is to be a physicians' office building and the project has been approved by both the Department of Health of Pennsylvania and the South Central Pennsylvania Health Planning Council, and has an estimated cost of approximately $500,000.

7. The proposed facility would require an estimated 900 gallon per day increase in the flow to the authority's sewage plant by the projected opening date of March 1, 1978.

8. The Gettysburg Municipal Authority sewage plant has a design capacity of 1,000,000 gallons per day and the plant was below this figure for only six days during a twelve-month period.

9. There has been a decrease in the flow to the plant of 53 million gallons since the sewer ban was imposed, and the total reduction for a one-year period due to specific discontinued operations is more than 1,000,000 gallons per year.

10. The proposed facility is needed in the area to attract new doctors to the community.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal.

2. DER properly imposed a sewer ban on the Gettysburg Municipal Authority plant on October 31, 1974.

3. Appellant has failed to prove that it qualifies under the exceptions recognized by DER to sewer ban orders.

4. Appellant is not entitled to a new exception to the sewer ban order of October 31, 1974.

DISCUSSION

The unique feature presented by this case, and the only difficulty in disposing of it, occurs because of the high social value placed by our society upon good medical services. How, one might ask, can DER possibly refuse to permit the construction of needed doctor's offices in Gettysburg when the Department of Health has already signaled its approval?

Let us begin the review at the beginning, by a look at the statutes:

The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.4, et seq. in its declaration of policy provides:

> "(1) Clean, unpolluted streams are absolutely essential if Pennsylvania is to attract new manufacturing industries and to develop Pennsylvania's full share of the tourist industry.
>
> * * *
>
> "(3) It is the objective of The Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted."

Pursuant to this policy, and in accordance with Section 5 of the Act, the Department has adopted the following regulation:

Chapter 91, §91.33 (b):

> "(b) No person or municipality shall authorize or permit the added discharge of sewage or industrial wastes into a sewer, sewer system or treatment plant owned or operated by such person or municipality without written authorization from the Department where such person or municipality has previously been notified by the Department that the sewer, sewer system or treatment plant is not capable of conveying or treating additional sewage or industrial wastes, or is not operated or maintained in accordance with the permit or applicable orders, rules and regulations."

It is clear from the above and indeed it has not been challenged here, that DER's imposition of a sewer ban was a proper exercise of authority. Moving then to the question of exceptions to sewer ban orders, we are by definition operating in an area where the rights of Appellant are much more restricted. If, as it is contended, DER should lift its restrictions imposed for public health reasons, there should be some overriding consideration based on an even greater public health benefit or it must be required by simple justice.

The value judgment to be made between the benefits of unpolluted water or better office facilities for doctors in Gettysburg, moves this Board toward judgments it is not equipped or indeed authorized to make. It is our view that DER is in an infinitely better position to make a decision on the relative public benefits to be derived from the above mentioned activities. Unless we find, and we do not, that this judgment has been exercised in some arbitrary or unreasonable manner, there is no clear call for the intervention of this Board.

In Commonwealth v. Alan Mitchell Corporation, EHB Docket No. 71-108-W, issued June 7, 1972, cited by both parties, the Board resolved the issue raised here by Appellant to the effect that the sewage discharge is *de minimis* and should for that reason be allowed. We there said:

> "Turning now to the Appellants' claim, that the added load from their new four story building containing 35 units would be negligible, only two brief comments are required. First, we believe that this new structure will add measurably to the present overload of the Authority sewer system and, secondly, even if it does not, the amount is irrelevant, inasmuch as it is the connection itself which the Department has prohibited. These kind of cases should not turn on the amount of added sewerage in the individual case, because presumably this approach is what has caused the very problem (always room for one more) that the Department has set out to solve by the ban."

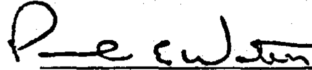
Finally, the Board follows its earlier decisions issued in Commonwealth v. Moon Nurseries, EHB Docket No. 73-395 issued December 31, 1973, and Commonwealth v. Kenneth G. Bissey, EHB Docket No. 72-338-B issued October 24, 1974, which hold that where the Appellant fails to bring himself within the recognized sewer ban exceptions, the Board will sustain DER's authority to deny the added discharge.

There are four recognized grounds for exception to a sewer ban order. We have discussed these at length in the above cases. Suffice it to say that none are applicable to this case, and the Appellant seeking a new exception category based on medical needs, does not seriously contend that they are. We therefore enter the following:

ORDER

AND NOW, this 7th day of March, 1975, the action of the Department of Environmental Resources in denying a sewer ban exception to Appellant, Annie M. Warner Hospital, is hereby sustained.

ENVIRONMENTAL HEARING BOARD



BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

CONCURRING OPINION

I concur in the result reached in this Adjudication, but I cannot accept the inference that DER made a decision on the relative merits of controlling pollution as opposed to permitting the building of an auxiliary hospital unit in response to a community-felt need for such facility. Nothing in the record indicates that the Department made such a determination. Rather, it is apparent that DER looked only to ascertain whether the request for an exception fell within the policy of DER on granting exceptions to sewer connection bans. Having ascertained that the hospital's application did not fall within this policy, the Department summarily denied the application.

Moreover, had the Department based its decision on the relative merits of water pollution control versus a community-felt need for an additional hospital facility, I am of the opinion that this Board could have inquired into the factual basis upon which such a decision was made to determine whether it was proper under the circumstances. However, I concur in this Adjudication for the reason that DER was under no legal compulsion to grant the exception in this case.

By JOSEPH L. COHEN
Member

DATED: March 7, 1975
llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

TOWNSHIP OF PLEASANT

Docket No. 73-252-CP-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member--Issued March 14, 1975.

The Department of Environmental Resources (hereinafter "DER") has commenced this action to have the Board assess a civil penalty against the Township of Pleasant, Warren County, Pennsylvania, for a discharge of liquid industrial wastes into an unnamed tributary of the Allegheny River. The parties have filed a stipulation in this matter wherein they have set forth facts material to the disposition of the case and have further agreed to have the Board at this time determine whether the Defendant Township is liable for a civil penalty because of such discharge. The parties have further agreed that the Board will rule on the Petition of DER to have a "default judgment" entered against the Township.

FINDINGS OF FACT

1. That the Defendant, Township of Pleasant, is a township of the second class located in Warren County, Pennsylvania.

2. That the Allegheny River and several of its tributaries pass through and near the Defendant Township.

3. That within the boundaries of the Township is located a "pond" or "lagoon" filled with acid wastes of industrial origin.

4. That the said acid pond originated more than thirty years ago as a dump for an oil refinery which had been located nearby.

5. That the Defendant is in no way responsible for the creation of the acid pond.

6. That the acid pond was in private hands until September 8, 1970, when the pond and the adjacent land was conveyed as a gift to the Defendant Township by Ida C. Wenzel and Luther Wenzel, her husband, by deed recorded in Warren County Deed Book 364 at page 250.

7. That the Defendant accepted this parcel of land in order to eliminate the pond and to convert the site into recreational area and an area where municipal facilities could be located.

8. That before the discharge of September 27, 1972, (on which discharge this action is based), the Defendant undertook to fill said pond and thereby to gradually dissipate its contents and to remove its detrimental effects.

9. The pond was inspected by personnel of the Plaintiff on September 16, 1970, November 19, 1970, and April 6, 1972, and no charges were filed against the Township prior to the discharge of September 27, 1972.

10. That immediately before the discharge of September 27, 1972, the area in which the pond is located experienced rainfall, specifically, 1.30 inches from September 24, 1972, through September 27, 1972, and .96 inch on September 27, 1972.

11. That on or about September 27, 1972, the pond did discharge liquid industrial wastes containing a high concentration of alkyl sulfonates into an unnamed tributary of the Allegheny River, the contents of this discharge being a noxious and deleterious substance which temporarily rendered unclean certain waters of the Allegheny River and did kill some fish therein.

12. Since the discharge of September 27, 1972, the Defendant is filling this acid pond under supervision of the Department of Environmental Resources.

13. That at no time did Defendant possess a permit issued pursuant to the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1 et seq., either for a discharge from this lagoon or for the lagoon itself.

14. That by Pre-Hearing Order No. 1 issued on February 6, 1974, the Board ordered the parties to submit pre-hearing memoranda with Defendants to be filed within 20 days of receipt of the Commonwealth's pre-hearing memorandum.

15. The Commonwealth's pre-hearing memorandum was due on or before March 29, 1974 and was filed with the Board on March 5, 1974, and received by the Defendant on March 6 or 7, 1974.

16. The Township's pre-hearing memorandum was filed with the Board and received by the Commonwealth on April 18, 1974.

17. The Commonwealth filed a Motion for Default Judgment with the Board on April 3, 1974.

18. Counsel for the Township filed its Answer to the Motion for Default Judgment on or about April 4, 1974.

19. The Commonwealth's Motion was denied on July 17, 1974, without prejudice and is still pending before the Board.

DISCUSSION

DER is vigorously pressing the Board to grant its Petition for a "default judgment" against the Township for the reason that it did not file its pre-hearing memorandum within the time specified by the Board's Pre-Hearing Order No. 1. The rules of the Board do not expressly provide for default judgments. Section 21.18(b) of the Rules provides that any party failing to respond to a complaint, new matter, petition or motion shall be deemed to be in default and, at the Board's direction, sanctions may be imposed in accordance with §21.41 of the Rules. This section provides:

> "The board may impose sanctions upon a party for failure to abide by a board order. Such sanctions may include the dismissal of any appeal or an adjudication against the offending party, orders precluding introduction of evidence or documents not disclosed in compliance with any order, barring the use of witnesses not disclosed in compliance with any order, barring an attorney from practice before the board for repeated violations of orders or such other sanctions as are permitted in similar situations by the Pennsylvania Rules of Civil Procedure for practice before the Courts of Common Pleas."

Although this Board entered what purported to be a "default judgment" in Commonwealth v. Froehlke, et al, EHB Docket No. 72-341 (issued July 31, 1973), it in effect only invoked sanctions authorized by §§21.18(d) and 21.41 of its Rules. The mere fact that the Board denominated its action as a "default judgment", should not obscure the fact that it was invoking sanctions authorized by its rules.

Under the Pennsylvania Rules of Civil Procedure, default judgments may be entered in both actions at law and in equity. Rule 1037 thereof provides for default judgments in assumpsit actions, while Rule 1047(a) covers default judgments in trespass action. Defaults in equitable actions are covered by Rule 1511. In all these cases the entry of a default judgment is a ministerial act performed by the prothonotary upon the praecipe of the Plaintiff. The imposition of sanctions against a party is a judgmental decision by the Board for failure to abide by Board orders or otherwise be in violation of the Board regulations. Thus, the imposition of sanctions by the Board is a decision that involves the exercise of the Board's discretion. The Board is of the opinion that to impose sanctions upon the Defendant Township in this case would serve no useful purpose. Moreover, the substantial question of liability in this matter inclines us to adjudicate that matter, rather than adjudicate this case on a peripheral issue.

In a civil penalties action the Commonwealth has the burden of proof. See Section 21.42 Rules of Practice and Procedure before the Board. The stipulated facts of this case show that on September 27, 1972, pollutants entered an unnamed tributary of the Allegheny River after a substantial rainfall occurring from September 24, 1972, to and including September 27, 1972. These pollutants emanated from a lagoon upon Defendant's property. The legal question presented by these facts is whether Defendant violated the provisions of the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1 et seq. The answer to this question depends upon whether Defendant municipality violated any duty imposed upon it by the Clean Streams Law, supra.

Section 301 of the Clean Streams Law, supra, provides:

> "No person or municipality shall place or permit to be placed, or discharged or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any industrial wastes, except as hereinafter provided in this act."

It is conceded that the discharge which is the subject matter of these proceedings was neither permitted by the Department of Environmental Resources nor conformable to its Rules and Regulations. Under such circumstances the discharge could not have been authorized by §307 of the Clean Streams Law, supra, which provides, inter alia, that no person or municipality shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, into any of the waters of the Commonwealth unless authorized by Rules and Regulations of the Environmental Quality Board or pursuant to a permit from DER.

Because of the manner in which the discharge in this matter took place, a question has arisen as to whether such was a discharge by Defendant municipality in violation of the Clean Streams Law, supra. It is clear that the discharge was not intentional as that term is understood in the law. However, nothing in the Clean Streams Law predicates a violation thereof on the intention of any party. Moreover, in Commonwealth v. Sonneborn, 164 Pa. Superior Ct. 493, 66 A.2d 584 (1949) violations of the Clean Streams Law, supra, were characterized as malum prohibitum, so as to render wholly immaterial a party's intent in connection with a violation of that act.

Nor do we think that, in the absence of an intentional discharge of industrial wastes contrary to the provisions of the Act, a violation thereof must be predicated upon negligence. We believe that the legislature in its various amendments to the Clean Streams Law, supra, particularly those of 1965 and 1970, intended to embody the principles of strict liability insofar as discharges of pollutants to the waters of the Commonwealth are concerned. Any other inference would not comport with the manifest intent of the legislature to protect the waters of the Commonwealth from contamination and pollution as indicated by its substantial amendment of that law in 1959 and 1970.

The principles of strict liability derive from the rule in Rylands v. Fletcher, 1868, L. R. 3 H. L. 330. See also Prosser, Law of Torts (4th Ed., 1971) 505 et seq.

In the matter before us, we are of the opinion that the Defendant municipality breached its duty in failing to maintain the lagoon on its property in such a manner as to prevent discharges from occurring therefrom resulting from foreseeable

natural phenomena against which adequate protection was not taken in this case. This is not a case in which "an act of God", not reasonably foreseeable, caused the discharge. The discharge was caused by moderately heavy rains during a period of a few days. Such rains were clearly a foreseeable natural event which, under the circumstances of this case, could have been foreseen by Defendant. We believe that the principles stated in Akin & Dimock Oil Co. v. State, 95 Okla. Crim. 218, 243 P.2d 384 (1952), is the principle to be adopted in cases of this sort. In the annotation in 32 A.L.R. 3rd 215, at 272 in which Akin & Dimock is reviewed, it is stated:

> " . . . The defendant company also argued that it had not been negligent and that the heavy rain had been an 'act of God,' but the court held that no showing of negligence or criminal intent was necessary to hold the defendant liable, because the legislature had intended to place a duty, higher than ordinary care, on oil companies to prevent the pollution of streams of the state. This duty, the court explained, is that of taking all reasonably prudent precautions to prevent the escape of crude oil, basic sediment, salt water, or other deleterious substances."

We therefore find that the Defendant municipality discharged industrial wastes into waters of the Commonwealth in violation of the Clean Streams Law, supra, and that such violation may form the basis for the imposition of a Civil Penalty in this matter. Inasmuch as the parties have stipulated that they do not wish to litigate at this time the extent of the civil penalty, we refrain from any action at this time other than finding a violation of the law.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter to this proceeding.

2. The principles of strict liability apply to unintentional discharges of industrial waste to waters of the Commonwealth which are otherwise not authorized by the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended 35 P. S. §691.1 et seq.

3. Defendant, Township of Pleasant, Warren County, Pennsylvania, violated the provisions of the Clean Streams Law, supra, by the discharge of industrial wastes from its lagoon into the waters of the Commonwealth.

ORDER

AND NOW, this 14th day of March, 1975, it is hereby ordered that the Township of Pleasant, Warren County, Pennsylvania, shall pay into the Clean Streams Fund a sum to be determined by the Board at a later time after hearing upon the issue of the size of the Civil Penalty for which Defendant may be liable according to the principles enunciated in this Adjudication.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

By JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: March 14, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

JOSEPH REEDY, Appellant
and
PENN TOWNSHIP, et al, Intervenors — Docket No. 74-124-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

A D J U D I C A T I O N

By Paul E. Waters, Chairman (Issued--March 31, 1975)

This matter comes before the Board as an appeal from an order of the Department of Environmental Resources, hereinafter "DER", issued to one Joseph Reedy, hereinafter "Appellant", on April 16, 1974, charging violations of the Solid Waste Management Act, Act of July 31, 1968, P. L. 788, No. 241, as amended. Penn, Wheatfield and Miller Townships, hereinafter "Intervenors" intervened in the proceedings, along with Perry County, alleging that the landfill was a necessity and should be allowed to operate despite the lack of a permit, until such time as a permit is issued to this or some site in close proximity.

FINDINGS OF FACT

1. Appellant Joseph Reedy is an individual operating a landfill in Wheatfield Township, Perry County, Pennsylvania.

2. Appellee is the Pennsylvania Department of Environmental Resources.

3. Appellant operates said landfill in Wheatfield Township, Perry County, Pennsylvania, without a permit from DER, as is required by the Pennsylvania Solid Waste Management Act, supra.

4. On or about March 23, 1970, Appellant submitted a solid waste permit application to DER and, thereafter, on or about January 1, 1971, Appellant submitted a Phase I Soils and Geology Module.

5. Said application and module were reviewed by DER and, on or about February 18, 1971, DER notified Appellant that his site was unsuitable because of shallow soil depth over fractured bedrock.

6. On April 16, 1974, DER issued the Appellant an order to immediately cease the operation of his landfill and to terminate the operation in conformity with paragraph 2 of the order and, further, to abate the discharge of leachate from the landfill.

7. On May 9, 1974, Appellant filed a timely appeal from said order of DER. However, no pre-hearing memorandum was ever filed on behalf of Appellant.

8. Intervenors are the County of Perry and the Townships of Wheatfield, Penn and Miller.

9. The Townships provide no refuse collection facilities nor do they have ordinances relative to refuse collection; Mr. Reedy deals with the individual residents of each Township on a contract basis and does not deal through said Townships.

10. There are other solid waste facilities within a reasonable distance from Mr. Reedy's site, including permitted facilities at the Rambler Landfill in Juniata County and at the Harrisburg incinerator in Dauphin County. In addition, the Thebes site near New Bloomfield in Perry County has been accepted by DER as a suitable site and can qualify for a permit as soon as certain minor engineering plans are changed.

11. Inspections by DER, dating from 1971, have in most instances revealed violations of DER's Rules and Regulations, including steep slopes, surface water ponding, failure to cover, lack of surface water diversion, and leachate discharge. Inspections immediately prior to DER's order and subsequent to the order have revealed the same violations.

12. The refuse at the site rises in a bank twenty (20) feet above a small stream which flows by the side of the landfill.

13. The landfill operation causes the discharge of leachate into the waters of the Commonwealth, to wit, an unnamed tributary to Dark Run which flows by the west side of the landfill site.

14. Water samples were taken from said stream on June 12, 1974, by Mr. Orwin, a solid waste specialist with DER, and on August 2, 1974, by Mr. Brehm, a DER Environmental Protection Specialist III. The latter samples were taken at the request of the Intervenors. These samples show a discharge to the

waters of the Commonwealth which alters the quality of the water in the small tributary to the west of the landfill; including an increase in the concentration of chlorides, an increase in the biochemical oxygen demand and increased concentration of iron in excess of the standards set forth in Chapter 97 of DER's Regulations, 25 Pa. Code, Section 97.15.

15. The landfill site is located in a region of shallow soil (ranging from two to ten feet) over fractured shale bedrock and, as such, does not meet DER's requirements for a natural renovation landfill, 25 Pa. Code, Section 75.84.

16. The shallow soils at the site fail to provide renovation for the leachate generated by the landfill, and the fractured bedrock beneath such soil provides an avenue to transmit the leachate directly to the ground water.

DISCUSSION

The controlling question raised by the record in this case is whether DER can reasonably order the closing of a landfill site in a county which presently has no other conveniently available permitted site for the dumping of solid waste.

There is little to be gained from a review of the statute and regulations, as they clearly authorize the closing of unpermitted landfills. A review, however, will show that the specific question raised by the facts of this case has not been previously dealt with by either the legislature or this Board.

It is beyond dispute that DER has the power and authority to close or order the closing of a landfill such as is here in question. Neither Appellant nor Intervenors seriously contend that Reedy is in full compliance with the law and Regulations of DER. Indeed, it is conceded that he has no permit to operate the landfill.

The question, it seems, then becomes whether there is an abuse of discretion by DER, or at least an unreasonable decision to employ enforcement actions, when, as here, one, the Appellant has attempted to comply with the permit requirements and, two, there is no other available permitted landfill in the county.

If we were to allow the Appellant or any landfill operator to ignore the plain requirements of the Solid Waste Management Act, *supra*, based on the fact that there is no convenient alternative, then the major impetus to compliance

activity will have been removed.

In other words, it is our view that no activity takes place without motivation. There must be some way to motivate a county or an individual to secure a permit for the proper operation of a landfill. If one is excused from the permit requirement on the mere showing that it would be inconvenient to use another site, even though this may be in another county, then there would remain no motivation for the operator to obtain a permit. And this is true regardless of the degree of inadequacy of the unpermitted site.

Turning to the other allegation, regarding efforts to obtain a permit, this allows a much easier resolution. We believe that DER is in a much better position than this Board to evaluate the "good faith" of a landfill permit applicant. This, after all, is the crux of the matter. Anyone can submit an application to DER at any time. Clearly, this alone cannot be a test for the purpose of exercising enforcement discretion. Something more must appear, and that is the "good faith" of the applicant. There should be some reasonable expectation of success for the applicant. It might very well be unreasonable for DER to order the immediate closing of a landfill, which inspections have shown to be properly operated, although without benefit of permit, where the operator has applied in good faith for a permit, and the decision is held up, on the permit grant, through no fault of the applicant. These, however, are not the facts of this case. Here the Appellant has not submitted all of the required data and, based on what has been submitted, DER has concluded that a permit cannot be issued. The inspection reports have been consistently unfavorable to Appellant, and Appellant has been operating for a number of years without a permit.

It is unfortunate that the burden of this decision falls heavily on the citizens who would like to properly dispose of their solid waste materials. We see no other way however to make it clear to the Appellant and the interested Intervenors that time has run out and they must now move with dispatch to resolve the problem of proper solid waste disposal for Perry County residents.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal.

2. Appellant, Joseph Reedy, presently operates a landfill in Wheatfield Township, Perry County, Pennsylvania, without a permit, in violation

of the Pennsylvania Solid Waste Management Act, 35 P.S. §6001 et seq. and the Rules and Regulations promulgated thereunder.

3. The landfill discharges an industrial waste, to wit, leachate, into the waters of the Commonwealth in violation of The Clean Streams Law, 35 P.S. §691.1 et seq. and Chapter 97 of the Department's Rules and Regulations.

4. DER has the power and duty to issue orders necessary to implement the Solid Waste Management Act, supra, and Clean Streams Law, supra, including orders requiring immediate closure.

5. The requirement of immediate closure is reasonable in light of Appellant's violations of the Solid Waste Management Act, supra, and the Clean Streams Law, supra, and Regulations thereunder and the existence of ongoing pollution.

6. Appellant and Intervenors have not set forth any basis upon which the Department's Order should be set aside.

O R D E R

AND NOW, this 31st day of March, 1975, the order of DER, issued April 16, 1974, is sustained, and the appeal of Joseph Reedy in which Penn Township, et al, intervened, is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

BY: [signature]
PAUL E. WATERS
Chairman

[signature]
JOSEPH L. COHEN
Member

[signature]
JOANNE R. DENWORTH
Member

DATED: March 31, 1975
llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

WILLIAM M. SMITH : Docket No. 72-359

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By The Board --Issued April 1, 1975.

This matter is before the Board on an appeal filed by William Smith, (hereinafter Smith), from an Order issued by an authorized agent[1] of the Department of Environmental Resources, (hereinafter Department), to Smith on September 18, 1972.

In the preamble to this Order, a finding was made that Smith had constructed a water obstruction in the back channel of the Allegheny River at Eaton Island, Mead Township, Warren County. It was then determined that this construction by Smith caused him to be in violation of §2 of the Act of June 25, 1913, P. L. 555, as amended, 32 P.S. §682, ("Water Obstructions Act"), for the reason that Smith had not obtained a permit authorizing such construction as required under said section, supra.

Smith was ordered to "discontinue" the above mentioned construction until such time as he obtained a permit from the Department.

A hearing on this appeal was held before Hearing Examiner Louis R. Salamon, Esquire, on July 10, 1973. A proposed adjudication was written, issuance of which

1. This Order was issued by Paul R. Sowers, a Waterways Patrolman, employed by the Pennsylvania Fish Commission. By virtue of an Agreement and Delegation of Authority, dated September 5, 1972, by and between the Department of Environmental Resources and the Pennsylvania Fish Commission, the Department delegated to the Commission the authority to issue cease and desist orders to persons responsible for the construction or maintenance of a water obstruction, as defined by the Act of June 25, 1913, P. L. 555, as amended 32 P.S. §681, et seq.

was delayed for a considerable time pending resolution of the question of the Board's jurisdiction over appeals from orders of this type, dealt with in Monongahela and Ohio Dredging Co. v. Commonwealth of Pennsylvania, Department of Environmental Resources, E.H.B. Docket No. 72-388-B (issued March 25, 1974, decision on reargument issued December 27, 1974), (hereinafter M & O Dredging).

At the hearing Smith admitted that he had constructed an obstruction, consisting of fill, across the body of water in question, and that he had no permit from the Department authorizing such construction.

Smith alleged, however, that he was exempt from the permit requirements of §2, supra, by virtue of the following provisions contained in §9 of the Act of 1913, supra:

> "The provisions of this act shall not prohibit the placing in any purely private stream, having a drainage area of less than one-half square mile, of any dam or obstruction that cannot in any way imperil life or property located below or above such dam or obstruction; nor shall the provisions of this act prohibit the making of necessary temporary repairs to any water obstruction."

Hearing Examiners Louis R. Salamon, Esquire and Robert Broughton, Esquire submitted a proposed Adjudication that is being adopted by the Board with a few modifications.

FINDINGS OF FACT

1. Sometime between 70 and 80 years ago there was a saw mill or lumber mill in Mead Township, Warren County, at a point adjacent to and west of Brown Run and adjacent to and south of the Allegheny River.

2. The operators of this mill drew water from Brown Run.

3. In order to gain access to additional water, the operators of this mill diverted water from the Allegheny River into a mill race or back channel which they constructed (hereinafter back channel).

4. A back channel, as used in the order appealed from, means a water area that is not the main channel of the river. In this case the back channel flows around an island, known variously as Knight's Island or Eaton Island or Rogers Island, just upstream from Glade Bridge, near Warren, Pennsylvania.

5. This back channel is presently between three-quarters of a mile and one mile in length. Brown Run presently flows into this back channel. The back channel presently reenters the Allegheny River at a point near Glade Bridge, just upstream from Warren.

6. Smith constructed an obstruction, consisting of fill across this back channel at a point approximately five hundred feet downstream from the mouth of the back channel. This obstruction was approximately 8 feet high. No testimony was offered as to when the obstruction was built. The only argument made by Smith relative to the nonapplicability of the Water Obstructions Act was that the back channel was a purely private stream within the meaning of §2 of the Water Obstructions Act. No convincing testimony was offered that the watershed of the back channel is less than one-half square mile; as already noted, the upstream end of the back channel connects with the main stem of the Allegheny River.

7. No proof was offered that the obstruction in question "cannot in any way imperil life or property located below or above such dam or obstruction." The position of the obstruction in the back channel of the Allegheny River leads us to conclude that no such proof could have been offered.

8. Smith did not have a permit from the Department by which he was authorized to construct said obstruction nor does he have such a permit at the present time.

9. Smith owns the land on both sides of this back channel at the point where he constructed this obstruction; Smith does not, however, own all the land on either side of this back channel over its entire length.

10. Paul R. Sowers, a Waterways Patrolman employed by the Pennsylvania Fish Commission, investigated the construction and the existence of this obstruction for and on behalf of the Department.

11. Waterways Patrolman Sowers drafted and issued the Order which is the subject matter of this appeal.

DISCUSSION

This case involves an Order by the Department to "discontinue" a certain activity until such time as a permit has been obtained.

An earlier draft Adjudication was circulated among the Members of the Board, which Adjudication would have dismissed this appeal based on the Board's first Adjudication in Monongahela and Ohio Dredging Co. v. Commonwealth of Pennsylvania, Department of Environmental Resources, supra. That Adjudication was based on our conclusion of law that a Cease and Desist Order requiring compliance with the Water Obstructions Act was not an appealable action of the Department, and that the Board was therefore without jurisdiction. At the time, the Board had agreed to reargument in that case, and the issuance of the Adjudication in this case was delayed pending our decision on reargument in M & O. After reargument, we decided that an order that reaches a conclusion of law that the actions of the party ordered are subject to the permit requirements of the law does constitute an action of the Department that affects the legal rights and relationships of the party ordered, and that the Board therefore has jurisdiction over an appeal from such an order. (Adjudication on reargument issued December 27, 1974). This being such an Order, and having concluded that we do have jurisdiction over the appeal, we therefore pass on to consider the merits of this case.

Two problems must be resolved: First, is this a "purely private stream" such that the provisions of §2 of the Water Obstructions Act, quoted supra, would exempt Smith's construction from the provisions of the Act? Second, if the Act applies, what is it that Smith has been ordered to do pending his obtaining of a permit?

Appellant admits the construction of the obstruction but contends that this is a purely private stream. The back channel in which the dam was placed, however, connects at its upstream and with the main channel of the Allegheny River. To argue that the watershed of that back channel is limited to the confines of the channel itself is, to be as charitable as possible, artificial. The back channel carries water from the Allegheny River. In time of flood the water in the back channel would rise concurrently with the water in the main stem. In both flood and normal flows it is a portion of the waters of the Allegheny River that

is being carried by the back channel.[2] In flood time that flow could be substantial, and a dam placed on the back channel could easily affect water levels both upstream and (especially if the dam broke) downstream. It could also affect water levels in the adjacent main channel, since by virtue of the obstruction less water would flow through the back channel.

Given a statute passed for the purpose of protecting the public against flood hazards, Water and Power Resources Board v. Green Springs Co., 394 Pa. 1, 145 A.2d 178 (1958), we should be reticent to enlarge exceptions contained in the statute. Cf. §52(5), Statutory Construction Act, Act of May 28, 1937, P. L. 1019, 46 P. S. §552(5); Apple Valley Racquet Club v. Commonwealth of Pennsylvania, Department of Environmental Resources, E.H.B. Docket No. 74-150-C (issued October 23, 1974). Indeed the very phraseology of the exception in this case, quoted supra, indicates that it is to be limited according to the purpose of the Water Obstructions Act, and is not to be extended where fulfillment of that purpose might be affected. Smith put no evidence on the record that his dam "cannot in any way imperil life or property below or above" the obstruction and, indeed, the evidence on the record convinces us that he could not do so. The burden of proving himself within the exception is on the Appellant. Commonwealth v. Finch, 80 Pa. Super. 386 (1923); Commonwealth v. Harrison, 137 Pa. Super. 279, 8 A.2d 733 (1939); cf. annotation, 153 A.L.R. 1218 (1944).

Appellant has thus failed to bring himself within two of the conditions specified in the exceptions: (1) He has failed to prove that his obstruction "cannot in any way imperil life or property . . .", and (2) he has failed to prove that the watershed above the obstruction is less than one-half square mile. We pass on to note some doubt whether this is even a "purely private stream".

In the case of Reynolds v. Commonwealth, 93 Pa. 458 (1880), one Reynolds was indicted and convicted for allegedly violating a statute which made it unlawful to trespass on lands for the purpose of taking fish from a private pond, stream, or spring. The Supreme Court was called upon to decide whether the body of water in which Reynolds was fishing was a private pond. The Court held, at 461, 462, as follows:

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2. Some distance downstream from the obstruction in question, a tributary stream named Brown Run flows into the back channel. Since that is downstream from the obstruction, we are ignoring it in treating the problem at issue.

"Recurring then to the statute, in order to constitute the offence, not only must a trespass be committed on the land, but it must be with the purpose of taking fish from a 'private pond, stream or spring.' The important question then is, in what manner must the water be owned and occupied to give it the private character contemplated by the act? The three bodies of water to which 'the purpose' must apply, are stated disjunctively. Whatever else be its character or condition, whether it be stream, spring or pond, the body of water must be 'private.' In case a running stream flows over a man's land, and he stocks the stream with fish, he does not thereby make it a private stream within the meaning of this act. The manifest intention is to protect to the owner those fish which were private property, and without the action of the trespasser would have remained such property. The title of a riparian owner of land extends to the middle of a stream, not a public highway. In case the lands of opposite riparian owners thus join, and one of them stocks the stream with fish, he does not thereby make it a 'private stream.'

"So if the waters of a pond cover a large surface of land, and one whose lands are covered by a part only of the water, places fish therein for the purpose of propagation, it does not thereby become a 'private pond.' The question is not whether he has rights which may be trespassed on, but is the whole body of water private within the meaning of the statute? We think it is not. To bring the case within the statute, the whole pond, stream or spring must be so far private property as to confine therein the fish with which it is stocked. The ownership of a part only of the land covered by the water is not sufficient to give to the whole water the distinctive character of private. It is not both public and private. The pond must be treated in its entirety. Either the whole or none is private. The owner of a part cannot make it private without an actual and visible separation from the other parts. Without such separation, the owner of a part cannot change its character against the wishes of persons owning the other parts thereof. The first, second, third and fifth assignments are sustained. We see no error in the fourth and sixth.
Judgment reversed."

When we consider the facts of the instant matter in light of the holding in Reynolds, supra, those facts being that Smith is the owner of only a portion of the total land area on either side of this back channel, that this back channel is not separated from Brown Run (which is clearly not a "purely private stream"), and that the water in the back channel is collected from the Allegheny River, we would conclude, based on Reynolds as well as based on the discussion previously, that the back channel is not a "private stream" within the meaning of §2 of the Water Obstructions Act. Appellant has therefore failed to bring himself within the exception contained in §2 of the Water Obstructions Act.

We must also resolve a question relating to the interpretation of the order. Does it require Smith to remove the obstruction or merely to get a permit for it? It in terms orders him to "cease and desist" until he has obtained a permit. We think that, to be reasonable on this record, the order must be modified so as to require that the obstruction not be enlarged or significantly changed

pending application for a permit. Granting that the dam was built illegally, if a permit were to be issued, it would be burdensome to require the dam to be removed just so it could ultimately be rebuilt legally. If in the process of Smith's seeking a permit it is determined that the dam is in fact dangerous, then an order to remove it may (should) be sustained. Evidence to support such an order is not set forth on this record, however. Appellant will be given 45 days to submit his application.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over this case and over the parties before it.

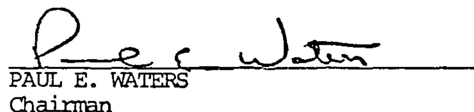
2. The back channel of the Allegheny River in which Appellant constructed a dam is not a "purely private stream" within the meaning of §2 of the Water Obstructions Act, quoted supra.

3. The Water Obstructions Act applies to Appellant's dam, and the Department was legally correct in requiring that a permit be obtained for that dam.

O R D E R

AND NOW, this 1st day of April, 1975, the order of September 18, 1972, of the Department of Environmental Resources to William M. Smith is sustained, except that it is further ordered that William M. Smith not enlarge or significantly change the water obstruction therein referred to pending action by the Department on a permit application to be filed by him. If such application is not filed within 45 days from the date of this Order, such obstruction shall be removed forthwith, as quickly as possible consistent with public safety and the minimization of siltation.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

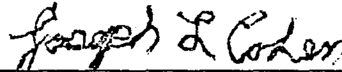
DATED: April 1, 1975

DISSENTING OPINION

By Joseph L. Cohen, Member

While I agree that the water obstruction erected by Appellant in this matter is illegal under the Water Obstructions Act, *supra*, for the reason set forth in my dissenting opinion in *Monongahela and Ohio Dredging Company v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 72-388-B (issued March 25, 1974, decision on reargument issued December 27, 1974), I must dissent from the Board's taking jurisdiction in this matter.

ENVIRONMENTAL HEARING BOARD



JOSEPH L. COHEN
Member

DATED: April 1, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

BOROUGH OF GROVE CITY : Docket No. 74-267-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member--Issued April 10, 1975.

This matter is before the Board on the appeal of the Borough of Grove City, Mercer County, Pennsylvania, from two actions of the Department of Environmental Resources. The appeal was filed December 10, 1974. The actions from which the appeal is taken are as follows:

1. An order issued by DER to the Borough of Grove City, Mercer County, Pennsylvania, on June 26, 1973 and received by the Borough on or about June 28, 1973, instituting a sewer connection ban with regard to the Grove City sewage treatment facilities.

2. The denial by DER to the Borough for an exception from the sewer connection ban to permit the connection of Perkins Pancake and Steak House to the Grove City Borough sewage system. The denial of the exception was dated November 12, 1974, and the Borough received notice thereof on November 13, 1974.

On March 26, 1975, DER through its attorney moved to dismiss the appeal with respect to the ban itself on the ground that the ban was not timely filed and with regard to the denial of the exception from the ban, on the ground that the Borough lacked standing. On April 1, 1975, the Borough through its counsel filed an answer to the Motion to Dismiss. Because the issues with regard to the ban itself and the exception to the ban are separate and distinct issues, we will adjudicate herein only the issue of whether the Appellant, Borough of Grove City, took a timely appeal from the ban.

FINDINGS OF FACT

1. Appellant is the Borough of Grove City, Mercer County, Pennsylvania.

2. Appellee is DER, the agency of the Commonwealth authorized to administer the provisions of the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1 et seq.

3. On June 26, 1973, DER issued an order to Appellant prohibiting new connections or cap-ons to that part of Appellant's sewer system tributary to the Grove City Borough treatment plant. Appellant received said order on or about June 28, 1973.

4. On December 10, 1974, almost one and a half years after the issuance of the sewer connection ban, Appellant filed an appeal with the Environmental Hearing Board from the order instituting the ban.

5. Section 21.21(a) of the Rules of Practice and Procedure before the Environmental Hearing Board establishes a 30-day appeal period from actions of DER in respect of those actions taken under the Clean Streams Law, supra.

DISCUSSION

The law in Pennsylvania is clear that statutory appeal periods are jurisdictional and may not be waived. See Commonwealth v. Niemeyer Olds, Inc., 12 Commonwealth Ct. 388, 316 A.2d 152 (1974); Iannotta v. Phila. Trans. Co., 11 Commonwealth Ct. 156, 312 A.2d 475 (1973); General v. Roseman et al, 10 Commonwealth Ct. 569, 312 A.2d 609 (1973).

Section 21.21(a) of the Rules of Practice and Procedure before the Board are authorized by §2119-A(e) of the Admininstrative Code of 1929, Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §51, et seq. as such. The appeal period set forth therein has the same status as an appeal period set forth in statute. Therefore, inasmuch as this appeal was filed more than 30 days after Appellant received notification of the order instituting a sewer connection ban, it must be quashed for lack of jurisdiction. See DiFrancis v. Commonwealth, Unemp. Comp. Bd. of Rev., ___ Commonwealth Ct.___ , 333 A.2d 202 (1975).

Appellant insists that if an appeal is not allowed in this case, it will be precluded from showing that it has complied with the conditions of the order of the Department and is therefore entitled to have the sewer connection ban lifted.

This, however, is no justification for allowing an untimely appeal. An appeal from the ban itself questions the validity of its issuance. This must be taken within the prescribed appeal period. If, however, Appellant wishes to have the ban lifted, it must first request the Department to do so and establish that the Department has refused unjustifiably to lift the ban. In such a case, the action from which an appeal would be taken would be the refusal to lift the ban. If such action were taken within the prescribed appeal period, Appellant could have the validity of the refusal determined. This is not the case in this matter. Appellant has stated no reason which would confer jurisdiction on this Board to entertain an appeal from the institution of the sewer connection ban on June 26, 1973.

CONCLUSION OF LAW

1. The Environmental Hearing Board does not have jurisdiction to hear an appeal from an order imposing a sewer connection ban, where the municipality to whom such order was issued took an appeal more than 30 days after the issuance of the order.

O R D E R

AND NOW, this 10th day of April, 1975, the appeal of the Borough of Grove City, Mercer County, Pennsylvania, from an order of DER under date of June 26, 1973, instituting a sewer connection ban with regard to connections to sewers tributary to its treatment facilities is hereby quashed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

By JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: April 10, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
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(717) 787-3483

In the Matter of:

D. STEVE REPLOGLE

Docket No. 74-108-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and PENN TOWNSHIP SUPERVISORS

ADJUDICATION

By Joseph L. Cohen, Member—Issued April 10, 1975.

This matter is before the Board on the appeal of D. Steve Replogle from the action of Penn Township Supervisors, Huntingdon County, Pennsylvania, taken on April 9, 1974, refusing to grant Appellant an on-lot sewage disposal permit to serve his eating and drinking establishment in the Township. Appellant filed an appeal from said action on April 26, 1974. Previous to the filing of the appeal, Appellant never requested a hearing before the Township in conformity with the now repealed provisions of §7(e) of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, as amended, 35 P. S. §750.1 et seq. Thereafter the Supervisors of Penn Township, on July 1, 1974, took action purporting to issue a permit to Appellant for an on-lot sewage disposal facility to serve his premises. The issue before the Board is whether this appeal should be dismissed either as being moot or for the reason that Appellant failed to pursue his administrative remedies.

FINDINGS OF FACT

1. Appellant is an individual, D. Steven Replogle, R. D. 1, Roaring Springs, Taylor Borough, Blair County, Pennsylvania.

2. Appellees are Supervisors of the Township of Penn, Huntingdon County, Pennsylvania, and the Pennsylvania Department of Environmental Resources, (hereinafter "DER").

3. Sometime prior to April 9, 1974, Appellant applied to Penn Township for a permit to install an on-lot sewage disposal system to serve his eating and drinking establishment on his property in the Township.

4. On April 9, 1974, Penn Township denied Appellant's application for a permit and advised him by letter as follows:

> "On April 9, 1974, a special meeting of the Penn Township Supervisors was held at which time your application for a permit for a sewage disposal system was considered. Pursuant to the directive of the department and Department of Environmental Resources your application is hereby denied.
>
> "This denial is based upon the following reasons as set forth in Rules and Regulations of the Department of Environmental Resources, Section 71.55:
>
> "1. Soil or geological conditions which would preclude safe and proper operation of the desired installation.
>
> "2. Failure of the proposed system to adequately protect the public health and prevent pollution.
>
> "If you have any questions please feel free to contact us."

5. On April 26, 1974, Appellant filed an appeal with this Board from the denial of the permit by the Penn Township Board of Supervisors.

6. At no time between the denial of the permit by Penn Township and the filing of the appeal by Appellant on April 26, 1974, did Appellant request Penn Township for a hearing in accordance with the provisions of §7(e) (now repealed) of the Pennsylvania Sewage Facilities Act, supra.

7. On or about July 1, 1974, the Supervisors of Penn Township took action purporting to issue Appellant the permit previously denied. Thereafter on August 28, 1974, DER, upon learning of the action of the Supervisors of Penn Township, requested the Township to hold a hearing at which DER could present its intentions respecting the propriety of the permit issuance. Although the Township acquiesced in DER's request, set a hearing date and notified DER thereof in writing, DER never appeared at this scheduled time and place.

DISCUSSION

From the evidence adduced in this matter, it is apparent that this Board cannot adjudicate the merits of this case for at least two reasons. The first is that Appellant failed to pursue his administrative remedies as set forth in §7(e) (now repealed) of the Pennsylvania Sewage Facilities Act, supra. This provision, now repealed but in effect at the time of the appeal in this matter, provided as follows:

"(e) In case any permit is denied or revoked, a hearing shall be held thereon before the municipality, county department of health, joint county department of health, or the department in accordance with the provisions of section 8 of this act, within fifteen days after request therefor is made by the applicant. Within seven days following the date of such hearing, the applicant shall be notified in writing of the determination of said hearing."

The failure of Appellant to request a hearing before Penn Township prior to appealing to this Board renders this appeal premature. The law in Pennsylvania has always been and is now that statutory remedies must be strictly pursued. Act of March 21, 1806, P. L. 588, 4 Sm.L., 326, §13, 46 P. S. §156 (now repealed); 1 Pa. S. §1504; see also Commonwealth v. Glen Alden et al, 418 Pa. 57, 210 A.2d 256 (1965). Inasmuch as Appellant did not pursue his statutory remedies, he is not entitled at this time to appeal the action of the Township in denying his permit.

The second ground for the dismissal of this appeal is that it is moot by virtue of the fact that on July 1, 1974, Penn Township issued a permit to Appellant to construct a sewage disposal facility on his property in the Township. Although DER had knowledge of the issuance of the permit and requested a hearing before the Township in order to contest the issuance of the permit, it took no further action to have the permit set aside. In such circumstances we are of the opinion that the time has passed to allow DER to contest the validity of the action of the Township Supervisors in this regard.

Section 12(a) (now repealed) of the Pennsylvania Sewage Facilities Act, supra, provided that any person aggrieved by the decision of a municipality under the Act could have appealed to this Board.[1] Section 12(a) of the Act must be read in pari materia with the provisions of the Admininstrative Agency Law, Act of June 4, 1945, P. L. 1388, as amended, 71 P. S. §1710.1 et seq. Section 2(d) of the Administrative Agency Law, supra, makes it clear that the term 'person' includes a State governmental agency.

Inasmuch as the Administrative Agency Law, supra, includes within its definition of 'person' a State agency, it remains to be considered whether DER is

1. Section 12(a) (now repealed) of the Pennsylvania Sewage Facilities Act, supra, originally provided for appeals to the Secretary of Health. However, by virtue of the provisions of §1921-A(b) of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §51 et seq., the Environmental Hearing Board had conferred upon it the jurisdiction to hear such appeals.

an 'aggrieved' person in order to have been able to appeal the action of the Supervisors of Penn Township. We are of the opinion that the allegation that the Township did not follow the rules, regulations and directives of DER, if proved, would constitute DER an aggrieved person within the meaning of both the Administrative Agency Law, supra, and §12(a) of the Pennsylvania Sewage Facilities Act, supra.

Inasmuch, therefore, as DER did not appeal to this Board to set aside the action of Penn Township in granting Appellant a permit within 30 days after it had received knowledge that the permit was issued, it is collaterally estopped from attacking the validity of the action of the Township in issuing the permit in this case. Thus, even if Appellant had pursued its administrative remedies and sought a hearing before the Township before appealing to this Board, we would have been constrained to dismiss the appeal as being moot for the above stated reasons.

CONCLUSIONS OF LAW

1. Under the provisions of §7(e) (now repealed) of the Pennsylvania Sewage Facilities Act, supra, a condition precedent to an appeal to this Board under §12(a) (now repealed) of that Act was that a party who has been denied a sewage facilities permit by a municipality request a hearing before the municipality upon that denial.

2. An appeal does not lie to this Board from the action of a municipality under now repealed sections of the Pennsylvania Sewage Facilities Act, supra, in denying a permit unless the applicant first seeks review of the denial from the municipality taking the action.

3. DER under now repealed sections of the Pennsylvania Sewage Facilities Act, supra, had the right to appeal to this Board within 30 days the grant of any sewage facilities permit to any person where such issuance was allegedly in violation of the Act or rules and regulations of DER promulgated pursuant thereto.

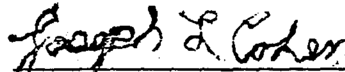
4. Where DER failed to appeal the issuance of a sewage facilities permit within the requisite appeal period, it may not thereafter collaterally attack such action as being contrary to law.

ORDER

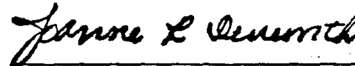
AND NOW, this 10th day of April, 1975, the appeal of D. Steven Replogle from the action of the Supervisors of Penn Township, Huntingdon County, taken April 9, 1974, denying him a permit for the installation of an on-lot sewage disposal facility is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman



By JOSEPH L. COHEN
Member



JOANNE R. DENWORTH
Member

DATED: April 10, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

SUMMIT TOWNSHIP TAXPAYERS ASSOCIATION

Docket No. 74-176-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member—Issued April 11, 1975.

This matter is before the Board on appeal of Summit Township Taxpayers Association (hereinafter "Appellant") from the action of the Pennsylvania Department of Environmental Resources (hereinafter "DER") in granting the Erie Disposal Company (hereinafter "Intervenor") a permit for the operation of a solid waste disposal facility in Summit Township, Erie County, Pennsylvania. The writer of this opinion held a hearing on behalf of the Board in this matter on January 23, 1975, at the Community Services Building, 606 West Second Street, Erie, Pennsylvania, for the purpose of taking testimony.

At the conclusion of the presentation of Appellant's case, Intervenor and DER moved to dismiss this appeal. While DER presented testimony in behalf of its action, Intervenor presented no testimony whatsoever.

After a full consideration of the evidence in this matter and the relevant legal principles, we enter the following Adjudication:

FINDINGS OF FACT

1. Appellant is Summit Township Taxpayers Association, an unincorporated association composed of residents of Summit Township, Erie County, Pennsylvania. Some members of the association live in the vicinity of the landfill site for which Intervenor received the permit which is the subject matter of these proceedings.

2. Appellee is DER, the Agency of the Commonwealth of Pennsylvania authorized to administer the Act of July 31, 1968, P. L. 788, as amended P. S. §6001 et seq.,

known as the Pennsylvania Solid Waste Management Act.

3. Intervenor is Erie Disposal Company, P. O. Box 298, 1154 West 16th Street, Erie, Pennsylvania.

4. On or about June 26, 1973, Intervenor filed with DER an application to operate a solid waste disposal facility on a site on Robison Road in the eastern portion of Summit Township, Erie County, Pennsylvania. On July 3, 1974, DER issued Intervenor a permit in response to its application.

5. The site for which Intervenor filed an application with DER on June 26, 1973, is adjacent to a site previously operated as a solid waste disposal facility by Intervenor.

6. The solid waste disposal facility operated by Intervenor previous to the one for which the permit in question in this proceeding was sought, was being operated with the approval of DER even though the facility was from time to time a source of odor and other problems to the residents in the vicinity of the facility.

7. With respect to the problems at the old site, Intervenor and DER worked together in good faith in an effort to resolve them.

8. The application and plans submitted for the solid waste disposal site for which a permit was granted on July 3, 1974, set forth the necessary information to enable DER to ascertain whether the application conformed to the requirements of departmental regulations regarding solid waste disposal facilities.

9. The information supplied to DER by Intervenor indicated that the application and attendant plans and specifications met the requirements of DER regulations.

10. DER conditioned the operation of the new facility on an inspection and certification by an independent third party to determine whether the site was prepared in such a manner as to be in keeping with the requirements set forth in applicable rules and regulations of DER regarding the operation of solid waste disposal facilities. This inspection and certification was done by a reputable registered professional engineer. Moreover, the Department made an on-site inspection of the proposed site and found it to be in accordance with its regulations.

11. Appellant offered evidence which tended to show that the old solid waste disposal facility operated by Intervenor may have been a source of irritation to the residents of Summit Township living in the vicinity of the then existing facility, but offered no substantial evidence to show that the application made by

Intervenor on the basis of which DER issued a permit in any way failed to conform with applicable DER regulations regarding solid waste disposal facilities.

DISCUSSION

Appellant has the burden of proving that DER committed a manifest abuse of discretion, a purely arbitrary execution of its duties and functions or committed an error of law in granting a permit to Intervenor to operate a solid waste disposal facility. Berlin, et al v. Department of Environmental Resources, 5 Pa. Commonwealth Ct. 677, 291 A.2d 553 (1972); Green Township Supervisors v. Commonwealth of Pennsylvania, Department of Environmental Resources, EHB Docket No. 74-001-B (issued November 26, 1974); August and Viola DeGuffroy, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources, EHB Docket No. 73-455-C (issued August 28, 1974). In applying this standard to the evidence produced by Appellant, we find that Appellant has not met its burden.

Appellant claims, inter alia, that the application for a permit did not meet the standards prescribed in DER regulations. In this connection, Appellant claims that the Department did not follow its own regulation with regard to cover material and with regard to access roads to the facility.

In regard to the character of cover material, 25 Pa. Code §75.82(b) provides:

> "Specific types of soil and other materials are unsuitable and shall not be used as cover material except as approved by the Department. Unsuitable categories shall include loamy sand, silt, clay loam, sandy clay, clay, silty clay, sand, organic soils, incinerator residue, and fly ash."

The application for the permit indicated that the characteristics of the soil on the site show it to contain a certain amount of Erie silt loam and other types of silt loam. (R. 8). Moreover, the evidence indicates that this type of soil is somewhat poorly to very poorly drained (ibid.). From this evidence Appellant concludes that the Department did not follow its own regulations with regard to cover material. However, the above cited regulation permits in haec verba the Department to approve the use of unsuitable soil and other material as cover. In view of this specific provision in DER regulation, it cannot be said that it disregarded this regulation when it approved the issuance of the permit in this case. It must be concluded that inasmuch as this information was available on the application,

the Department approved of the use of this material as cover when it approved the issuance of the permit in question. Hence, it cannot be said that DER disregarded its regulation in this regard.

In regard to all-weather access roads, 25 Pa. Code §75.43 provides:

> "(a) All-weather access roads negotiable by loaded collection vehicles shall be provided to the entrance of the site or facility.
> "(b) The minimum cartway width for two-way traffic shall be 22 feet.
> "(c) For one-way traffic, separate roads with a minimum cartway of 12 feet shall be available."

Appellant contends that Robison Road, a public road, which borders the landfill site, does not meet the requirements of the regulation. However, it is clear that the regulation applies only to the access road on the site itself and not to public roads bordering the disposal site.

Appellant further contends that DER in its review of Intervenor's application did not give sufficient weight to the residential character of the vicinity in which the proposed site was to be located. Appellant suggests that to permit a landfill in a residential area is either an abuse of the Department's discretion or otherwise contrary to law. We must reject this claim by Appellant for the reason that neither the Solid Waste Management Act, supra, nor DER rules and regulations adopted pursuant to that Act require the denial of permits to operate solid waste disposal facilities in residential areas. Moreover, Article I, Section 27 of the Pennsylvania Constitution does not compel such a conclusion.

With regard to the constitutional amendment, Payne v. Kassab, 11 Commonwealth Ct. 14, 312 A.2d 86 (1973) set forth the test by which State action affecting the environment is to be considered in light of this constitutional provision.[1] The court in Payne set forth the following standard to be utilized in ascertaining compliance with the constitutional amendment:

> "Judicial review of the endless decisions that will result from such a balancing of environmental and social concerns must be realistic and not merely legalistic. The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?" 11 Commonwealth Ct. at 29-30, 312 A.2d at 94.

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1. While Appellant did not expressly raise the issue of Article I, Section 27 of the Pennsylvania Constitution, we discuss it here because it presents the only other conceivable basis upon which an argument could be made that landfills may not be located in residential areas.

Applying the above stated standard to the facts of this case, it is clear that DER complied with all applicable statutes and regulations relative to solid waste disposal areas. Although it did not consider local zoning regulations in the area, it was not compelled to do so. However, 25 Pa. Code §75.32 requires that the map submitted with the application shall, inter alia, indicate the use of adjoining land. Intervenor's application indicated the residences in the vicinity of the proposed landfill operation. This indicated to DER that the site of the proposed landfill is in a sparsely settled, rural residential area. Under such circumstances, we cannot say that the decision of DER in granting this permit was either arbitrary, capricious or contrary to law.

Furthermore, the rules and regulations of DER adopted under the provisions of the Pennsylvania Solid Waste Management Act, supra, assure that DER in passing upon applications take reasonable efforts to reduce environmental insults in the granting of permits for solid waste disposal facilities. Moreover, the record in this matter does not disclose that the environmental harm which may result from the operation of Intervenor's facility will so clearly outweigh the benefits derived that we can charge DER with an abuse of discretion.

Finally, nothing in the law or regulations would require the Department to interview the residents in the area, as is claimed by Appellant. Nevertheless, the day before the permit was issued the Department heard the views of the residents in the area. It chose, however, to grant the permit, even though there was substantial public objection.

It is abundantly clear, contrary to Appellant's contention, that the Department did ascertain the views of the residents in the area before it issued the permit in question to Intervenor. That it issued the permit despite public objection does not render the Department's action illegal. It merely demonstrates under all the facts in this case that the Department made an independent judgment as to whether the permit should issue. The process by which the Department came to this conclusion amply demonstrates that it did not violate the law nor was its action arbitrary, capricious or unreasonable.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of these proceedings.

2. Where a party appeals to the Board from the issuance of a permit by DER to an applicant for a permit, such party has the burden of showing that the action of the Department was arbitrary, capricious or unreasonable or contrary to law.

3. DER did not violate its own regulation with regard to cover material.

4. DER did not violate its own regulation with regard to access roads.

5. Appellant did not sustain its burden of showing the impropriety of DER issuing a permit to Intervenor.

6. DER properly issued a permit to operate a solid waste disposal facility to Intervenor, Erie Disposal Company.

ORDER

AND NOW, this 11th day of April, 1975, the action of DER in issuing a permit for the operation of the solid waste disposal facility to Erie Disposal Company on July 3, 1974, is hereby sustained and the appeal of Summit Township Taxpayers Association is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

By JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: April 11, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

PAUL O. SUNDAY, et al, Appellant

Docket No. 75-068-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES, Appellee
CARLISLE BOROUGH SEWER SYSTEM AUTHORITY, Intervenor

ADJUDICATION

By Paul E. Waters, Chairman (Issued--April 17, 1975)

It appearing that the Appellants raise the same issues which have previously been decided against them in an equity action filed by them to No. 5 March T. 1974, in the Court of Common Pleas of Cumberland County, against the Carlisle Borough Sewer System Authority, a party to this suit, we enter the following:

ORDER

AND NOW, this 17th day of April, 1975, the Motion to Quash the appeal of Paul O. Sunday, et al filed on behalf of Intervenor, Carlisle Borough Sewer System Authority is hereby granted.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: April 17, 1975
llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

ORANGE CLEANERS

Docket No. 74-168-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

A D J U D I C A T I O N

BY PAUL E. WATERS, Chairman, April 29, 1975

This matter comes before the Board as an appeal from a refusal by the Department of Environmental Resources (hereinafter DER), to grant an exception requested by Orange Cleaners (hereinafter Appellant), to a sewer ban order issued by DER in Easttown Township, Chester County, Pennsylvania. Appellant operates a dry cleaning business and desires to extend the operation to laundering shirts. The Township requires a permit to make the new washer hookup to the already installed sewer system, and the permit was refused because of the sewer ban now in effect.

FINDINGS OF FACT

1. Appellant, Orange Cleaners, operates a dry cleaning establishment located at 554 Lancaster Avenue, Berwyn, Easttown Township, Chester County, Pennsylvania.

2. In 1966, Orange Cleaners contemplated a future commercial laundry operation on said premises, took out a plumbing permit from Easttown Township and installed a sewer connection between its premises and the street sufficient to handle any requirements resulting from said laundry operation.

3. On June 21, 1973, the Commonwealth of Pennsylvania, Department of Environmental Resources ordered Easttown Township to prohibit additional dis-

charges into the Easttown Township sanitary sewerage system or treatment facilities without written authorization from DER.

4. Subsequent to the issuance of said order, Appellant proposed to install commercial laundry equipment at its Lancaster Avenue premises which installation would result in an additional discharge of 51,870 gallons of sewage a year to the Easttown Township sanitary sewer system.

5. The installation of said equipment requires another plumbing permit from Easttown Township.

6. By letter of May 1, 1974, the Board of Supervisors of Easttown Township advised Appellant that the Township lacked the authority to issue a plumbing permit for an additional discharge to the Easttown Township sanitary sewer system without written authorization from DER.[1]

7. On June 6, 1974, Appellant requested permission from DER to connect said laundry equipment to the Township sanitary sewer system.

8. It is DER's policy that exceptions to sewer connection bans will be granted only under three very limited factual circumstances:

> 1. "A building permit for new construction was issued by the municipality prior to or on the date of receipt of the ban.
>
> 2. "The connection will serve an existing occupied dwelling built prior to the date of receipt of the ban.
>
> 3. "The connection will result in no increase in sewer flows to overloaded facilities."

9. By letter of June 21, 1974, DER denied the request of Appellant for an exception to the Easttown Township ban, as not within any of the exception provisions.

10. The total amount of sewer water contemplated by this Appellant, including present usage and usage requested, is approximately 70,000 gallons per year. This is considerably less than discharged in 1969, and amounts to about 200 additional gallons a day or 1,000 gallons per week.

11. No regulation has been adopted by DER dealing with its exercise of discretion in permitting additional sewerage in existing structures.

DISCUSSION

This is another sewer-ban case which brings hard facts into a head on collision with hard law. The facts have been so categorized because it seems

1. The order issued to the Township by DER on June 21, 1973, prohibited ... "any additional discharge into your sanitary sewer system or treatment facilities without written authorization from the Department except [where]---building permits were issued prior to the date of receipt of this order".

likely from both the testimony and pure logic, that more water would be consumed by laundering a given number of shirts by individual homemakers, than by use of Appellant's proposed commercial facility. The problem with this theory (i.e. the reason it fails to hold water) is that there can be no guarantee that the given number of shirts are: 1. Now being done at individual homes, and 2. Even if they are, that they will necessarily be brought to Appellant as opposed to some other commercial establishment in or out of the area.

One of the facts upon which both parties agree is that there will be an additional sewer discharge of about four thousand gallons per month.

The hard law of the case is, of course, the very restrictive basis upon which DER exercises its discretion to allow sewer ban exceptions. It is, after all, the reasonableness of this policy which is a test of its legality. The courts have said in F & T Construction Company, Inc. v. Department of Environmental Resources, 6 Pennsylvania Commonwealth Court 59 (1972):

> "In a collateral attack such as the appellant chose to mount, the burden must be on the appellant to show that the ban is invalid, but no evidence to that effect was even introduced.
>
> "The appellant also contends that the date of issuance of a building permit was improperly established as the criterion for allowing an exemption to the ban on further discharge. It suggests that a more reasonable criterion would have been the subdivision approval date. Needless to say, the appellant prefers this latter date because it would work to his advantage in this case. But what of the situation where no subdivision approval is necessary and a builder may have already begun work under a building permit? The use of the date of issuance of a building permit as the cut-off date is in our view a reasonable standard for this purpose."

Appellant contends that it actually qualifies for the exception granted for certain "new construction", under one of DER's three major exceptions.[2]

The Appellant submits that the proposed laundry facility is in effect "new construction". Even if we agreed with this view of the addition of laundry machines to an existing dry cleaning plant, clearly the requirement of a building

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2. The actual provision is:

"A building permit for new construction was issued by the municipality prior to or on the date of receipt of the ban."

permit issued prior to the ban, is the key phrase that has been overlooked by Appellant.

The final question seemingly raised by Appellant is: When is a connection not a connection? The answer would seem to be—when it will not serve as a conduit for any additional discharge to an overloaded sewer system. We believe that the hookup of machinery to plumbing facilities, under a municipal permit system, is clearly within the meaning of "connection" as here prohibited by the Regulations of DER.

Although the Appellant alleges violations of both the Pennsylvania and Federal Constitutions regarding its right to equal protection of the laws, it has cited no cases and no argument beyond the bald assertion appearing in the brief. We will attach the same significance to the argument as Appellant appears to, and summarily dispose of it by saying we find no such patent violation.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this proceeding.

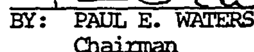
2. The issuance of a plumbing permit for a discharge of an additional 51,870 gallons of sewage a year to the Easttown Township sanitary sewer system subsequent to the imposition of a sewer connection ban on said system requires an exception from DER.

3. The Appellant does not qualify for an exception to a sewer connection ban under the Department's exercise of discretion in granting such exceptions.

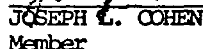
ORDER

AND NOW, this 29th day of April, 1975, the appeal of Orange Cleaners is hereby dismissed and the action of the Department of Environmental Resources in refusing, on June 21, 1974, to grant an exception to the sewer ban issued to Easttown Township on June 21, 1973, is hereby sustained.

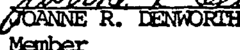
ENVIRONMENTAL HEARING BOARD



BY: PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member



JOANNE R. DENWORTH
Member

DATED: April 29, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

BELL DEVELOPMENT CORPORATION

Docket No. 73-261-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, April 30, 1975.

This matter is before the Board on the appeal of Bell Development Corporation (hereinafter Appellant), from two orders dated August 1, 1973, issued Appellant by the Pennsylvania Department of Environmental Resources (hereinafter DER). Appellant operates two apartment developments in Moon Township, Allegheny County, Pennsylvania, College Park Apartments and Colony West Apartments. In each apartment development, Appellant operates a swimming pool facility for the benefit of its tenants and their invited guests. The DER orders of August 1, 1973, revoke previously issued permits to Appellant to construct and operate the swimming pool facilities at each apartment development and further order Appellant to drain the pools and cease operation thereof until such time as Appellant applies for, is issued and operates the swimming pool facilities in compliance with the provisions of a permit.

Although the appeals in this matter raise question as to the factual basis upon which the orders of DER were issued, Appellant's major contention is that the pools are not public bathing places and, hence, are not subject to the provisions of the Public Bathing Law, Act of June 23, 1931, P. L. 899, as amended, 35 P. S. §672 et seq.

On May 22, 1974, a hearing in this matter was held in the eighth floor conference room of the Kossman Building, Forbes Avenue and Stanwix Street, Pittsburgh,

Pennsylvania, before Louis R. Salamon, Esquire, a Hearing Examiner appointed by this Board to hear this case. Upon review of the evidence presented at the aforementioned hearing, including consultation with the Hearing Examiner regarding questions of credibility, and after review of the legal arguments of the parties, the Board enters the following Adjudication:

FINDINGS OF FACT

1. Appellant is Bell Development Corporation, registered to do business in the Commonwealth of Pennsylvania with offices located at Suite 2013, One Oliver Plaza, Pittsburgh, Pennsylvania 15222.

2. Appellee is DER, the agency of the Commonwealth charged with the administration and enforcement of the Public Bathing Law, supra.

3. Appellant operates two apartment complexes in Moon Township, Allegheny County, Pennsylvania, the Colony West Apartments and the College Park Apartments.

4. On June 29, 1968, and on April 15, 1969, Appellant submitted to the Pennsylvania Department of Health, at that time administering the provisions of the Public Bathing Law, supra, applications to construct and operate swimming pool facilities at the College Park Apartments and the Colony West Apartments, respectively.[1]

5. The Pennsylvania Department of Health on September 24, 1968, issued Appellant Permit No. 468B019 to construct and operate an outdoor swimming pool at the College Park Apartment complex, and on May 15, 1969, issued Appellant Permit No. 0269110 to construct and operate an outdoor swimming pool at the Colony West Apartment complex.

6. The College Park Apartments swimming pool is open for the use of its tenants and their guests. The Colony West swimming pool is open for use by its tenants and their guests. The College Park Apartment complex has 160 apartments while the Colony West Apartment complex has 147 apartment units.

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1. By virtue of §1901-A(9) of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177 as amended, 71 P. S. §51 et seq., added by the Act of December 3, 1970, P. L. 834, Act No. 275, the administration of Public Bathing Law, Act of June 23, 1931, P. L. 899, as amended, 35 P. S. §672 et seq., was conferred upon DER, effective January 19, 1971. Prior thereto, the Pennsylvania Department of Health administered the provisions of that Act.

7. Pursuant to a written agreement with DER, the Allegheny County Department of Health is authorized to act as agent for DER to inspect swimming and bathing facilities within Allegheny County, for compliance with the Public Bathing Law, supra, the Rules and Regulations of DER adopted pursuant thereto and conditions set forth in Bathing Place Permits issued by DER. The Allegheny County Department of Health, after making such inspections, reports its findings to DER. Thereafter, DER takes such action with regard to such inspection reports as it deems appropriate under the circumstances.

8. On July 24, 1973, personnel of the Allegheny County Department of Health conducted an inspection of the swimming pool facilities at Appellant's College Park Apartment complex and its Colony West Apartment complex and found with respect to the two swimming pool facilities:

(a) No chlorine residual was present in the waters of either swimming pool, and

(b) The pH value of the waters used in the pools was below 6.8.

9. On the basis of information available to it, the Allegheny County Department of Health ascertained that:

(a) At neither pool were lifeguards on duty during times when the pool was open for use by the tenants and their guests, and

(b) The electrical facilities at each swimming pool had not been inspected during the last three years.

10. The Allegheny County Department of Health transmitted the findings of its inspectors with regard to Appellant's swimming pools to DER.

11. On the basis of the information supplied to it by the Allegheny County Department of Health and other information available to it, DER issued the following orders to Appellant on August 1, 1973:

> "THEREFORE, pursuant to §680(b) of said Public Bathing Law and §193.17 of the Rules and Regulations for the Department of Environmental Resources, it is hereby ordered that:
>
> "1. Effective immediately, Bathing Place permit No. 468B019 is hereby revoked;
>
> "2. Effective immediately, Bell shall drain and keep dry the swimming pool at College Park;
>
> "3. Said swimming pool shall remain closed until Bell applies for, is issued and is operating in compliance with, a Bathing Place permit."

"THEREFORE, pursuant to §680(b) of said Public Bathing Law and §193.17 of the Rules and Regulations for the Department of Environmental Resources, it is hereby ordered that:

"1. Effective immediately, Bathing Place permit No. 0269110 is hereby revoked;

"2. Effective immediately, Bell shall drain and keep dry the swimming pool at Colony West and cease all use of said facilities;

"3. Said swimming pool shall remain closed until Bell applies for, is issued, and is operating in compliance with, a Bathing Place permit."

12. The testimony offered on behalf of DER, while partially contradicted by testimony offered on behalf of Appellant, is worthy of belief. Such testimony clearly establishes, as of August 1, 1973, and we specifically find, as follows:

(a) No chlorine residual was present in the waters of either swimming pool.

(b) The pH value of the waters in each swimming pool was below 6.8.

(c) No lifeguard protection was provided at either swimming pool.

(d) The electrical facilities at each swimming pool have not been inspected during the last three years.

DISCUSSION

The evidence in this matter clearly shows that prior to August 1, 1973, DER had in its possession facts which indicated that Appellant violated certain DER regulations relating to the operation of Public Bathing Places with respect to its Colony West Apartment complex and its College Park Apartment complex in Moon Township, Allegheny County, Pennsylvania. Not only does the testimony of DER's witness clearly establish these violations, but Appellant concedes that this is the fact.

Appellant does not claim that DER had no sufficient cause for revocation of the permits for the College Park and Colony West swimming pools. It claims, rather, that its swimming pools are not required to have a permit for the reason that they are private in nature and do not come within the provisions of the Public Bathing Law, *supra*. Inasmuch as Appellant is not questioning the sufficiency of the cause for the revocation of the permits in question, we need not pass upon the question of whether the permits should have been suspended rather than revoked.

Moreover, the issue of the validity of the revocation does not necessarily bear on the issue of whether the Department could have ordered the pools closed for violations of DER Bathing Place Regulations promulgated pursuant to the Public Bathing Law, supra.

In light of our Adjudication in Apple Valley Racquet Club v. Commonwealth of Pennsylvania, Department of Environmental Resources, EHB Docket No. 74-150-C (issued October 23, 1974), we must reject Appellant's contention that the pools in question are not subject to the provisions of the Public Bathing Law, supra. In fact, the facts of this case present even stronger reasons for holding the pools in question to be subject to the provisions of the Public Bathing Law, supra, than those in the Apple Valley matter. The tenants of the Appellant in this case have no right of control over the manner in which the pools are operated. In Apple Valley at least the members of the club theoretically had such power. Moreover, it cannot be said, as Appellant argued in its brief, that these pools are not "for hire". Mr. Bell, a principal in the Bell Development Corporation, acknowledged that the tenants of Colony West and College Park Apartments are indirectly paying for the use of the pool as part of their rent. Under the circumstances of this case, it is clear that the swimming facilities at Appellant's apartments are subject to the provisions of the Public Bathing Law, supra. Any other holding not only would place a crimped construction on that law inconsistent with its status as a public health and safety measure, but would deny the protection of that Act to a growing number of the public who reside in apartment dwellings similar to those of Appellant.

We are persuaded by the reasoning of Raponotti v. Burnt-Mill Arms, Inc., 113 N. J. Sup. 173, 273 A.2d 372 (1971), which construes apartment house swimming pools to be "public" pools within New Jersey's analogue to our Public Bathing Law, supra.

Appellant cites Drexelbrook Associates v. Pa. P. U. C., 418 Pa. 430, 212 A.2d 237 (1965), is support of its contention that Appellant's swimming facilities are not public bathing places. However, Drexelbrook is interpreting the specific provisions of the Public Utility Code, Act of May 28, 1937, P. L. 1053, as amended, 66 P. S. §1101 et seq. Suffice it to say that the interests to be protected by the Public Utility Code, supra, are not those to be protected

by the Public Bathing Law, supra. We are not concerned with the regulation of a monopoly as to the rates it may charge and the obligations it has to render service to all comers, but with considerations of public health and safety. The difference in interests to be protected taken together with the differences in statutory definition do not allow the adjective "public" to be given the severely restrictive meaning under the Public Bathing Law, supra, as contended for by Appellant.

We are not persuaded that Appellant is estopped from asserting that the provisions of the Public Bathing Law, supra, do not apply to its swimming pools in this case. We are of the opinion that the issue is whether the Public Bathing Law, supra, covers the College Park and Colony West swimming pools and we find that it does. But, we do not believe that the mere fact that Appellants applied for and received a permit under the Public Bathing Law, supra, is sufficient to preclude it from contesting the necessity for having these permits. Authority to regulate under a given statute cannot be conferred by agreement. Either the statute mandates the regulation of the specific subject matter or it does not. In this case it is clear that the swimming pools under consideration are subject to regulation under the Public Swimming Law, supra. Thus, the issue of estoppel is moot.

Even if we were to decide that Appellant was not required to have a permit under the Public Bathing Law, supra, nevertheless it is clear from the provisions of §8 of the Act that the applicability of this section is not limited to public bathing facilities. Thus, independently of the permit sections of the law we are persuaded that the Department could take steps to close any swimming pool, regardless of whether it is "public", found to be operated not in conformity with the requirements of §8 of the Act.

The issue of whether the violations which have been proved constitute a public nuisance is not for the Board to decide. Whether they do constitute a public nuisance is a matter to be determined by a court of competent jurisdiction in an action to abate the nuisance pursuant to §12 of the Act. It is sufficient for us to decide, which we do, that the violations proved in this matter are sufficient to justify the closure of the pools at Colony West and College Park Apartments.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this proceeding.

2. Swimming pool facilities owned and operated by the owners and operators of apartment complexes for the accomodation of the tenants thereof are subject to the provisions of the Public Bathing Law, supra, and may not be constructed or operated without first obtaining a permit therefor from DER.

3. There was substantial evidence in the record in these proceedings to show that the swimming pool facilities at Colony West and College Park Apartments were being operated in violation of the Public Bathing Law, supra, and the Rules and Regulations of DER promulgated pursuant thereto.

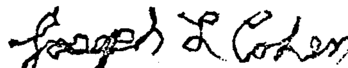
4. The violations of the Rules and Regulations of DER occurring at the swimming pools at College Park and Colony West Apartments owned and operated by Appellant, constitute sufficient grounds for ordering the closure of said pools until conformity with the Public Bathing Law, supra, and the Rules and Regulations of DER promulgated pursuant thereto is obtained.

ORDER

AND NOW, this 30th day of April, 1975, the actions of DER taken on August 1, 1973, in ordering the closure of the swimming pool facilities at the Colony West and College Park Apartments in Moon Township, Allegheny County, Pennsylvania, and revoking permits with regard thereto, previously issued Appellant, are sustained, and the appeals of Bell Development Corporation are hereby dismissed. Further, the supersedeas previously issued in these matters on June 17, 1974, is hereby withdrawn.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman



BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: April 30, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of: :

EUGENE PISANI :

: Docket No. 74-045-C

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, May 6, 1975

This matter is before the Board on the appeal of Eugene Pisani (hereinafter Appellant) from the action of the Pennsylvania Department of Environmental Resources (hereinafter DER) in issuing Lower Gwynedd Township Municipal Authority (hereinafter Intervenor), a water quality management permit and an encroachment permit in connection with a project to sewer the northeast corner of Lower Gwynedd Township, consisting principally of the residential subdivisions of Gwynedd View and Lamplighter Lane. Appellant filed this appeal for the reason that the proposed sewer project does not include his vacant land which he proposes to develop as a residential subdivision.

The writer of this Adjudication heard all the testimony in this matter. On the basis of the record and the legal arguments set forth in the briefs of the parties, we enter the following:

FINDINGS OF FACT

1. Appellant is an individual, Eugene Pisani, the owner of 27.75 acres of land located on the south side of Sumneytown Pike between Brushtown and Evans Roads in Lower Gwynedd Township, Montgomery County, Pennsylvania.

2. Appellee is DER, the agency of the Commonwealth having the authority to administer the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended 35 P. S. §690.1 et seq.

3. Intervenor is Lower Gwynedd Township Municipal Authority, Montgomery County, Pennsylvania.

4. On February 27, 1974, DER issued Intervenor sewage permit no. 4673416 and encroachment permit 4673740 in response to Intervenor's application proposing to sewer the northeast corner of Lower Gwynedd Township, Montgomery County, Pennsylvania, consisting principally of the residential subdivisions of Gwynedd View and Lamplighter Lane.

5. The proposed sewerage facilities of Intervenor include collection sewers and interceptors in the Upper Trewellyn Watershed which drained to a pumping station proposed to be located on Sumneytown Pike and thereafter approximately 2,200 feet to existing sewer lines.

6. The sewering of the areas covered by the project for which the aforementioned permits have been issued was the subject of reports and studies made by the Intervenor in 1964 and 1969. These areas were included in the official plan of Lower Gwynedd Township filed and approved pursuant to the provisions of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, as amended, 35 P. S. §750.1 et seq. The project for which the permit was issued is in conformity with supplements to the official plan.

7. The official plan of Lower Gwynedd Township identified four areas of the Township as having malfunction in sewer systems. Upon completion of the project for which the permits were issued the remaining two of the four areas will have been sewered.

8. The sewer project for which DER granted Intervenor a permit will not serve Appellant's property.

9. Appellant appealed the issuance of said permit on the following grounds:

a. The proposed sewerage facilities lack the capacity adequately to receive and handle the expected rate of flow; and

b. The proposed sewerage facilities do not extend south of Sumneytown Pike to the Wissahickon Interceptor, thereby sewering Appellant's property.

10. The permitted sewerage project was designed to accomodate the maximum flow resulting from total development of the sewered area.

11. The sewerage project will sewer portions of Lower Gwynedd Township in need of immediate service due to the number of malfunctioning systems in the area.

12. The official plan for Lower Gwynedd Township filed and approved pursuant to the provisions of the Pennsylvania Sewage Facilities Act, supra, does not call for the sewering of the area south of Sumneytown Pike until 1980 or thereafter.

13. There are no serious or widespread malfunctions of sewage systems south of Sumneytown Pike.

14. Appellant studied the feasibility of sewering the area south of Sumneytown Pike and concluded that this alternative was economically unfeasible at the present time. It therefore rejected said alternative.

15. The issuance of the permits in question by DER to Intervenor in no way precludes at sometime in the future the extension of sewer services south of Sumneytown Pike, if Intervenor should decide that the sewering of such area is feasible.

DISCUSSION

It is a fundamental principle of adminstrative law that where a statute confers discretion upon an agency to take certain action, such action will not be set aside unless they constitute either a manifest abuse of discretion or an arbitrary exercise of agency duties. Blumenschein v. Housing Authority of Pittsburgh, 397 Pa. 566, 109 A.2d 331 (1954); Sierra Club v. Sanitary Water Board, 3 Commonwealth Ct. 110, 281 A.2d 256 (1971). The burden of proof is upon Appellant to show by substantial evidence that DER in granting the aforesaid permits abused its discretion in so doing. We are unable so to find in this matter.

Appellant urges this Board to set aside the action of DER in granting Intervenor permits for the sewerage project in the northeastern portion of Lower Gwynedd Township for the reason that it does not intend to serve his proposed residential subdivision. Basically, Appellant has attacked the choice of proposals which Intervenor made when it submitted the applications for the permits herein involved. This Board, however, cannot decide whether Intervenor made the proper

decision in choosing the plan set forth in its applications. Our review is confined to determining whether on the basis of the application submitted to DER, that agency acted properly in granting the permits to Intervenor. In doing so, we are mindful that DER is the agency of the Commonwealth authorized to administer the Clean Streams Law, supra, and to take appropriate action with regard to permit applications contemplated under that law. DER's review process with regard to such applications is to determine whether they meet the applicable provisions of law and regulations adopted pursuant thereto.

Appellant misconstrues the review function of DER regarding Intervenor's applications. It is not DER's function in reviewing applications for sewerage permits to indicate which of several alternatives available to an applicant the applicant should choose. If DER were unwisely to assume such authority, it would become involved in the local political decisions of practically every municipality in the Commonwealth. Furthermore, it is doubtful whether the legal authority exists in DER to assume such a function.

Once the local decision is made to submit a given application, DER's role is to determine whether such application meets the requirements of the Clean Streams Law, supra, and the rules and regulations adopted pursuant thereto. In this case, there is no suggestion in the record that DER failed to perform its function in this regard. Appellant concedes that the application submitted by Intervenor complies with the requirements of the Upper Gwynedd Township official plan submitted to and approved by DER in conformity with the Pennsylvania Sewage Facilities Act, supra. The application, therefore, meets the requirements of 25 Pa. Code §91.31. Once this determination is made DER must determine the soundness of the proposal in terms of its intended purpose---i.e. to collect, in this case, municipal sewage from a given area and transport the same to a treatment plant which is capable of receiving and treating the sewage within the requirements of DER. It is readily apparent that DER made such a determination in favor of Intervenor.

With regard to whether the proposed facility will achieve its intended purpose, Appellant did not meet his burden of showing that Intervenor's proposal is technically unsound and will not perform as anticipated. Not having demonstrated this, it cannot be said that DER manifestly abused the discretion lodged with it by the Clean Streams Law, supra. It is apparent that Intervenor is proceeding to sewer the areas of the Township in a phase manner consistent with the Township's official plan. That it does not propose to sewer a given area to meet the needs of

a subdivision developer does not present an issue that this Board can adjudicate. To do so would inferentially cast upon DER the responsibility of dictating an option to local political subdivisions which, as indicated above, we think improper and unwise. Moreover, the Board in our opinion, does not have the jurisdiction to make such a determination. Whether Intervenor wisely exercised its discretion or authority in submitting a given plan to DER for approval is not within the Board's power to determine.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this proceeding.

2. The owner and developer of a proposed realty subdivision located within the service area of a municipal authority has standing to appeal the grant of a permit to said authority where the application for a permit involves the extension of sewerage service to a portion of the service area, but not including the subdivision of the party in question.

3. If a municipality or municipal authority submits an application to DER which otherwise meets the requirements of the Clean Streams Law, supra, and the rules and regulations promulgated pursuant thereto, the Environmental Hearing Board lacks jurisdiction to review the discretion exercised by said municipality or authority.

4. Where DER grants a permit to a municipality or municipal authority to extend sewerage services to a given portion of said municipality and the extension of such service is in conformity with the official plan of that municipality, the Environmental Hearing Board will not disturb the action of the Department unless it is shown that the design of the permitted project is technically or environmentally unsound.

5. In order to prevail in an appeal from the action of DER in granting a permit, an Appellant before the Environmental Hearing Board must sustain his burden of proof that the action of the Department in granting such permit is either arbitrary, capricious, unreasonable or otherwise in violation of the law.

6. Where an Appellant produces no substantial evidence to justify a finding that a proposed sewage collection system for which DER has issued a permit

lacks the capacity adequately to receive and handle the expected volume of sewage, such Appellant has not sustained his burden of proof to show that the permitted system is technically and engineeringly unsound.

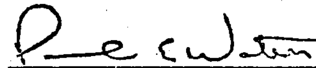
7. Appellant in this case did not sustain his burden of showing the action of DER to be arbitrary, capricious, unreasonable or otherwise contrary to law.

8. DER properly issued to Intervenor Water Quality Management Permit No. 4673416 and Encroachment Permit No. 4673740.

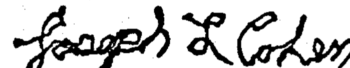
ORDER

AND NOW, this 6th day of May, 1975, the action of the Department of Environmental Resources in granting Upper Gwynedd Municipal Authority Water Quality Management Permit No. 4673416 and Encroachment Permit No. 4673740 is hereby sustained and the appeal of Eugene Pisani is hereby dismissed.

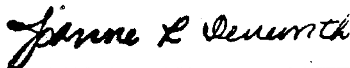
ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



BY: JOSEPH L. COHEN
Member



JOANNE R. DENWORTH
Member

DATED: May 6, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

OAKS CIVIC ASSOCIATION

Docket No. 73-378-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, May 8, 1975

This matter is before the Board on the appeal of Oaks Civic Association from the action of the Pennsylvania Department of Environmental Resources, (hereinafter DER) in granting Intervenor, Montgomery County Sewer Authority, a Water Quality Management Permit, Permit No. 4672405 to expand its sewage treatment plant in Upper Providence Township, Montgomery County, Pennsylvania. The permit was issued on October 24, 1973. The appeal was filed on November 5, 1973.

On January 17, 1975, at 10:00 a.m. the writer of this Adjudication held a hearing on behalf of the Board on this matter at the State Office Building at Broad and Spring Garden Streets, Philadelphia, Pennsylvania. At the conclusion of Appellant's case, DER and Intervenor moved for dismissal of the appeal. At the close of proceedings the parties agreed that it would not be necessary to file post-hearing briefs of any kind in this matter because of the relative simplicity of the facts and the issues.

Therefore, on the basis of the record in this matter, we enter the following Adjudication:

FINDINGS OF FACT

1. Appellant is the Oaks Civic Association, the membership of which does not appear of record. Its address is River Road, Oaks, Pennsylvania 19456. Its Chairman is John Sudofsky.

2. Appellee is DER, the agency of the Commonwealth authorized to administer the provisions of the Clean Streams Law, Act of June 22, 1937, P. L. 1987 as amended, 35 P. S. §691.1 et seq.

3. Intervenor is the Permittee, Montgomery County Sewer Authority.

4. In response to an application by Intervenor, DER issued Water Quality Management Permit No. 4672405 which authorized the expansion and updating of Intervenor's treatment plant in Upper Providence Township, Montgomery County, Pennsylvania.

5. On November 5, 1973, Appellant appealed the issuance of the aforementioned permit to Intervenor.

6. Appellant offered no evidence which tended to show that the issuance of the permit was based upon inaccurate data or that the Department in reviewing the permit did not follow the Clean Streams Law, supra, the Rules and Regulations adopted pursuant thereto or tending to show that the Department did not take into consideration the environmental impact of its decision.

7. While the present facility of Intervenor does produce problems of an enviromentally serious nature, the proposed expansion and updating of the plant as authorized by the permit issued to Intervenor is designed to improve the treatment of sewage and otherwise prevent serious environmental degradation.

DISCUSSION

Appellant objects to the issuance of a permit by DER to the Montgomery County Sewer Authority for the expansion and upgrading of its treatment plant in Upper Providence Township, Montgomery County, Pennsylvania. In its notice of appeal Appellant sets forth the following as reason for this appeal:

> "1. The proposed expansion of the Oaks sewage treatment plant to the edges of the Schuylkill River and Perkiomen Creek is severely harmful to the environment not only in the immediate area but it will also down grade the entire reach of the Perkiomen and that stretch of the Schuylkill from Black Rock Dam to Barbadoes Island. Contiguous property can be used for the expansion without destroying the natural cover provided by the trees in the flood plain.
>
> "2. The proposed expansion of the Oaks Sewage Treatment Plant is entirely in the flood plain, a practice being outlawed throughout the country and is presently not permitted in Upper Providence Township, site of the plant.

"3. The present plant emits noxious fumes that can only be described as air pollution, it can only be assumed that the proposed expansion of capacity will aggrevate the situation. Therefore we believe no expansion should be permitted until the present situation is corrected and that expansion plans include covers over the various tanks to eliminate future air pollution problems."

In addition to the above cited reasons for appeal, Appellant in its pre-hearing memorandum filed with this Board strenuously objects to the diking of the proposed sewage treatment plant in that it contends that the diking would alter the flood plain characteristics of the Schuylkill River and Perkiomen Creek, adversely affecting downstream areas and the stream banks opposite the plant site.

Appellant has the burden of proof to show that the action of DER in granting Intervenor a permit was either a manifest abuse of discretion or an arbitrary execution of its duties. F. & T. Construction Co. v. Department of Environmental Resources, 6 Commonwealth Ct. 59, 293 A.2d 138 (1972); Sierra Club v. Sanitary Water Board, 3 Commonwealth Ct. 110, 281 A.2d 256 (1971). The term "burden of proof" means the burden of producing evidence and the burden of persuasion. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE,(1954) 635. In order to meet its burden of persuasion, a party must first meet its burden of producing evidence. In this matter, Appellant did not even meet its burden of producing evidence.

The testimony offered on behalf of Appellant by its President, John Sudofsky, was on the whole unrelated to the permit issued by DER. Most of his testimony was directed toward the conditions which now exist when minor flooding occurs in the vicinity of the sewage treatment facility as it now exists. In issuing the permit to expand and upgrade the existing facilities, DER had the reasonable expectation that the conditions which now exist would improve and not be made worse by the expansion and upgrading of the treatment plant. Nothing in Appellant's testimony in any manner seriously addressed itself to this issue. Appellant merely relied upon its President to present its opinions as to the undesirability of the plant expansion. But opinions are not enough to overturn a considered action of the Department in granting a permit under these circumstances. Opinions must be buttressed by a sufficient factual foundation in order to have credence before this Board. Especially is this the case where the Department has issued a permit to expand and upgrade a sewage treatment facility which is designed sub-

stantially to reduce the environmental insults of which Appellant complains. Under such circumstances it is not sufficient to show that the existing facility, which admittedly is the case, cannot fulfill its intended purpose. It is because it cannot do so that the sewer authority in this case made application to the Department for a permit.

With regard to the flood plain issue, Appellant merely conjectured on the record. Again, no facts were presented to support its contentions.

Lastly, the question of whether the Department considered the environmental impact of its decision to grant the permit must be answered in the affirmative. The information supplied DER by Intervenor on the basis of which DER issued it the permit in question was sufficient to enable DER to evaluate the environmental impact of the expanded facilities being permitted in the absence of any indication to the contrary. The fact that DER reached a different conclusion in this regard than Appellant is, in and of itself, insufficient to call into question the validity of the permit issuance.

Not only did Appellant fail to present a scintilla of evidence which would tend to support a conclusion that DER acted improperly, but it is clear that DER in this case made a conscious and deliberate choice in favor of improved sewage treatment facilities and the improved environmental conditions that would obtain as a result thereof as against a rather speculative claim regarding the deterioration of the scenic beauty of the environment. In this connection, we find it persuasive that if the Intervenor had not voluntarily applied to expand its treatment facilities in Upper Providence Township, the Department was prepared, because of the water and air pollution problems associated with the existing facility, to order the sewer authority to upgrade its plant. In such circumstances, we cannot say that the departmental decision was improper. In fact, applying the principles enunciated in Payne v. Kassab, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973), DER's decision appears to be eminently justified.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this proceeding.

2. Whenever a permit issued by DER is called into question in an appeal, Appellant has the burden of showing that DER committed a manifest abuse of discretion, a purely arbitrary execution of its duties and functions or an error of law.

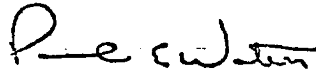
3. An Appellant does not meet its burden of showing that DER improperly issued a permit where it offers conjecture and speculation rather than factual evidence in regard to its contentions.

4. Appellant, Oaks Civic Association, did not meet its burden of showing that DER improperly issued permit No. 4672405 to the Montgomery County Sewer Authority to expand and upgrade its sewage treatment plant in Upper Providence Township, Montgomery County, Pennsylvania.

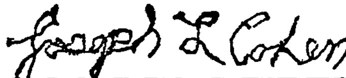
ORDER

AND NOW, this 8th day of May, 1975, the action of DER under date of November 24, 1973, in issuing a Water Quality Management Permit, No. 4672405, to Montgomery County Sewer Authority is hereby sustained and the appeal of Oaks Civic Association is hereby dismissed.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



By: JOSEPH L. COHEN
Member

CONCURRING OPINION

I concur in the conclusion that Appellant did not offer sufficient evidence to present even a prima facie case that the Department's issuance of a permit in this case was an abuse of discretion. However, I think the last several paragraphs of the opinion go too far toward granting the Department infallibility by assuming (in this case without having heard any testimony from the Department) that the Department has taken account of all material environmental considerations and come to an environmentally sound conclusion in issuing a permit. A presumption

of this sort, added to the already difficult burden of showing abuse of discretion, might make it next to impossible to attack the issuance of a permit on any but the most overwhelming environmental grounds--a result that could be undesirable from the standpoint of safeguarding the environment.

ENVIRONMENTAL HEARING BOARD

JOANNE R. DENWORTH
Member

DATED: May 8, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

COMPASS COAL COMPANY, INC. : Docket No. 72-190

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CITY OF DuBOIS

ADJUDICATION

By Joseph L. Cohen, Member, May 16, 1975

Compass Coal Company, Inc., (hereinafter referred to as Appellant), has sought to establish and to maintain a bituminous coal strip mining operation affecting 59 acres of land in Huston Township, Clearfield County, Pennsylvania.

On August 11, 1970, Appellant filed an application for a permit approving the discharge of mine drainage pursuant to the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended to July 31, 1970, 35 P. S. §691.315, with the Commonwealth of Pennsylvania, Department of Mines and Mineral Industries.

While this application was pending, legislation was enacted which created the Department of Environmental Resources (hereinafter DER), abolished the Department of Mines and Mineral Industries and vested the new Department with the authority formerly residing in the now defunct Department of Mines and Mineral Industries to administer those provisions of the Clean Streams Law, supra, relating to mine drainage.[1]

On January 12, 1972, DER held a fact finding conference on this application, and on April 3, 1972, DER issued a written denial of this application to Appellant.

On April 18, 1972, Appellant filed the instant appeal from that denial to this Board.

1. This was accomplished by the enactment of Section 20 of the Act of December 3, 1970, P. L. 834, No. 275, which amended the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §51 et seq. This transfer of responsibilities was effective January 19, 1971.

On August 25, 1972, we granted the Petition of the City of DuBois for Leave to Intervene in this appeal. On or about January 8, 1973, the City of DuBois, (hereinafter referred to as Intervenor), petitioned to have said appeal declared moot.

On February 13, 14 and 15, 1973, we held hearings on this petition and upon the merits of the appeal. Thereafter, the parties requested that we withhold our decisions on these matters pending settlement negotiations.

On January 14, 1975, we entered an Opinion and Order whereby Intervenor's petition to have said appeal declared moot was refused.

This Adjudication is based upon a proposed Adjudication submitted by Louis R. Salamon, Esquire, Hearing Examiner in this matter.

FINDINGS OF FACT

1. Appellant is a corporation, having its office in Punxsutawney, Pennsylvania.

2. The Appellee is DER which is the department of the Commonwealth of Pennsylvania which is vested with the responsibility, inter alia, to act on applications for mine drainage permits submitted pursuant to The Clean Streams Law, supra.

3. Intervenor, the City of DuBois, is a municipal corporation, duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania.

4. On August 11, 1970, Appellant filed with the Department of Mines and Mineral Industries, now defunct, an application for a mine drainage permit to operate a strip mine in Huston Township, Clearfield County, Pennsylvania. The proposed operation would affect 59 acres of land, 31 of which are situated west of and 28 of which are situated east of Pennsylvania Route No. 153, the area to be affected by this proposed operation for approximately 1/4 of a mile north of Anderson Creek. Only the 31 acres of land which are situate west of Pennsylvania Route No. 153 are in the Anderson Creek Watershed.

5. Although the Bureau of Water Quality Management of DER recommended disapproval of this application, William E. Guckert, Director of the Division of Mine Reclamation, Bureau of Land Protection and Reclamation of DER, advised Appellant by letter of October 8, 1971, that DER approved its application for a mine drainage permit, but indicated that the issuance of the permit was being withheld to afford any protestants time to request a hearing, presumably in compliance with the provisions of 25 Pa. Code §99.14.

6. Intervenor objected to the issuance of this permit to Appellant and on January 12, 1972, DER held a fact finding conference for the purpose of determining whether a mine drainage permit should be issued to Appellant. Donald A. Lazarchik, Director of the Bureau of Land Protection of DER, presided at this conference.

7. On April 3, 1972, DER by Mr. Lazarchik, issued the written denial of this application to Appellant, which denial forms the basis of the instant appeal. The reasons for said denial as therein set forth by Mr. Lazarchik are as follows:

> "Your application is hereby denied for the following reasons:
>
> "1. The Clean Streams Law and the Department's Rules and Regulations allow the issuance of permits for the treatment and discharge of industrial wastes and mine drainage only when such discharges will not cause pollution of the waters of the Commonwealth. Pollution is defined to include injurious or detrimental effects on domestic and recreational water uses and on wild animals, fish or other aquatic life. The purpose of the Law is to prevent pollution and to improve the quality of all of the streams of the Commonwealth. Your stated intention of achieving conditions similar to those that now exist on the Reiter tract is not likely to improve water quality and may very well result in a deterioration of Anderson Creek. The only possible area of improvement would be in eliminating minor drainage problems from the abandoned strip mine which has been stabilized through natural revegetation over a number of years and does not appear to seriously affect the quality of Anderson Creek. The possibility of creating more serious new drainage problems far outweighs the benefit to be gained.
>
> "2. The application fails to insure that the proposed method of operation will prevent soil erosion and reduction in the capacity of the City of Dubois's water supply reservoir. You state that you will follow all of the Department's requirements in providing erosion control structures and that you will plant the area in quick growing grasses. It is not the Department's responsibility to design the needed structures, to investigate soil conditions and the necessity for soil treatment, or determine the type of vegetation that will rapidly stabilize the backfilled areas. No special study or consideration was given in your application to the fact that the receiving stream needs extra protection because of its use for public water supply and for high quality recreational use. It is my feeling that the burden of proof in such matters rests with the applicant. Numerous expert opinions were provided by the protestant that special precautions are necessary in this case to prevent erosion, but you failed to provide any indication that you have even considered the need for such precautions. The application lacks a specific plan that anticipates these problems and attempts to control them."

8. The area to be affected by this proposed stripping is approximately 4-1/3 miles northeast of (and upstream from) a water supply reservoir maintained by Intervenor in the Anderson Creek watershed. The main source of water flowing to this reservoir is Anderson Creek. This reservoir is the only source of water for the City of DuBois, the Borough of Sykesville and Sandy Township.

9. Intervenors are considering increasing the present capacity of this reservoir by building a dam, approximately 2,000 feet downstream from the present dam.

10. A portion of the area to be affected by this proposed stripping, which is located on the westerly side of Pennsylvania Route No. 152, was stripped many years ago by persons or entities other than Appellant. This previously stripped area is 600 feet long and 50 feet wide. There is a discharge of mine drainage from said previously stripped area to the stream which traverses this area. From time to time, this mine drainage discharge is substantial.

11. Although there is an existing stream which runs in a general south-westerly direction across approximately 100 feet of the area on the westerly side of Pennsylvania Route No. 153 to be affected by this proposed operation, Appellant affirmatively set forth in the portion of its application known as "Supplemental D" that there are no streams across the proposed operation and that the proposed operation would not involve the relocation of any water course or stream. These statements were reaffirmed by Mr. Hess, the Engineer who prepared Appellant's application, during his direct examination at the hearing before Louis R. Salamon, Hearing Examiner.

12. Although 25 Pa. Code §99.12(2) requires Appellant to show the nature and acid forming potential of the overburden, Appellant performed no tests to determine the other chemical and physical properties thereof. In Supplemental "A" of this application, Appellant has merely set forth the technical name and thickness of each such stratum overlying the coal. These findings were made when 6 test holes were excavated on the area proposed to be strip mined.

13. In its application, Appellant stated that any drainage from this proposed stripping operation would be discharged to Anderson Creek. This statement was made notwithstanding the fact that any drainage from the proposed stripping operation on the easterly side of Pennsylvania Route No. 153 would not naturally flow into Anderson Creek. There is nothing in the application which provides for treatment, on the easterly side of Pennsylvania Route No. 153, of any mind drainage generated from the proposed stripping operation on said easterly side.

14. In Supplemental "B" of this application, Appellant states that in order to prevent the entry of surface water into the excavation or pit, effective diversion ditches will be built and maintained above the highwall to divert surface water past the excavation or pit. However, the information contained in Supplemental "B" was insufficient to appraise the validity of Appellant's statement regarding erosion control. In order for the Department to have evaluated the erosion control measures of Appellant, it would have had to have been supplied with the following information:

1. The width, length and shape of all diversion or drainage ditches,

2. The gradient at which the bottom of the ditches would be constructed, and

3. The identity of the soils present on the site of the proposed stripping operation.

15. Although it was likely that a discharge from the proposed operation could occur after the completion of backfilling, Appellant had not affirmatively stated in its application that it would provide continuous treatment of such discharge subsequent to the completion of backfilling.

DISCUSSION.

By virtue of the provisions of §1901-A(2) of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, as amended 71 P. S. §51 et seq., DER is the successor of the Department of Mines and Mineral Industries in administering those portions of the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1, et seq., relating to the issuance of mine drainage permits. Under §5(d)1 of the Clean Streams Law, supra, DER does have the power to review and take appropriate action upon permit applications submitted to it. On April 3, 1972, DER issued a denial of Appellant's application for a mine drainage permit setting forth the reasons therefor. It is the propriety of this denial which is in issue in this appeal.

The reasons set forth in Appellant's appeal are as follows:

> "Applicant appeals and objects to the findings set forth in Paragraph No. 1, of the letter of denial, dated April 3, 1972.
>
> "Applicant appeals and objects to the findings set forth in Paragraph No. 2, in the letter of denial dated April 3, 1972.
>
> "Appelent feels that the findings in both Paragraph numbers 1 and 2, are not supported by the facts and evidence submitted in this matter."

Thus, Appellant objects to the stated reasons for the permit denial and that the reasons are unsupported by substantial evidence. It is our duty and responsibility to ascertain whether DER properly denied the permit. In doing so, we must first determine whether the stated reasons for denying the permit are legally sufficient to do so. If the reasons stated for denying the permit are legally sufficient to do so, we must then ascertain whether Appellant met its burden of proof to show its entitlement to a permit. This involves a consideration of the relevant provisions of the Clean Streams Law, supra, the rules and regulations of DER promulgated pursuant thereto, relevant principles of administrative law and the burden of proof Appellant must sustain if it is to prevail in this proceeding.

Section 315 of the Clean Streams Law, supra, prohibits mining unless in conformity with rules and regulations of the Environmental Quality Board or a permit issued by DER. 25 Pa. Code §99.11 provides as follows:

> "Applications for mine drainage permits shall be submitted on forms provided by the Department and shall include such information that would enable the Department to determine whether or not the proposed mining operation would be conducted in a manner which would prevent pollution to waters of this Commonwealth."

This section of the regulations is designed to require Appellants to provide the Department with sufficient data upon which it can predicate an informed decision as to whether the activity contemplated by the application would prevent pollution to waters of the Commonwealth. The intent of the regulation is to implement the discretion conferred upon the Department under the provisions of §5 of the Clean Streams Law, supra, in an intelligent and meaningful manner.

It is a fundamental principle of administrative law that where a statute confers discretion upon an agency to take certain actions, those actions will not be set aside unless they constitute either a manifest abuse of discretion or an arbitrary exercise of agency duties. F. & T. Construction Co. v. Department of Environmental Resources, 6 Commonwealth Ct. 59, 293 A.2d 138 (1972); Sierra Club v. Sanitary Water Board, 3 Commonwealth Ct. 110, 281 A.2d 256 (1971). Moreover, as is stated in 1 P. L. E., Administrative Law and Procedure, §29:

". . . the power vested in an officer or agency to grant a license, permit, or other authorization, carries with it the power to exercise a reasonable discretion in granting or refusing it." (Footnote omitted).

It is clear that the stated reasons for the denial of the permit are consistent with the objectives of the Clean Streams Law, supra, and, to that extent, they are reasonable. They relate to deficiencies in the application of Appellant which, if true, would adversely affect the interests sought to be protected by the law itself had the permit been issued. Inasmuch as the reasons for denial of Appellant's permit are reasonable in light of the Clean Streams Law, supra, we must now consider what the Appellant's burden of proof is in this matter and whether it has met its burden.

In administrative proceedings, the burden is upon the applicant to show his or its entitlement to the thing claimed. See: 2 AM. JUR. 2d, Administrative Law, §391; accord: Jones, et al v. Zoning Hearing Board, et al, 7 Commonwealth Ct. 284, 298 A.2d 664 (1972); F. & T. Construction Co. v. DER, supra.

Appellant did not sustain its burden of showing its entitlement to a mine drainage permit. Title 25 Pa. Code §99.11 requires a permit applicant to include such information on its application that would enable DER to determine whether the proposed mining operation would be conducted in a manner which would prevent pollution of the waters of the Commonwealth. However, Appellant did not supply such information with its application to DER. The following deficiencies in the application are cited in justification of DER's ultimate action in this matter:

1. Although Appellant's application proposes the mining of 26 acres on the easterly side of Pennsylvania Route No. 153, it does not contain any information from which DER could infer that any discharge of mine drainage in that area would be treated. Although Appellant's engineer, John W. Hess, indicated that any such discharge could be piped under Pennsylvania Route No. 153 for treatment in facilities proposed on the westerly side of the roadway, the application made no such reference to that possibility. Were this contemplated, the method of its accomplishment should have been set forth in Appellant's application.

2. With regard to the proposed treatment pond in the application, Appellant did not disclose how many ponds are contemplated or whether they would be lined with impervious material. Moreover, Appellant did not disclose specific calculations and criteria by which DER could have determined whether the capacity of the proposed treatment ponds would be sufficient to retain flows from all diversion or drainage ditches built during the operation as well as from discharges from evacuations or pits created as a result of the operation.

3. Appellant did not include sufficient information in its application with regard to erosion control measures. While Appellant did indicate that it would construct effective diversion ditches above the highwall to divert surface water past the evacuation and that it would construct drainage ditches below the spoil material if siltation from the spoil area became a problem, Appellant did not set forth necessary information as to the length, width, shape and depth of these ditches. Furthermore, Appellant did not indicate at what gradient the bottom of each ditch would be constructed.

Clearly the deficiencies in this application are such as would not warrant DER to approve the application submitted by Appellant. We are at a loss, however, to understand how the Department initially could have approved this application. That it took the effective intervention of the City of DuBois to demonstrate that there were serious deficiencies in Appellant's application tends to call into question some of the processes by which DER arrives at its decisions. Nevertheless, the Department ultimately took the proper action.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this proceeding.

2. In order to be entitled to a mine drainage permit under the provisions of the Clean Streams Law, supra, an applicant must show that it has met the requirements of the law and the rules and regulations promulgated pursuant thereto that thereupon the permit application.

3. Where an applicant does not provide sufficient information in its mine drainage permit application to permit DER to determine whether the proposed plan of drainage will prevent pollution to waters of the Commonwealth, the applicant has not met its burden of showing its entitlement to a mine drainage permit.

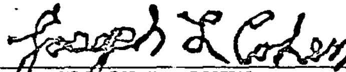
4. Appellant in this matter has not met its burden of showing its entitlement to a mine drainage permit.

ORDER

AND NOW, this 16th day of May, 1975, it is ordered that the action of the Commonwealth of Pennsylvania, Department of Environmental Resources in denying to Compass Coal Company, Inc., a permit to operate a bituminous coal strip mine in Huston Township, Clearfield County, Pennsylvania, is sustained and the appeal of Compass Coal Company is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman



BY JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: May 16, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

BERNINI & KONOVAL

Docket No. 74-158-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, June 6, 1975

This matter is before the Board on the appeal of Rose Bernini and Joyce Konoval from a refusal by the Department of Environmental Resources (hereinafter DER) to approve a proposed amendment to the official sewage plan of Washington Township, Westmoreland County, Pennsylvania, which refusal was issued on June 11, 1974. The proposed amendment to the official plan of Washington Township was designed to accomodate Appellants' subdivision, Bernini Acres, for the use of on-lot sewage disposal systems for lots to be developed in the subdivision for residential purposes. The stated grounds for the refusal of the amendment were that the soil of the lots in question did not meet DER's standards for on-lot sewage disposal systems.

On October 11, 1974, prior to the hearing on the merits in this matter, the Board issued an order limiting the hearing to the issue of whether the soils at the site met the requirements of DER standards for on-lot sewage disposal systems.

On April 9, 1975, subsequent to a hearing on the merits, the Board issued an order to the parties to file their proposed findings of fact, conclusions of law, and briefs in support thereof on or before May 12, 1975. While the DER has complied with this order in a timely manner, Appellants have not as of the date of this Adjudication complied with the Board order of April 9, 1975.

On the basis of the hearing on the merits and the proposed findings of fact, conclusions of law and briefs in support thereof filed by DER, we enter the following:

FINDINGS OF FACT

1. Appellants are Rose Bernini, 157 Conneaut Drive, Pittsburgh, Pennsylvania and Joyce Konoval, 5802 Kenwood Court, Louisville, Kentucky, owners of a subdivision in Washington Township, Westmoreland County, Pennsylvania, known as "Bernini Acres".

2. Appellee is DER, the agency of the Commonwealth having the authority to approve official sewage plans for municipalities pursuant to the provisions of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, as amended, 35 P. S. §750.1 *et seq.*

3. On May 17, 1974, Washington Township filed a proposed amendment to its official plan with DER for the purpose of adding thereto a seven-lot portion of Bernini Acres of approximately 15.43 acres.

4. After receipt of the proposed amendment to the Washington Township official plan, DER caused an inspection to be made of the soils at the Bernini Acres subdivision site to determine whether these soils would meet the standards for on-lot sewage disposal systems set forth in DER regulations. As a result of the inspections made of the soils at the site of Bernini Acres and an analysis of the soils in terms of whether they met the standards of DER for on-lot sewage disposal systems, DER made a determination that none of the soils investigated are suitable for conventional subsurface sewage disposal systems according to the standards specified in 25 Pa. Code §73.11(c). More specifically, of the four pits examined at Bernini Acres, it was determined that pits number 1 and 2 have rock formations less than four feet below the bottom of the excavation and that the soils in pits numbered 3 and 4 have a seasonal high water table less than four feet below the bottom of the excavation.

5. Based on said determinations, DER on June 11, 1974, notified Washington Township of its refusal to approve the proposed amendment to the official sewage plan.

On July 10, 1974, Appellants filed the instant appeal with this Board.

6. The letter of June 11, 1974, refusing to approve the proposed amendment to the official plan stated, in pertinent part:

> "The following is a brief description of each of those pits with emphasis on those factors limiting the use of conventional subsurface sewage disposal systems.
>
> "Pit #1 was located on Lot #4. The soils as mapped are Upshur-Gilpin. The limiting factor in this Pit was the presence of an impervious rock formation at a depth of 28 inches from the ground surface.
>
> "Pit #2 was located on Lot #5. The soils as mapped in this location are Upshur-Gilpin. An impervious rock formation located at a depth of 66 inches from the ground surface is the limiting factor in this Pit.
>
> "Pit #3 was located on Lot #6. The soil as mapped in this location is near the delineation of Wharton and Upshur-Gilpin soils. The limiting factors in this Pit were the presence of an impervious rock formation located at a depth of 30 inches from the ground surface and also the presence of gray mottled clay at a depth of 17 inches from the ground surface indicating a seasonal high water table.
>
> "Pit #4 was located on Lot #7. The soil as mapped is near the delineation of Wharton and Gilpin. The limiting factors in this Pit were the presence of an impervious rock formation at a depth of 34 inches from the ground surface and the presence of gray mottled clay at a depth of 16 inches from the ground surface indicating a seasonal high water table.
>
> "None of the soils investigated in these four (4) pits are suitable for the installation of conventional subsurface sewage disposal systems as specified in the Standards For Sewage Disposal Facilities, Chapter 73, (Sections 73.11-C and 73.63-B-2). Pits 1 and 2 have rock formations less than four feet below the bottom of the excavations. Pits 3 and 4 have rock formations and mottling of the soil which is indicative of a seasonal high water table at depths of less than four feet below the bottom of the excavations. Water was noted within 18 inches of the surface in most of the percolation holes checked around Pit #3 located on Lot #6.
>
> "Therefore, please be advised that our Department hereby disapproves this Plan Revision Module For Land Development for the use of conventional subsurface sewage disposal systems (septic tanks, seepage beds or tile fields) for these four (4) lots for the above stated reasons."

7. There were four pits dug on four different lots on Bernini Acres subdivision to ascertain whether the soils at the site would meet the requirements of 25 Pa. Code §73.11(b). These pits were dug on lots numbered 4, 5, 6 and 7.

8. The excavation on lot number 4 revealed the presence of a rock formation at a depth of 28 inches from the surface of the ground. The excavation on lot number 5 revealed a rock formation located at a depth of 66 inches from the surface of the ground.

9. With regard to lot number 6, the excavation revealed a rock formation located at a depth of 30 inches from the surface of the ground and also the presence of gray mottled clay at a depth of 17 inches from the surface.

10. The excavation on lot number 7 revealed that there was a rock formation at a depth of 34 inches from the ground surface and the presence of mottled clay at a depth of 16 inches from the surface.

11. At the time Washington Township submitted its official plan revision to DER, 25 Pa. Code §73.11(c) provided:

> "The maximum elevation of the ground water table shall be at least four feet below the bottom of the excavation for the subsurface absorption area. Rock formations and impervious strata shall be at a depth greater than four feet below the bottom of the excavation."

12. Although there was a conflict of expert testimony on the issue of mottling[1], the degree of examination of the soils performed by DER's expert, Mr. Weaver, clearly indicates that there was developed mottling on lots 6 and 7 at a depth of 17 inches and 16 inches from the surface of the ground respectively. We make this finding, not in derogation of the expertise of Mr. Ascenzi, Appellants' expert, but on the comparison of the respective analyses made by the two experts.

13. There was no conflicting testimony regarding rock formation.

DISCUSSION

Appellants set forth the following reasons for their appeal:

> "1. The decision of the Bureau of Community Environmental Control states that Pits No. 1, 2, 3 and 4 contain impervious rock, and uses this conclusion as a basis for the refusal specified in

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1."Mottling is, in simplest terms, a variation in the coloring of soils. When that variation shows a concentration of redder colors in some spots, and grayer colors in others--a variation in "chroma", in particular--it will almost invariably be due to segregation of iron compounds from other components in the soil, and especially segregation of reduced (ferrous) iron compounds from oxidized (ferric) iron compounds. Iron compounds in the soil in the presence of air for any extended period of time will oxidize to the ferric state; ferric compounds are generally red. If the water table rises to a given level for prolonged periods of time, say eighteen inches, . . . then the relative absence of oxygen produces reducing conditions, and the ferric compounds are changed to ferrous compounds. Ferrous compounds are generally grayer--of a lower chroma. The ferrous compounds tend to migrate, and collect in nodules; when the water table drops, many of these nodules will be exposed to air, and oxidize to ferric iron. Nodules that for some reason the air did not reach, and areas of the soil from which much of the iron had earlier migrated, will appear gray." Fabiano v. Commonwealth, EHB Docket No. 73-051-B (issued August 1, 1973).

Paragraph 2 hereof. It is the appellants' position that the subsurface does not contain impervious rock; but on the contrary, the subsurface structure is suitable for the use of a conventional subsurface sewage disposal.

"2. The finding of the Bureau of Community Environmental Control that there was gray mottled clay in certain of the pits tested which indicated a seasonal high water table is erroneous. On the contrary, it is the appellant's position that a seasonable high water table does not exist and that the subsurface structure is satisfactory for a conventional subsurface sewage disposal system.

"3. The Bureau of Community Environmental Control in its field investigation of May 28, 1974, failed to use proper testing procedures in determining if the rock formations in question were impervious rock and if in fact a high water table did exist prior to denying the appellants' request as contained in the Plan Revision Module for Land Development."

Appellants strenuously argued that they were misled by DER's notice of disapproval of the plan revision for the reason that the notice speaks in terms of "impervious rock". It is clear that the use of the term "impervious" in the notice of plan revision disapproval was patently erroneous. The relevant standard which DER sought to invoke in its refusal to approve the plan revision in question was contained in the then effective provisions of 25 Pa. Code §73.11(c) which provided:

"The maximum elevation of the ground water table shall be at least four feet below the bottom of the excavation for the subsurface absorption area. Rock formations and impervious strata shall be at a depth greater than four feet below the bottom of the excavation."

While Appellants may have been somewhat misled by the term "impervious rock" and may have expended time and money in ascertaining whether the excavations on their property revealed impervious rock, nevertheless this was harmless error. Title 25 Pa. Code §73.11(c) clearly requires that rock formations and other impervious strata be at a depth greater than four feet below the bottom of the excavation. Inasmuch as this provision of the regulations was not met, the plan could not have been approved in any event.

The evidence in this matter clearly indicates that the soils on lots numbered 4, 5, 6 and 7 of the Bernini Acres subdivision did not meet the requirements of 25 Pa. Code §73.11(c). Although given an opportunity at a further hearing to contest the findings of DER with respect to the depth of rock formations, Appellants declined this opportunity. Thus, in the absence of contrary evidence, there is no doubt that on the soils examined rock formations existed less than four feet below the bottom of the excavation on the lots involved.

With regard to the issue of mottling, there was a conflict of expert testimony. However, our finding that developed mottling exists on lots numbered 6 and 7 less than four feet below the bottom of the excavation, namely 17 inches and 16 inches from the surface of the ground respectively, is based upon the elaborate examination of the soils by Jay Weaver, an expert on soils, their mottling and the effect of such soils on effluent renovation for on-lot sewage disposal systems. (R. 138-195). Inasmuch as "developed mottling" is due to the fluctuation in the level of the water table (R.163, 167), the occurrence of such mottling 16 and 17 inches below the surface of the ground is convincing evidence that the requirements of 25 Pa. Code §73.11(c) regarding water table elevations were not met.

Although Appellants' expert, Mr. Ascenzi, testified that he did not observe mottling at the depths indicated, his examination of the soils for this purpose was perfunctory when compared with the detailed analysis of Mr. Weaver. For this reason, our finding of fact with regard to mottling is supported by the substantial and credible testimony of Mr. Weaver.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this proceeding.

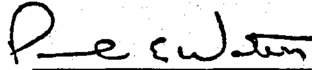
2. There is substantial evidence to show that the soil on the lots of the Bernini Acres subdivision which is the subject matter of this proceeding do not meet the requirements of 25 Pa. Code §73.11(c).

3. Appellants have not shown their entitlement to have the Washington Township official plan amendments approved by DER.

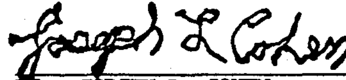
ORDER

AND NOW, this 6th day of June, 1975, the action of the Department of Environmental Resources of the Commonwealth of Pennsylvania, in denying approval for proposed amendments to the official sewage plan of Washington Township, Westmoreland County, Pennsylvania, is hereby sustained and the appeal of Bernini and Konoval is hereby dismissed.

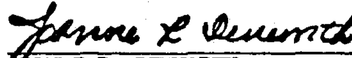
ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



BY: JOPSEH L. COHEN
Member



JOANNE R. DENWORTH
Member

DATED: June 6, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

HOOVERSVILLE WATER COMPANY

Docket No. 75-067-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

A D J U D I C A T I O N

By Joanne R. Denworth, Member, June 6, 1975.

Appellant, here, the Hooversville Water Company (Hooversville) has appealed from a "Violation Notice" of the Department of Environmental Resources. The notice, which was sent February 27, 1975, recites that upon various inspections by Department personnel the company was found to be in violation of "the Rules and Regulations of the Department promulgated under the Public Water Supply Law of 1905, the Sewage Treatment Plant and Waterworks Operations Certification Act and the Rules and Regulations of the Department promulgated thereunder, and the Clean Streams Law of Pennsylvania ..." The notice then lists specific violations of the cited statutes and requlations. The notice concludes with two paragraphs:

> "The failure of the Hooversville Water Company to operate it's waterworks in conformance with the laws, rules and regulations of the Commonwealth of Pennsylvania has subjected it to appropriate enforcement action by this office.
>
> "On or before March 21, 1975, submit to this office, in writing, the steps to be taken by the Company to achieve compliance with each of the violations described above. Included in the requested submission should be a schedule indicating the dates by which phases of all actions are to be completed. If you have any questions feel free to write or call 717-326-2681."

The Department has moved to dismiss the appeal on the ground that a violation notice is not an "appealable action" of the Department within the Administrative Agency Law, 71 P.S. §1710.2 (a) and Rule 21.21 of the Rules and Regulations of the Environmental Hearing Board.

Under the rationale expressed in *Commonwealth of Pennsylvania v. Standard Lime and Refractories Co.,* 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971) and *Commonwealth of Pennsylvania v. Sunbeam Coal Corporation,* 8 Pa. Commonwealth Ct. 622, 304 A.2d 169 (1973), it is clear that, except for its last paragraph, a violation notice such as the one directed to the Appellant is not an appealable action of the Department. The only question here is whether the addition in the notice of a requirement that Appellant submit a compliance proposal to the Department by a certain date converts a violation notice into a "final order" that is appealable. We think it does not.

A violation notice is in the nature of a warning. It is not a final determination "affecting personal or property rights, privileges, immunities or obligations..." of a party within the meaning of §2 of the Administrative Agency Law, *supra,* because its purpose is to apprise the party of what the Department believes are violations of the law, and it is, as such, preliminary to the Department's taking some action on the basis of the alleged violations. An appeal from a violation notice is premature because the party will have an opportunity to defend itself and challenge the alleged findings of violation when and if the Department does initiate an enforcement action. See *Standard Lime and Refractories Co., supra,* pp. 438-39, where the court held that the Department's determination that a timetable for compliance with an abatement order was unsatisfactory was not an appealable order, and *Sunbeam Coal Corporation, supra,* where the court held that a violation notice issued under §8 of the Surface Mining Conservation and Reclamation Act. 52 P.S., §1396.4 (c) was not an appealable action of the Department.

As we construe it, the additional paragraph in this notice requiring the Appellant to submit a compliance proposal by a certain date does not alter the Appellant's position or affect its rights. It is intended to give Hooversville an opportunity to comply with the Department's requirements prior to the Department's taking any enforcement action, and it gives a date by which the company is to demonstrate its intent with regard to compliance. Hooversville can take the position that it is not in violation of the law as alleged and it will have a full opportunity to defend its position if the Department then chooses to bring an enforcement action. Failure to comply with the compliance request will not

result in a separate offense under any of the statutes cited.[1] Appellant can argue in any enforcement action that it did not respond to the request for a compliance proposal because it was not violating the law.

From a policy standpoint it is undesirable to allow review of the Department's action at this early stage. The Department should be encouraged to administer the laws it is entrusted to administer in a fair and orderly way, which includes notifying people of suspected violations and giving them an opportunity to correct any such violations. If the Department is wrong about the violations, review of its determinations will be obtained in an enforcement proceeding. If the Department is right, Hooversville should be encouraged to discuss its problems with the Department and resolve them insofar as possible without litigation. The Company bears some risk that its lack of response may weigh against it if it is in fact found to be violation of the law in a later proceeding. However, it is appropriate to place that risk on the Company so that it will make an accurate assessment of its status under the laws and a conscientious effort to deal with the Department to correct any deficiencies that do exist. If disagreements about compliance remain after the negotiation process, there is time enough to review the Department's action either in an enforcement proceeding or by review of any abatement or other final order the Department may then issue. See e.g., §610 of the Clean Streams Law, 35 P.S. §691.901 and 3.1 of the Public Water Supply Law, 35 P.S. §716.

It might be noted that although there is some similarity between an abatement order and the requirement in this violation notice that a compliance proposal be submitted (in that they both require the recipient to take some affirmative action), there are differences of substance and finality. An abatement order directs that certain specific actions to abate pollution be taken by the recipient and does not contemplate further department consideration of the

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1. This is clearly the case under the Public Water Supply Law where the only enforcement action available to the Department would be an order to the permittee to take corrective action within sixty days, and if that failed, a petition in the common pleas court to take over the permittee's water supply. 35 P.S. §716 Similarly, under the Sewage Treatment Plant and Waterworks Operators Certification Act, the only civil remedy for violation of the provision requiring that a water supply company employ a certified operator is an injunctive or other court action, by the Secretary. In fact, it is not clear that there could be any final orders of the Department under these two laws that this Board would have jurisdiction to review. Under the Clean Streams Law there would be separate liability or responsibility for failure to comply with an "order" of the Department, see 35 P.S. §§691.602, 691.605, 691.610, but as we do not construe this notice to be an "order" of the Department, there is no such liability. Obviously, this denomination carries the further consequence that Hooversville will not be collaterally estopped from raising any of the issues it seeks to litigate here in a later proceeding.

imposed requirements. The notice here invites submission of a proposal for departmental review and possible negotiation. It is in no sense a final action of the Department.

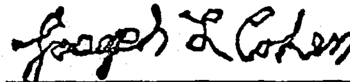
In view of this opinion it would be appropriate for the Department to give Hooversville a further period of time to respond, if it chooses to do so, to the violation notice of February 27, 1975.

ORDER

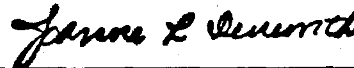
AND NOW, this 6th day of June, 1975, the Commonwealth's Motion to Dismiss is granted and the appeal of Hooversville Water Company is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member



BY: JOANNE R. DENWORTH
Member

DATED: June 6, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

ROBERT L. ANTHONY, et al

Docket No. 73-356-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES, Appellee
SPRINGFIELD ASSOCIATES, Intervenor

ADJUDICATION

By Paul E. Waters, Chairman, June 12, 1975

This matter comes before the Board as an appeal from the issuance of an erosion and sedimentation control permit to Intervenor, Springfield Associates, for the construction of a large shopping center and mall in Delaware County. Robert L. Anthony, Appellant, is the president of a citizens' group dedicated among other things to the preservation of Crum Creek which borders the property of Intervenor. This matter was previously before the Board on a jurisdictional question, which was resolved in favor of Appellant.

FINDINGS OF FACT

1. On December 4, 1972, following a determination by the Department of Environmental Resources, hereinafter DER, that Springfield Associates, in the construction of the Springfield Mall, was undertaking earthmoving activities without appropriate plans having been submitted to DER, the Department issued an Order to Springfield Associates, William P. Dean, and Kevy K. Kaiserman, hereinafter Developers, to submit to DER an erosion and sedimentation control plan in accordance with Department Regulations 102.21 through 102.34.

2. Following the issuance of the Order, DER and the Developers entered into negotiations which resulted in the entry of a Consent Order dated December 28, 1972, hereinafter Consent Order. The Consent Order provided, in part, that the Developers should submit to DER, for its approval, an erosion and discharge control plan in accordance with the requirements set forth in Paragraph B of the Consent Order.

3. Following the entry of said Consent Order, Woodward-Gardner and Associates, Inc., on behalf of Developers, submitted a plan.

4. As a result of DER's review of said plan and all material submitted on behalf of the Developers, DER and the Developers entered into an Amended Consent Order dated March 28, 1974, which, in addition to reaffirming the effectiveness of all the provisions of the Consent Order, modified said Order to allow for the release rate from the outlet structure to the stream to be three feet per second instead of 1.5 feet per second which was originally provided.

5. Thereafter, DER approved the plan submitted to DER pursuant to the Amended Consent Order and DER's Regulations, Chapter 102, Sections 102.21 through 102.34.

6. The Crum Creek is a major recreational area for the Borough of Swarthmore. Each year, before the construction of the Springfield Mall, more of the carbon deposits that were built up along the banks of the Crum Creek have washed out, and fish have started to return to the Creek.

7. It is the objective of Swarthmore College to maintain the Crum Creek Valley as a natural green belt, and the area owned by the college is called Swarthmore College Conservation Area. The college owns approximately 1.5 miles of the Crum Creek Valley, and its use is open to the public for fishing, skating, hiking, and as a general nature area.

8. The Springfield Mall is located approximately 1,000 feet from the land of Swarthmore College.

9. The development of the Springfield Mall on the site near the mouth of Crum Creek Watershed has a larger impact on the Watershed than a development located elsewhere.

10. The change in the water runoff, brought about by the development of the Springfield Mall, can be controlled by storm water management.

11. The negative effect on the Watershed caused by the increased runoff from the Springfield Mall site is a minor impact on the total Crum Creek Watershed.

12. The peak water runoff into the Crum Creek Watershed is greater as a result of the erection of the Springfield Mall.

13. In the fifty years Mrs. Wolff lived at the property, on Whiskey Run

downstream from Springfield Mall, there were prior floods, which consisted of water backing up from Crum Creek at the mouth of Whiskey Run, but this was the first flood she experienced in fifty years where the flood was caused by water flowing down Whiskey Run.

14. Absent the presence of the Springfield Mall, the flooding which occurred on the Wolff property on August 24, 1974, might not have been as significant as the flooding which actually did occur due to the presence of the Springfield Mall.

15. After a certain period of time has elapsed, 15 years or less, the use of the Springfield Mall may result in oil in the water runoff in excess of ten parts per million unless a strong water control and management program is instituted, which does not presently exist for this purpose on the site in question.

16. On August, 25, 1974, there was sand, silt and rocks on the Baltimore Pike, just south of the Springfield Mall site. Further, there was observed damage to the grassy areas of the mall site, several trees which had fallen over, and several portions of the southwest bank of the mall site which had washed away. In addition, at the northeast corner of the mall site, dirt and silt had washed out from the mall site onto the SEPTA trolley tracks.

17. Prior to the construction of the Springfield Mall there were no signs of any serious erosion on the site, and the natural trees and ground cover provided a natural control of the site.

18. Prior to the construction of the Springfield Mall on the site, the rainfall filtered down through the trees onto the ground cover of accumulated leaves and root mat, which impeded its flow, causing a gradual flow down the slope into Whiskey Run.

19. No provision has been made either in the Consent Order of December 28, 1972, or in the Amended Consent Order of March 28, 1974, for monitoring to assure that the Consent Order criteria will be met.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this proceeding.

2. DER gave proper and adequate consideration to Article I, Section 27 of the Pennsylvania Constitution in issuing the Erosion and Sedimentation Control Permit to Intervenor, Springfield Associates based on present conditions.

3. Where there is a strong likelihood of future environmental damage unless further steps are taken to preserve the environment, DER must design or require a monitoring program to fit the particular circumstances of each case.

DISCUSSION

When all of the underbrush is cleared away from the various charges, countercharges, innuendo, and aspersions that have characterized this dispute we are left with the one legal question: Did DER violate the constitutional rights of Appellant by issuing an amended erosion and sedimentation control permit, to Springfield Associates? The Constitution provides:

> "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all of the people." (Article I, Section 27)

We recently held under related facts in *The Chesterbrook Conservancy v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 73-418-W, (issued October 18, 1974), that DER has a basic responsibility under the Constitution but that it would be interpreted with due regard to its recent enactment in reference to the permit in question, and we noted that stricter standards could properly apply, beyond that minimum, as time allowed for the development of staff and technique. We here affirm that decision and we use it as our starting point of reference.[1]

The Appellant questions the right of DER to increase or make less stringent the water discharge rate imposed on Intervenor. Originally the rate of runoff to the Creek was to be not less than 1.5 feet per second. This proved to be impractical and it was amended to 3.0. The evidence on this point as presented at the hearing clearly showed the reasonableness of the change:

"THE EXAMINER:[2] What is the purpose of allowing the increase? Why was that necessary?"

(This question was asked of Dr. Aslam Shah, Hydraulic Engineer for DER.)

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1. *Bruhin, et al v. Commonwealth, et al*, 14 Pa. Commonwealth Ct., 300, 306, A.2d. 907, 910, (1974).

2. See Notes of Testimony, August 26, 1974, Hearing, Pages 165, 167, 168, 169.

"THE WITNESS [DR. SHAH]: Okay. The reason that we allowed the increase from 1.5 feet per second to 3 feet per second was primarily this: As I indicated before, they had built some structure made out of stones before, which we felt weren't adequate. Therefore, we told them to put some concrete structure here, or to change this, and do something else that would be more effective, more suitable to the conditions. So they came up with another design and they showed us that their velocity, in one case, could not be maintained less than 1.5 feet per second. They have three of these structures going into the stream, one at Structure 1. The velocity was 1.25 feet per second, according to their report, The Woodward Gardner report. That was below 1.5 feet per second.

"At another basin, the velocity was 0.8 feet per second. At the third basin, the velocity was 2.7 feet per second, and this was the one that was above 1.5 feet per second.

"Now, as I indicated, our regulations permit the slight changes, if it can be shown that those changes, in the velocity would not cause any adverse effect or accelerated erosion, and at the same time, the regulations specify that the velocity should be less than 1.5 feet per second, if the water has to flow from the point of discharge to the ground or into the stream, where there are chances of causing erosion. And also the same regulations state that certain facilities can have velocities up to three feet per second, and dependence to those regulations gives much higher velocities, eight feet and so forth, depending on the given conditions."

. . .

"BY MR. GOLDBERG: Q This diagram basically shows what is called an energy dissipator for outlets 1, 2 and 3 of Springfield Fashion Mall, correct?

"A Right.

"Q Is this the dissipator, the design of the dissipator, was this not a design which you essentially originated?

"A The idea was mine, yes.

"Q And the Springfield engineers then, in effect, created this after your concept, is that correct?"

. . .

"THE WITNESS: So as a result, we had a meeting in which this item was discussed, and we felt that changing this number 1.5 feet per second to 3 feet per second, which is given in the regulations and which is permissible, and with the understanding that you want 3 feet per second velocity of discharge from this point, which will cause absolutely no damage in terms of erosion or sedimentation of the stream.

"At the same time, when these velocities are discharged into the stream, the velocity of the water flowing in the stream is around — for this, it is 5.9 feet per second. The number of this velocity is the number in the stream water, itself. In other words, coming from up here.

"THE EXAMINER: To the extent that they are related, you might have to make your presentation in such a way that someone reading it will know what you are talking about in terms of one number's relation to another number.

"THE WITNESS: Yes, sir. These are related.

"THE EXAMINER: But when you say right here, the record won't show where you mean.

"BY MR. GOLDBERG: Q Dr. Shah, let me see if I can't clarify this with a couple of questions. The point you are now making is that there is a difference between the discharge velocity at each of the three outlets, and the stream velocity at each of the three outlets, and the figures which you have read, with respect to the first outlet, the discharge velocity is 1.25 feet per second, and the stream velocity is 5.9 feet per second.

"A Right.

"Q With respect to the second outlet, the discharge velocity is 0.8 feet per second, and the stream velocity is 3.3 feet per second. As to the third outlet, the discharge velocity is 2.8 feet per second as compared to a stream velocity of 4.21 feet per second.

"A So the point is that the velocity of water in the stream is higher than the velocity of the discharge in the water, or the water entering from the mall into the stream. And under these conditions, of course, the erosion and sedimentation will not be caused.

"So in our meeting, we discussed this. We were convinced that changing this number would not cause any adverse effect on the stream, and that increasing this would permit this velocity to occur. And therefore, that as a result, the consent order was amended to change the exit velocity from 1.5 feet per second, to 3 feet per second.

"Q Before that amendment was made, did you have a meeting with representatives at which Mr. Anthony and his group were present?

"A Yes, there was a meeting that was held between the Department and the Springfield Associates and the Action for Community Survival, and at that time we discussed this."

It is clear that DER at all times discussed these important matters with Appellant after the Action for Community Survival Group made known its interest.[3]

We have reviewed all of the testimony relating to the modification of the discharge rate from 1.5 to 3.0 feet per second, specifically we find no violation of statute, and more importantly we conclude the change was both reasonable and proper in light of the present stream velocity.

We move to the second test laid down for us in *Payne v. Kassab*, 312 A.2nd 86 (1973) by which we must review the testimony to determine whether the constitutional mandate of (Article I, Section 27) has been adhered to. The previous outlined testimony is also instructive on this point. The question is:

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3. Dr. A. Shah's testimony is illuminating on this point. NT Page 171:

"THE WITNESS: "Yes, sir. So to repeat it, the meeting was held on March 26, 1974, and the consent order, or the amended consent order was issued on March 28, 1974. So that means they had a chance of discussing this and they did. The Action for Community Survival group indicated their opposition to this change and we listened to them. We evaluated this again, and as a result, we felt that this change would cause no adverse effect, and therefore, we did amend the consent order."

Have there been reasonable efforts to reduce environmental incursion to a minimum? On a number of occassions the proposals put forth by the Intervenor Developer, were rejected by DER on the grounds that they would not adequately protect the waters of the Commonwealth. In one instance, not disputed by the Developer, DER required an in-place structure to be "taken out" and rebuilt.[4]

We are, of course, mindful of the fact that things will never be the same in Springfield Township as they were in pre-mall days. Mrs. Wolff, a property owner downstream from the Mall has experienced more flooding than she has seen in many, many years. We believe that the Springfield Mall is partially responsible for this. Mrs. Wolff, however, lives on the flood plain. She expected, or she should have expected occasional flooding on her historic creekside home site. This is not a tort action and we need not concern ourselves here with the question of legal liabilities for flood damage which Appellant consistently tried to bring into this appeal. Suffice it to say that some part of the price for the "progress" exemplified by the Springfield Mall has been paid by Mrs. Wolff.

This brings us to the third and final *Payne v. Kassab, supra,* test. Does the environmental harm which will result, so clearly outweigh benefits to be derived therefrom that to proceed further would be an abuse of discretion? We believe the increased flooding potential and any oil or other impurities which

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4. Dr. A. Shah's Testimony, NT Pages 171-172:

> "Since that time, these basins were, the energy dissipating basins were designed by the developer, the developer's engineers. They were submitted to us two or three times. They were not properly designed, so we returned them, returned the designs to them and made them revise it.
>
> "Then they constructed these basins, and one of the basins was not properly constructed. In other words, it was not constructed to the design submitted, and I inspected the site, and as a result, I insisted that they take that basin out which was not constructed to the design, and rebuild it. Therefore, they tore this apart and rebuilt the new basin.
>
> "So we were very stringent, I believe, in vigorously enforcing the requirements on these aspects, and it was only, as I indicated, after five or six months of time that we did approve this. And our recent inspection last week indicated that these basins are still intact, that they are functioning properly, and that they have suffered no damage at all.
>
> "These are meant to be permanent facilities and would work for a long time."

accumulate in the water from the parking area, constitute "environmental harm".

Although we are satisfied to take judicial notice of the fact that shopping areas are essential for our modern day way of life, the size and construction thereof are, to my mind, much more open to question, and indeed frequently leave much to be desired. That judgment, however, takes us beyond our assigned task, and is one more properly made at another level.

The testimony is lengthy but inconclusive on the question of the degree of added flood potential caused by the Springfield Mall. Appellants offer expert opinion that only a 300 cubic feet per second discharge is required to overflow the banks of Crum Creek. The Intervenor and DER, on the other hand, have settled on the figure of 800 cubic feet per second. The only thing which is clear from this is that the matter cannot be settled at this time--on this record. We do, however, reach the conclusion that the Springfield Mall will not, alone, appreciably degrade the environment. Dr. Hammer, a well-qualified expert and a key witness for Appellant, was asked after lengthy testimony--with reports, charts and figures:

> "THE EXAMINER:[5] I understand your theory and figures, but I don't understand your conclusions in the terms of what does it mean?
>
> . . .
>
> "THE WITNESS [DR. HAMMER]: In terms of final conclusions, well, I could say why wait for future development. You know, the conclusion is that—
>
> "THE EXAMINER: Well, that is what I am trying to determine. What is the immediate danger, other than for indicating some possible future problem with more development, or if you are saying something other than that, I want to know what it is.
>
> "THE WITNESS: I see your point. This particular development, I would be misrepresenting the situation if I said this particular development was putting the stream across some threshold in terms of run-off such that there would be instant and devastating deterioration in terms of quality of the stream. It is not true. This one development won't do it, and I will make no bones about that.
>
> "The problem in dealing with this whole situation is the fact that increase in run-off, due to impervious development, is that incremental problem--very rarely does a single development produce noticeable effect on a stream having a watershed this size, but you add up a lot of these .5 per cent, and you can have a big effect.

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5. See Notes of Testimony Pages 119, 120, 121.

"THE EXAMINER: But you are talking about the future, obviously?

"THE WITNESS: True. Well, the future, except that this is a component. You know, is this .5 per cent less important than a .5 per cent which occurs ten years from now?"

It would appear that the most that we could conclude from this testimony reading it in the light most favorable to Appellant, who offered it, is that care must be exercised in allowing *future* development along Crum Creek.

The Appellant has also presented persuasive evidence that there may be *future* environmental harm from oil and other run-off accumulations from automobiles. Having concluded that there is no clear and present danger of environmental harm, we must hasten to add, that the future verdict is not so reassuring.

The difficulty we draw from all that has been said is that assuming there will be future problems unless future steps are taken, how and when is DER to know what to do—or to require this or future Developers, to do? It cannot reasonably do so without a workable monitoring program.

Although Appellant argues that DER is required by its Regulations to have a monitoring program, no unequivocal language to this effect has been called to our attention. The Regulations provide, however,

> "(b) An acceptable plan includes adequate and qualified staff for the review of erosion and sediment control plans and for the surveillance and enforcement of this Chapter. . ." *Title 25 Pa. Code 102.51 (b)*

This language is primarily directed toward the situation where a local government is delegated enforcement authority by DER. It is our thought that DER should not expect more from a county or local unit under these circumstances than DER is responsible for under the same circumstances. In any event Article I, Section 27, clearly requires that its mandate be carried out in some reasonable way, and we conclude that it would be unreasonable for DER to permit a major environmental alteration such as the Springfield Mall and then conduct no follow-up or monitoring operations thereafter. We believe all of the evidence requires that DER with the Intervenor Developer devise a specific plan for periodic monitoring of the dis-

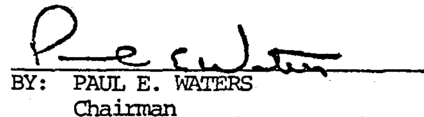
charges to the waters of the Commonwealth from the Springfield Mall which is the subject of this proceeding.[6]

We therefore enter the following:

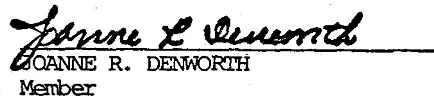
ORDER

AND NOW, this 12th day of June, the matter of *Robert L. Anthony, et al, v. Commonwealth of Pennsylvania, Appellee, Springfield Associates, Intervenor,* is hereby remanded to the Department of Environmental Resources for the purpose of devising a long-range monitoring plan consistent with this adjudication, a copy of which shall be made available to Appellant and this Board within ninety (90) days.

ENVIRONMENTAL HEARING BOARD



BY: PAUL E. WATERS
Chairman



JOANNE R. DENWORTH
Member

6. Inasmuch as we did not have the benefit of a final brief on behalf of the Commonwealth, we are unable to determine what, if anything, the Department intended to do in this regard.

CONCURRING OPINION

By Joseph L. Cohen, Member

I concur in this Adjudication for the reason that the erosion and sedimentation control plan appears to be in conformity with DER regulations. However, although both sides in this matter relied heavily on *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973), I have difficulty applying the entire test of *Payne* in a matter in which the basic decision does not involve the permission or denial of permission for a particular land use. In *Payne* the issue was whether to approve a land use decision in light of Article I, §27 of the Pennsylvania Constitution. Likewise, in *Bucks County Board of Commissioners, et al v. Pennsylvania Public Utility Commission, et al*, Pa. Commonwealth Ct. 437, 313 A.2d 185 (1973), the Court was concerned with basically a land use decision of the Public Utilities Commission in granting a certificate of public convenience and necessity to an interstate pipeline company to build a pipeline facility, 80 miles long, to supply low sulfur oil to an electric generating facility.

To apply the entire rationale of *Payne v. Kassab, supra,* to this case results in an anomaly. Here we are not involved in a DER decision whether to approve a projected use of land. Our only concern is whether the proposed erosion and sedimentation control plan met DER standards.

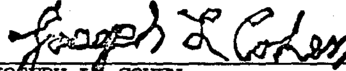
Inasmuch as DER is not deciding whether to have a shopping center in the first place, its decision with regard to the erosion and sedimentation control plan cannot have been with regard to balancing the need for the shopping center against the environmental damage that would ensue because of its construction.

DER is not authorized by any provisions of law generally to grant permission to developers before they can make use of their property. In certain limited situations, of which this is not one, DER may require permits. See: The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §690.1 *et seq.*; Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, as amended 35 P. S. §4001 *et seq.*; Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, as amended, 35 P. S. §750.1 *et seq.*; Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, No. 241, as amended, 35 P. S. §6001 *et seq.* But these enactments do not confer upon the Department general supervision and control over land use decisions throughout the Commonwealth. While DER decisions may incidentally affect land usage, it is not the primary concern of DER's legislative authority.

The requirement for an erosion and sedimentation plan under the circumstances of this case is designed to limit the environmental incursions that would otherwise ensue from earthmoving activities. However, the approval of a plan does not under the circumstances of this case imply anything about the decision of whether a shopping center should be built. This being the case, it is difficult to understand how the rationale of *Payne v. Kassab, supra,* applies to this case. *Payne v. Kassab, supra,* presupposes a decision whether to allow a particular land usage. In this case, however, that land usage has been determined prior to DER exercising its authority. Moreover, DER could in any event only determine whether the particular plan met its requirements. It could not determine the particular use to which the land was put. This being so, DER and this Board can have nothing meaningfully to say concerning the relative importance of shopping centers in relation to the environmental harm that

may be created. For these reasons I cannot subscribe to the language in the Adjudication which implies that the third test in *Payne v. Kassab, supra,* has any relevance in this matter.

ENVIRONMENTAL HEARING BOARD



JOSEPH L. COHEN
Member

DATED: June 12, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

ROBERT B. BROOKS

Docket No. 74-188-D

v.

UPPER FREDERICK TOWNSHIP BOARD OF SUPERVISORS &
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Joanne R. Denworth, Member, June 16, 1975

This case arises on appeals from two separate applications for a privy that the Appellant proposed to install to service a vacation house on property in Bucks County, Pennsylvania. The applications were denied by the local approving body, Appellee here, Upper Frederick Township Board of Supervisors.

FINDINGS OF FACT

1. Appellant is Robert B. Brooks, Jr., who resides at 870 E. Chelten Avenue, Philadelphia, Pennsylvania.

2. Appellees are the Upper Frederick Township Board of Supervisors, Montgomery County, Pennsylvania and the Pennsylvania Department of Environmental Resources, (hereinafter Department).

3. Appellant is in the process of building a simple recreational home on a portion of his parents' property on Hauck Road in Upper Frederick Township, Bucks County, Pennsylvania, which he presently intends to use on a part-time basis.

4. In January of 1974, prior to building his home, Appellant had a deep hole test performed to determine whether the soil was suitable for an on-lot sewerage disposal system. At that time it was informally determined by the

Township enforcement officer that the soil was not suitable due to mottling[1] at 37 inches.

5. Appellant then applied for a permit to install a concrete privy, which the Appellant claimed was authorized under §73.81 of the Rules and Regulations of the Department. This application was denied by the Township enforcement officer, George E. Gallie, and on appeal his denial was affirmed by the Township Board of Supervisors.

6. In July of 1974 Appellant submitted another application for a privy at a different location on the property. That application was again denied by Mr. Gallie on July 11, 1974, and on appeal his decision was again affirmed by the Township Board of Supervisors by an order dated August 2, 1974.

7. In connection with the Appellant's first application the Department by letter dated April 25, 1974, advised Mr. Gallie that the application must be denied because the proposed system failed to meet certain enumerated requirements of Chapters 71 and 73 of the Department's Regulations.

8. After the Department published new regulations in September, 1974, Appellant was advised to apply for a permit to construct a built-up sand filter system. He made application for such a system and his application was approved. The sand filter system was 3/4 completed at the time of the hearing in this matter.

9. Although the Appellant plans to use the sand filter disposal system during the summertime, he did not wish to withdraw his appeal on his application for a privy because he wants to make part-time use of the house in the winter and he wishes to avoid the expense and possible nuisance of having the water turned on during the winter.

10. There is no official municipal sewerage facilities plan in effect in Upper Frederick Township providing for privies at any location.

1. "Mottling is, in simplest terms, a variation in the coloring of soils. When that variation shows a concentration of redder colors in some spots, and grayer colors in others--a variation in "chroma", in particular--it will almost invariably be due to segregation of iron compounds from other components in the soil, and especially segregation of reduced (ferrous) iron compounds from oxidized (ferric) iron compounds. Iron compounds in the soil in the presence of air for any extended period of time will oxidize to the ferric state; ferric compounds are generally red. If the water table rises to a given level for prolonged periods of time, say eighteen inches, . . . then the relative absence of oxygen produces reducing conditions, and the ferric compounds are changed to ferrous compounds. Ferrous compounds are generally grayer--of a lower chroma. The ferrous compounds tend to migrate, and collect in nodules; when the water table drops, many of these nodules will be exposed to air, and oxidize to ferric iron. Nodules that for some reason the air did not reach, and areas of the soil from which much of the iron had earlier migrated, will appear gray." Fabiano v. Commonwealth, EHB Docket No. 73-051-B (issued August 1, 1973).

11. There is no municipal ordinance providing for the cleaning out of holding tanks in Upper Frederick Township. Appellant intended to arranged to have his privy cleaned out annually by contract with a private contractor who said he should be available for that purpose.

12. The Township enforcement officer who has been approving on-site sewage disposal systems since 1966 has never issued a permit for a privy in Upper Frederick Township.

DISCUSSION

The question here is whether the Township should or could have issued a permit for a privy under the applicable Regulations of the Department. The Regulations do include provisions dealing with the construction and location of privies. Because the Appellant's argument is based on differentiating between privies and holding tanks, we quote the Regulations dealing with holding tanks in full:

"HOLDING TANKS, PRIVIES
AND CHEMICAL TOILETS

"§73.81 General.

"Holding tanks, privies, chemical toilets and related on-lot sewage disposal systems are individual sewage systems and require permits. Because such systems do not provide for final on-lot treatment and disposal of the sewage and require regular service and maintenance to prevent their malfunction and overflow, they shall only be used where a septic tank and tile field or aerobic sewage treatment system cannot be used and where the sewage facilities plan provides for their use.

"§73.82 Holding tanks.

"(a) *Capacity*. A holding tank shall be large enough to hold a minimum of three days sewage waste or 1,000 gallons whichever is larger.
"(b) *Construction*. A holding tank shall be constructed of durable material and shall be watertight.
"(c) *Warning device*. The collection unit shall be equipped with a warning device to indicate when the unit is within 75% of capacity. Such warning device shall create an audible or visible signal at a location frequented by the homeowner or responsible individual.
"(d) *Maintenance*. Disposal of waste from a collection unit must be to a site approved by the Department.

"§73.83 Privies.

"(a) *General*. Where water under pressure is not available, a privy is the simplest means of excreta disposal.
"(b) *Location*. The location shall be such as to minimize danger of contamination to water supplies. Under ordinary conditions the privy shall be at least fifty (50) feet and downgrade from any sources of water supply. The site shall be accessible to the user, about fifty (50) feet

from any building served, and consideration shall be given to the direction of prevailing winds to reduce odor nuisances.

"(c) *Construction.* The privy shall be constructed of substantial materials using a concrete vault large enough to provide several years storage and be provided with a clean-out in order to assure easy access.

"(1) The pit shall be provided with a screened vent and the seat covers and door shall be made self-closing to prevent the entrance of flies. The privy superstructure shall also be fly-tight, well-ventilated and fastened solidly to the floor.

"(2) An earth mound shall be placed around the privy or a surface water diversion ditch shall be used to prevent flooding of the vault.

"(3) The seat and cover shall be smooth and easily cleanable.

"(4) The door shall be provided with weather stripping for purposes of insect proofing."

These Regulations, which were in force at the times of Appellant's applications, were replaced in September, 1974, with slightly altered provisions. In the 1974 version the last sentence of §73.81 states:

"... Because such systems do not provide for final on-lot treatment and disposal of the sewage and require regular service and maintenance to prevent their malfunction and overflow, they shall only be used where the Department finds and gives written notice to the approving body that the requirements of § 71.51 and 71.52 of Chapter 71 of this Title have been met."

Also, section (a) of §73.83, stating that "where water under pressure is not available, a privy is the simplest means of excreta disposal", was eliminated. However, in the definition sections of both sets of Regulations, privy is defined under the heading "holding tank" as "a holding tank designed to receive sewage where water pressure is not available". *Compare:* 25 Pa Code §73.1 (a) (iii), adopted August 2, 1971 and revised April 20, 1972, *with* 25 Pa Code §73.1 (14) (iii), effective September 16, 1974; *and compare* 25 Pa Code &71.1 (9) (iii) adopted August 2, 1971 and revised September 20, 1973, *with*25 Pa Code §71.1 (14) (iii), effective September 16, 1974. In the chapter of the Regulations dealing with the "Administration of Sewage Facilities Programs", Regulation §71.61 (which was replaced by a similar provision, §71.51, in the new Regulations) provided:

"HOLDING TANKS

"§71.61 Restrictions on use.

"(a) Holding tanks require regular service and maintenance to prevent their malfunction and overflow and shall be used only in lieu of treatment tanks and subsurface absorption areas when all the following specific conditions are met:

"(1) The applicable official plan or the revisions thereto indicate the use of holding tanks for that lot and provides for replacement by adequate sewerage services in accordance with a schedule approved by the Department.

"(2) The municipality, sewer authority, or other Department approved entity with jurisdiction or responsibility over the site has by suitable ordinance, regulation or restric-

tion assumed responsibility for maintaining existing and new holding tanks and has received Department approval for its proposed disposal site.

"(3) The holding tank meets the design standards set forth in Chapter 73 of this Title (relating to standards for sewage disposal systems).

"(b) Holding tanks may be permitted by the Department notwithstanding the restrictions set forth in subsection (a) of this section when such use is necessary to abate a nuisance or public health hazard."

We conclude from the evidence that the Appellant would construct a privy in compliance with the construction and location requirements of §73.83. However, as the Department's letter to Mr. Gallie indicates, it is the pre-conditions for the allowance of a privy that the Appellant cannot satisfy. First, it is clear that water pressure is available at the Appellant's site. The fact that Appellant does not wish to use it does not make it "not available". Second, there is no sewerage facilities plan provision that would allow a holding tank on the site in question as a temporary measure. Third, there is no municipal "ordinance, regulation or restriction" providing for the maintenance of holding tanks in Upper Frederick Township. Fourth, while initially it might have been said that no alternative system was available (although the Department thought that even under the old Regulations that possibility was not exhausted), it is now a fact that Appellant has an alternate permitted on-lot sewage disposal system.

Appellant argues that a privy is different from a holding tank in that it does not receive waste water and, therefore, does not require the kind of authorization or servicing necessary for holding tanks. He argues that the Regulations recognize this distinction and that the requirements of section 71.61 were only intended to apply to retention type holding tanks, not privies. Appellant believes that even if this distinction wasn't recognized under the old Regulations it is under the new. We think this is wishful thinking on the part of the Appellant. Under all of the Regulations new and old, a privy is defined as a type of holding tank "designed to receive sewage where water pressure is not available". And it is clear under both old §73.83 and new §73.83, the "general" provision governing holding tanks and privies, that both are to be permitted only pursuant to a sewerage facilities plan.

We must admit that a study of the Regulations dealing with privies presents something of the aspect of Catch-22, since it does not appear that a privy would ever be permitted unless it was provided for under an approved sewage facilities plan and that in itself seems unlikely. Although there might be some question about the constitutionality of these requirements if no water

pressure were available and no municipal plan and ordinance were in effect, see *Commonwealth of Pennsylvania, Department of Environmental Resources v. Trautner*, 1225 C.D. 1974, Issued May 19, 1975, there can be no question about the reasonableness of the Regulations as applied to Appellant when the Appellant has in fact been able to get an approved on-site sewage disposal system for his property. Insofar as the Appellant means to challenge the modern philosophy that precludes privies where other systems are available, he should perhaps address himself to a forum for environmental opinion. The intent of the Department's Regulations appears to be to limit the use of privies to the most primitive circumstances or where they may be necessary to abate a nuisance, and we cannot say that these Regulations are unreasonable.

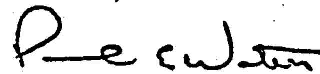
CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this appeal.
2. A privy is a type of holding tank under the Regulations of the Department of Environmental Resources that were in effect at the times of the Appellant's applications and under the revised Regulations that have been adopted since then.
3. Since water pressure is available at Appellant's property and there is no official municipal sewerage facilities plan that would allow a privy on Appellant's property, Appellant's applications for a privy were properly denied.

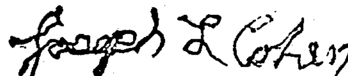
ORDER

AND NOW, this 16th day of June, 1975, the action of the Upper Frederick Township Board of Supervisors in denying Appellant's applications for a privy is sustained and the appeal of Robert B. Brooks, Jr., is dismissed.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: June 16, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

NEW ENTERPRISE STONE &
LIME COMPANY, INC.

Docket No. 75-069-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

A D J U D I C A T I O N

By: Joanne R. Denworth, Member, June 18, 1975.

New Enterprise Stone & Lime, Inc. (NESLC) has filed a "petition for review and modification" with this Board seeking to review and modify the terms of an "Agreement" between itself and the Department of Environmental Resources (DER) dated April 15, 1974. The Agreement provided for the postponement of NESLC's obligation under a DER order to install air pollution control equipment at its Bakersville Quarry and, after March 1, 1975, the imposition of penalties of $500 per week for failure to have the equipment installed by that time. Prior to March 1, 1975, NESLC made a request to the Department that the contract be reviewed and modified. That request was denied by the Department by letter of March 17, 1975.

The primary ground upon which NESLC bases its request for review and modification is the pendency of litigation over the denial of its application for a mine drainage permit at the Bakersville Quarry. That matter (which is EHB Docket Number 73-157-B) was begun in 1973. NESLC claims that, until June, 1974, there was every indication that the water pollution matter would be settled so that when it entered into the 1974 Air Pollution Control Agreement, it expected to be operating with a mine drainage permit by the time the Agreement was to be carried out. However, the settlement did not occur, there were entensive hearings in the case and the matter is now awaiting adjudication, final briefs from the parties having been filed May 1, 1975. Petitioner argues that since the operation of the Bakersville Quarry is dependent on having a mine drainage permit, it would be senseless

to install air pollution control equipment until it knows the outcome of its mine drainage permit; and further, that the payment of weekly fines is unreasonable and confiscatory under these circumstances.

The Department has made what is in effect a motion to strike NESLC's petition on the ground that the Board has no jurisdiction to review this matter. We agree.

The Department makes several procedural arguments as to why the Board lacks jurisdiction in this case. First, there is no provision in the Rules and Regulations of the EHB or in the Rules of Civil Procedure for initiating an action before the Board by petition. Second, if the petition is to be regarded as an appeal from action of the Department of Environmental Resources, the "action" was a contract dated April 15, 1974, and the appeal is therefore untimely. We think these questions are governed by the more fundamental principle here, which is that the Board does not have jurisdiction to review a contractual dispute. If it did, it might be appropriate to initiate such review by petition and the time for such review might be within 30 days of the date on which the Department refused to review this contract.

The Board has held in several different contexts that it does not have jurisdiction to review questions arising out of contracts entered into between the Department and others. *L. A. Stotler v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-079, (issued May 16, 1975), *Commonwealth of Pennsylvania, Department of Environmental Resources v. Joseph McFadden*, EHB Docket No. 73-413, (issued February 7, 1974), see also *Mill Service, Inc. v. Commonwealth v. Pennsylvania, Department of Environmental Resources*, EHB Docket No. 74-253, (issued January 31, 1975). NESLC argues that the Department's action here is a "decision" of the Department, which the Board is given power to review under §1921.A of the Administrative Code, 71 P.S. §510-21 (a). It urges upon our attention the following language in *Joseph McFadden, supra*, which suggests that there might be some contract terms or conditions that would be reviewable by the Board:

> "This appeal would have to be comprehended under subsection (a), as an appeal from a decision of the Department, if we have jurisdiction at all. A review of §§1901-A through 1920-A of the Administrative Code of 1929, *supra*, however, convinces us that the legislature intended that the type of decision that was intended to be appealable to this Board was *limited to decisions relating to environmental management and regulation.*

> "*We are not ready to say that this Board has no jurisdiction over any matter relating to any contract entered into by the Department.* A number of "decisions" the Department might make relating to its environmental management and regulation functions might become final actions, ripe for appeal, *only as contracts were entered into to carry them out.* Such contracts, or conditions or terms thereof, might well be appealable actions."
>
> (Emphasis supplied)

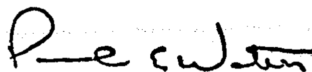
Whether or not there will ever be a "decision" of the Department that presents itself in reviewable form in a contract, it seems clear that the Board's jurisdiction is for the most part limited to review of unilateral actions of the Department, --particularly, orders, permits, licenses or decisions as stated in §1901-21A, *supra*. We think the Board does not have jurisdiction to review questions of whether parties should be excused from the terms of contracts with the Department on equitable grounds such as mistake. Once a dispute with the Department is resolved by agreement, both parties have the normal remedies available to parties to a contract--in a court of law for breach of contract or a court of equity where equitable relief such as rescission or modification is appropriate. The fact that the subject matter of the contract is one that frequently comes under the Board's jurisdiction does not mean it is the sole province of the Board. As a matter of principle it would be extremely disruptive to the administrative process if the Board were to begin reviewing agreements with the Department to determine whether or not they were fair. When would such review be appropriate and when would it ever stop? We think that a party must be held by his bargain to the normal remedies one accepts when entering into an agreement with the Department as with anyone else.

Undoubtedly, NESLC feels that the fact that its mine drainage permit case is pending before the Board makes it particularly appropriate for the Board to review the penalty clause under its air pollution control contract. The Department, on the other hand, argues that NESLC knew or should have known that the water pollution matter might not be resolved, that it agreed to the extension for the filing of briefs in that case until May 1, 1975, and that it has the option, in order to avoid penalties, of ceasing operation until the permit question is resolved. While we have some sympathy with NESLC's position, we do not see the Board's involvement in the permit case as sufficient ground for jurisdiction to review NESLC's agreement.

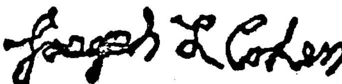
ORDER

AND NOW, this 18th day of June, 1975, the petition of New Enterprise Stone and Limestone Company, Inc. for review and modification is denied on the ground that the Board lacks jurisdiction to hear this matter. Consequently, petitioner's request for a pre-hearing conference is also denied.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member

BY JOANNE R. DENWORTH
Member

DATED: June 18, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

JOSEPH R. BIERMAN, et al, Appellant

Docket No. 74-140-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES, Appellee
CITY OF ALLENTOWN, Intervenor

ADJUDICATION

By Paul E. Waters, Chairman, June 26, 1975

This matter comes before the Board as an appeal from the issuance of a permit for the City of Allentown,(hereinafter City), to fluoridate its public water supply to insure better dental health for its citizens. Appellants who use the Allentown water supply are opposed to this change for a number of reasons, including their belief that fluoride is ineffective in preventing tooth decay, is harmful to the environment, is unnecessary because of natural fluoride intake and because the other municipalities using City water have not approved the fluoride addition.

FINDINGS OF FACT

1. The Appellants are Joseph R. Bierman, M.D., and Emanuel Roth, of the City of Allentown, and Luther Bilheimer of Hanover Township, Carol A. Zimmerman of South Whitehall Township, Paulina L. Curtis of Salisbury Township and F. Murray Iobst, D.V.M., of Whitehall Township, all in Lehigh County, Pennsylvania.

2. The Appellee is the Department of Environmental Resources of the Commonwealth of Pennsylvania,(hereinafter DER).

3. The Appellee-Intervenor is the City of Allentown, an optional-charter city of the third class situate in Lehigh County, Pennsylvania.

4. On April 8, 1974, the City of Allentown enacted an ordinance which provided for the fluoridation of the City's public water supply system.

5. The City proposes adding fluoride to its water supply system for preventive health care purposes which are unrelated to water contamination.

6. Pursuant to said ordinance, the City's Authority, which operates its public water supply system, applied for a permit from DER to install and operate fluoridation equipment.

7. The said Allentown Authority supplies water to the residents of the City of Allentown and to certain residents of the townships of Hanovers, South Whitehall, Salisbury and Whitehall.

8. There has been no action by the legislative bodies or electorate of the townships of Hanover, South Whitehall, Salisbury or Whitehall, authorizing or approving the addition of fluoride to their water supply systems.

9. The water supply for the City of Allentown is derived from three sources: The Little Lehigh Creek, Schantz's Spring and Crystal Springs, and is dumped as waste water into the Lehigh River which flows into the Delaware River.

10. On an average day, 31 million gallons of water are pumped through the Allentown water supply system.

11. The plan as submitted by the City to DER makes no provision for a pre-treatment (de-fluoridation) of the water waste prior to dumping of same into the Lehigh River.

12. There has been no environmental impact study to determine the impact of the addition of fluorides at 1 ppm into the City's water supply, particularly on the said rivers, their wildlife, plants or persons residing along their banks.

13. There has been no measurement of the present total fluoride intake of humans in the Allentown area from food, water, air and the environment.

14. The system as proposed by the City allows hydrogen -fluoride gas to escape into the atmosphere upon the filling of the tanks which will occur on the average of once every 23 days.

15. The system must provide for venting into water and not the atmosphere to be safely designed.

16. There is presently pending in the Court of Common Pleas of Lehigh County, Pennsylvania, an action to compel a referendum by the electorate of the City of Allentown on the question of whether the City's water supply should be fluoridated, to wit: *Roth et al v. Saeger*, No. 112 June Term, 1974.

17. In acting upon Allentown's application, DER consulted with the Pennsylvania Department of Health on the public health issues involved.

18. Fluoridation of a public water supply at approximately 1 ppm is recognized as a safe, efficient, and economical public health measure and recommended by the Pennsylvania Department of Health.

19. Approximately five and one half million people in Pennsylvania presently drink fluoridated water.

20. A prime public health benefit of adding fluoride to water at approximately 1 ppm is an approximate 65 percent reduction in dental cavities, or caries.

21. Fluoridating a public water supply at approximately 1 ppm is safe from a medical standpoint.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal.

2. DER has properly complied with Article I, Section 27 of the Pennsylvania Constitution, and all relevant statues and regulations, except as noted hereinafter.

3. It would be unreasonable to permit hydrogen fluoride to escape into the air when the admitted small if any hazard it creates can be easily and inexpensively controlled.

4. The City is entitled to a permit allowing fluoridation of its public water supply notwithstanding pending litigation on a referendum, and the lack of specific legislative action by municipalities electing to use the water supply.

DISCUSSION

At the outset it is important to note that we believe this appeal raises a substantially different question than was raised in the matter of *DAEMON C. STRICKLER, et al and CITY OF LEBANON, et al, Intervenors v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket Nos. 73-304-W and 73-314-W, issued January 3, 1975, by a divided opinion of this Board. To be sure there are similar fact questions of the efficacy and safety of fluoride in the prevention of tooth decay in the young. We find that it is effective and safe and, of course, we affirm those factual conclusions.

This appeal, however, is from the grant of a permit properly requested by and for the City of Allentown. In the Lebanon case, the City of Lebanon wanted to *remove* fluoride from the public water supply and it was a *refusal* by DER to allow the change which gave rise to that appeal. We are not here faced with the

question of whether DER has certain "preventive medicine" powers, but simply whether the City's proposal to add fluoride to its water is--"prejudicial to the public health".[1] We agree with DER, that it is not.

The Appellants have suggested that this is a proper case for DER to require an *Environmental Impact Statement*[2] by the City prior to issuing the permit here in question. We must answer this in the context in which it comes to our attention. The applicant, DER, must in the first instance determine whether the permit issuance has the probability of a measurable negative impact on the environment. If it so concludes, then we agree with the Appellants, that an investigation, discussion and review of these matters should be required of the applicant by the Department. If the required environmental study has not been made under the above test, then DER should withhold its permit until the applicant has complied with this responsibility. The Board's function is to review the decision made by DER, not necessarily to see if it agrees with the decision, but to see if it is reasonable, and not arbitrary, capricious or unlawful. *Eways v. Reading Parking Authority, 1956, 385 Pa. 592, Appeal by Borough of Dormont, 180 Pa. Super. 550, 119 A.2d 827 (1956)., Department of State v. Bewley, 272 A.2d 531 (1971).*

It is, after all, DER which has the technical staff and professional personnel needed to evaluate in detail any incidents of negative environmental impact. We are satisfied that DER has not abused its discretion by not requiring the detailed environmental study, proposed by Appellants.

It must be remembered that every activity of man, theoretically, has some impact on the environment. The question of degree which must be answered anew at each of the two levels will frequently require a difficult judgment. The matter of total fluoride intake could be significant if the human body could safely tolerate only a small amount without dire consequences. The evidence, however, is to the effect that the excess intake is simply excreted the same as

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1. Act of April 22, 1905 P.L. 260 as amended 35 P.S. §711 *et seq.* (Water Supply Law).

2. For purposes of clarity we reserve the term *Environmental Impact Statement* for those reports officially required by the Federal Environmental Protection Agency, and construe the Appellants' argument to pertain to an environmental study.

would occur with an excess of Vitamin B. Because the water quality program of the Commonwealth regularly conducts tests in the Allentown area, we are satisfied that there will be time enough for action when and if the water fluoride accumulation warrants it.[3]

The Appellants argue that the fluoride question should be the subject of a referendum in the City, and a suit is pending in County Court to resolve the issue. On this basis we are asked to withhold the permit granted by DER, at least until the Court decides this other question. It is clear to us that the two issues are legally separate and need not be combined through our action. In order to properly hold up the use of the permit until the outcome of the referendum, a preliminary injunction requested from the Court having jurisdiction of the referendum question would appear to be the appropriate procedure. In any event, this Board has concern enough with the caseload before it, without injecting itself into a referendum dispute clearly beyond its jurisdiction.

In a similar vein we view the Appellants' argument regarding the rights of those citizens living outside of the City who are supplied city water and, who, it is alleged, do not want fluoride in their water. It was, after all, the municipal governing body that contracted for the water supply here in question. If for any reason (including the addition of fluoride to the water), a municipality contracting with the City of Allentown, believes the contract to be breached, they have a remedy. If there is no alternate available water supply, then this would appear to be proper grounds for equity action for specific performance. The real point, however, in all of this, is that individual citizens have their remedy, in the first instance against their municipal officials. The political remedy is obvious, but beyond that they can urge municipal legal action on the water supply contract if the fluoride is not wanted by the municipality. We have concluded that the addition of fluoride to water is both safe and effective in preventing tooth decay. Therefore, aside from the contract, we must reject Appellants' claim to the extent that it is based on the health and welfare issue as opposed to the strictly legal issue of the authority of the City to effect a change in the water supply of citizens of another municipality.

3. Appellant has suggested a study of the addition of lime to the water supply to insure a proper PH balance, which otherwise might be affected over the years due to water fluoride content.

Finally, we are concerned with the allegation that the system or plan for introducing fluoride into the water is inadequate. The testimony on this point, although not in total harmony, does indicate that there is less risk involved to the public when the vent on the equipment used to introduce fluoride into the water, does not allow a gas (hydrogen fluoride) to escape into the atmosphere. The City can alter its plans to economically allow venting through an aspirator which will insure that no harmful gas enters the air from fluoride equipment.

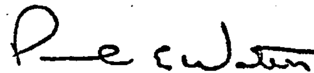
We believe this to be a reasonable precaution even though there are no nearby residences to the City water plant.

We therefore enter the following order.

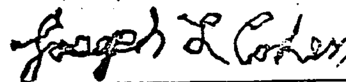
ORDER

AND NOW, this 26th day of June, 1975, the matter of Joseph R. Bierman et al v. Commonwealth of Pennsylvania, Department of Environmental Resources is hereby remanded to the Department of Environmental Resources and it is ordered to impose a condition on the permit issued to the City of Allentown, requiring a change in the plant venting pipe so that hydrogen fluoride is not released directly to the atmosphere. In all other respects the action of DER is sustained and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



BY: PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: June 26, 1975

mau ndg. plc. [handwritten]

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

SHELL OIL COMPANY : Docket No. 74-177-C

v.

BUCKS COUNTY DEPARTMENT OF HEALTH, Appellee
and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT
OF ENVIRONMENTAL RESOURCES, Intervenor

ADJUDICATION

By Joseph L. Cohen, Member, June 30 , 1975

This matter is before the Board on the appeal of Shell Oil Company (hereinafter Shell) from the action of the Bucks County Department of Health (hereinafter Bucks), taken on July 2, 1974, denying Shell's application to install a holding tank in connection with its proposed service station to be built on its property situate at the intersection of Route 611 and Edison Road, Doylestown, Bucks County, Pennsylvania. The stated reasons for the denial was Shell's alleged failure to comply with the requirements of 25 Pa. Code §71.61(a)(1) and (2) which, at the time of the denial, provided:

> "§71.61.[1] Restrictions on use.
>
> "(a) Holding tanks require regular service and maintenance to prevent their malfunction and overflow and shall be used only in lieu of treatment tanks and subsurface absorption areas when all the following specific conditions are met:
>
> "(1) The applicable official plan or the revisions thereto indicate the use of holding tanks for that lot and provides for replacement by adequate sewerage services in accordance with a schedule approved by the Department.
>
> "(2) The municipality, sewer authority or other Department approved entity with jurisdiction or responsibility over the site has by suitable ordinance, regulation or restriction assumed responsibility for maintaining existing and new holding tanks and has received Department approval for its proposed disposal site."

On September 17, 1974, the Board issued an order to Shell and Bucks, the only parties of record before the Board at that time, to submit to the Board on or before October 17, 1974, a stipulation of those material facts to which they are able to agree. The said stipulation was filed with the Board on October 19, 1974.

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1. At the time of the denial, these provisions were part of 25 Pa. Code §71.61. However, the substantially same provisions are now, as a result of the revisions of August 22, 1974, and February 20, 1975, set forth in 25 Pa. Code §71.51.

On January 20, 1975, the parties were ordered to submit briefs on the legality of 25 Pa. Code §71.61(a)(1) and (2) on or before January 31, 1975. On January 30, 1975, the parties submitted their briefs on the issue of the legality of the aforementioned regulation. On the same day, the Pennsylvania Department of Environmental Resources (hereinafter DER) filed a Petition for Leave to Intervene. On February 7, 1975, Shell filed an answer to DER's Petition. On February 14, 1975, the Board granted the Commonwealth's Petition to Intervene for the sole purpose of allowing it to file a brief in support of the legality of the contested regulation of DER. Said brief was to be filed on or before March 3, 1975. The Commonwealth filed its brief with the Board on the scheduled date.

On March 4, 1975, DER filed a Motion for Oral Argument and a Petition for a hearing. On March 6, 1975, DER filed an Amended Petition for Hearing. The Motion for Oral Argument and the Petitions for a Hearing were denied by the Board on May 19, 1975.

On the basis of the foregoing, the Board enters the following:

FINDINGS OF FACT

1. Appellant is Shell Oil Company, a Delaware corporation registered to do business in Pennsylvania with a registered business address of P. O. Box 805, Valley Forge, Pennsylvania 19482.

2. Appellee is the Bucks County Department of Health which is authorized to issue permits under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, as amended, 35 P. S. §750.1 *et seq.* (1974-1975 Supp.).

3. Intervenor is DER, the agency of the Commonwealth authorized to administer The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §690.1 *et seq.*, and to adopt regulations under the Pennsylvania Sewage Facilities Act, *supra*.

4. Shell Oil Company is the owner of a certain tract of real estate situate at the intersection of Route 611 and Edison Road in Doylestown, Bucks County, Pennsylvania.

5. Shell has obtained the requisite zoning and building permits from the appropriate local authorities for the erection of a gasoline service station on the aforesaid property.

6. On May 8, 1972, Bucks issued a permit to Shell for the installation of an on-site sewage disposal system at the above site.

7. In April 1973, Shell began extensive demolition, grading and rock removal at the above site.

8. Construction of the service station proper was begun by Shell in late August, 1973.

9. On October 15, 1973, Shell received formal notice of a stop order issued by Bucks.

10. A hearing on the Bucks stop order was held on November 21, 1973.

11. Shell was notified by Bucks on November 23, 1973, that the revocation of the permit previously issued was upheld. Shell never appealed this revocation to the Environmental Hearing Board.

12. On April 30, 1974, Shell submitted revised plans for an on-site system.

13. On May 6, 1974, Shell was advised by County that no on-site system except a holding tank would be approved for this location.

14. Shell was also advised by Bucks on May 6, 1974, that in order to get approval for a holding tank, the requirements set forth in 25 Pa. Code §71.61(a)(1) and (2) would have to be met.

15. On June 17, 1974, Shell filed an application for approval of a holding tank system with Bucks. Bucks denied the application for failure to comply with 25 Pa. Code §71.61(a)(1) and (2).

16. The applicable official plan does not indicate the use of holding tanks for the lot in question and does not provide for replacement by other sewerage services in accordance with a schedule approved by the Department.

17. Doylestown Township has not assumed responsibility for maintaining existing and new holding tanks by appropriate ordinance or resolution.

18. The holding tank proposed by Shell meets all the holding tank design specifications set forth in the DER rules and regulations.

19. Shell has offered to post a bond to guarantee the absolute cleanliness of its holding tank operation and to give appropriate assurances that it will deal only with a competent and reputable holding tank cleaning company.

20. There is no community sewer line accessible to this property.

21. Shell has thus far expended $130,188.00 in site preparation and improvement of the property in question.

DISCUSSION

The central issue in this case is whether 25 Pa. Code §71.61(a)(1) and (2) are a proper exercise of the authority of DER under the provisions of the Pennsylvania Sewage Facilities Act, *supra*, or the provisions of The Clean Streams Law, *supra*. We are not concerned in this appeal with the action of Bucks in revoking a prior permit issued to Shell for an on-lot sewage disposal facility on the same tract of land in question. Shell never appealed that revocation to this Board within the requisite time; therefore, we may not inquire as to the propriety of that action. Neither are we concerned with whether the revocation of the permit was the result of activities engaged in by Shell or for some other reason. We must presume that the revocation was for the reasons set forth in §7(f) of the then operative provisions of the Pennsylvania Sewage Facilities Act, *supra*.

Whether the provisions of the Pennsylvania Sewage Facilities Act, *supra*, authorized the adoption of 25 Pa. Code §71.61(a)(1) and (2) depends upon the provisions of that Act. Section 7(a) of the Act provides:

> "No person shall install an individual or community sewage disposal system or construct any building for which an individual or community sewage disposal system is to be installed without first obtaining a permit indicating that the site and the plans and specifications of such system are in compliance with the provisions of this act and the standards adopted pursuant to this act. No permit shall be required by the department county department of health, joint county department of health, joint municipal department of health, municipality, joint township department of health or township in those cases where a permit from the Sanitary Water Board or the secretary has been obtained, or where the department determines that such permit is not necessary for the protection of the public health or for a rural residence."

Section 3 of this Act clearly sets forth the power and duties of DER in respect of the adoption of rules, regulations, standards and procedures. It provides:

"The department shall have the power and its duties shall be to adopt such rules, regulations, standards and procedures as shall be necessary to enable it to carry out the provisions of this act, to wit: adoption of standards for construction and installation of community individual and community sewage disposal systems and standards for construction, installation and maintenance of community sewage treatment plants, requirements for disbursement of State and Federal funds to municipalities for planning, personnel and construction of water supply and sewage disposal systems, and review and acceptance of official plans."

Assuming arguendo that the holding tank proposed in Shell's application falls within the definition of "individual sewage system" as defined in §2(1)[2] of the Pennsylvania Sewage Facilities Act, supra, it is clear that with reference to such individual systems the Department may only adopt standards for their construction and installation. Moreover, the authority to grant or deny permits is limited to a determination with regard to whether the site and plans and specifications of the system are in compliance with the provisions of the Act and the standards adopted pursuant thereto. Thus, there is no authority in the Pennsylvania Sewage Facilities Act, *supra*, to condition the granting of an individual sewage system upon compliance with the provisions of 25 Pa. Code §71.61(a)(1) and (2).

Although there is nothing in the Pennsylvania Sewage Facilities Act, supra, which would authorize such conditions in regulations adopted pursuant to its provisions, nevertheless, §402(a) of The Clean Streams Law, *supra*, provides:

"Whenever the board finds that any activity, not otherwise requiring a permit under this act, including but not limited to the impounding, handling, storage, transportation, processing or disposing of materials or substances, creates a danger of pollution of the waters of the Commonwealth or that regulation of the activity is necessary to avoid such pollution, the board may, by rule or regulation, require that such activity be conducted only pursuant to a permit issued by the department or may otherwise establish the conditions under which such activity shall be conducted, or the board may issue an order to a person or municipality regulating a particular activity. Rules and regulations adopted by the board pursuant to this section shall give the persons or municipalities affected a reasonable period of time to apply for and obtain any permits required by such rules and regulations."

The provisions of §402(a) of The Clean Streams Law, *supra*, clearly confer upon DER alternative methods by which it may regulate activity creating a danger of pollution to waters of the Commonwealth.

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2. Inasmuch as individual sewage systems is defined in this Section as " . . . a single system of piping, tanks or other facilities serving one or two lots and collecting and disposing of sewage in whole or in part into the soil of the property or into any waters of this Commonwealth.", we express serious doubt as to whether a holding tank falls within this definition.

During the pendency of this matter, Commonwealth Court rendered its decision in *Commonwealth of Pennsylvania, Department of Environmental Resources v. David Trautner* (No. 1225 C. D. 1974, issued May 19, 1975). In that case *Trautner* made application to DER for a permit to install an individual sewage treatment plant to serve a home to be constructed on his six acre tract of land in Hepburn Township, Lycoming County, Pennsylvania. The effluent from the proposed sewage treatment facility was to be discharged into a small stream nearby. DER raised no objection to the ability of the treatment facility to perform its intended purpose so long as *Trautner* regularly serviced it. Nevertheless, DER refused to issue *Trautner* a permit for the facility for the reason that, *inter alia*, Hepburn Township did not have an official plan, approved by DER under the provisions of the Pennsylvania Sewage Facilities Act, *supra*, which included the proposed treatment facility as part of the plan. The Township attempted to revise its plan by including the *Trautner* facility, but DER refused to approve the revision because it did not contain data required by DER regulations.

The basis of the Department's refusal in *Trautner* was 25 Pa. Code §93.31(a) and (b) which requires that a private sewerage project be in conformity with a comprehensive program of water quality management before DER may grant the project a permit. To have been part of such a comprehensive program, the *Trautner* project would have had to be part of the Hepburn Township official plan or a revision thereof which would be approved by DER. Since the *Trautner* project was not part of an approved official plan or revision thereof, DER refused to issue a permit for the treatment facility. In holding such a regulatory scheme to be unconstitutional as depriving a landowner of the reasonable use of his property, the Court said:

> "...While we realize that DER and local officials are obligated to make adequate plans for the disposal of sewage, under the present regulatory scheme, a property owner, such as Trautner, can be denied the reasonable use of his property while all of the various parties involved pursue agreement among themselves regarding what precisely is to be done with an area in transition from 'isolated' to non-isolated status.
>
> "We have carefully examined the record and the regulatory scheme involved in this case and we conclude that, as applied to Trautner's circumstances, the regulations noted above constitute an unreasonable restriction on the use of his land and are, in effect, a confiscation without due process of law. By sustaining DER's appeal we would be enforcing these regulations in derrogation of Trautner's constitutional rights, and this we cannot do."

While there are many factual distinctions between the matter before us and *Trautner*, we are of the opinion that *Trautner* holds that where a regulatory scheme denies a person the reasonable use of his property pending undertakings by a municipality which may never occur, such regulatory schemes is a violation of the due process clause of the 14th Amendment of the United States Constitution. Although we are of the opinion that 25 Pa. Code §71.61(a)(1) and (2) are not unconstitutional when applied to realty subdivisions, inasmuch as a proliferation of holding tanks may pose a public health and a pollutional hazard, nevertheless in the circumstances of this case we believe *Trautner* mandates us to reverse the Bucks County Department of Health decision to deny Shell a permit for a holding tank.

The facts of this case are unusual in that Shell invested a large sum in the development of the service station prior to the revocation of its permit for a septic tank system. After that revocation Shell was informed that a holding tank was the only available system, but that it could not have a holding tank because there was no official plan provision for holding tanks at that site and no ordinance providing for their maintenance. Shell has offered to post a bond to assure the proper maintenance of a holding tank. Certainly, there is no doubt about Shell's financial ability to make that assurance and, with such a guarantee, it seems very unlikely that a holding tank at Shell's station would result in any pollutional or health hazards. Under these circumstances, *Trautner* appears to us to compel the conclusion that the requirements of Regulation §71.61--that there be an official plan provision and municipal ordinance before Shell can obtain a permit for a holding tank--unreasonably deprive Shell of the use of its property. The Department argued in its brief and motion for a hearing that the revocation of Shell's permit was Shell's own fault since it resulted from Shell's excavation of the site. Even if that were the case, we think that it is unreasonable at this point to deny Shell the use of its developed property, where Shell is willing to guarantee satisfactory maintenance of a holding tank, on the ground that there is no municipal plan for holding tanks at the site.

Inasmuch as there is an indication by DER that within a period of two to three years the soil on Shell's land may be capable of accomodating a septic system and, inasmuch as holding tanks are at best a temporary expedient, we think that the Bucks County Department of Health may condition further the granting of its permit upon the installation of the septic disposal system when the soil on the property is capable of accomodating such.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter and the parties to these proceedings.

2. The Pennsylvania Sewage Facilities Act, *supra*, does not authorize the adoption of 25 Pa. Code §71.61(a)(1) and (2).

3. The Clean Streams Law, *supra*, in §402 authorizes the adoption of reasonable restrictions on the use of holding tanks for sewage.

4. Where the owner of a tract of land developed the land for use as a gas station while in possession of a permit for an on-lot sewage disposal system that was later revoked and now proposes to install a holding tank on the property, and where the owner is able to give reasonable assurances that the contents of the holding tank will be emptied and disposed of in a satisfactory manner, the denial of a permit for a holding tank on the ground of noncompliance with the municipal plan requirements of 25 Pa. Code §71.61(a)(1) and (2) is unreasonable and a deprivation of the owners' property.

5. It is a reasonable restriction to impose a condition in a holding tank permit that the tank not be used if the soil can accomodate a septic system and such a system is installed thereon, or if public sewerage facilities are available to serve the land in question.

O R D E R

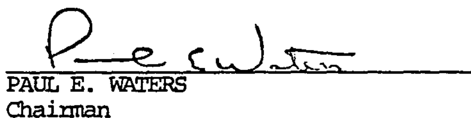
AND NOW, this 30th day of June, 1975, the action of the Bucks County Department of Health in denying Shell Oil Company a permit to install a septic tank on its property in the Township of Doylestown, Bucks County, Pennsylvania, is hereby set aside and the said Bucks County Department of Health is hereby ordered to issue a holding tank permit to Shell Oil Company for its property in Doylestown, Bucks County, Pennsylvania, on the following conditions:

1. Shell Oil shall post a bond to guarantee the cleanliness of its holding tank operation and shall give reasonable assurances that it will deal only with a competent and reputable holding tank cleaning company and that it will cause the holding tank to be cleaned at intervals agreeable to Bucks County Department of Health,

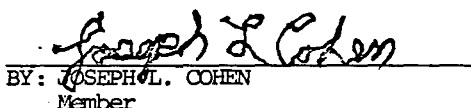
and

2. Shell shall cease discharging sewage into said holding tank upon either the availability of public sewerage facilities to serve its property or the installation of a septic disposal system on said property under order of Bucks County Department of Health, whichever occurs first.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: June 30, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Docket No. 74-071-CP-C

v.

FEDERAL OIL AND GAS COMPANY AND JAMES
V. JOYCE, t/d/a JOYCE PIPELINE COMPANY

ADJUDICATION

By Joanne R. Denworth and Joseph L. Cohen, Members, July 1, 1975.

This is a civil penalty action brought by the Department of Environmental Resources (hereinafter DER) against Federal Oil and Gas Company (hereinafter Federal), the owner of a deep gas well prospect in McKean County, Pennsylvania, and Joyce Pipeline Company (hereinafter Joyce), the drilling company employed by Federal to drill the prospect. The complaint asks for civil penalties on two counts: first, that during the nine day period (November 17--November 25, 1973) in which the gas well was being drilled, the Defendants were responsible for the continuous discharge of industrial wastes--namely, drilling fines, oil and silt--into the waters of the Commonwealth in violation of §301 and §307 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P. S. §§691.301, 691.307; and, second, that the Defendants did not "design, implement or maintain a plan to prevent erosion and sedimentation" on the drilling site as required by §102.4 of the Regulations of DER, which was adopted under §402 of The Clean Streams Law, *supra*. DER alleges that the Defendants are jointly and severally liable on both counts for civil penalties, which DER requests should be imposed in the maximum amount--$14,500.00 for the first count ($10,000.00 plus $ 4,500.00 for continuous violations) and $10,000.00 for the second count.

FINDINGS OF FACT

1. On September 18, 1973, Federal, a Pennsylvania corporation, was issued Well Drilling Permit No. McK-10394 by the Oil and Gas Division of the Department of

Environmental Resources to drill a gas well at site number one on the Onofrio well farm in Corydon Township in McKean County. The permit states that the operator is granted permission to drill the subject site "in accordance with pertinent legal requirements".

2. The drilling site was selected for Federal by an "independent petroleum geologist". A permit to drill the site was then obtained and the site located and prepared by John DePetro, a "consultant petroleum engineer" employed by Federal for this purpose.

3. The drilling site consisted of approximately 1.3 acres on the west side of Forest Road 176 in the Allegheny National Forest.

4. To prepare the site Mr. DePetro's employee was instructed to bulldoze a road from Forest Road 176 onto the site, and to clear and grade the site. The site was at an elevation approximately four to five feet above the road and sloped slightly from a direction northwest to southeast. The entrance road located on the eastern portion of the site was approximately 30 feet long and was graded at a slope of approximately 12%. Mr. DePetro's criteria for locating the road were that it be a short distance from the Forest Road onto the site and not too steep a grade.

5. No erosion control plan was developed in the preparation of the site or maintained at the site.

6. The U. S. Forestry Service checks on the preparation of drill sites to guard against erosion. At the direction of Donald Burge, a Ranger for the Allegheny National Forest, a ten inch sluice was placed in the ditch under the entrance road to conduct runoff water from above the entrance road to below the entrance road. Mr. Burge's office approved the preparation of the site.

7. Joyce, a sole proprietor doing business as Joyce Pipeline Company, was employed by Federal to drill the well.

8. Joyce constructed three sumps that were located in the eastern and southeastern portion of the site. In the drilling process sumps are required for the purpose of catching and containing drilling fines, which are sandstone cuttings resulting from drilling into the ground. The cuttings are mixed with fluid and blown out a pipe from the drilling rig into the sumps.

9. Buck Lick Run is a native brook and brown trout stream that is annually stocked with fingerling sized trout. It flows in a northeast to southwest direction south of the gas well site. An unnamed tributary of Buck Lick Run, flowing north to south, runs adjacent to the gas well site. Buck Lick Run flows into Sugar Run approximately two miles from the well site and Sugar Run flows into the Allegheny Reservoir approximately five miles from the site. Sugar Run is a productive native brook and brown trout stream that is stocked annually with trout from the Lamar National Fish Hatchery.

10. On November 17 and 18, 1973, drilling fines were being blown outside the sump and were discharging from the lower side of one of the sumps down the entrance road embankment into a wet weather ditch beside Forest Road 176 and from there into the unnamed tributary and into Buck Lick Run and on into Sugar Run and finally into the Allegheny Reservoir.

11. The drilling fines caused Buck Lick Run, which was clear above the entrance of the unnamed tributary, to have a distinctive white, milky appearance, which was visible, though progressively lighter, from the entrance of the unnamed tributary into Buck Lick Run all the way to the Allegheny Reservoir.

12. On November 17 and 18, 1973, oil from underneath the drilling machinery was observed discharging from the drilling site into Buck Lick Run by the same route described above. The oil caused a discoloration and sheen on Buck Lick Run for a distance of at least one mile.

13. The drilling operation was shut down once on November 20, and once on November 21, 1973, by the Forester for the United States Forest Service because of the failure to contain drilling fines in the sumps.

14. By November 20, 1973, the leakage of drilling fines from under one sump had been stopped by lining that sump with a plastic liner.

15. On November 20, 1973, the water in Buck Lick Run was still slightly discolored from the drilling fines and silt and sediment, but the discharge of drilling fines had been stopped.

16. On November 20, 22, 23, 24 and 25, 1973, oil was discharging from the drilling site into Buck Lick Run by way of the wet weather ditch and the unnamed tributary. Such oil was observable as a sheen or irridescence on the surface of

Buck Lick Run and occasionally on Sugar Run. No evidence of oil was present above the entrance of the unnamed tributary into Buck Lick Run.

17. Grab samples taken from stagnant pools in the wet weather ditch on the night of November 23, 1973, showed the presence of large amounts of oil.

18. On November 24 and 25, 1973, oil was found on rocks in Buck Lick Run below where the unnamed tributary entered Buck Lick Run.

19. All of the observations of oil in Buck Lick Run were visual. None of the representatives of the Department or the Fish Commission who inspected the site at various times took samples of or measured the amount of oil in Buck Lick Run itself.

20. Grab samples taken November 28, 1973, showed nine parts per million of oil in the wet weather ditch and five parts per million of oil in the unnamed tributary.

21. During the nine day period of the alleged violations--November 17 to November 25, 1973--the weather was usually rainy.

22. On November 25, 1973, silt and sediment were running off the drilling site at an accelerated rate--that is at a rate faster than would have occurred if the site was not cleared of vegetation and opened up by the bulldozed entrance road to allow runoff into the wet weather ditch and the unnamed tributary.

23. On November 25, 1973, the runoff of silt and sediment from the site caused excessive turbidity in Buck Lick Run for a distance of some 400 yards.

24. On November 22, 1973, one dead trout and two physiologically depressed cottus were found in Buck Lick Run below the entrance of the unnamed tributary about one-half mile from the drilling rig.

25. The macroinvertebrate population of a stream constitutes the food supply for the fish in this stream. On November 19, 1973, there was a severe reduction (measured as 71.3%) in the macroinvertebrate population of Buck Lick Run below the entrance of the unnamed tributary. This severe reduction in the food supply could have been expected to lead to a curtailment of fish production and fishing in the affected area of Buck Lick Run for approximately one year. However, no evidence

was produced to show whether this expected reduction actually occurred. By August of 1974, there was an improvement in the macroinvertebrate population in Buck Lick Run below the entrance of the unnamed tributary. Nevertheless, there was still existing a substantial decrease (measured as 42.4%) in the macroinvertebrate population in the affected area of Buck Lick Run.

26. In August 1974, there was no significant difference in the water quality of Buck Lick Run below the entrance of the unnamed tributary from that which was obtained above this point, although there existed small amounts of oil on several rocks below the entrance of the unnamed tributary.

27. Federal was aware of the discharge problems at the drilling site as early as November 20, 1973.

28. On a number of days during the drilling operation representatives of the Department and/or the Pennsylvania Fish Commission talked with personnel from Joyce and/or Federal and requested that the discharges be stopped. Although some concern was shown, no real effort was made to stop the discharge of oil from the site, which was continuing on November 25th, the last day of drilling.

29. The well, which was nonproductive, was turned over to Kaylar Development Corporation, owner of the shallow mineral rights by contract dated December 5, 1973.

30. The Oil and Gas Department of DER did not begin notifying operators of the requirement for an erosion control plan for drilling operations until March of 1974, although Regulation §102.4 was adopted in September of 1972.

31. In January 1974, a penalty of $1,000.00 was paid by Federal to the Pennsylvania Fish Commission. In his report made out at the time of payment, the Fish Commission representative, who was the most frequent observer of discharges from the site, characterized the pollution from the drilling site as "light" and its effect as "unknown".

DISCUSSION

The issues in this case can conveniently be discussed under three sub-headings:

1) Were there violations of §307 of The Clean Streams Law, *supra*, and §102.4 of DER's Rules and Regulations, as alleged?

2) To what extent are Federal and Joyce jointly and severally liable for any penalties that may be assessed?

3) What is the appropriate amount of civil penalties to be assessed for any proven violations?

I. Were there violations of §307 of The Clean Streams Law, *supra*, and §102.4 of the Department's Rules and Regulations, as alleged?

A. §307 of The Clean Streams Law, *supra*.

The Department has shown by a preponderance of the evidence in this case that there were discharges from the Defendant Federal's gas drilling site of drilling fines, oil and, on one occasion at least, silt and sediment into the waters of the Commonwealth during the period from November 17, 1973, to November 25, 1973, while Federal's gas prospect was being drilled by Joyce. Indeed, the Defendants do not seriously argue that there were no discharges from the site, although they have claimed that the Department has not shown a causal connection between the discharges from the drilling site or the machinery on the drilling site and the pollution of Buck Lick Run. We are not persuaded by those arguments. DER produced substantial evidence to show that drilling fines, oil and silt were discharged from the drilling site into Buck Lick Run during the period of the complaint.

The Defendants make several arguments as to why these discharges, even if admitted, were not violations of The Clean Streams Law, *supra*. First, Defendants argue that silt and drilling fines are not industrial wastes within the meaning of The Clean Streams Law, *supra*. Section 1 of the Act defines the terms "establishment" and "industrial waste" as follows:

> "'Establishment' shall be construed to include any industrial establishment, mill, factory, tannery, paper or pulp mill, garage, oil refinery, oil well, boat, vessel, mine, coal colliery, breaker, coal processing operations, dredging operations, except where the dredger holds an unexpired and valid permit issued by the Pennsylvania Water and Power Resources Board prior to the effective date of this act, quarry, and each and every other industry or plant or works.
>
> "'Industrial waste' shall be construed to mean any liquid, gaseous, radioactive, solid or other substance, not sewage, resulting from any manufacturing or industry, or from any establishment, as herein defined, and mine drainage, silt, coal mine solids, rock, debris, dirt and clay from coal mines, coal collieries, breakers, or other coal processing operations. 'Industrial waste' shall include all such substances whether or not generally characterized as waste."

Federal argues that the term "silt" in the statutory definition of industrial waste refers only to silt from coal operations. *Commonwealth v. Sechan Limestone Industries, Inc.*, 52 D. & C. 2d 10 (1970), aff'd 220 Pa. Super. 782, 286 A.2d 406 (1972), held that silt, irrespective of whether it originated from coal mining operations, was within the statutory definition of "industrial waste" in The Clean Streams Law, *supra*. Applying the *Sechan* construction, if rock, debris, dirt or clay qualify as industrial wastes independent of coal operations, drilling fines would perforce fall within that category. However, we are of the opinion that *Sechan* must be limited to silt resulting from an industrial process. We do not think that silt resulting from erosion rather than an industrial process constitutes "industrial waste" within The Clean Streams Law, *supra*. Thus, any liability to be imposed on the Defendants for the discharge of silt and sediment from the site must be related to Regulation §102.4 rather than §307 of The Clean Streams Law, *supra*.

Federal also argues that a gas well is not within the statutory definition of the term "establishment" and that drilling fines are not industrial wastes. On a parity of reasoning with *Sechan*, we must conclude that a gas well is an establishment within the meaning of The Clean Streams Law, *supra*, and that drilling fines are industrial wastes within the meaning of that Act.

In *Sechan*, the court found that the Defendant's limestone mining operation was an establishment within the meaning of The Clean Streams Law, *supra*, either as a mine or a quarry or the type of industry, plant or works in the operation of which industrial wastes are produced. 52 D. & C. 2d at 13. Similarly, while the statutory definition of establishment does not specifically list "gas well", there can be no doubt that a gas well is nevertheless within the intended scope of the statute. See *U. S. v. Getty Oil* , 3 Envir. Reptr. 1225 (S. D. Tex., 1971), in which the court concluded that a "production platform" from which oil had been discharged was by "common sense" to be included within the enumerated places from which such discharges were prohibited under the 1899 Refuse Act.

The Defendants also argue that DER violated the rule of *Bortz Coal Company v. Air Pollution Commission*, 2 Pa. Commonwealth Ct. 441, 279 A.2d 388 (1971) and *North American Coal Corporation v. Air Pollution Commission*, 2 Pa. Commonwealth Ct. 469, 279 A.2d 356 (1971), that visual observations are not adequate evidence of a violation where recognized scientific tests are available, because DER did not present

any scientific evidence as to the quantity of drilling fines, oil or silt present in Buck Lick Run on any particular date. We are of the opinion that Defendant's reliance on *Bortz* and *North American* is unjustified under the facts of this case. *United States Steel Corporation v. Department of Environmental Resources*, 7 Pa. Commonwealth Ct. 429, 300 A.2d 508 (1973), has limited the applicability of the *Bortz* and *North American* holdings in regard to scientific evidence. And see *Rushton Mining Company v. Commonwealth*, 16 Pa. Commonwealth Ct. 135, 328 A.2d 185 (1974). Moreover, we believe that these cases are not applicable where the discharge itself is unauthorized.

Section 307 of The Clean Streams Law, *supra*, prohibits all discharges of industrial waste not authorized by a permit issued by DER or by rules and regulations adopted by that Department. It is conceded that neither Defendant had a permit from DER to discharge industrial wastes. However, it is claimed on behalf of Defendants that 25 Pa. Code §97.63 specifically permits the discharges of oil involved in this case. Defendant's reliance on this regulation is patently unjustified. The regulation applies to quantities of oil permitted in "waste water discharges" from industrial processes. It has no applicability whatsoever to undiluted discharges of oil to waters of the Commonwealth.[1]

Of more relevance to the discharges in this case than 25 Pa. Code §97.63 are 25 Pa. Code §§97.54(b) and 97.55, which apply to producing oil and gas wells. These regulations prohibit the discharge of any amount of oil into the waters of the Commonwealth. While the gas well in this case is a nonproducing one, we believe that the regulations which apply specifically to producing oil and gas wells have a greater degree of relevance to the facts of this case than does 25 Pa. Code §97.63.

Furthermore, it might be noted that, although oil can be measured, a major recognized test for the presence of oil under both federal and state laws is a visual one—whether there is a "slight iridescence" or "sheen"—presumably because

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1. It might be noted that even if the applicability of §97.63 were assumed, the Defendants have not shown that its discharges were within the stated limit by relying on the samples taken on November 28th, which showed nine parts per million of oil in the ditch water and five parts per million in the unnamed tributary. These samples were taken several days after the drilling had stopped and outside of the period for which penalties are sought. Large amounts of oil (as much oil as water by the Examiner's observation) were present in the samples taken from the ditch water on November 23rd. It can be presumed from the drainage of this area that that oil had washed into the waters of the Commonwealth by November 28th.

the presence of oil can be detected by observation alone. See, e.g., 40 C. F. R. §§110.3(b) and 110.1(e), adopted pursuant to §11(b)(3) of the Federal Water Pollution Control Act, 33 U. S. C. § , and 25 Pa. Code §97.63. In sum, the visual observations of the Commonwealth witnesses that oil and drilling fines were discharging from the drilling site into Buck Lick Run were sufficient to establish a violation of §307 of The Clean Streams Law, *supra*. Section 605 of The Clean Streams Law, *supra*, authorizes the imposition of penalties based on a daily standard for continuous violations. The evidence here established that the drilling fine pollution occurred on two days. The oil pollution was observed on six days. Since the statute clearly contemplates the division of penalties for initial discharges and continuous violations, we think it is appropriate to break down the assessment of any penalties here into an assessment of a penalty for the initial discharges of drilling fines and oil plus an assessment of daily penalties for the additional five days on which drilling fines and/or oil were discharging from the site.

B. Regulation §102.4.

Section 102.4 of the Rules and Regulations of DER provides:

> "All earth-moving activities within this Commonwealth shall be conducted in such a way as to prevent accelerated erosion and the resulting sedimentation. To accomplish this, all persons engaged in earth-moving activities shall design, implement, and maintain erosion and sedimentation control measures which effectively prevent accelerated erosion and sedimentation. These erosion and sedimentation measures shall be described in a plan set forth in §102.5 of this Title (relating to erosion and sedimentation control plan), and shall be available at all times at the site of the activity. The Department or its designee may, at their discretion, require this plan to be filed with the Department or its designee."

Earth-moving activity is defined in §102.1 as "Any construction or other activity which disturbs the surface of the land including, but not limited to, excavations, embankments, land development, subdivision development, mineral extraction, and the moving, depositing, or storing of soil, rock, or earth".

In this case there was a violation of §102.4 of the Regulations in that earth-moving activity (clearing, grading and embankment) was required for the preparation of the site and no erosion control plan was developed or maintained at the site. Although the site was prepared for Defendant Federal by an independent contractor, for reasons discussed below, we conclude that Federal must be held responsible for this violation. Defendant Joyce, however, cannot be held responsible because as

the driller of the well it cannot be described as a person engaged in earth-moving activities within the meaning of the Regulations.

Defendant Federal's argument that the Oil and Gas Division of DER did not begin notifying operators of the requirements for erosion control plans before March of 1974, does not excuse Federal from compliance with those regulations which were adopted in September of 1972. 25 Pa. Code §102.1 *et seq*. (relating to earth-moving activities) duly adopted and published in accordance with the provisions of the Commonwealth Documents Law, Act of July 31, 1968, P. L. 769, No. 240, as amended, 45 P. S. §1101 *et seq*. (1974-1975) sup.). Thus, §504 of the Act regarding constructive notice of documents published in accordance with its provisions applies to Federal. *Ignorantia legis non excusat* Federal, therefore, cannot escape its duty with regard to the aforementioned regulation by relying on the notice from the Oil and Gas Division of DER, approximately 1-1/2 years after the adoption and promulgation of these regulations in the Pennsylvania Code.

While the failure to develop an erosion control plan by Federal may not have been willfull, nevertheless, within the context of this case it was a significant violation of the rules and regulations of DER relating to erosion control. The location and construction of the entrance road and the bulldozing away of vegetation on the site were a major contributing cause to the discharges from the drilling site into Buck Lick Run. The failure to take reasonable erosion control measures on the part of Federal Oil and Gas as required under the regulations cannot be excused by the fact that heavy rains occurred during this period. Had erosion control measures been taken, perhaps the heavy rains may have been a circumstance to be taken into consideration in mitigation of civil penalty assessments but that is not the case before us.

Defendants argue as to both counts in the complaint for civil penalties that their actions in connection with the discharges were not willful and that, therefore, they cannot be assessed civil penalties. Their position assumes that intent is an element of a violation of the Clean Streams Law, *supra*. Clearly, Defendants are wrong in their contention in this regard. As we said in *Township of Pleasant v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 73-352-CP-C (issued March 14, 1975):

> "Because of the manner in which the discharge in this matter took place, a question has arisen as to whether such was a discharge.

by Defendant municipality in violation of the Clean Streams Law, *supra*. It is clear that the discharge was not intentional as that term is understood in the law. However, nothing in the Clean Streams Law predicates a violation thereof on the intention of any party. Moreover, in *Commonwealth v. Sonneborn* 164 Pa. Superior Ct. 493, 66 A.2d 584 (1949) violations of the Clean Streams Law, *supra*, were characterized as *malum prohibitum*, so as to render wholly immaterial a party's intent in connection with a violation of that act."

Moreover, §605 of The Clean Streams Law, *supra*, authorizes the imposition of civil penalties regardless of the fact that the violation may not have been willful. The element of willfulness is only to be taken into account in determining the amount of a civil penalty.

II. To what extent are Federal and Joyce jointly and severally liable for any penalties that may be assessed?

Defendant Federal claims that it may not be held responsible for the discharges of oil and drilling fines from the site for the reason that the cause of such discharges was not an activity or operation conducted by Federal or its employees. The fact that the activities causing the discharges were those of an independent contractor, Joyce, is not sufficient under the circumstances of this case to relieve Federal of its basic responsibility to comply with The Clean Streams Law, *supra*. The issue is the nature of the duty which Federal had with regard to the discharges of oil and drilling fines.

As lessee under a lease for the exploration and exploitation of the gas rights on the Onofrio tract, Defendant Federal had such control over the surface of the leased land as would enable it to exercise its rights under the lease. Generally, the lessee of an oil and gas lease may occupy so much of the surface as is reasonably necessary for the purpose of extracting the gas or oil contemplated by the lease. 38 AM JUR 2d, Gas and Oil, §115. As a lawful occupier of the surface of the land subject to the oil and gas lease, the lessee would appear to have those duties with regard to the surface of the land which generally attached to those who lawfully occupy the surface. Therefore, inasmuch as a violation of §307 of The Clean Streams Law, *supra*, does not require a specific intent, we are of the opinion that Joyce and Federal are jointly and severally liable for the discharges of oil and drilling fines from the site of the gas well operation.

With regard to the failure to develop and implement an erosion control plan, it is apparent that this was not the responsibility of Joyce. Joyce was not "a person engaged in earthmoving activities" within the contemplation of 25 Pa. Code §102.1 *et seq*. and, therefore, cannot be charged with the violation of the regulations prevailing to develop and implement an erosion control plan.

III. What is the appropriate amount of civil penalties to be assessed for the proven violations?

Section 605 of The Clean Streams Law provides that in assessing the amount of a civil penalty, the Board shall consider "the willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors". In this case it is clear that there were discharges of drilling fines and oil from Defendant's drilling site into Buck Lick Run and that there was some damage to Buck Lick Run as a result. The amount of the damage, however, has not been shown to be great or, for that matter, calculable. We may take judicial notice that a trout stream requires a very high degree of water quality to support its population. See e.g., 1GRAD, TREATISE ON ENVIRONMENTAL LAW, Volume I, §3.01, p. 3-18. The evidence here showed only minimal damage to fish in the stream. The significant harm from the discharges was to the macroinvertebrate aquatic population in Buck Lick Run below the entrance to the unnamed tributary, which was severely reduced by what one aquatic biologist thought was "a catastrophic shock to the organisms". The harm that this could be expected to result in (aside from the damage to the aquatic life itself) was the loss of food for trout in the stream and hence the probable curtailment of fish production and fishing in the affected area for a period of at least a year. Tests taken in August of 1974 showed that the water quality in Buck Lick Run below the entrance of the unnamed tributary was normal and that the aquatic population at that location, while still reduced, had recovered by 28.9% since November of 1973. No evidence of an actual effect on fishing in the area was shown.

It did not appear that the initial discharges were the result of any willful action on the part of the Defendants. The leakage of oil from the machinery and drilling fines from the sump were clearly accidental. In the case of the drilling fines the Defendants did take remedial action within a relatively short time. The fact that the Defendants did not take steps to control the erosion and discharge of oil once they had been asked to do so is some evidence of willfulness.

In *United States Steel Corporation v. Department of Environmental Resources, supra,* the Court emphasized the obligation of the Board to articulate the basis for civil penalties in assessing such penalties. In this case no evidence that would serve as a basis for measuring the damage to Buck Lick Run was presented. No cost of restoration was demonstrated by the Commonwealth—apparently because no remedial action was undertaken by either the Department or the Fish Commission. The representative of the Fish Commission in his report accompanying the penalty payment in January of 1974 characterized the pollution as "light" and indicated that the damage to the stream was "unknown". The imposition of maximum penalties, as the Commonwealth requests, is clearly inappropriate in a case like this where the demonstrated harm was not great, no cost of restoration was shown, the initial violations were not willful and a penalty has already been paid to the Fish Commission, which is the agency most concerned with damage to trout streams.

We are mindful, however, that the imposition of civil penalties also functions as a deterrent. Recognizing the need to protect the trout streams of the Commonwealth and to discourage even minimal pollution of them, we feel the violations here require the imposition of civil penalties if for no other purpose than to remind the Defendants and others engaged in the well drilling business that they must take all necessary and diligent precautions to assure that their activities do not result in any discharges into the waters of the Commonwealth. Accordingly, basing its determination solely on the deterrent value of the penalties, the Board assesses penalties in this case as follows: $1,000.00 for the initial discharges of industrial wastes under Count One of the Complaint, plus $100.00 per day for the continuous discharges of drilling fines and/or observed oil on November 19, 20, 23, 24 and 25, 1973, or a total of $1,500.00 to be assessed against Federal and Joyce jointly and severally; $1,000.00 for failure to maintain an Erosion Control Plan under Count Two to be assessed against Federal individually.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter of this case and the parties before it.

2. Drilling fines are industrial wastes within the meaning of The Clean Streams Law.

3. One who occupies land as a lessee for the purpose of extracting oil or gas from the subsurface of the land cannot avoid liability for discharges in violation of the Clean Streams Law on the ground that the discharges were caused by an independent contractor.

4. Defendants Federal and Joyce violated §§301 of the Clean Streams Law by discharging industrial wastes--namely drilling fines and oil--into the waters of the Commonwealth while drilling Federal's gas well prospect in Corydon Township, McKean County, Pennsylvania, in the period between November 17 and November 25, 1973.

5. Defendants Federal and Joyce are jointly liable under §605 of the Clean Streams Law for allowing the discharges of oil and drilling fines from the site to continue.

6. Defendant Federal violated §102.4 of the Rules and Regulations of the Department by not designing, implementing or maintaining a plan to prevent erosion and sedimentation at its gas well drilling site.

7. Considering all the factors set forth in §605 of The Clean Streams Law, the legal and proper assessment of civil penalties for violation of §§301, 307 and 605 of the Clean Streams Law in this case is $1,000.00 for the initial discharges and $100.00 per day or a total of $500.00 for the days on which the discharges were continuing, to be assessed against Defendants Federal and Joyce jointly and severally.

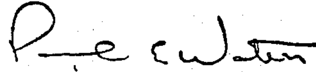
8. Considering all of the factors to be considered under §605 of The Clean Streams Law, the legal and proper assessment of civil penalties for violation of Regulation §102.4 of the Rules and Regulations of the Department is $1,000.00 to be assessed against Federal individually.

ORDER

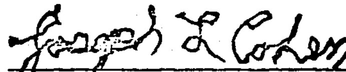
AND NOW, this 1st day of July, 1975, in accordance with §605 of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended 35 P. S. §690.1 *et seq.*, civil penalties are assessed against Defendants Federal Oil and Gas Company and Joyce Pipeline Company, jointly and severally in the amount of $1,500.00 and against Defendant Federal individually in the amount of $1,000.00.

This amount is due and payable into The Clean Water Fund immediately. The Prothonotaries of Allegheny and McKean Counties are hereby ordered to enter these penalties as liens against any private property of the aforesaid Defendants with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

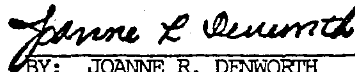
ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



BY: JOSEPH L. COHEN
Member



BY: JOANNE R. DENWORTH
Member

DATED: July 1, 1975.

/Main adj. file #1

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

AUDREY R. BENNET AND JOHN P. TOTH and PAMELA B. TOTH, his wife

Docket No. 74-235-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and WESTERN PENNSYLVANIA WATER COMPANY, Intervenor

ADJUDICATION

By Joseph L. Cohen, Member, July 18, 1975

This matter is before the Board on the appeal of Audrey R. Bennet and John P. Toth and Pamela B. Toth, his wife, from the action of the Pennsylvania Department of Environmental Resources (hereinafter DER) in denying Appellant approval to install and operate a prefabricated chemical treatment facility to treat sewage collected from approximately 112 homes to be constructed on a tract of land which they own in Franklin Township, Washington County, Pennsylvania. The proposed treatment facility would discharge treated sewage effluent into a stream called "Crystal Run" which flowed into a reservoir maintained by Western Pennsylvania Water Company (hereinafter Intervenor) serving as a source of public water supply to the area of Washington, Pennsylvania.

At the termination of a hearing in this matter held on February 25, 1975, in room 1202 of the Kossman Building, Forbes at Stanwix Street, Pittsburgh, Pennsylvania, Intervenor, joined by DER, moved to dismiss this appeal on the basis that Appellants failed to sustain their burden of proving their entitlement to a permit to install and operate the proposed chemical treatment facility. In consideration of the motion in light of the evidence adduced at the hearing and the briefs of the parties submitted subsequent thereto, we enter the following:

FINDINGS OF FACT

1. Appellants are Audrey R. Bennet and John P. Toth and Pamela B. Toth, his wife, owners of a certain tract of real estate in North Franklin Township, Washington County, Pennsylvania.

2. Appellee is DER, the agency of the Commonwealth charged with the administration and enforcement of the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §690.1 et seq.

3. Intervenor is Western Pennsylvania Water Company which maintains a reservoir on Crystal Run which serves as a source of public water supply for the area of Washington, Pennsylvania.

4. Appellants acquired their real estate in North Franklin Township in 1973 with the intention of subdividing the same into approximately 112 residential lots. After having ascertained that sewerage facilities would not be available to serve the subdivision for a considerable period of time, Appellant proposed to install and operate a prefabricated chemical treatment plant which would treat the sewage from the residences proposed to be built in the subdivision and discharge the treated effluent at a point on Crystal Run upstream of Intervenor's reservoir number 3 which served as a source of public water supply for the area of Washington, Pennsylvania.

5. The proposed sewage treatment facility of Appellants was intended as an interim facility to serve Appellants' subdivision until such time as public sewerage facilities were available to the subdivision.

6. On two separate occasions Appellants, through their engineer, John Mudroch, submitted to DER an application for the proposed chemical sewage treatment facility, but each time the application was returned by the Department because of the lack of conformity with formal requirements of DER with regard to application submissions.

7. Subsequent to the submission of the applications by Appellants, it became apparent to DER that the proposed point of discharge of Appellants' treatment facility would be upstream of reservoir number 3 of Intervenor in active use as a source of public water supply for the Washington, Pennsylvania, area. For a time, although DER knew of the existence of the impoundment, it was not fully aware that it was in use as a source of a public water supply.

8. Appellants' proposed prefabricated chemical treatment facility would not produce a quality of effluent which DER would permit to be discharged into an impounded area as evidenced by DER's letter to Appellant's engineer of December 17, 1973, which reads, in relevant part:

"In order to meet the Water Quality Criteria established for Chartiers Creek and to protect the downstream reservoir, the effluent from this treatment plant must meet the following discharge standards:

"1. The 5-day BOD shall not exceed 10 mg/l.
"2. Total suspended solids shall not exceed 10 mg/l.
"3. Ammonia nitrogen shall not exceed 1.5 mg/l as N.
"4. Total phosphorus shall not exceed 0.5 mg/l as P.
"5. Dissolved oxygen shall equal or exceed 5 mg/l.

"The treatment process you proposed in the PEF does not appear adequate to meet the limit for phosphorus.

"Furthermore, before we can approve this project, we would need some indication from Western Pennsylvania Water Company that they would have no objections to this discharge entering their reservoir."

9. Not only would the quality of the effluent from the proposed plant not meet DER's requirements with regard to impoundments generally, but the effluent would not meet DER's requirements for a high degree of treatment necessary to protect an effluent being discharged into a source of a public water supply reservoir.

10. The parties to this proceeding stipulated that, even though Appellants did not submit to DER a formal application suitable for review by DER, that DER would deny an application for such a treatment plant as Appellants proposed for the reason that its effluent would be unsuitable for discharge into a source of public water supply.

DISCUSSION

Appellants purchased a tract of land in North Franklin Township, Washington County, Pennsylvania, with the intention of subdividing the real estate and erecting approximately 112 homes thereon. Inasmuch as public sewerage facilities were not available to service the subdivision, Appellants proposed to install a prefabricated chemical treatment facility which would treat the domestic wastes from the subdivision and discharge a treated effluent to Crystal Run, a stream which flows into reservoir number 3 of Intervenor. After Appellants filed an application for a waste discharge permit with DER for its proposed sewage treatment facility, it became evident that reservoir number 3 was in use as a source of public water supply to Washington, Pennsylvania, and the surrounding area. Intervenor, Western Pennsylvania Water Company, informed DER of its strong opposition to the proposed treatment facility discharging upstream of its water supply reservoir. After extended discussions between DER and Appellants' engineer, John Mudroch, DER indicated to Mr. Mudroch that the proposed treatment facility would not meet DER's requirements. Mr. Mudroch indicated that he

would submit to DER an amended application which would contain plans for a proposed treatment facility which would meet the requirements of DER with regard to effluent discharges into streams which serve as a source of public water supply. Mr. Mudroch, however, never submitted such amended application to DER.

While the state of the record is unclear as to whether DER had before it an application from Appellants for a prefabricated chemical treatment facility to serve its subdivision, nevertheless, it has been stipulated that the parties desire a ruling as to the propriety of DER not approving the original submission of Appellants' application for a permit to install and operate the proposed treatment facility with a point of discharge to Crystal Run upstream of Intervenor's reservoir number 3. Also, the parties have agreed that this matter should be treated as if all the formalities of the application process have been completed, even though this is contrary to fact, so that the substantive issue as to whether a treatment facility such as Appellants propose should be permitted to discharge its effluent to a stream which is the source of a public water supply can be determined.

Article V of the Clean Streams Law, *supra*, authorizes DER to protect sources of public water supply from pollution. Section 501 of that Act provides:

> "In addition to the powers and authority hereinbefore granted, power and authority is hereby conferred upon the board, after due notice and public hearing, to make, adopt, promulgate, and enforce reasonable orders and regulations for the protection of any source of water, approved by the Commissioner of Health or the Department of Health, for present or future supply to the public, and prohibiting the pollution of any such source of water, so approved, rendering the same inimical or injurious to the public health or objectionable for public water supply purposes."

Among the variety of public interests sought to be protected by the Clean Streams Law, *supra*, surely the protection of public water supply is among the most important. Safe and potable drinking water has been one of the major concerns in the public health field for a long time. Article V of the Clean Streams Law, *supra*, recognizes this as a high priority.

On November 6, 1974, DER further explained to Appellants' attorney the reason for its disapproval of the proposed treatment facility as follows:

> "This letter is to supplement my October 2, 1974 letter to you giving our final decision on the proposed sewage treatment plant to serve the Auburn Greens Development. I will attempt to clarify the factors that went into the decision to disapprove this project.

"First, we did not require the consent of the Western Pennsylvania Water Company before acting on this proposal. We did, however, consider the water company's, and through it, the public's interests in reviewing your proposal.

"The water company reviewed your engineer's proposal for sewerage service to this development and felt that it would jeopardize the water of their No. 3 reservoir, rendering it unsafe as a public water supply.

"We concurred with the water company in this respect. The proposal from your engineer did not even meet our minimum requirements, such as phosphate removal, for a discharge to impounded bodies of water in general, let alone meeting the requirements for discharge to a source of public drinking water.

"In addition, before a discharge permit could be issued, North Franklin Township would have to revise its official sewerage plan to include a treatment plant at this location, under Section 91.31 of the Department's rules and regulations. To this date, this revision has not taken place."

This letter was in further explanation for the reasons for disapproval contained in the departmental correspondence with Appellants' counsel under date of October 2, 1974. Treating the letters of October 2 and November 6, 1974, together as the action of the Department in refusing Appellants' application and the stated reasons therefor, our task is to determine from the record whether Appellants have met their burden of showing the impropriety of DER's action.

As we have recently said in *Compass Coal Company, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources and City of DuBois* (issued May 16, 1975), EHB Docket No. 72-190:

"It is a fundamental principle of administrative law that where a statute confers discretion upon an agency to take certain actions, those actions will not be set aside unless they constitute either a manifest abuse of discretion or an arbitrary exercise of agency duties. *F. & T. Construction Co. v. Department of Environmental Resources*, 6 Commonwealth Ct. 59, 293 A.2d 138 (1972); *Sierra Club v. Sanitary Water Board*, 3 Commonwealth Ct. 110, 281 A.2d 256 (1971). Moreover, as is stated in 1 P. L. E., Administrative Law and Procedure, §29:

" '. . . the power vested in an officer or agency to grant a license, permit, or other authorization, carries with it the power to exercise a reasonable discretion in granting or refusing it.' (Footnote omitted).

"It is clear that the stated reasons for the denial of the permit are consistent with the objectives of the Clean Streams Law, *supra*, and, to that extent, they are reasonable. They relate to deficiencies in the application of Appellant which, if true, would adversely affect the interests sought to be protected by the law itself had the permit been issued. Inasmuch as the reasons for denial of Appellant's permit are reasonable in light of the Clean Streams Law, *supra*, we must now consider what the Appellant's burden of proof is in this matter and whether it has met its burden.

"In administrative proceedings, the burden is upon the applicant to show his or its entitlement to the thing claimed. See 2 AM. JUR. 2d, Administrative Law, §391; accord: *Jones, et al v. Zoning Hearing Board*, et al, 7 Commonwealth Ct. 284. 298 A.2d 664 (1972); *F. & T. Construction Co. v. DER, supra*.

Section 21.42 of the Rules of Practice and Procedure before the Board clearly follows these general principles of administrative law by placing the burden upon Appellants in those cases in which the appeal is from the denial of a permit.

It is clear that Appellants have not met their burden. The original submission of plans to DER by Appellants' engineer, John Mudroch, was on the basis of incomplete information supplied to him by McCall and Associates who were retained by Appellants to implement the proposed installation. (R. 71). McCall and Associates retained Mr. Mudroch to perform the engineering necessary to submit an application to DER. (*Ibid.*). McCall and Associates supplied Mr. Mudroch with a portion of the United States geological survey topographical map which Mr. Mudroch was to use in the preparation of plans for the proposed treatment facility. The portion of the map supplied to Mr. Mudroch did not reveal the existence of Intervenor's reservoir number 3. (*Ibid.*). Mr. Mudroch, who never visited the site on which the plant was proposed to be located (R. 72), designed the treatment facility without reference to the reservoir. (R. 72).

Appellants, through Mr. Mudroch, admit that the proposed treatment facility effluent would not meet the requirements of DER for discharges into impounded waters. (R. 86-89). Appellants never submitted an amended plan to DER for its review for the reason that they believed DER would not approve such an amended plan as they had in mind. (R. 75).

The Board is in the anomalous position of passing upon an application for a prefabricated chemical treatment facility which was designed for stream conditions other than those which actually exist. Inasmuch as this is the case, and Appellants' proposal does not meet the requirements for effluents to be discharged into Crystal Run upstream of Intervenor's reservoir, we are constrained to uphold DER's action in refusing to approve Appellants' proposal.

Inasmuch as the record is bereft of any submission to DER subsequent to Appellants' original proposal, this Board cannot pass upon actions which DER has not taken for the reason that Appellants have not submitted any revised plan other than that which DER rejected. Clearly, this Board cannot fashion a plan on behalf of

Appellants for submission to DER which would be designed to meet DER's requirements. Apart from the fact that the Board is not authorized or professionally competent to do so, it is Appellants' responsibility either to submit a plan which meets DER requirements or to show that the plan it submitted was improperly rejected. Inasmuch as Appellants offered no evidence whatsoever on either of these issues, it cannot prevail in these proceedings.

The Board was impressed with the testimony of Joseph Lagnese, Professional Engineer and expert in sewage treatment facility design, who appeared before the Board as its witness. Mr. Lagnese's testimony was extremely helpful in setting forth the context in which the present case arose and in setting forth the deficiencies in Appellants' proposal.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this proceeding.

2. An applicant for a permit to discharge treated sewage effluent into waters of the Commonwealth has the burden of proving its entitlement to such permit where DER has denied the application.

3. Where an application is made for the construction and operation of a sewage treatment facility to discharge treated wastes into a particular stream, the application is properly denied where the planned facility upon which the application is predicated is not suitable to the stream conditions as they actually exist.

4. Where no evidence is introduced to controvert an assertion by DER that the treated sewage effluent from a proposed treatment facility will be inimical to a source of public water supply, the party carrying the burden has not shown that DER's judgment is arbitrary, capricious, or unreasonable.

5. Appellants have not met their burden of proof necessary to establish that DER's action in refusing to approve their proposed sewage treatment facility was improper.

ORDER

AND NOW, this 18th day of July , 1975, the action of DER in refusing to approve Appellants' proposed treatment facility is hereby sustained and the appeal is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY JOSEPH L.COHEN
Member

JOANNE R. DENWORTH
Member

DATED: July 18, 1975

Moscarǵ. file #1

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

ANDREW D. and DORRIS B. BULKLEY : Docket No. 73-414-C

v.

BUCKS COUNTY DEPARTMENT OF HEALTH
and THOMAS E. STRINGER, CHARLES A. BINGLER,
AND PLEASANT VALLEY ENTERPRISES, t/a
LEISURE ACRES, Intervenors

ADJUDICATION

By Joseph L. Cohen, Member, July 18, 1975

This matter is before the Board on an appeal by Andrew D. Bulkley, M.D. and Dorris B. Bulkley, his wife, (hereinafter Appellants) from the action of the Bucks County Department of Health (hereinafter Appellee) in granting Thomas E. Stringer, Charles A. Bingler and Pleasant Valley Enterprises, t/a Leisure Acres (hereinafter Intervenors) a permit to install on-lot sewage facilities in connection with the development of a tract of land in Buckingham Township, Bucks County, Pennsylvania.

On May 17, 1974, Intervenors filed a Motion to Dismiss alleging that this Board lacks jurisdiction to hear the appeal in this matter because it was not timely filed and, in the alternative that this Board lacks jurisdiction to pass upon four of the nine reasons Appellants have advanced in their appeal. On October 5, 1974, Intervenors' Motion to Dismiss was denied. Subsequent to the disposition of the Motion to Dismiss, hearings on this matter were held on October 17 and 18, 1974. Appellants filed their proposed findings of fact, conclusions of law and briefs in support thereof on March 6, 1975, while Intervenors filed their proposed findings of fact, conclusions of law and supporting briefs on January 2, 1975. Appellee, Bucks County Department of Health filed no documents of this nature.

On the basis of the foregoing proceedings, we enter the following Adjudication:

FINDINGS OF FACT

1. Appellants are Andrew D. Bulkley, M.D. and Dorris B. Bulkley, his wife, who reside on Spring Valley Road, Buckingham Township, Bucks County, Pennsylvania, with a mailing address of R. D. 3, Doylestown.

2. Appellee is the Bucks County Department of Health, a county department of health organized under the provisions of the Local Health Administration Law, Act of August 24, 1951, P. L. 1304, as amended, 16 P. S. §12001 *et seq.*, and authorized to issue permits for on-lot sewage disposal systems pursuant to the provisions of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, as amended, 35 P. S. §750.1 *et seq.*

3. Intervenors are Thomas E. Stringer, Charles A. Bingler and Pleasant Valley Enterprises, t/a Leisure Acres, developers of a tract of land of approximately 15.619 acres bounded on the northwest by Spring Valley Road, on the southwest by Appellants' property, on the southeast and northeast portions by several other residential properties.

4. There are no public sewerage facilities available to Intervenors' tract of land nor to the residences immediately adjacent thereto.

5. With respect to their tract of land in Buckingham Township, Intervenors submitted a subdivision plan to the Township calling for a 12 lot subdivision. However, the Township finally approved a subdivision plan for this land calling for 11 residential lots, each of which is at least 1 acre in area.

6. Lots numbered 1 to 7 in the subdivision plan approved by the Township are at the same location and are the same size as the same numbered lots on the original subdivision plan containing 12 lots. However, Lot No. 8 in the amended subdivision plan comprises Lots 8 and 9 of the original plan. New Lot Nos. 9, 10 and 11 were formerly Lots numbered 10, 11 and 12, respectively.

7. With regard to the original plan of 12 lots, Intervenors submitted an application to the Bucks County Department of Health to install on each lot an on-lot sewage disposal system. Permits responsive to these applications were issued on July 31, 1973. After the subdivision plan was amended to contain only 11 lots, new applications for these lots were submitted to the Bucks County Department of Health. Permits with regard to these new applications were issued October 16, 1973.

8. The subsequent applications for Lots numbered 1 through 8, inclusive, contained the same information as the prior applications made with regard to these lots. The applications with regard to Lot Nos. 9, 10 and 11 contained the same information as the prior applications regarding Lots 10, 11 and 12, respectively. Each new application proposed to install the on-lot sewage disposal system in a different portion of the lot than was proposed in the original application. Nevertheless, the new permits were issued without making any new determination with respect to the adequacy of the proposed new location to renovate the septic tank effluent. The new applications were issued based solely upon the information supplied in the old applications.

9. The information supplied by Intervenors on all its applications for permits was in response to the information requested by the application. Intervenors did not supply information which was knowingly false.

10. Of all the applications filed and permits issued, all but those relative to Lots numbered 7 and 8 were for seepage pits to be used in connection with the septic system. On Lots 7 and 8, however, the applications called for and the permits granted were for seepage beds to renovate the effluent from the septic tanks.

11. Although the Soil Conservation Study Map shows the entire site is Lansdale silt loam soil, actual inspections of the site indicated that the soil types varied. Lot Nos. 4, 5, 6, 7 and 11 conform to traditional Lansdale silt loam soil. A transitional soil zone appears in Lot Nos, 1, 2, 3 and 10. On Lots No. 8 and 9 the soil type is highly variable and contains properties normally associated with Bowmansville, Readington or Penn Lansdale. Additionally, the soil on those lots further contain properties normally associated with the characteristics of Lansdale silt loam.

12. Because of the variability of the soil, only tests performed in the vicinity of the intended sewage disposal system can have any validity with regard to the adequacy of the leaching areas properly to renovate the sewage effluent from the septic tank.

13. There is no credible evidence on the record in this matter such as to indicate whether the testing done on applications for permits first issued is sufficient to justify their utilization in respect to the subsequent applications on the same lot.

14. Although the regulations adopted by DER under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, as amended, 35 P. S. §750.1 *et seq.*, in effect on October 16, 1973, did not expressly provide for seepage pits, the regulations of the Bucks County Department of Health did specifically provide for seepage pits under certain specified conditions.

15. Although the permits in this matter were issued on October 16, 1973, when Appellants on October 26, 1973, sought to examine the permits at the office of the Bucks County Department of Health, they were informed that no permits were issued with regard to the Leisure Acres subdivision. However, on or about November 9, 1973, Mr. Boyle of the Bucks County Department of Health informed counsel for Appellant that the permits had in fact been issued. The failure of the Bucks County Department of Health to inform Appellants of the issuance of the permit when Appellants first made inquiries on October 26, 1973, misled Appellants into believing that no permits were issued.

DISCUSSION

Intervenors assert that this Board lacks jurisdiction to hear this matter for the reason that this appeal has been filed more than 30 days after the permits in question were issued. In this regard we adhere to our former ruling of August 5, 1974, in which we denied Intervenors' Motion to Dismiss. Moreover, irrespective of the reasons set forth in support of our denial of Intervenors' Motion to Dismiss, the elements that allow for the filing of an appeal, *nunc pro tunc*, are present in this case. When Appellants inquired of the Bucks County Department of Health on October 26, 1973, ten days after the issuance of the permits in question, they were informed that the permits had not been issued. Had they so not been misinformed, Appellants could have

filed their appeal within the requisite time limit. It was only after two weeks had elapsed, that the Bucks County Department of Health informed Appellants' counsel that the permits were actually issued on October 16, 1973. Such conduct on the part of Bucks County Department of Health is sufficient to grant an appeal, *nunc pro tunc*. See *Anthony v. Sanitary Water Board* 178 Pa. Super. 78, 113 A.2d 152 (1955), and cases cited therein.

At the conclusion of Appellants' case, Intervenors moved to dismiss the appeal alleging that Appellants' failed to sustain their burden of proof. Under §21.42 of the Rules of Practice and Procedure before the Board, the burden of proof is upon Appellants to show that the permits in question were improperly issued. In order to determine the propriety of Intervenors' motion we must look to the reason stated in the appeal and the evidence produced on behalf of Appellants. Appellants have stated the following reasons for their appeal:

"1. Percolation tests are outdated.

"2. Maps and permits inconsistent.

"3. Soils not suitable; tests inadequate.

"4. Original percolation tests not near proposed septic systems.

"5. Probable interference with proposed and existing water supply.

"6. Insufficient volume in sedimentation pit.

"7. Insufficient design data for sedimentation pit. No cross-section of sedimentation pit.

"8. No provision for alternate septic system in case of failure of original system.

"9. Other questions to be studied and added."

Although Appellants alleged that the percolation tests performed were outdated, they presented no evidence to show by what standard the tests could be considered to be outdated. Presumably, there was no change in the character of the soils on the subdivision which would render such tests invalid. Inasmuch as Appellants have not cited us any standard by which the tests could be judged outdated, we can only speculate on this issue. Thus, Appellants have not met their burden in this regard.

We are constrained to agree with Intervenors that the fact that the subdivision maps and the permit are inconsistent is of no consequence. The issue is not whether the permits correspond with the subdivision map but whether the applications for the permits properly identify the location of the proposed sewage disposal

system. Thus, even if this allegation is true, it has no significance in this matter.

Appellants sought through their expert, geologist Edwin F. Beemer, Jr., to show that the soils on the entire subdivision tract were unsuitable for on-lot disposal of sewage. While Mr. Beemer undoubtedly has a great expertise in the field of geology, his testimony only proves that where he dug holes his observations were different from those of the Bucks County Department of Health personnel who dug holes elsewhere. We are of the opinion that such evidence does not prove that the information with regard to the actions of the county are erroneous. This is even more the case where the soil is as variable as Mr. Beemer so conclusively demonstrated.

Appellants have not sustained their burden of proving allegations 3, 5, 6, 7 and 8 set forth in their notice of appeal. Thus, with regard to the majority of the reasons for appeal, we would be inclined to grant the motion to dismiss were it not for the allegation that the original percolation tests were not performed near the proposed septic systems. On that issue, we are of the opinion that Appellants have sustained their burden and, therefore, we do not grant the motion to dismiss.

Appellants' Exhibit No. 3 conclusively establishes that two sets of permit applications were made, one set in May of 1973 and one set sometime later. The first set of applications were made in connection with the initial subdivision plan which consisted of 12 lots. Permits were issued on 12 of these lots originally. When the plan for the subdivision was altered to include only 11 lots Intervenor submitted 11 new applications. Although the applications for lots 1 through 11 corresponded to lots 1 to 8 and 10 to 12 under the old plan, the location of the septic system on each lot in the new application was different from what it had been for the same lots on the prior applications. Nevertheless, there were no new tests made in connection with the new applications. The work sheets of the Bucks County Department of Health pertaining to the applications indicated, for the most part, that the new permits were issued on the basis of the information and tests made in connection with the old permits.

The Bucks County Department of Health adopted rules and regulations relative to on-lot sewage disposal systems and minimum technical standards governing such systems. It is clear from these technical standards that percolation tests are to be made in the area of the proposed absorption site. See §8.2(1) of the Bucks County technical

standards. To the extent, therefore, that Bucks County Department of Health failed to conduct percolation tests on the new application prior to issuing a permit in response thereto, it failed to abide by its own regulations and technical standards. Thus, the permits were improperly issued for the reason that no new percolation tests were made at the location of the proposed new seepage pits or beds.

The necessity for taking percolation tests at the place where the seepage area is proposed to be located is to determine the renovative capacity of the soils at that spot. This, especially, must be done where the characteristics of the soil in question are so variable. The rather perfunctory nature with which the Bucks County Department of Health treated the second set of applications cannot be condoned. It has the responsibility to carry out those provisions of the Pennsylvania Sewage Facilities Act, *supra*, relative to the issuance of permits in Bucks County. As a public health agency, Appellee should have been as much concerned with adherence to proper standards as it was, apparently in this case, to facilitate the purposes of Intervenors.

In *Committee to Preserve Mill Creek v. Secretary of Health*, 3 Pa. Commonwealth Ct. 200, 281 A.2d 468 (1971), Commonwealth Court said:

> "We have included above a verbatim rendering of portions of the appellants' appeal to the Secretary. Our purpose was to indicate that most of the grounds relied upon would not justify relief if proved, and hopefully thereby to avoid the flood of appeals anticipated by the Secretary. The appellants' interest entitled to the protection by appeal is that the facility to be constructed on their neighbor's lot be installed in accordance with official standards. That the application may be inartful, or that appellants were not consulted by the County Health Department, or that the percolation tests are inconsistent with a government soil survey, or that appellants are of the opinion that the grant of the permit will result in 'grave danger to health and welfare of surrounding landowners and the community at large,' accord the appellants no standing. Their allegations that the permit as granted is contrary to standards of the Department and inconsistent with the application, do." (3 Pa. Commonwealth Ct. at 207-208).

We are of the opinion that the failure of Bucks County Department of Health to ascertain the renovative capacity of the soils at the precise location of the seepage areas in these applications amounts to a failure not only to adhere to its own rules, regulations and standards, but also those of DER.

Appellants belatedly raised the issue that under DER regulations in effect at the time the permits herein were issued did not permit seepage pits to be utilized as a method of renovating effluent from septic tanks. Because we have decided this matter on another issue and because this question was not raised in Appellants'

notice of appeal or their pre-hearing memorandum filed with the Board, we decline to rule on this contention. Moreover, inasmuch as the Pennsylvania Sewage Facilities Act, *supra*, has been substantially amended and DER has issued new regulations under these amendments, we are of the opinion that a ruling on this question would serve no useful purpose at this time.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this proceeding.

2. Appellants have met their burden of showing that the second set of permits issued to Intervenors were improperly issued.

3. Tests of the renovative capacity of soils to accomodate septic tank effluent must be made at the place where the seepage area is to be located.

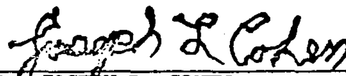
4. It was improper for Bucks County Department of Health to grant Intervenors' permits for on-lot sewage disposal systems where no percolation tests were performed on the seepage areas proposed in the application.

ORDER

AND NOW, this 18th day of July, 1975, the actions of the Bucks County Department of Health on October 16, 1973, in issuing permits for on-lot sewage disposal systems with respect to Lots numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 are hereby set aside and the appeal of Andrew D. and Dorris B. Bulkley, Appellants, is hereby sustained.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman



BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: July 18, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

COUNTY COMMISSIONERS
OF DELAWARE COUNTY

Docket No. 74-261-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Joanne R. Denworth, Member , July 18, 1975

This case grows out of an air pollution abatement order issued by the Department of Environmental Resources (hereinafter Department) to the County Commissioners of Delaware County on March 21, 1971. After appeal of that order followed by negotiations between the Department and the County and revisions of the Department's Regulations governing air pollution, that order was withdrawn and the County applied for, and on January 3, 1973, was granted a temporary variance from ambient air quality standards under chapter 141 of the Department's Regulations. The variance, which was not appealed by the County, called for the installation of air pollution controls at the County's three incinerators that would result in compliance with ambient air quality standards by December 31, 1974. In August of 1973, the County by letter to the Department requested an extension "of the implementation schedule set forth in the variance". The letter did not give a date by which compliance would be accomplished. In the next year and more during which the Department and the County were in communication concerning the County's air pollution control program, the Department on several occasions informed the County that the extension request could not be acted upon unless a plan and a time schedule for compliance were submitted. Because the requested information was not submitted, the Department denied the County's request for an extension of its variance by letter dated November 7, 1974. The County appealed that denial.

The Department has moved to dismiss the County's appeal on the ground that since the request for an extension of the variance did not comply with the

Department's Regulations, it could not be granted as a matter of law. An argument on the motion was held before the Board *en banc* on June 16, 1975.

The facts here, on this state of the record, are somewhat difficult to penetrate. The original variance order directed the County to file a detailed plan for reduction of emissions at its incinerators by July 2, 1973, to submit copies of purchase orders for the necessary equipment by August 1, 1973, and to begin, by November 1, 1973, the construction necessary for compliance. None of these requirements of the variance order were met by the County. The County asserts, however, that though it may have been slow, it is making an effort to comply, as attested by the fact that it has had its consultant prepare a detailed study proposing alternative systems of solid waste management for the County. Apparently the County has not yet finally determined what its solid waste management plan will be, but it may adopt a plan that will use landfills for solid waste disposal and phase out two of its three incinerators, thus ending the need for air pollution control at those incinerators. Its adoption of this plan or any other, however, depends on the approval of the plan by the County's constituent municipalities. The County argues that it is or was "impossible" for it to submit a compliance schedule since it could not know when a management plan would be adopted by the municipalities. The County also asserts that it put out specifications for bids on air pollution control equipment (not until January, 1975, it should be noted) for its Number 1 incinerator (which would be retained under any of its solid waste management plan proposals), but that no bids were received and it was therefore "impossible" for it to comply with the terms of the variance.

Under Section 13.5 of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, §4013.5 (a), the Department is authorized to grant "temporary variances" upon such terms and conditions as Regulations adopted by the Environmental Quality Board shall prescribe. The statute makes no mention of renewals of variances, but it does not appear to us, and it is not asserted by the County, that the Regulations with regard to variances and renewals of variances are unauthorized or unreasonable. Thus, for present purposes, compliance with Chapter 141 of the Rules and Regulations of the Department, 25 Pa. Code Chapter 41, *et seq.*, is essential to the grant of a variance or a renewal of a variance.

The Department cites several ways in which the requested extension here failed to comply with the Regulations. First, it claims that the County asked in effect for an indefinite extension, and points out that under Section 141.4 (a) of the Regulations the Department has no power to grant a renewal of a variance for more than one two year period. Regulation §141.4 provides:

" (a) Any temporary variance granted pursuant to this Chapter shall be granted for a period of time not to exceed three (3) years, and may be renewed for only one (1), additional period of time not to exceed the period of time for which the variance was originally granted or two (2) years, whichever is shorter.

" (b) A petition for the renewal of a temporary variance shall be submitted to the Department at least sixty (60) days prior to the expiration of the period for which the variance was originally granted, and shall comply with the requirements of § 141.11 of this Title (relating to filing petitions for variances)."

Although we agree (and so does the County) that the Department can only grant a two year renewal, we do not think the fact that the County did not specify a two-year extension in its letter of request meant that the Department could not grant any renewal. Although Section 141.4 describes the powers of the Department with regard to terms of variances and renewals of variances, it does not prescribe the requirements for the contents of requests for variances or renewals.

The more substantive deficiency in the request was the failure to comply with Regulation 141.11 governing the contents of petitions requesting variances or extensions of variances. See Regulation §141.4 (b), supra. The County's request for an extension consisted simply of a short two paragraph letter stating that, since the future of incineration also depended on adoption of a solid waste management plan, the County wanted an extension for implementation of the air pollution control plan at its incinerators "until such time as the management plan has been approved and it is determined that incineration will in fact, continue to be utilized." The County argues that it did not submit a petition because it was simply asking for an extension of time to implement the plan submitted in its prior petition for a variance. While the County may be entitled to rely on the prior petition for many of the facts supporting its requested extension, we think that §141.4 (b) and §141.11 require at the least the submission of a plan and time schedule for compliance in connection with the request in accordance with the following sections of §141.11:

" (5) A detailed plan setting forth all steps the petitioner proposes to take to reduce emissions to a level permitted by this Article, including a schedule indicating the dates upon which each intermediate step would be completed, and the date upon which full compliance with the standards and requirements of this Article would be achieved.

" (6) The reasons why the petitioner feels full compliance with the standards and requirements of this Article cannot be attained at any time prior to the date of full compliance set forth in the plan of the petitioner."

Under section 141.2 the Department is required to grant a variance only if it finds the following:

> "(1) Such action will not prevent or interfere with the attainment or maintenance of any ambient air quality standard contained in this Article within the time prescribed for the attainment of such ambient air quality standard by the Clean Air Act.
>
> "(2) The quantity and level of emissions from the source at the expiration of the temporary variance are likely to comply with the applicable standards of this Article.
>
> "(3) Such action is reasonable considering the toxicity and other effects of such emissions on the public health, safety and welfare, the meteorological factors affecting the dispersion of the emissions, the land use characteristics of the areas affected by the emissions, efforts taken by the petitioner to comply with those orders and regulations of the Department which were in effect prior to the effective date of this Chapter and which are related to those contaminants which are the subject of the petition, the status of compliance of the petitioner, and any other relevant factors."

The County argues - on literal rather than logical grounds - that this section applies only to initial grants of variances, not renewals. But we think that the Department must consider these policies and goals in acting on any requested deviation from the air pollution standards, whether by variance or renewal of a variance, and that it is impossible for the Department to consider whether these standards will be met in connection with a renewal if the applicant does not submit a plan and time schedule in accordance with Section 141.11.[1]

Whatever the facts may be here, we think that the Department cannot operate in a vacuum and grant an extension of a variance where no plan or schedule for compliance have been submitted either under the terms of the original variance or in connection with the requested extension. While it may be that the County is having difficulties getting agreement on a plan and even that the Department is well aware of those difficulties, the Department cannot grant an extension of a variance unless the substantive requirements of the Regulations governing variances are complied with.

As an additional ground for dismissal the Department points out that the County did not comply with the requirements of Regulation Section 141.12 and

1. Note that §13.5 of the Air Pollution Control Act, *supra*, which authorizes the grant of temporary variances under Regulations to be adopted provides:

> "...Such rules and regulations shall not authorize the grant of a variance which will prevent or interfere with the attainment or maintenance of any ambient air quality standard imposed by Federal law within the time prescribed by such law for the attainment of such standard."

141.13, which require the publication of notice by applicants for variances or "petitions for renewals of variances". The County has no excuse for this failure other than its belief that if the Department were really concerned with these technicalities it should have mentioned this deficiency prior to the filing of a motion to dismiss. While a petitioner cannot rely on the Department to tell it what it must do to comply with the Regulations, we are inclined, consonant with our resolution of the major issue as discussed below, to give the County time to cure this defect.

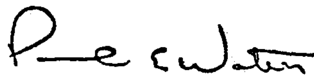
The problem here is clearly one of timing. The County is working on solving its air pollution control problems in connection with its solid waste management problems, but it apparently is or was not yet at the point of deciding on or implementing a plan that was to have resulted in compliance by December 31, 1974, under the terms of its initial variance. We think that under ordinary circumstances this appeal would have to be dismissed because, under Chapter 141 of the Regulations, the Department simply does not have authority as a matter of law to grant a renewal of a variance where no plan or schedule for compliance with air pollution control standards has been submitted. We are, however, mindful of the practical difficulties that a political entity faces in developing a plan that requires the approval of a number of constituent municipalities and mindful also that the time limits set by the Department may have been nearly "impossible" to meet under such circumstances. Further, we are unclear as to whether or not the County now has a finalized plan it could submit, and we feel that the obligation of this Board, which is quasi-judicial in nature, is to encourage compliance with the environmental laws rather than to adhere to strict rules of non-suit. Therefore, we will give the County 45 days to perfect its renewal request by submitting a plan and schedule to the Department and complying with the filing and notice requirements of §141.12 and §141.13. If the County does take the necessary action to perfect its request, the Department can then act upon the submission as it sees fit, and if the County is dissatisfied with the Department's action, an appeal will lie to this Board. As we interpret Regulation 141.41 (a), the Department cannot grant an extension of the variance beyond December 31, 1976. If the County does not, within 45 days from the date of this Order, certify to this Board that it has submitted to the Department an air pollution control plan and schedule for compliance and has complied with the requirements of §141.12 and §141.13, its present appeal will be dismissed.

As we are disposing of this matter on the ground of noncompliance with the Regulations, we do not deem it necessary to rule on the Department's other grounds for dismissal.

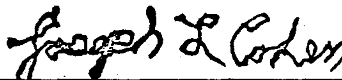
ORDER

AND NOW, this 18th day of July, 1975, it is hereby ordered that the Appellant shall have forty-five (45) days (or until Monday, September 1, 1975) to perfect its request for a renewal of its variance by complying with the requirements of Regulations 141.11, 141.12 and 141.13 in conformity with this opinion. If within that time, the Appellant does not certify to this Board that it has taken such action, its appeal will be dismissed.

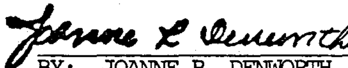
ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member



BY: JOANNE R. DENWORTH
Member

DATED: July 18, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

DOLORES M. GONDOS, APPELLANT, and
MRS. MARY BOBNAR, INTERVENOR

Docket No. 73-421-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
AND U. S. STEEL CORPORATION, INTERVENOR

ADJUDICATION

BY THE BOARD, July 24, 1975.

This case involves three appeals from the grant by the Department of Environmental Resources (hereafter, Department) of three permits to U.S. Steel Corporation (hereafter, U.S. Steel) for it to operate a disposal area for washing plant reject material in Carroll Township, Washington County, Pennsylvania. The Appellants are Dolores M. Gondos and Mrs. Mary Bobnar (hereafter, collectively Appellant). The three appeals were from the grant of each of these permits, and were consolidated under the above caption and docket number. All three appeals are adjudicated herein.

The Hearing Examiner in this case was Dr. Robert Broughton, former Chairman of the Board. His proposed adjudication is adopted by the Board with several modifications.

FINDINGS OF FACT

(1) The three permits the grant of which was appealed from were: (1) A "Permit for Coal Refuse Area", permit No. 50065, issued September 20, 1973; (2) A Water Quality Permit, No. 6373204, issued November 21, 1973; and (3) A Water Obstructions Act Permit, for two dams across an unnamed tributary of Pidgeon Creek, No. 6373602, issued November 19, 1973.

(2) Separate appeals were taken from the grant of each of these permits, which appeals were consolidated under the above caption.

(3) At the trial, Appellants on the first day did not appear. Able

counsel for Appellants did appear, and requested a continuance on the grounds that he had been retained only one week previously, and was unable to prepare adequately. This was opposed on the grounds that a prior hearing had already been continued at Appellants' request, and that they should have sought counsel earlier, and that a number of witnesses were already present, at some expense, on that day. Upon U.S. Steel offering to assume the burden of going forward, at least for that hearing day, the continuance was denied.

(4) The permits in question are for a "coal mine refuse disposal area", the refuse in question being material that is sorted out and rejected by the coal washer associated with U.S. Steel's Maple Creek Mine in Carroll, Fallowfield, and Nottingham Townships, Washington County, Pennsylvania.

(5) The present refuse area, which has been used in the past by U.S. Steel, being inadequate for future needs, U.S. Steel sought permits for a new area during 1973. This was at a time when the Department was in the process of developing regulations governing coal mine refuse disposal areas under the Solid Waste Management Act, Act of July 31, 1968, P.L. 788, No. 241.

(6) U.S. Steel's permit applications for a new disposal area for the Maple Creek Mine became a test case or comparison model for the development of such regulations for two reasons: (i) because of the congruence in time, and (ii) because the Department regarded the existing disposal area as being as close to a model operation as existed in Pennsylvania.

(7) The Department did consider alternative methods and locations for disposal, specifically some nearby abandoned strip mines, and redeposition in the mine, and concluded "in the last analysis that if coal was to be mined at this mine, that they would have to put the coal refuse where U.S. Steel proposed it."

(8) No evidence was introduced tending to show that the issuance of any of the permits was in violation of any applicable regulations or statutes governing the Department, including Article I, Section 27 of the Constitution of Pennsylvania. Such evidence as was introduced relative to these matters tended to show that all such regulations, statutes and constitutional provisions were (and would be) complied with.

DISCUSSION

Appellants raise three arguments in support of their position that the Department abused its discretion in granting the permits at issue:

(1) The permits were issued in violation of §91.26(a) of the Regulations of the Department, because U.S. Steel was in violation of State environmental standards at its Clairton Coke Works in Allegheny County.

(2) The activities permitted would be in violation of the Zoning Ordinance of Carroll Township.

(3) The permits were issued without following the procedures required of the Commonwealth as trustee of Pennsylvania's public natural resources under Article I, Section 27 of the Constitution of Pennsylvania.

We will take these in order.

Section 91.26 (a) applies in terms only to require that a (water) waste discharge permit be denied if the applicant for such a waste discharge permit is discharging wastewater in violation of an order or requirement (including presumably a regulation or permit condition) of the Department.[1] There may even be some question whether §91.26 (a) was intended to apply to situations where it is another plant of the applicant that is in violation, although there does not appear to be any reason to so limit it. Noncompliance at any plant may be some indication of inability or unwillingness, or some combination thereof, of the plant operator to comply. The hypothesis behind § 91.26(a) seems to be that noncompliance not only may be, but is evidence of such inability and/or unwillingness. To the extent that unwillingness is the reason and problems at different plants are similar, noncompliance at one plant will be relevant to the Department's belief that compliance is less likely to come about at another plant.

It is true that noncompliance with environmental regulations other than those dealing with water would also be relevant, to the extent that such noncompliance was due to unwillingness. The regulation, however, is limited to consideration of noncompliance with water pollution standards. Furthermore, to the extent that such violation might be considered apart from the regulatory provision, § 91.26(a), the one cited instance of violation of air pollution standards, at U.S. Steel's Clairton Cokeworks, was not shown to have been due to

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[1] Section 91.26(a) provides as follows:

> When considering applications coming before it, the Department shall take notice of the failure of the applicant to comply with any of its prior requirements or orders respecting sewerage or industrial waste disposal and shall consider the application favorably only if, in its opinion, there are sufficient extenuating reasons for the failure or if the public interest as affected by the proposed project warrants favorable action, in which case the Department shall include suitable conditions respecting compliance with its unfullfilled requirements in any permit which it may authorize.

an unwillingness to comply. (The opinions of Commonwealth Court[2] and of the Allegheny County Court of Common Pleas[3], of which we were requested to take judicial notice, were not conclusive on this point.)

We hold that neither the letter nor the spirit of § 91.26(a) was shown to have been violated in this case by the issuance of the permits in question.

(2) It is clear that, at the time the permits in question were issued, the use of the land in question for a coal mine refuse disposal area would have been in violation of the Carroll Township Zoning Ordinance[4]. We are convinced, however, that that does not invalidate the permits.

The Department is not in the business of enforcing local zoning ordinances. The Department is required, as a trustee of the public natural resources of the Commonwealth, to consider and take into account specifically the environmental factors required by Article I, Section 27 of the Constitution of Pennsylvania[5]. The requirement that it act as the trustee may at times mean that the Department refuses to permit (or, as in *Fox v. Commonwealth*[6] to aid by providing public capital facilities for) activities that could be permitted by local zoning ordinances, or at other times that the Department permits activities that would be in violation of local zoning ordinances. The latter is what the Department did in this case. The Department may, and at times, should consider local zoning ordinances in deciding whether an activity is environmentally harmful; however, where the Department has studied the environmental impact of a particular activity, in compliance with its con-

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[2]*Commonwealth v. United States Steel Corporation*, 15 Pa. Commonwealth Ct. 184, A.2d (1974).

[3]*Commonwealth of Pennsylvania and County of Allegheny v. United States Steel Corporation*, No. 1550 April Term 1972, Equity.

[4]The Ordinance and Map admitted into evidence as Appellant's Exhibits D and C, respectively, show the area in question as being mostly in an "Agriculture" zone, with a portion being in a "Conservation" zone. Neither, as defined in the Ordinance, includes anything like a coal mine refuse disposal area as a permitted use.

[5]Article I, Section 27 provides as follows:

> "Natural resources and the public estate
> Section 27. The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

[6]E.H.B. Docket No. 73-078 (Issued May 16, 1974).

trolling statutes and Article I, Section 27, and has concluded reasonably that a permit should be granted, it is not bound to deny the permit because the activity is not permitted by a local zoning ordinance.[7]

(3) Although the Department is not bound by local zoning ordinances, the Department must thoroughly consider whether the full range of values protected by environmental protection statutes and by Article I, Section 27 of the Constitution of Pennsylvania will be adversely affected by the Permit in question. *Payne v. Kassab*, 11 Commonwealth Ct. 14, 312 A.2d 46 (1973), *Bucks County Commissioners v. Pennsylvania Public Utility Commission*, 11 Pa. Commonwealth Ct. 487, 313 A.2d 185 (1973), *Fox v. Commonwealth, supra.*

Commonwealth Court, in *Payne v. Kassab*, 11 Pa. Commonwealth Ct. at 29-30, 312 A.2d at 94, stated a threefold test for determining whether the Commonwealth has met its duty under the Constitution:

> " . . . (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
>
> "(2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
>
> "(3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?"

In addition, in *Fox v. Commonwealth, supra,* this Board specified, in connection with the problem there before it (which was somewhat different from the problem at issue in *Payne v. Kassab, supra*) that a reasonable trustee should, in evaluating a particular use of a particularly valuable resource, consider alternative uses.

In this case there was no testimony (as there was in *Fox*) that the area in question had special value as, e.g., a rare ecosystem, existing or potential park, or significant recreational area. Mr. Elias E. Nickman, regional solid waste coordinator for the Department, called by U.S. Steel as a witness, did testify, however, that the Department considered alternative

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[7]Unless the relevant ordinance allows, or is changed (or a variance issued) to allow, the activity in question, then that activity will presumably not take place. Compliance or noncompliance with the zoning ordinance, however, is not the Department's responsibility.

ways of disposing of the refuse material. All of them were either inadequate or appeared to the Department to create more problems than the one in question. The Department's conclusion was that, if coal mining were to take place at all at this location, this area would have to be used.

In addition the testimony indicated that the tests laid down by Commonwealth Court were very adequately met: First, the Department did consider all applicable environmental control statutes, and determined that they would be complied with. Second, the record does indicate an effort to reduce environmental incursion to a minimum. Third, there was no specific or generalized environmental harm, or risk of such harm, proved which we could say outweighs the benefits of the action to any extent.

While we can certainly sympathize with the fact that no one wants a coal mine refuse disposal area to locate right next to them, we must look primarily to the broader interests of the community, both with respect to environmental impact, and with respect to the social and economic impact of an action of the Department. Here, a potential for environmental harm clearly exists; but the Department took numerous precautions, and was satisfied that that potential harm would not become actual. It is the Department's responsibility to make exactly such judgements relative to the whole range of permits it is authorized to issue.

There was no indication, here, that the Department was wrong, much less that it had abused its discretion.

CONCLUSIONS OF LAW

(1) The Board has jurisdiction over the subject matter of this appeal and over the parties before it.

(2) The Department did not abuse its discretion, under any law or statute of the Commonwealth, in granting the permits here at issue.

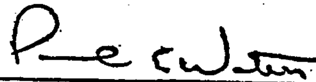
(3) The Department is not precluded, under § 91.26 of its regulations from granting the permits here in question.

(4) The Department is not precluded from validly granting the permits here in question because at the time of issuance the activity contemplated by those permits would have been in violation of the municipal zoning ordinance governing the use of the land involved.

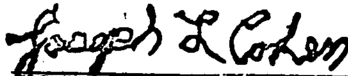
ORDER

AND NOW, this 24th day of July, 1975, the action of the Department in the above captioned case is affirmed and the within appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: July 24, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

DEAKE G. PORTER, Appellant
and MISS CLARA VANDERSLICE for
CONCERNED TAXPAYERS OF COLUMBIA COUNTY

Docket No. 74-205-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
COLUMBIA COUNTY SOLID WASTE AUTHORITY, et al

ADJUDICATION

By Paul E. Waters, Chairman--July 31, 1975

This matter comes before the Board as an appeal from the approval by the Department of Environmental Resources, hereinafter DER, given to the Columbia County Solid Waste Authority, hereinafter Authority, to open and operate a landfill in Mt. Pleasant Township. Appellants, Deake G. Porter and Clara Vanderslice, are citizens of the county who oppose the landfill not only for environmental reasons, over which we have jurisdiction, but for a myriad of reasons over which this Board has no control. A supersedeas was requested early in this lengthy proceeding, and was denied for reasons outlined hereinafter.

FINDINGS OF FACT

1. Permit #100924 for construction of a solid waste disposal facility was issued to the Columbia County Solid Waste Authority on June 15, 1973, by DER in response to a detailed application including required phase I and II module submissions.

2. The landfill authorized pursuant to that permit was inspected by DER on August 16, 1974, and approved for operation which began on August 19, 1974.

3. The inspection revealed that the leachate collection pipe was connected to the holding tanks and that an agreement had been entered into with the Bloomsburg Sewer Authority to treat the leachate and that a pump was present

on the site for recirculating the leachate.

4. DER approved the use of two 1,000 gallon asphalt lined concrete holding tanks as an interim leachate collection facility instead of the original ponds called for in the application.

5. The contract with the Bloomsburg Authority was never carried out because of capacity limitations of the plant.

6. The Authority is presently recycling the liquid accumulation coming from the landfill although no substantial amount of leachate was expected in the beginning months of operation.

7. After the plans were approved, the Authority made many alterations in the construction and intended operation plans, some of these were approved by DER but it appears that some did not receive prior approval.

8. The single most important change was made as to the type of liner which was to be used to cover the landfill site before any refuse cells were deposited. Although not the subject of testimony, we infer that either DER, the Authority or both, did not deem it safe to rely upon the soil alone to protect the waters of the Commonwealth from degredation.

9. The uncertainty which seems to have permeated this operation from the very beginning, was accentuated by a last minute change in liner material--from an asphalt membrane over a sand base to an asphalt cement spray known as AC-20,[1] made on the very day it was to be put in place.

10. The Authority made extensive efforts to obtain a site for solid waste disposal which would meet the requirements of DER.

DISCUSSION

This controversy has called forth the very best efforts in temperament, patience, legal skill and perception. The long, drawn out hearings covering many months and hundreds of pages of testimony brought personal attacks and aspersions cast upon the Hearing Examiner, his integrity and knowledge of the law, by one not an officer of the Court, having been admitted to practice law

1. What we have referred to as a liner is a sub-base with a small amount of AC-20 and 2 inches of concrete base known as amiesite, sprayed with hot asphalt material at the amount of 1-1/2 gallons per square yard, which hardens into an impervious area over the landfill site. On top of this the refuse is then placed in bulk loads, compacted by a large piece of machinery and then a layer of earth placed on top of it again compacted before another "cell" of refuse is placed on top of that.

before no bar in this State. The clearest difference we have in this matter with the Appellants, is our honest belief that no matter what decisions we make, we could be in error. This is a possibility never once considered by them, as they denied their own fallibility, by assuming that any disagreement with their position arose from corrupt motives.

The Solid Waste Management Act, Act of July 31, 1968, P. L. 788 No. 241 has as its primary purpose to bring control to the activity of collecting and disposing of refuse throughout the Commonwealth. Because of the nature of solid waste and its long range ability in landfills to create a by-product known as leachate, which is a pollutant, The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. 691.1, *et seq.*, must be read in conjunction with it, to resolve the many issues raised by this appeal. In addition, the Constitution of Pennsylvania, Article I, Section 27 now provides:

> "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people."

This is the legal basis upon which the appeal must sit if it is to be successful. Much of the "testimony" which was offered, and I use the term loosely, was totally unrelated to the above indicated provisions as we are given to understand them. We consistently rejected statements regarding the cost of the landfill and the outrage thereby caused to the taxpayers. It is true that the Solid Waste Management Act, *supra*, refers to "economic loss"[2] as one item which the Act was intended to prevent. Although there is some question as to whether this language refers to the cost to taxpayers in obtaining a landfill, as opposed to

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2. Solid Waste Management Act, Act of July 31, 1968, P. L. 788, 35 P. S. §6002:

"It is hereby determined and declared as a matter of legislative finding that, since improper and inadequate solid waste practices create public health hazards, environmental pollution and *economic loss*, it is the purpose of this act to:

"(1) Establish and maintain a cooperative state and local program of planning and technical and financial assistance for comprehensive solid waste management;

"(2) Utilize, wherever feasible and desirable, the capabilities of private enterprise in accomplishing the desired objectives of an effective solid waste management program; and

"(3) Require permits for the operation of processing and disposal systems."

...

loss due to disposal methods used where there is no permitted solid waste system, we believe that issue to be outside of our jurisdiction. DER is not authorized to refuse the grant of a permit based on the cost of the project. The only State funds authorized in the Act are to be used for planning, and not the purchase or maintenance of a solid waste disposal area.[3] This leads us to the conclusion that, inasmuch as DER has no authorization to grant or refuse a permit based on the cost involved, which it does not pay in any event, this Board cannot review actions of DER based on that consideration. This is not to say that honest, hard working taxpaying citizens have no remedy when unscrupulous public officials fraudulently divert funds as alleged by Appellants in this case. Clearly, they do have a remedy, criminally by bringing the information to the attention of the District Attorney and the Justice Department, civilly, by actions to recover public funds and, finally, the very cornerstone of our system of government, the ballot, can be used to remove from office those unfit to serve. We say all of this having said it many times before during the hearing, only because for some reason Appellants could not or would not believe it when orally communicated. Perhaps the written word will help. In any event, it will clearly permit a review of these legal conclusions on appeal.[4]

DER has consistently maintained that the Board has no jurisdiction in this case because there was no appeal from the issuance of the permit within 30 days of the June 15, 1973, date. Undoubtedly that would have been an appealable action. The Authority, however, was notified by DER that the landfill for which the permit had been issued could not begin operation unless and until DER made a final inspection and consented to the operation. It would take a very narrow construction, indeed, of the review power of this Board, to hold that when the

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3. Solid Waste Management Act, Act of July 31, 1968, P. L. 788, 35 P. S. §6012(a):

"(a) The department is authorized to assist counties, municipalities, and authorities by administering grants to pay up to fifty percent of the costs of preparing official plans for solid waste management systems in accordance with the requirements of this act and the rules, regulations and standards adopted pursuant to this act, and for carrying out related studies, surveys, investigations, inquiries, research and analyses."

...

4. Appellant argues that the Board has jurisdiction over fraud cases because DER has cited a case indicating that a late appeal can be accepted as timely by the Board in the event that fraud prevented its timely filing. Of course only the latter is good law but it shows vividly the truth of the old saying that "a little knowledge is a dangerous thing". This lack of understanding of the rules of law and their many exceptions caused this hearing to take much longer because the Examiner, at every opportunity, tried to briefly explain the legal implications of various aspects of the case, only to be charged with bad intentions by those he sought to help.

representatives of DER went to the site, made a final inspection and authorized the landfill to begin operation on August 16, 1974, that they took no "action" reviewable by this Board.

The next, and more difficult question is: What is the scope of the review based on the appeal filed on September 6, 1974? DER, again taking the most conservative approach, argues that we are limited to consideration of only those matters which occurred prior to the August 16, 1974, action. We do not agree. This Board has on numerous occasions allowed DER to present testimony as to events occurring at a time after their action under attack, when that information would support their original decision, See *Joseph Rostosky d/b/a Joseph Rostosky Coal Co. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 73-178-C, (issued June 26, 1974). The Commonwealth Court has recently affirmed this procedure by saying:

> ...
> "In cases such as this, we are not required to review an administrative decision by DER which was rendered without a due process hearing, because as we view the Administrative Agency Law and section 1921-A of the Code, when an appeal is taken from DER to the Board, the Board is required to conduct a hearing *de novo* in accordance with the provisions of the Administrative Agency Law. In cases such as this, the Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board. If DER acts pursuant to a mandatory provision of a statute or regulation, then the only question before the Board is whether to uphold or vacate DER's action. If, however, DER acts with discretionary authority, then the Board, based upon the record made before it, may substitute its discretion for that of DER. See *East Pennsboro Township Authority v. Commonwealth of Pennsylvania, Department of Environmental Resources*, ___ Pa. Commonwealth Ct. ___, 334 A.2d 798 (1975) and *Rochez Bros., Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, ___ Pa. Commonwealth Ct.___, 334 A.2d 790 (1975). DER's authority to attach terms and conditions to the permit in the instant case was obviously discretionary and, therefore, the Board could properly substitute its discretion concerning the terms and conditions for that of DER. ..."
> (*Warren Sand & Gravel Co., Inc., et al v. Department of Environmental Resources*, 734, 735 C. D. 1974.)

In this case we perceive no reason to treat the parties any differently than the proverbial goose and gander. We extended a broad scope hearing to Appellants in line with the above decisions with the belief that, if it was shown that the landfill should not have been authorized to open, or if conditions should now be added to limit that authorization, this Board is properly called upon to take corrective action. It goes without saying, that there must, nevertheless, be some logical end to this reviewing process.[5] The Board must not slip from adjudication into administration. It is the Authority and not DER or this Board which must finally operate the landfill.

One other procedural matter deserves comment before we further discuss the substantive issues of this appeal. Appellant filed a notice of appeal making many allegations. No answer was filed by either DER or the Authority and Appellant argues that this is a clear violation of Pa. Code Title 25, §21.18, the Board's own procedural rules. The language relied upon requires that an answer be filed to--"a complaint, new matter, petitions or motions". There are two problems with Appellants' argument. First, the notice of appeal is not included in any of the named pleadings. Secondly, as to the supersedeas, which is a petition, the burden of proof would remain upon Appellant in any event if the simple device of denying all allegations, was resorted to by DER and/or the Authority. Any allegations made, in which either adverse party concurred, could and presumably would have been stipulated to on any number of the occasions on which they specifically refused to do so. In short, there has been no prejudice to Appellant, and these procedural rules are designed, after all, only to insure fairness and order in Board proceedings.

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5. Appellant Porter, filed a document on April 18, 1975, entitled "*A New Appeal against Operation of a Landfill in Continuing Violation of the Solid Waste Management Act and The Pennsylvania Code, or Brief in Support of a Petition for Supersedeas*. We have received and docketed this as a post-hearing brief only, the time for any new appeals from DER action having long since elapsed.

The major issues raised by this appeal[6] based on the length of time devoted to them by Appellant, are the plan revisions and the method by which they were accomplished. The Solid Waste Management Act, Act of July 31, 1968, P. L. 788, 35 P. S. §6007(d), requires:

...

> "(d) Plans, designs and relevant data for the construction or alteration of solid waste processing and disposal facilities and the location of solid waste processing and disposal areas shall be prepared by a registered professional engineer and shall be submitted to the department for approval prior to the construction, alteration or operation of such facility or area except when food process wastes are used for agricultural purposes in a manner which will not create a public health hazard or pollution of the air or water."
>
> ...

Much has been made of the fact that there was no actual physical mark showing written approval by DER of the permit application which was submitted and contained phase II module plans and specifications for the landfill. It is true

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6. The unstated but underlying factor in this proceeding is the same as identified by the Court in *Application of Borough of Carlisle for Approval to Operate Solid Waste Incinerator Plant,* 25 Cumberland 16:

...

> "There is also associated with these concerns a sort of intangible feeling that makes acceptance difficult. One witness for the objectors gave it a name: 'Adverse negative psychological effect on the neighborhood." In *Wood v. Town of Wilton,* 240 A.2d 904, where there was an action for an injunction to restrain the town from using land for a dump, the trial courts, in granting the injunction, '(c)oncluded that the spector of a 'town dump' blights the area with a 'black psychological overcast' which has a depressing and deprecating effect on the plaintiffs' properties.' After taking account of the trial court's finding as quoted above, the Supreme Court of Connecticut said: '(T)he finding discloses that this fear of a 'town dump,' although real, has no basis of fact.' The court then went on to say that the anticipation by the plaintiffs of the possible consequences of the defendant's proposed use of the property can be characterized as a speculative and intangible fear. The appellate court found instead that the disposal area for garbage involved in this suit was not a garbage dump as such expression is usually used, but is a sanitary landfill garbage disposal operation. The trial court was reversed and the town's proposed landfill was not enjoined."

that formal written approval on the application itself would be an easily understandable method of carrying out the program. The question, however, is whether that is the only acceptable way in which to proceed. We think not. When a permit is issued, as it was here, on June 15, 1973, any question about the action taken by DER as to the application submitted by the Authority would clearly be resolved. This would seem to be a statement of the obvious.

There was convincing evidence as well as admissions that the plans set forth in the original application, of which the phase II module was a part, were changed significantly on a number of occasions. The Appellant dramatically demonstrated a number of these revisions and some inconsistencies between what was called for in the plans and what actually was done at the site.[7] This raises what I believe to be the key question which ran throughout this entire proceeding. The Act specifically authorizes DER to revoke or suspend any permit where the disposal facility is in violation of the Act or Department Regulations.[8] It is clear from the language of the Act that this power is not mandatory but discretionary. The question then becomes, whether it is an abuse of discretion for DER to fail to suspend or revoke a permit when actual violations of the Act occur. The only logical answer to this question is, that it all depends on the "violation" in question. If the legislature intended every and any violation, regardless of magnitude, to call forth a suspension--or worse--it would have

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7. Among the many items:

(a) The access road did not in all respects measure up to the re-requirements of the plans and regulations.

(b) The refuse cells were often placed improperly.

(c) The type of liner was changed at the last minute, when the intended material was not available.

(d) The stock piles used for cover material were poorly utilized.

(e) A temporary recycling of leachate was embarked upon, rather than the original treatment plans.

(f) The retaining walls (head walls) around drain pipe were not properly maintained.

8. The Solid Waste Management Act, Act of July 31, 1968, P. L. 788, No. 241, 1968, as amended, 35 P. S. §6007(e) provides:

> "(e) Any permit granted by the department, as provided in this act, shall be revocable or subject to suspension at any time the department shall determine that the solid waste processing or disposal facility or area (i) is, or has been conducted in violation of this act of the rules, regulations, or standards adopted pursuant to the act, or (ii) is creating a public nuisance, or (iii) is creating a health hazard, or (iv) adversely affects the environment or economic development of the area."
>
> . . .

said so. It would not have left the matter in the hands of DER to decide. The permit, where violations occur, is merely "subject to suspension" or "revocable" i.e. subject to be revoked. It seems to us that the nature and extent of alleged violations must be the criteria for determining whether and when the above power is to be exercised.

The final logical step which Appellant is bound to take if he would complete the showing needed to move this Board to finding an abuse of discretion is proof of some clear danger or actual harm to citizens or the environment. It is here, where the Appellants' evidence falls short. At this crucial point we are urged[9] to accept suspicions, fears, vague unsubstantiated possibilities and good intentions in place of the missing facts.

The writer visited the site of this landfill, and found that Fishing Creek, a body of water which runs in close proximity to the landfill, does appear to justify some long range concern. The landfill sits on a lovely hill overlooking the scenic creek site. The asphalt liner (AC-20) used to line the landfill is intended to last indefinitely, and the expert witnesses all agreed that any underground water supply would not be harmed so long as the liner did the job for which it was put in place. Still, this is not a procedure with any proven long range on-site efficiency record. We would expect that all of the laboratory tests would be favorable, but they are still only tests, and candor dictates that we call the installation of the liner at the landfill itself a test. The slope of the land, pieces of liner that clearly did not remain in the ground[10] and appearance

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9. Perhaps the word "badgered" would be more appropriate. The Appellants' brief states:

> ...
> "Porter is certain that, even if he had not proven that this Landfill has created hazards to health and pollution, and threatens much greater hazards and pollution in the future, the overwhelming evidence that DER officials have engaged in a conspiracy with appellee Authority to allow contractors to steal hundreds of thousands of dollars under color of complying with Act 241 and Chapter 75 rules, required this Board to revoke this Landfill's Permit, if this Board had any wish to continue to pretend it has any interest in upholding Act 241."
> . . .

10. Large pieces of the liner were presented as exhibits by Appellant and Respondents claim this was all "excess", a defense easily made, but hard to prove.

around the edge of the liner of an unsightly seepage all lead me to a more cautious appraisal. The uncertainty of just what the future holds with regard to disposition of the leachate that is collected, and the effectiveness of the recycling program have all given me pause. The general maintenance of the landfill and all of the uncertainty that seems to have been a part of this project from the beginning up until now causes us to require some continuing vigilance on the part of DER.

As a beginning point there must be continuing periodic sampling of Fishing Creek before and after it passes the landfill site. We believe a monitoring program is clearly called for by the facts of this case. We suspect there may be no such thing as a perfect landfill, and we do not reach for that utopia here. We do however believe that valuable information can be gained from the liner installation so that future decisions on the use thereof in Pennsylvania can be made more intelligently and, of course, more importantly, so that any problem which develops at the site of this landfill are detected at an early date so that any needed corrective measures can be taken.

There were a number of issues raised which deserve only brief final comment, and others which we feel deserved none at all. The Appellant consistently argued on behalf of the haulers and alluded to their dissatisfaction but, curiously, none of them appeared as witnesses. We are free, under the law, to draw certain conclusions from their absence--and we did. Apparently there are a number of other actions pending, both civil and criminal, which are related in some way to this proceeding. This information came to our attention by various devices at the hearing and we merely repeat the irrelevancy as then stated. Appellant argues that if there is an enforcement unit in DER this case should be handled by it. The mandamus or equity actions needed to accomplish the results sought can be brought by the Secretary pursuant to the Solid Waste Management Act, Act of July 31, 1968, 35 P. S. §6005(i) or §6013, but DER alone, must decide whether it wants to institute such enforcement actions.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal.

2. DER properly issued a solid waste management permit to the Authority on June 15, 1973.

3. The grant of permission by DER for the Authority to begin operation on August 16, 1974, was an appealable action of DER.

4. The failure of the Authority to comply in exact detail with every letter of the Solid Waste Management Act, *supra*, and the Department's regulations promulgated thereunder, does not automatically require a suspension or revocation of a permit by DER.

5. DER did not abuse its discretion by allowing the Authority to begin operation on August 16, 1974, and no evidence presented at the hearing before this Board would require a revocation or suspension of the permit.

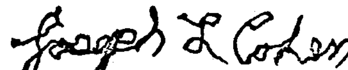
6. There is enough uncertainty in the new liner process being used by the Authority in close proximity to substantial waters of the Commonwealth, to require continuous monitoring by both the Authority and DER in line with a detailed and specific program to determine the efficacy of the liner.

O R D E R

AND NOW, this 31st day of July, 1975, the grant of Permit No. 100924 to the Columbia County Solid Waste Authority is hereby sustained. The matter is, nevertheless, remanded to the Department of Environmental Resources for the purpose of requiring the Authority to implement, within 90 days , a specific long term monitoring and testing program as to the liner itself and its effect, if any, on the waters of the Commonwealth.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: July 31, 1975
llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

BRADY TOWNSHIP
GREGG TOWNSHIP
ELIZABETH STEWARD

Docket No. 74-246-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and LYCOMING COUNTY COMMISSIONERS, Intervenors

A D J U D I C A T I O N

By Paul E. Waters, Chairman, August 7, 1975

This matter comes before the Board as an appeal from the issuance by the Department of Environmental Resources, hereinafter DER, of a permit to construct a sanitary landfill in Brady Township, Lycoming County. Appellants are two townships and a citizen of Clinton Township who is personally opposed to the site. The landfill is designed to use a liner and other devices for protection of the groundwater and this along with the general conditions at the site and the method used in approving the permit are all called into question by this appeal. A supersedeas was issued early in these proceedings without serious objection from DER or the Intervenor, Lycoming County.

FINDINGS OF FACT

1. Appellant Elizabeth Steward is an adult individual residing at R. D. #1, Montgomery, Clinton Township, Lycoming County, Pennsylvania, and the other Appellants are municipalities, Gregg Township and Brady Township located in Union and Lycoming Counties respectively.

2. The Intervenor is the Lycoming County Board of Commissioners also known as the permittee under the permit of DER.

3. Solid Waste Permit No. 100963 for a sanitary landfill in Brady Township, Lycoming County, was issued on October 7, 1974, by the Bureau of Land Protection of DER.

4. The permit is conditioned upon inspection of the facility by DER and certification by a professional engineer that the site has been constructed in accordance with the plans prior to the operation of the site.

5. Application for the permit was made by the Lycoming County Commissioners, Intervenor in this proceeding, and consisted of five items: Ground Water Module, Phase I (S-5); Application and Phase II Module (S-4); letter of August 22, 1974, to Wilbur Taxis (S-3); letter of September 23, 1974, to William Bucciarelli (S-2); letter of September 23, 1974, to Wilbur Taxis (S-1).

6. DER's regional office staff reviewed Phase I of the application and forwarded comments to the applicant, reviewed Phase II of the application and commented to the applicant and further required additional information including information on a depression at the site and the liner.

7. At the suggestion of Mr. Bucciarelli of DER, a field inspection was held on January 31, 1974, in conjunction with Appellants and their consultants, followed by a meeting in the Williamsport Regional Office. At this meeting DER agreed to require some additional information concerning the site including a backhoe investigation of the depression.

8. The protective measures at the proposed site consist of: a 20 mill PVC liner covered with 6 inches of sand which in turn is covered with 12 inches of sand below the liner in addition to the natural features present at the site including thick glacial till with a low permeability; upward ground water flow in the till; bedrock with low permeability and artesian ground water.

9. The monitoring well system as proposed for the site consists of two upgradient background wells, two existing downgradient monitoring wells, one of which is located on a fracture trace, two more proposed collector/monitoring wells located on fracture trace intersections and two shallow till monitoring wells.

10. On September 18, 1974, an excavation was made through a depression at the site to investigate the origin of this depression. The trench remained open for several days to allow DER and Appellants' consultants to inspect it. An examination of the excavation indicated to DER's and Intervenor's consultants that the depression was a remnant of a man-made excavation.

11. Dr. Loughry concluded that the depression was an artifact of man based on the existence of two relatively straight parallel lines of stones, apparent penetration into but not through the fragipan, the interruption of the surface soil and the lack of similarity to soils found in other sink features previously examined.

12. Before approving the liner, DER engaged in an extensive review of the research data concerning PVC and its prior uses and a review of the data concerning the quality ranges of leachate, and discussed these findings with those working in the respective fields. DER also observed existing facilities already constructed or being constructed which use PVC as a liner material, and drew upon prior experience with PVC in landfills and other construction uses.

13. The area known as the "Sinks" which periodically fills and empties of water is approximately two miles northwest of the proposed landfill.

14. Although, in compliance with the direction of the Board that the Appellants be provided with a sample of the PVC liner proposed to be used, and although a sample of such a PVC liner material was provided to the Appellants, no test results on such sample were ever introduced by the Appellants.

15. The Appellants failed to prove probability of rupture of a PVC liner.

16. Appellants failed to prove by their testimony and evidence that the proposed Lycoming County Solid Waste Landfill would deposit solid waste in areas where there would be continuous or intermittent contact between solid waste and groundwater.

17. Solid waste deposited in the proposed Lycoming County Landfill should not come in contact with the groundwater table because of the isolation of the solid waste deposited and leachate derived therefrom by the system of overdrains, liner and underdrains.

18. Appellants failed to produce testimony or evidence that would prove that the proposed Lycoming County Landfill would interfere with the quantity or quality of natural water supplies available to the Appellants and to the adjoining land users.

19. The proposed Lycoming County Landfill concept of overdrains, liner and underdrains is the best concept presently available to prevent mixing of leachate and groundwater.

20. A properly monitored and managed landfill on the Lycoming County proposed site will not jeopardize the safety of water wells of surrounding citizens.

21. With the proposed design protective measures and natural protective features it may reasonably be concluded that leachate from the proposed landfill could not get into the groundwater flow system in such a way as to pollute any water supply well.

22. In the improbable event of leachate escaping the four protective design measures and four natural protective features of the proposed landfill site and entering the glacial till, it would be many years before it would leave the landfill site and would provide years of lead time to develop a system of collection devices.

23. The underdrain system of the proposed landfill will be monitored to detect any occurrence of leachate below the level of the PVC liner.

24. The area of the proposed landfill is covered with a glacial till to a thickness ranging from 12 to 79 feet, and which is of low permeability.

25. The proposed landfill design includes four designed protective measures to prevent leachate from entering the groundwater as follows: (1) A 12 inch layer of compacted low permeability native soil which would tend to divert leachate to a series of sand filters and collection pipes known as overdrains; (2) Beneath the 12 inch layer a 6 inch layer of sand under which would be (3) A 20 mill impermeable PVC liner under which would be (4) A 12 inch layer of highly permeable sand interspersed by a series of perforated collection pipes known as the underdrain system, on top of undisturbed low permeability glacial till, and the site provides four natural protective features as follows: (1) A thick mantle of compact glacial till overlying bedrock; (2) The site is a groundwater discharge area for water moving in the glacial till; (3) A low permeability bedrock; and (4) The groundwater in the bedrock is under artesian pressure.

26. The leachate collection and containment system proposed by Lycoming County involves a containment and collection system, a lagoon, an aerator, and recirculation of the leachate to the landfill.

27. Extensive topographic, hydrogeologic and geologic surveys and studies were made of the proposed landfill site to determine its suitability for solid waste disposal.

28. The proposed Lycoming County Landfill site is hydrologically isolated from the area known as the "Sinks" and the Allenwood Fair Grounds.

29. Core drill samples from the proposed Lycoming County Landfill site do not appear to indicate any cavern forming limestone beneath the site.

30. The nearest cavern forming limestone rock layer is about 2 miles south of the proposed landfill site and 2 miles northwest of the proposed landfill site, and over 2,000 feet deep below the site.

31. Extensive investigation of the "depression" on the proposed landfill site revealed several independent pieces of evidence to support the conclusion that the "depression" was an old, man-made excavation and has no significance to the successful operation of the proposed landfill.

32. Uncontrolled leachate existing for about two years in a dump located 420 feet up slope from well number 2 on the proposed site was not detectable in the water testing of well number 2.

33. The groundwater monitoring system for the proposed landfill is adequate to detect any malfunction in the environmental safeguards system, as well as to allow removal by pumping of any escaping leachate.

34. The proposed landfill will have monitoring wells consisting of two existing up-slope wells, two existing down-slope wells, one being on a fracture trace, two additional collector and monitoring wells located on fracture trace intersections, and two shallow till monitoring wells.

35. Aeration of leachate at the lagoon and recirculation of leachate by spraying onto the landfill would tend to remove fifty per cent of the biological pollutants from the leachate, and such procedure is a form of treatment of leachate.

36. A liner can be a safe way to prevent leachate from entering the groundwater or subsoil. The PVC membrane liner proposed to be placed beneath the proposed landfill should prevent any contact between solid waste and the groundwater table, and should prevent the flow of leachate to groundwaters.

37. Even if such a liner as the type proposed leaked leachate into the soil, some natural renovation could occur.

38. As PVC loses its plasticizer with time, the tensile strength increases.

39. The range of leachate which the specifications in the application require that the liner be able to withstand is comparable with the range of leachate contained in the research data in the field.

40. The application of the Lycoming County Board of Commissioners for a landfill permit sets forth sufficient and adequate information from which DER could properly evaluate and, based upon which, DER could properly issue permit number 100963.

DISCUSSION

This matter is before us for decision after many days of hearings and raises a number of important issues which have arisen for the first time in Pennsylvania.[1]

The most unusual question, which must first take our attention, is the applicability if any, of the Act of July 10, 1974, P. L. ____ No. 175 popularly known as the "Sunshine Law". It is alleged by Appellants that the decision to issue the permit in question was made at a meeting not the subject of public notice and therefore in violation of the Act. We do not believe either the facts as presented as to the issuing process, which shows that Mr. Lazarchik alone was authorized to finally decide whether to sign and issue the permit, or the example offered from the Attorney General's memo interpreting the Act, support Appellant's position.[2] In any event, the Board does not have jurisdiction over this issue. Section 9 of the Act clearly provides:

> "The Commonwealth Court shall have original jurisdiction of actions involving State agencies and the courts of common pleas shall have original jurisdiction of actions involving other agencies to render declaratory judgments or *to enforce this act, by injunction or other remedy deemed appropriate by the court*. The action may be brought by any person in the judicial district where such person resides or has his principal place of business, where the agency whose act is complained of is located or where the act complained of occurred." (Emphasis supplied.)

The next, and much more troublesome issue, concerns the fact that nowhere in the statute or regulations of DER is a liner[3] as proposed here, authorized. Specifically, Appellant argues that The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1, *et seq.* and the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, No. 241 §1, 35 P. S. §6001, *et seq.*, when read together with the

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1. We feel that counsel for all parties fully, fairly and ably explored all of these issues.

2. See opinion of Attorney General dated September 12, 1974:

> "(d) Commission E has the power to issue certain licenses. It holds a hearing at which two groups dispute who, if anyone, is entitled to a particular license. After the hearing has concluded, the commission wishes to discuss the case and make a decision. Is the proposed discussion required to be open to the public? Yes. ..."

3. The liner is to be constructed of polyvinyl chloride and is also referred to herein as a PVC liner.

Regulations[4] do not authorize the grant of a permit where the groundwater is within 6 feet of the surface as it is at some places on the landfill site. We have serious reservations about the legality of the last sentence of DER's regulation 75.118 which provides:

> "The depositing of solid waste shall be prohibited in areas where continuous or intermittent contact occurs between solid waste and the groundwater table. *This prohibition may be waived by the Department provided special requirements are met."* (Emphasis supplied.)

The County and DER contend, however, that there will be *no contact* between the solid waste and the groundwater table. In fact, this is the very heart of their case as developed through a number of technical witnesses called as experts and extensively cross-examined by Appellant. We believe that the designed and natural features of this proposed sanitary landfill give ample protection to the ground water in this area. Beyond that, the backup safety measures inherent in the plan satisfy us that there has been no abuse of discretion by DER in issuing the permit here in question. Inasmuch as we agree that there will be no contact between the groundwater and the solid waste, the "waiver" provision did not direct DER and does not now require a decision as to its legality.[5]

Although we find no violation of statute by DER's action in granting the permit with a liner being used to protect the groundwater, there is a major shortcoming in the Regulations, in that they do not spell out the requirements or guidelines for the use of a liner. At the very least we believe a range of acceptable alternatives should be set forth for prospective applicants.[6]

The Appellant has argued a deprivation of due process rights because

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4. See Title 25, Pennsylvania Code, Section 75.84:

> "a) To assure that there is no risk of free flow of groundwater, sites with less than six feet of fine soil over limestone or other fissured rocks; or coarse sand and gravel shall be considered unsuitable...
>
> ....
>
> "c) Depth to the seasonal high water table shall be greater than six feet from the bottom of the lowest refuse lift. The depth shall be increased by at least six feet for each additional lift depending on the character of the earth material."

5. It would take a straining of our sense of reasonableness to uphold a blanket power given by DER unto itself to waive by unwritten regulation, a statutory and indeed a constitutional prohibition (Article I, Section 27) with nothing more than a bald assertion of its existence.

6. Although this is related to the point raised by Appellants, in actuality want of compliance by DER with this requirement does not directly relate to them, inasmuch as they are not applicants, and therefore have questionable standing.

of the fact that DER has used an internal method of granting the permit which makes it extremely difficult--if not impossible--to determine exactly when, how, why and by whom that decision was made. We must also confess some confusion by the process, which looks like a classic bureaucratic buck pass, in which DER engaged in issuing the solid waste permit.[7]

We are not, however, properly called upon, to review the structure and administrative procedures used by DER. It may well be that another system would more clearly identify the person issuing the permit with the person who reviews, understands and actually passes upon the application, but we can find no due process question here. As the Court said in *Warren Sand & Gravel Co., Inc., et al v. Department of Environmental Resources*, 734, 735 C. D. 1974:

> ...
> "In cases such as this, we are not required to review an administrative decision by DER which was rendered without a due process hearing, because as we view the Administrative Agency Law and section 1921-A of the Code, when an appeal is taken from DER to the Board, the Board is required to conduct a hearing *de novo* in accordance with the provisions of the Administrative Agency Law. In cases such as this, the Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board. If DER acts pursuant to a mandatory provision of a statute or regulation, then the only question before the Board is whether to uphold or vacate DER's action. If, however, DER acts with discretionary authority, then the Board, based upon the record made before it, may substitute its discretion for that of DER. See *East Pennsboro Township Authority v. Commonwealth of Pennsylvania, Department of Environmental Resources*, ___ Pa. Commonwealth Ct. ___, 334 A.2d 798 (1975) and *Rochez Bros., Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, ___ Pa. Commonwealth Ct. ___, 334 A.2d 790 (1975). DER's authority to attach terms and conditions to the permit in the instant case was obviously discretionary and, therefore, the Board could properly substitute its discretion concerning the terms and conditions for that of DER. ..."

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7. The testimony shows that Mr. Lazarchik, the person who signed the permit, did not read all supporting data but relied upon a Mr. Bucciarelli--he in turn did not review the entire matter but relied upon a Mr. Taxis, the head of the Regional office, who then states:

> "I am not an expert in any of the technical fields. I rely completely on my staff." (N.T. Page 316)

We now turn to the major question in this entire proceeding. Did DER act arbitrarily or capriciously in approving the use of a PVC liner and other devices to protect the groundwater at the landfill site? Clearly related to this question is the underlying one--will it work? At bottom the Appellant's argument boils down to the fact that there has never been a test of this proposed liner material on any actual landfill, kept in place for 40 years or more to determine whether or not it will do the intended job. The statement of this charge carries its own refutation. Appellants oppose the installation of a PVC liner because there has been no prior 40 year installation. Yet, there could never be such proof unless installation is allowed in the first instance. The most that can reasonably be required at this time is that the material be successfully tested under simulated conditions--and this has been done. We believe that the tests conducted with the liner material and the expert opinions expressed by knowledgeable witnesses goes a long way toward supporting the decision of DER to grant the permit. We were not unimpressed by the fact that an issue was made of the Appellants' right to have a piece of the liner material for the purpose of conducting their own tests.[8] This was allowed by the Examiner. The Appellants thereafter at no time introduced any of their test results which would serve as a basis for us to ignore those offered by the County. It is, however, the added safety or backup features at the landfill site which finally convince us that DER acted with proper regard for the law and its own regulations and not arbitrarily or capriciously in granting the permit. It is our opinion that it would be difficult to approve any use of a liner in a sanitary landfill if this one is found to be inadequate. In *Deake G. Porter, Appellant and Miss Clara Vanderslice for Concerned Taxpayers for Columbia County v. Commonwealth of Pennsylvania, Department of Environmental Resources, Columbia County Solid Waste Authority, Intervenor*, EHB Docket No. 74-205-W (issued July 31, 1975), we were dissatisfied with the monitoring provisions made at the site. Here we deem them to be adequate to give the permittee and DER notice so that corrective measures can be taken if the liner should fail at any time in the future.

8. Under our Rules the Appellant had the burden of proof in this proceeding. We have not relied heavily upon this rule because in a case of this kind, we deem it to be an unfair burden.

One last observation is in order regarding the authority of DER to permit a liner at a solid waste facility. There is an implication in the testimony that sanitary landfills are not as desirable as incinerators in any case, and that DER should act accordingly. The Appellants are entitled to this view and we may even share it, but the fact is that our legislature has not declared this to be the public policy of our State, and the Act and the Regulations of DER clearly authorize landfills as a proper disposal method. DER has a responsibility to review the proposals made at the local level for the management and disposal of solid waste. Once the decision is made as to the disposal method at the local level, DER cannot and should not second guess the municipality or county, so long as the method chosen has been authorized by statute and regulations, and is deemed feasible.[9] The question of leachate storage which has been raised,[10] is one for future resolution. The present plans call for recycling, but this is not a permanent solution. This problem must be resolved, and DER has a clear responsibility to see that it is. The Appellants are not without a remedy should the County fail to deal with this long range problem. Likewise we believe the question of hazardous waste disposal to be an enforce-

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9. See *Community College of Delaware County and Community College of Delaware County Authority, Appellants and Township of Marple, Intervening Appellant v. Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellees,* 654 C. D. 1974, (July 18, 1975) and *Central Delaware County Authority, Appellant v. Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellees,* 743 C. D. 1974, (July 18, 1975):

> "... it is not a proper function of the DER to second-guess the propriety of decisions properly made by individual local agencies in the areas of planning, zoning, and such other concerns of local agencies, even though they obviously may be related to the plans approved. Moreover, impropriety related to matters determined by those agencies is the proper subject for an appeal from or a direct challenge to the actions of those agencies as the low provides, not for an indirect challenge through the DER. As we read the Sewage Facilities Act, the function of the DER is merely to insure that proposed sewage systems are in conformity with local planning and consistent with statewide supervision of water quality management; it is the local government agencies, who are responsible for planning, zoning and other such functions."
> ..."

10. Appellant asks the rhetorical question: "...What can the adjacent neighbors expect if after 15 or 20 years the county discontinues operation of the landfill or the federal government terminates the permit. The generation of leachate will continue. Who is there to treat the leachate. If leachate is to be generated it should be treated immediately and not be allowed to be collected as a toxic time bomb to explode upon nearby residents."

ment problem, which cannot properly be resolved on this record. The Regulations require that a daily record be kept indicating special provisions being made for such wastes. We will not assume that the County will ignore this requirement.[11]

The Appellants, on the last day of hearing, offered a document entitled "An **Assessment of Liners for Land Disposal Sites**"[12] for the purpose of proving the truth of the statements contained therein. Of course neither the authors or an expert conversant with its contents was available for cross-examination on the conclusions put forth in the exhibit. We therefore allowed the exhibit only for the limited purpose of showing that there was on-going work on the PVC liner question and that apparently EPA had an interest in it. This document was so clearly hearsay that extended discussion was deemed unnecessary. We have allowed published studies as exhibits when they are properly authenticated and no party is prejudiced by their surprise introduction. The Board has broad discretionary power in this area, and we deemed the importance and controversy of the substantive issues in the publication to be so great as to require a witness under oath, if not for direct, at least for cross-examination purposes, to support their consideration by us. Appellants now assert that this ruling was in error. We do not agree.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of these proceedings.

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11. DER Rules and Regulations, §75.120:

> "(a) To assure that proper construction of the landfill is carried out according to operational plans and to provide for the most efficient utilization of the completed site, daily operational records shall be maintained.
> (b) Operational records shall consist of a written log maintained by the sanitary landfill operator and shall include the following information:
> (1) Types and quantities of solid waste received.
> (2) The portion or area of the landfill used.
> (3) Special provisions made for hazardous waste disposal.
> (4) Any deviation from the operating plans and specifications."

12. The publication (Exhibit A-17) was written by Allen J. Gewin who was unknown to the Examiner and is stamped in dark type across the front "DRAFT", and indicated at the bottom that it was prepared by or for the U.S. Environmental Protection Agency in 1975.

2. Where a party appeals to the Board from the issuance of a permit by the Department, such party has the burden of proving that the action of the Department was a manifest abuse of discretion or a purely arbitrary act.

3. DER properly issued a permit to operate a solid waste disposal facility to Intervenor, Lycoming County Commissioners and did not abuse its discretion.

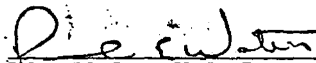
4. If an applicant submits an application to DER, which otherwise, meets the requirements of the Solid Waste Management Act, *supra*, and the Rules and Regulations promulgated pursuant thereto, the Environmental Hearing Board lacks authority to review the discretion exercised by the applicant in choosing the kind of disposal facility it deems proper for its needs.

5. The Board lacks jurisdiction to decide whether the action of the Department violated the "Sunshine Law", *supra*.

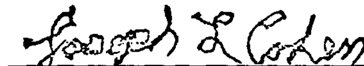
ORDER

AND NOW, this 7th day of August, 1975, the appeals of Brady Township, Gregg Township and Elizabeth Steward are hereby dismissed. The Supersedeas Order issued previously is withdrawn and the action of DER in issuing Permit No. 100963 to Lycoming County is hereby sustained.

ENVIRONMENTAL HEARING BOARD



BY: PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: August 7, 1975
llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

ALLEGHENY RIVER PROTECTIVE ASSOCIATION, INC.

Docket No. 74-280-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and EMLENTON LIMESTONE COMPANY, INC., Intervenor

ADJUDICATION

By Joseph L. Cohen, Member, August 12, 1975

This matter is before the Board on the appeal of Allegheny River Protective Association, Inc. from the action of the Pennsylvania Department of Environmental Resources (hereinafter DER) of November 26, 1974, which reinstated a previously suspended permit issued to Emlenton Limestone Company Inc., Intervenor. The appeal was filed on December 24, 1974. On February 5, 1975, Intervenor filed a Motion to Quash and Dismiss the Appeal for the reason that it was not served by Appellant with a copy of its appeal within 48 hours of the filing of the said appeal. On February 10, 1975, Appellant filed a Motion for a general continuance in the appeal until such time as all appeals contemplated to be taken in connection with the above captioned matter have been taken and consolidated and until Appellant has a reasonable opportunity for discovery in the same matters. By a series of actions on February 14, 1975, the Board granted Emlenton's Petition to Intervene in the above captioned matter, issued a Rule upon Appellant to Show Cause why the appeal should not be quashed or dismissed and relieving the parties of the duty to comply with Pre-Hearing Order No. 1 until further order of the Board. On February 24, 1975, the Board informed counsel for Appellant that, inasmuch as its Motion for Extension of Time was filed five days after Intervenor's Motion to Quash and Dismiss the appeal, action upon Appellant's Motion will await the disposition of Intervenor's Motion to Quash and Dismiss.

On March 21, 1975, Appellant filed a Petition for Supersedeas. The Board held a hearing on this petition on April 3, 1975, and at the close thereof denied the petition. The stated basis for denial was that Appellants were not likely to prevail in their appeal.

Upon consideration of Intervenor's Petition to Quash and Dismiss the appeal, the answer of Appellant thereto and the respective briefs of the parties, we enter the following:

FINDINGS OF FACT

1. Appellant is Allegheny River Protective Association, Inc., a corporation not for profit organized and conducting its affairs under the laws of the Commonwealth of Pennsylvania. Its business address is Tidioute, Pennsylvania 16351.

2. Appellee is DER, the agency of the Commonwealth authorized to administer the provisions of the Clean Streams Law, Act of June 22, 1937. P. L. 1987, as amended, 35 P. S. §690.1 *et seq.*, and to act upon application for mine drainage permits issued thereunder.

3. Intervenor is Emlenton Limestone Company, Inc., P. O. Box 1128, 726 West Front Street, Oil City, Pennsylvania 16301.

4. On January 22, 1974, Intervenor submitted to DER an application for a mine drainage permit to excavate sand and gravel on Mead Island in the Allegheny River. Mead Island is located in that portion of the Allegheny River flowing through Warren County, Pennsylvania. Thereafter, on June 20, 1974, DER issued to Intervenor Mine Drainage Permit No. 4674SM5 in response to the aforementioned application.

5. On July 5, 1974, DER suspended said permit and on November 25, 1974, reinstated the permit with amendments.

6. On November 26, 1974, DER by letter advised Appellant that Intervenor had its permit, No. 4674SM5 reinstated with amendments.

7. On December 23, 1974, Appellant filed an appeal with this Board, certifying therein that it had either served by mail or personally a copy of the

appeal upon the following:

(a) the Bureau of Administrative Enforcement, P. O. Box 2351, 709 Health and Welfare Building, Harrisburg, Pennsylvania 17120;

(b) the Officer of the Department of Environmental Resources responsible for the action from which the appeal is taken, and

(c) to the Permittee.

8. On January 28, 1975, DER sent a letter to Intervenor advising it that Appellant had filed an appeal in the matter. The letter states:

> "The attached information will provide you with notice that the above-captioned appeal has been filed with the Environmental Hearing Board of the Commonwealth of Pennsylvania. The subject of that appeal is the letter of November 26, 1975, from Robert J. Biggi, Chief, Pit and Quarry Section, Bureau of Surface Mine Reclamation of the Commonwealth to the Appellant, the Allegheny River Protective Association, Inc. That letter announced to the Appellant the reinstatement of Mine Drainage Permit No. 4674SM5, effective November 25, 1974. The reasons for the appeal are explained in the attached information.
>
> "The purpose of this letter is to inform the Emlenton Limestone Company, Inc. that it must bear the burden of defending the reinstatement of its Mine Drainage Permit. The Department of Environmental Resources, the issuing authority in this matter, will be closely watching the progress of this matter; however, it should be clear that the presentation of witnesses at hearing and presentation of legal arguments from this point forward are the responsibility of the permittee.
>
> "Please note that Pre-Hearing Order No. 1 requires that the Commonwealth file an answering pre-hearing memorandum within fifteen (15) days of receipt of the Appellant's pre-hearing memorandum. The Department does not presently intend to file such a memorandum; consequently, that obligation as well as all others, rests with the Emlenton Limestone Company.
>
> "Initially, the company should enter an appearance with the Environmental Hearing Board.
>
> "If you have any questions concerning this matter, please feel free to contact me."

9. Appellant never served personally or mailed a copy of this appeal to Intervenor, the Permittee in this matter.

10. Section 21.21(b) of the Rules of Practice and Procedure before the Board provides as follows:

> "The Appeal shall be filed in duplicate with the Environmental Hearing Board, Blackstone Building Annex, 112 Market Street, Harrisburg, PA 17101.

"The Appellant shall, within 48 hours after filing an Appeal, serve a copy of the appeal on the officer of the Department or the local agency issuing the Order and on the Bureau of Administrative Enforcement, P. O. Box 2351, Harrisburg, PA 17120. Where the Appeal is from the granting of a permit, an additional copy shall be served upon the recipient of the permit."

11. Section 21.21(d) of the Rules of Practice and Procedure before the Board provides as follows:

"Failure to comply with this section shall be a sufficient basis for dismissing the Appeal. The action of the Department or local agency shall be final as to any person who fails to file an appeal or to perfect an appeal pursuant to this section."

DISCUSSION

Intervenor's Motion to Quash and Dismiss the Appeal in this matter alleges that Appellant did not serve Intervenor with a copy of the appeal filed in this case within 48 hours of its filing and that, therefore, the appeal has not been perfected within the time required by §21.21(b) of the Rules of Practice and Procedure before the Board. Further, Intervenor challenges the standing of Appellant to prosecute this appeal.

In its answer to Intervenor's Motion, Appellant admits neglecting to serve a copy of the Notice of Appeal upon Intervenor in this matter. Appellant, in an amended answer to Intervenor's motion, asserts that it has standing to prosecute this appeal. In view of our disposition of this case, it is unnecessary for us to decide the issue of standing.

Nothing can be more settled in the law of this Commonwealth than the principle that failure to file and perfect an appeal within the period established by law is jurisdictional. *In re Township of Franklin*, 2 Pa. Commonwealth Ct.496, 276 A.2d 549 (1971), reviewing the law on the subject, the court said:

> "The timeliness of an appeal and compliance with the statutory provisions which grant the right of appeal go to the jurisdiction of a court and its competency to act. See Commonwealth v. Yorktowne Paper Mills, Inc., 419 Pa. 363, 214 A.2d 203 (1965). It is the general rule that, where an act of assembly fixes the time within which an appeal may be taken, courts have no power to extend it, or to allow the act to be done at a later day, as a matter of indulgence. Something more than mere hardship is necessary to justify an extension of time, or its equivalent, an allowance of the act nunc pro tunc. Tuttle Unemployment Compensation Case, 160 Pa. Super. 46, 49 A.2d 847 (1946); Yeager v. United Natural Gas Company, 197 Pa. Super. 25, 176 A.2d 455 (1961); Morgan v. Pittsburgh Business Properties, Inc., 198 Pa. Super. 254, 181 A.2d 881 (1962). Two notable exceptions to this general rule are where there is presence of fraud or a breakdown in the court's operation to the prejudice of a party (Nixon v. Nixon, 329 Pa. 256, 198 A. 154 (1938)); *See* Christiansen v. Zoning Board of Adjustment, 1 Pa. Cmwlth. 32, 271 A.2d 889 (1971), or where the failure of a defendant in a criminal case to take a timely appeal is the result of an unconstitutional deprivation of the assistance of counsel (Commonwealth ex rel. Light v. Cavell, 422 Pa. 215, 220 A.2d 883 (1966))." 2 Pa. Commonwealth Ct. at 499; 276 A.2d at 551 (1971)

This same principle applies to administrative appeals as well. *DeFrancis v. Commonwealth of Pennsylvania, Unemployment Compensation Board of Review,* ___ Pa. Commonwealth Ct. ___, 333 A.2d 202 (1975).

It is in light of these principles that we must consider the motion before us. Section 21.21 of the rules applicable to this Board specify the requirements for appeals to the Board. These provisions are authorized by 71 P. S. §510-21(e)[1], which expressly provides:

> "Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall include time limits for the taking of appeals, procedures for the taking of appeals, locations at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board."

Inasmuch as this provision of the Administrative Code of 1929 authorizes *in haec verba* rules and regulations such as the above §21.21, this regulation has the force and effect of law. 1 P. L. E., ADMINISTRATIVE LAW AND PROCEDURE, §35. However much, therefore, we may wish to hear and dispose of this matter on its merits, we are bound by the law of this Commonwealth in respect of appeals.

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1. Section 1921-A(e) of the Administrative Code of 1929, *supra*.

We must decide this matter on the basis of the law of Pennsylvania, cited above. Applying these principles to the issue before us, we have no alternative but to quash the appeal.

Appellant's contention regarding the purported ambiguity of §21.21(b) of the rules cannot withstand a clear reading of that provision. Moreover, Appellant has never served a copy of the appeal on Intervenor. It cannot claim that it was not required to serve the Intervenor, regardless of the issue of the period of time within which it is to be served.

Nor can Appellant's contention that the term "perfection of an appeal" is undefined in either the Administrative Code of 1929 or the regulations applicable to the Board prevail. The second sentence of §21.21(d) of the rules clearly destroys the force of that argument for the reason that it requires the filing and perfection of an appeal pursuant to the provisions of the entire section of these rules. By distinguishing between filing and perfection, it is clear beyond a doubt that the second sentence in §21.21(d) of the rules requires compliance with all provisions of §21.21. Thus, the granting of the permit to Intervenor became final with regard to Appellant by virtue of Appellant's lack of compliance with the requirements of §21.21 of the rules.

Turning now to the issue of allowance of the appeal, *nunc pro tunc*, we advert to §21.21(e) of the rules which provides:

> "The board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitues good cause shall be the common law standards applicable in analogous cases in Courts of Common Pleas in the Commonwealth. No petition may be granted where a statutory period for filing an appeal with the Board has passed."

This provision mandates us to follow the principles of Pennsylvania law regarding appeals, *nunc pro tunc*. The prevailing Pennsylvania law on allowance of appeals, *nunc pro tunc*, is clearly set forth in *City of Pittsburgh v. Pennsylvania Public Utilities Commission*, 3 Pa. Commonwealth Ct. 546, 284 A.2d 808 (1971) wherein

it is stated:

> "Finally, appellants contend that we should allow their appeals in the interest of justice. This argument assumes incorrectly that we have discretion in the matter. Failure to perfect an appeal within the time allowed by statute is a defect in the proceeding of which the appellate court must take notice, even on its own motion. We have no power to extend the time limit for filing an appeal. Department of Highways v. Pa. P. U. C., *supra*. Neither appellant complains that its failure to make timely appeal involved 'fraud or some breakdown in the court's operation through a default of its officers.' Nixon v. Nixon, 329 Pa. 256, 198 A. 154 (1938). See also Tuttle Unemployment Compensation Case, 160 Pa. Super. 46, 49 A.2d 847 (1946) and Layton v. Unemployment Compensation Board, 156 Pa. Super. 225, 40 A.2d 125 (1944). The effect of Christiansen v. Zoning Board of Adjustment, 1 Pa. Cmwlth. 32, 271 A.2d 889 (1970), is limited to its peculiar factual situation carefully stated in the concurring opinion of Judge (now Justice) Barbieri. There, upon timely oral application of counsel, a writ of certiorari to a zoning board was issued, although a petition for allowance of appeal required by ordinance was not filed within the prescribed time. The writ was the second issued in the case, an appeal from an earlier order having resulted in a remand to the board. The actual issuance of the writ, and assurances by a court officer that the written petition might follow after the appeal time, were held to bring the case within the rule of Nixon v. Nixon, *supra*. By contrast, we have here only the simple failure of both appellants to comply with statutory procedures their counsel erroneously believed to be ineffective." (3 Pa. Commonwealth Ct. at 552, 284 A.2d at 811 (1971).

DeFrancis, supra, applies this same principle to administrative agencies. We have found no case in regard to the allowance of appeals, *nunc pro tunc*, which predicates such an allowance on the failure of Appellant to follow legal requirements concerning appeals. We think the above cited authorities leave us no alternative but to quash this appeal.

CONCLUSIONS OF LAW

1. A party which has not complied with the requirements of §21.21 of the Rules of Practice and Procedure before the Environmental Hearing Board has not perfected its appeal.

2. Failure to perfect an appeal within the time limitation set forth in §21.21(b) renders the action of DER, from which the appeal is taken, final.

3. Where the action appealed from is the granting of a permit by DER, an Appellant is required to serve a copy upon the Permittee of such an appeal within 48 hours of the filing thereof. Section 21.21(b) of the Rules of Practice and Procedure before the Board.

4. Appellant, by not serving a copy of its appeal upon Intervenor, did not perfect its appeal in this matter within the time specified by §21.21(b) of the Rules of Practice and Procedure before the Board.

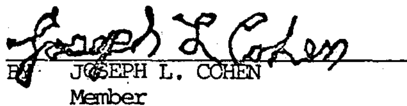
5. The Board lacks jurisdiction to review the merits of this matter because the appeal was not perfected within the time required under regulations of the Environmental Quality Board.

O R D E R

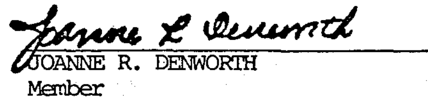
AND NOW, this 12th day of August, 1975, the appeal of Allegheny River Protective Association, Inc., is hereby quashed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman



BY JOSEPH L. COHEN
Member



JOANNE R. DENWORTH
Member

DATED: August 12, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

POCONO HEIGHTS--HIGHLAND LAKE ESTATES — Docket No. 74-192-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, August 12, 1975

This matter is before the Board on the appeals of Pocono Heights Property Owners Association and Pocono Highland Lake Estates Association (hereinafter Appellants) from orders of the Pennsylvania Department of Environmental Resources (hereinafter DER) to cease and desist operation of the private lakes of each as a public bathing place until such time as it issues to each of them a Bathing Place Permit approving and authorizing operation of said bathing places. Each of the Appellants filed a timely appeal to this Board from the orders of DER. By Board order of December 31, 1974, the two appeals were consolidated under the caption of "Pocono Heights--Highland Lake Estates v. Commonwealth of Pennsylvania, Department of Environmental Resources", EHB Docket No. 74-192-C.

On February 14, 1974, the parties to this proceeding filed a stipulation setting forth those facts material to the disposition of these appeals to which they agreed. Said stipulation was entered pursuant to a Board order of December 31, 1974, and January 28, 1975. On March 13, 1975, DER filed a motion for summary judgment to which Appellants filed an answer on March 21, 1975. Subsequently, the Board on April 21, 1975, issued a rule upon Appellants to show cause why their appeal in the above captioned matter should not be dismissed for lack of jurisdiction. The Board issued this rule *sua sponte* for the reason that it was of the opinion that the nature of the orders involved necessitated an exploration of this issue.

The parties herein filed replies to the rule, Appellant's reply having been filed on May 5, 1975, and Appellee's reply on June 5, 1975, in compliance with the rule of the Board.

Because of the nature of the stipulation which the parties filed with the Board, there is no need for any evidentiary hearing in this matter. Appellants have filed a brief in support of their legal contentions while Appellee has chosen not to file a brief but in lieu thereof to rely on the Board's Adjudication in *Apple Valley Racquet Club v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 74-150-C (issued October 23, 1974).

On the basis of the foregoing we enter the following:

FINDINGS OF FACT

1. Appellants are Pocono Heights Property Owners Association and Pocono Highland Lake Estates Association, both of which nonprofit corporations incorporated under the laws of Pennsylvania and located in Middle Smithfield Township, Monroe County, Pennsylvania.

2. Appellee is DER, that agency of the Commonwealth authorized to administer and enforce the Public Bathing Law, Act of June 23, 1931, P. L. 899, as amended, 35 P. S. §672 *et seq*.

3. Appellant, Pocono Heights Property Owners Association, Inc. is the owner of a lake in Middle Smithfield Township, Monroe County, Pennsylvania, which it acquired by deed from Arthur L. Yetter and Mary J. Yetter, his wife, dated June 16, 1967, and duly recorded on said date in the Office of the Recorder of Deeds of Monroe County, Stroudsburg, Pennsylvania.

4. The deed which conveyed the property to Appellant, Pocono Heights Property Owners Club, Inc., states:

> "The premises above described have been owned and are now being conveyed to the Grantee for the use and benefit of the lot owners and members of the club and this conveyance is made under and subject to the condition that the use and enjoyment shall be limited to the members of the club."

5. The by-laws of Appellant Pocono Heights Property Owners Club, Inc. specifically state that the use of the lake is limited solely to members in good standing of the club and their duly authorized guests. There are yearly dues levied upon members of the club and only those individuals who pay their dues regularly are members in good standing.

6. Access to the lake is completely controlled by Appellant Pocono Heights Property Owners Club, Inc. The only method by which an owner of property in the development which the club serves may make use of the lake is by joining the club and remaining a member thereof in good standing.

7. Appellant Pocono Heights Property Owners Club, Inc. limits access to the lake and the club facilities to members in good standing and their authorized guests. Each member of the club is issued six guest tags which allow that particular member to have a maximum of six guests at any one time utilizing the facilities of the club, including the lake.

8. There are approximately 240 members of the club. Approximately 100 members use the lake on a regular basis. Inasmuch as Pocono Heights Development is seasonal in nature, the lake is used primarily on weekends. The average weekend group on the beach at the lake is approximately 15 individuals. In addition there are approximately 60 guests utilizing the lake over the entire summer, except that on the weekend of the summer which the club conducts its annual picnic there are an additional 20 guests present, many of whom use the lake facilities.

9. There are no eating or changing facilities by the lake or any place on the property of the club. However, there are two outdoor toilet facilities by the beach.

10. Appellant Pocono Heights Property Owners Club, Inc. tests the water quality of the lake twice a year, the first test conducted prior to the commencement of the summer season and the second conducted while the summer season is in progress.

11. Appellant Pocono Heights Property Owners Club, Inc. is not in possession of a Public Bathing Place Permit from DER.

12. With regard to Appellant Pocono Heights Property Owners Club, Inc., DER personnel on November 29, 1973, inspected its bathing facilities and subsequently in writing notified the Appellant that it was maintaining a bathing place without a

permit. Thereafter on February 5, 1974, DER caused a second letter to be sent to Appellant setting forth what it considered to be continuing violations on the part of Appellants and requesting compliance with the Public Bathing Law, *supra*, and DER Rules and Regulations.

13. On July 30, 1974, DER through Lawrence A. Pawlush, Regional Water Quality Manager, issued the following order:

> "NOW, TO WIT, This 30th day of July, 1974, The Department of Environmental Resources ('Department') has found and determined that:
>
> "1. Pocono Heights Property Owners Association is operating a public bathing place at Pocono Heights Development in Middle Smithfield Township, Monroe County.
>
> "2. A bathing place permit has not been issued by the Department authorizing operation of said bathing place.
>
> "3. Operation of a public bathing place which has not been approved by a written permit issued by the Department is declared a public nuisance by Sections 5 and 12 of the Act of June 23, 1931, P. L. 899, as amended ('Public Bathing Law') and Section 193.11 of the Department's Rules and Regulations.
>
> "NOW, THEREFORE, pursuant to Section 1917-A of the Administrative Code of 1929, as amended, 71 P. S. Section 510-17 it is hereby Ordered that Pocono Heights Property Owners Association, Owner, Pocono Heights Development, Middle Smithfield Township, Monroe County, shall:
>
> "Immediately cease operation of said bathing place until such time as a bathing place permit is issued by the Department approving and authorizing operation of said bathing place."

14. Appellant Pocono Highland Estates Property Owners Association became the owner of a lake which is the subject matter of its appeal by deed from Pocono Highland Lake Estates, Inc. a Pennsylvania corporation, dated May 10, 1974, and recorded June 7, 1974, in the Office of the Recorder of Deeds, Monroe County, Pennsylvania, in Stroudsburg.

15. Membership in Pocono Highland Lake Estates Property Owners Association is limited to owners of property in a real estate development known as Pocono Highland Lake Estates, the territorial limits of which are set forth on a plot plan prepared by Hess Associates of Stroudsburg, Pennsylvania.

16. Appellant Pocono Highland Lake Estates Property Owners Association limits the use of its property, including the lake in question, to members of the Association in good standing and their guests. The owners of property in the real estate development known as Pocono Highland Lake Estates must be a member of the property owners association in order to use the lake.

17. There are approximately 230 property owners in the development known as Pocono Highland Lake Estates, but only 120 of these are members of the Appellant Association.

18. Appellant Pocono Highland Lake Estates Property Owners Association has no policy concerning the limitation of guest privileges.

19. The lake in question is spring-fed and only warm enough for swimming during the months of July and August. In area, the lake consists of 5 acres and is divided into a 2 acre lake connected to a larger 3 acre lake. The 3 acre lake has a small 50 foot wide beach upon which sand has been placed on both the exposed surface of the beach and along the bottom of the lake to a point where the water depth is somewhat greater than 6 feet. There is no lifeguard at the swimming area, but the swimming area is enclosed by a roped off area.

20. There are no eating facilities nor changing facilities in the lake area nor is there any type of commercial enterprise which furnishes food or drink to the individuals utilizing the beach. There is one toilet facility near the beach.

21. Appellant Pocono Highland Lake Estates Property Owners Association does not conduct a regular program of water testing.

22. During the months of July and August, when the lake is warm enough for swimming, there are an average of three people per weekday using the lake. On weekends, the average is approximately 12 people per day.

23. Pocono Highland Lake Estates Property Owners Association is not in possession of a Public Bathing Place Permit from DER.

24. On December 5, 1974, DER through Lawrence A. Pawlush, Regional Water Quality Manager, issued to Appellant Pocono Highland Lake Estates Property Owners Association the following order:

> "NOW, TO WIT, This 5th day of December, 1974, The Department of Environmental Resources ('Department') has found and determined that:
>
> "1. Pocono Highland Lake Estates Property Owners Association is operating a public bathing place at Pocono Highland Lake Estates in Price Township, Monroe County.
>
> "2. A bathing place permit has not been issued by the Department authorizing operation of said bathing place.
>
> "3. Operation of a public bathing place which has not been approved by a written permit issued by the Department is declared a public nuisance by Sections 5 and 12 of the Act of June 23, 1931, P. L. 899, as amended, ('Public Bathing Law') and Section 193.11 of the Department's Rules and Regulations.

"Furthermore, Section 5 (a) - Permits of the Public Bathing Law states: 'It shall be unlawful for any person or persons, club, firm, corporation, partnership, institution, association, municipality or county to construct, add to or modify, or to operate, or continue to operate, any public bath house, bathing, swimming place or swimming pool, natatorium, or any structure intended to be used for bathing or swimming purposes, indoors or outdoors, without having first obtained a permit so to do or being in possession of an unrevoked permit.'

"NOW, THEREFORE, pursuant to Section 1917-A of the Administrative Code of 1929, as amended, 71 P. S. Section 510-17 it is hereby Ordered that Pocono Highland Lake Estates Property Owners Association, Owner, Pocono Highland Lake Estates, Price Township, Monroe County, shall:

"Immediately cease operation of said bathing place until such time as a bathing place permit is issued by the Department approving and authorizing operation of said bathing place."

25. Both Appellants filed timely appeals from the aforementioned orders of DER.

DISCUSSION

In each of these appeals there is the common element of a bathing place being provided for the accomodation of lot owners of a particular development in the Pocono Mountains. In the case of Appellant Pocono Heights Property Owners Club, Inc., all the members of said corporation must own at least one lot in an area in Middle Smithfield Township known as Pocono Heights. The membership of Pocono Highland Lake Estates Property Owners Association is restricted to lot owners of a development in Middle Smithfield Township, Monroe County, Pennsylvania, known as Pocono Highland Lake Estates. Membership in each association is the only means by which a property owner in the respective developments can gain access to the lake area of each development for the reason that the ownership of the lakes in question and the surrounding land is in the Appellants. Individual lot owners in each development have no right of access to the lake area except as members of one of the Appellants.

The facts of each appeal are substantially similar. However, some noticeable differences exist. In the Pocono Heights appeal the deed of conveyance from the developers of Pocono Heights to the Club contain a deed restriction to the effect that the property to be conveyed is for the sole benefit of lot owners of Pocono Heights. There is no similar restriction or condition in the deed of transfer from Pocono Highland Lake Estates, Inc. to Pocono Highland Lake Estates Property Owners Association. Moreover in Pocono Heights, each member of the club in good standing is limited in guest privileges to six persons at any one point in time. There is no such limitation

with respect to guest privileges of members of Pocono Highland Lake Estates Property Owners Association. There is greater utilization of the Pocono Heights Lake Area by its membership and guests than there is of the Pocono Highlands Lake area. This may be due to the fact that the Pocono Heights area has been in existence for a longer period of time and, consequently, is more built-up than is Pocono Highland Lake Estates. These differences, however, are not legally significant for the purposes of this Adjudication.

Appellee moved for summary judgment in this matter, but we do not think that a motion for summary judgment is proper where the matter has been submitted for adjudication on the basis of stipulated facts. See Pa. R. C. P. 1035.

During the pendency of this matter Commonwealth Court rendered its decision in *Apple Valley Racquet Club v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 1517 C. D. 1974 (issued July 17, 1975) upholding our Adjudication in which we affirmed a DER order requiring Apple Valley Racquet Club, a non-profit swim club, to cease operation of its pool, drain the same, and not to reopen until it is in possession of a valid bathing place permit issued by DER pursuant to the provisions of the Public Bathing Law, *supra*. In upholding the Board, the court, per Judge Mencer, said:

> "Appellant would have this Court take the position that the Legislature intended to apply these requirements to membership clubs only when the swimming pool is made available to the public on an unrestricted basis, come one, come all, save only that a fee might be charged. Such a position might have been tenable and indeed was taken by the Common Pleas Court and a divided Superior Court with regard to public eating and drinking facilities in *Commonwealth, Human Relations Commission v. Loyal Order of Moose, Lodge No. 107*, 220 Pa. Superior Ct. 356, 286 A.2d 374 (1971), but was expressly discarded by a unanimous Supreme Court of Pennsylvania, in 448 Pa. 451, 294 A.2d 594 (1972). In that case, the Pennsylvania Supreme Court ruled that a membership club, while 'private' when it restricted its facilities to its members only, became 'public' when any member of the public could be admitted on the invitation of any member. It is as simple as that. It is clear from the stipulation of facts, as well as the findings of fact, that there are 45 shareholders or members of appellant, a nonprofit corporation. Each shareholder or member is entitled to sponsor as many guests as he chooses, restricted only to paying a 50 cents admission charge.
>
> "Indeed, *Lodge No. 107, supra*, would seem to be a much stronger case than the instant one for ruling that the Act did not apply, since the Act there involved has an express exclusionary clause applying to fraternal corporations or associations. Section 5, the Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, *as amended*, 43 P. S. §955 (Supp. 1974-1975).

"Appellant argues that it is not a membership type of club open to any member of the public to join upon payment of dues, but rather is a group of co-owners, familes and guests who are the 'sole users' of the pool. We do not understand this argument, for the stipulation of facts states that appellant is a nonprofit corporation organized and existing under the rules of the Commonwealth, and that the corporation owns the pool 'for the exclusive use and enjoyment by the shareholders and guests of shareholders'. The fact that the member also has a share of stock which he may transfer under certain circumstances would not seem to have any bearing on whether the unrestricted right to sponsor guests at the pool makes the pool a public facility." (Footnote omitted)

We are of the opinion that on the substantive issues in these appeals the decision of the court in *Apple Valley* is dispositive. Hence, we have no difficulty under the rationale of *Apple Valley* in holding the two lakes which are the subject matter of these appeals to be subject to the permit requirements of the Public Bathing Law, *supra*.

We have examined the jurisdictional issue and are of the opinion that the affirmance of these orders by us would constitute Board adjudications. The term "adjudication" is defined in 71 P. S. §17.2[1] as follows:

"'Adjudication' means any final order, decree, decision determination or ruling by an agency affecting personal or property rights, privileges, immunities or obligations of any or all of the parties to the proceeding in which the adjudication is made, but shall not mean any final order, decree, decision, determination or ruling based upon a proceeding before a court, or which involves the seizure or forfeiture of property, or which involves paroles, pardons or releases from mental institutions."

Because of the provisions of 71 P. S. §510-17[2] these orders subject Appellant to the possibility of additional liability for failure to comply with the provisions of the orders in question. This provision authorizes DER to enter Appellants' premises for the purpose of taking abatement action and charge the costs thereof to Appellants, if they fail to comply with the orders. Thus, even though the Public Bathing Law, *supra*, does not contain any provision authorizing the issuance of orders or their enforcement, §1917-A of the Administrative Code of 1929, *supra*, does subject Appellants to the possibility of additional liability if the orders are upheld. In such circumstances our sustaining the DER orders would clearly "affect" Appellants' rights. Hence, our determination would constitute

1. Section 2 of the Administrative Agency Law, Act of June 4, 1945, P. L. 1388, as amended 71 P. S. §1710.1 *et seq*.

2. Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, as amended 71 P. S. §51 *et seq*.

an adjudication as defined in the Administrative Agency Law, *supra*.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of these proceedings.

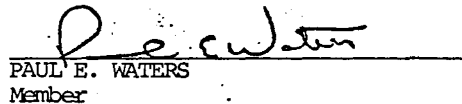
2. Inasmuch as Appellants permit their membership to bring guests to their facilities and utilize such facilities including the lakes as a swimming place, Appellants' lakes constitute public bathing places as defined in the Public Bathing Law, *supra*.

3. Section 1917-A of the Administrative Code of 1929, *supra*, authorizes DER to have issued the orders to Appellants which are the subject matter of these appeals.

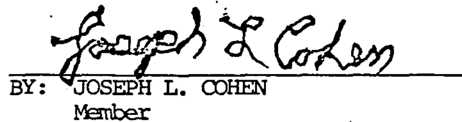
O R D E R

AND NOW, this 12th day of August, 1975, the order of July 30, 1974, issued by the Pennsylvania Department of Environmental Resources to Pocono Heights Property Owners Club, Inc. is hereby sustained and the appeal taken from said order is hereby dismissed; further that the order of December 5, 1974, issued by the Pennsylvania Department of Environmental Resources to Pocono Highland Lake Estates Property Owners Association is hereby sustained and the appeal from said order is hereby dismissed.

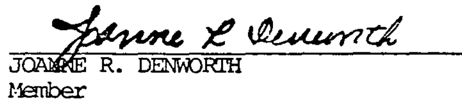
ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Member



BY: JOSEPH L. COHEN
Member



JOANNE R. DENWORTH
Member

DATED: August 12, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

HALLAM BOROUGH

Docket No. 75-016-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

BY: JOANNE R. DENWORTH, Member , August 15, 1975

This case arises on an appeal by Hallam Borough from the grant of a permit to Arthur C. Rhineer for a demolition debris disposal on a site uphill from the springs that are the source of the Borough's water supply system.

FINDINGS OF FACT

1. Appellant, Hallam Borough, is the owner of a water works system that serves the Borough and customers in Hellam Township.

2. Appellee is the Department of Environmental Resources, the agency of the Commonwealth of Pennsylvania authorized to administer the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P.L. 788, as amended, 35 P.S. §6001, *et seq.*

3. Intervenor-Permittee is Arthur C. Rhineer, Box 126, Willow Street, Pennsylvania.

4. On or about November 1, 1974, the Intervenor filed with the Department of Environmental Resources an application for Permit for Solid Waste Disposal on a site in Hellam Township, York County, Pennsylvania.

5. On December 23, 1975, a Permit No. 100995 was issued in response to Intervenor's application.

6. The current water sources for the Borough's water supply are nine springs located north of the Borough from which water is piped by gravity flow to a reservoir. The quality of water from these springs is exceptionally high, though somewhat acid.

7. The proposed demolition debris disposal site is located within the watershed that feeds the Borough's springs. The site is uphill at a distance of 700 feet from the nearest spring.

8. The topography of the watershed and direction of groundwater flow are such that if the groundwater became polluted from the disposal site, the Borough's springs would be likely to be polluted.

9. By policy rather than regulation, the Department distinguishes between solid waste disposal and demolition debris disposal facilities on the basis that the materials that will be placed in a demolition debris disposal site are inert building materials--namely bricks, plaster, cement, glass and wood--and, therefore, the requirements for disposal of such debris need not be as stringent as those for other kinds of refuse.

10. Since the 1972 flood, the Department has been approving demolition debris disposal sites informally and has not required permits for such sites. The Department changed its policy in the summer of 1974. The Intervenor was the first applicant for a demolition debris disposal site, who was required to comply with the Regulations applicable to the permitting of solid waste disposal facilities.

11. Before the Department's policy on demolition debris disposal sites was changed, the Intervenor was given an informal approval by the Department. At that time, the Department was not aware that there were springs for a public water supply located near the disposal site. The Intervenor was later told that he would have to complete the modules and investigation required for a solid waste disposal site.

12. Extensive inspection and investigation of the proposed site was done by the Intervenor's engineer and the Department's soil scientist and regional geologist. At the time of their review they were aware of the approximate location of the springs for the Borough's water supply.

13. The regional water table was determined by inspection of the backhoe pits dug on the site and a neighboring well (where the water table was approximately 54 feet) to be below 10 feet. However, there was evidence of a perched seasonal water table in several of the pits in the proposed areas

of the trenches, which showed mottling[1] in the upper zones. Below these zones there was a deep accumulation of soil that exhibited very good drainage characteristics. No water or bedrock was observed in the pits, several of which were ten or eleven feet deep.

14. In issuing the Permit, the Department of Environmental Resources attached conditions to the use and operation of the proposed facility, including *inter alia:*

a. Segregation of the debris in question - "all garbage, rubbish, furniture and applicances, etc. are to be removed from the demolition waste and transported to a permitted sanitary landfill."

b. Inspection and certification by a Registered Professional Engineer with regard to site development prior to operation;

c. The placement of lime-rich materials in the bottom of the trench area and, upon completion the placement of lime-rich materials on top of the deposited waste prior to final cover, including the use of finely crushed limestone, if necessary.

d. Creation of diversion ditches to assure that no surface water runs into the landfill.

15. It is not known how successful segregation of the debris can be to assure that metals and other refuse are not placed in the disposal site since segregation of debris has never before been required at other demolition debris disposal sites.

16. If the site is operated according to conditions in the permit, no pollutional hazard will result to the Borough's public water supply.

1. "Mottling is, in simplest terms, a variation in the coloring of soils. When that variation shows a concentration of redder colors in some spots, and grayer colors in others–a variation in "chroma", in particular–it will almost invariably be due to segregation of iron compounds from other components in the soil, and especially segregation of reduced (ferrous) iron compounds from oxidized (ferric) iron compounds. Iron compounds in the soil in the presence of air for any extended period of time will oxidize to the ferric state; ferric compounds are generally red. If the water table rises to a given level for prolonged periods of time, say eighteen inches, . . . then the relative absence of oxygen produces reducing conditions, and the ferric compounds are changed to ferrous compounds. Ferrous compounds are generally grayer–of a lower chroma. The ferrous compounds tend to migrate, and collect in nodules; when the water table drops many of these nodules will be exposed to air, and oxidize to ferric iron. Nodules that for some reason the air did not reach, and areas of the soil from which much of the iron had earlier migrated, will appear gray." *Fabiano v. Commonwealth*, EHB Docket No. 73-051-B (issued August 1, 1973).

DISCUSSION

While there is a threshold preposterousness to the grant of a permit to place a landfill uphill from a public water supply source, we cannot say after careful review of the evidence that the Department abused its discretion or arbitrarily or unreasonably applied the law in granting this permit. See *F. & T. Construction Co. V. Department of Environmental Resources*, 6 Pa. Commonwealth Ct. 59, 293 A.2d 138 (1972); *Sierra Club v. Sanitary Water Board*, 3 Pa. Commonwealth Ct. 110, 281 A.2d 256 (1971). The Appellant's primary concern, expressed by its expert witness, is that demolition wastes cannot be successfully segregated from other debris, and that wastes containing garbage and refuse that have been left in abandoned houses will be dumped together with wood into the landfill where such material will come in contact with water, which will cause the wood and other putrescible material to decompose creating an acid condition, which would then cause any metals that might be present to move into a leachate that would pollute the groundwater.

Appellant's concern that the material would be in frequent contact with water is not supported by the evidence. It is true that Intervenor did not literally comply with all the requirements of the regulations since it did not drill any borings or wells into the groundwater as required by 25 Pa. Code §75.81. The water table depth was approximately determined by calculation of the slope from the well at the northwest corner of the property to the Borough's springs to be around 23 feet at the southern portion of the disposal site. Apparently, because the Department had decided to limit the capacity of the landfill to one lift and because the site would contain only demolition debris, it did not require a boring or well to determine the exact groundwater table level. The evidence was sufficient to support the conclusion that the groundwater table would be more than six feet below the bottom of the only lift in accordance with 25 Pa. Code §75.84 (c). Although there was an indication of a perched water table in several areas of the site, the excavating of this area in order to create the trenches and the construction of the diversion ditches to divert the surface water from the site as required in the design of the facility, would largely eradicate that condition. There may be a possibility of some water around the edges of trenches in this area at wet times of the year, but that would appear to be a minimal hazard. The evidence was quite substantial that if the site were operated in accordance with the conditions of the permit, there would be no danger of pollution to

the water of the Borough.[2]

The problem is with that "if." We share the Borough 's concern for the protection of its water supply, as does the Department. The Intervenor would like us to assume that the operation will be in accordance with the conditions of the permit, and we suppose that that is his intent. However, we were impressed with the probable difficulty of separating the demolition debris from other refuse and for that reason we will require that the Intervenor install a monitoring well. This would assure that if the operating conditions are not met and putrescible debris does come in contact with water at various times of the year, any danger to the Borough's water supply would be detected, and immediate corrective action could be required. The details and location of the well shall be approved by the Department in accordance with 25 Pa. Code §75.81 (1) (iv). We will also add as a condition of the permit that no industrial demolition debris be placed in the site, since such debris would be more likely to contain chemicals and other hazardous waste than debris from residential and commercial buildings. Although we recognize that this Intervenor has borne the burden of what may be extra precautions, these precautions are required by the special circumstance of locating a disposal site, even of demolition wastes, next to the source of a public water supply system. The regulations require the identification of any public water supplies that are within a quarter of a mile of any proposed disposal site, 25 Pa. Code §75.72 (a) (2), and we think this is intended to afford extra protection to public water supplies.

Appellants argument that the Intervenor's original proposal was for 90 demolition houses and should be limited to that, has no basis in the law or regulations. The permit was granted for a term of five years and for a certain area. Determination has been made that the site is appropriate for an amount of debris, which may or may not take five years to accumulate. Although Intervenor initially intended to use the site for a project he was then bidding on, that project has long since been completed and he now wishes to use the site for other jobs. There was testimony to indicate the Department's policy now is to approve these demolition sites for long term use, since they are now requiring extensive review and investigation in order to obtain a permit.

As to the Appellant's contention that the Intervenor should be required to use the York County Landfill as the municipalities of the County have been

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2. The Department's witness distinguished between "pollution" and "degradation" of the groundwater . He said that some "degradation" of the groundwater might result in that the amount of sulfates and dissolved solids in the groundwater might increase. However, these would not "pollute" the water or make it in any sense undrinkable. Much as we would like to agree with the Borough that not even any degradation of their water should occur, we must agree with the Department that the law does not require such purity.

ordered to do by the Department, we must agree that it seems an anomaly to insist on municipalities using a regional landfill while permitting an individual to develop a private landfill simply to make his business more profitable. The problem is that the Pennsylvania Solid Waste Management Act, *supra*, gives the Department authority to require official solid waste management plans from municipalities and to see that such plans are coordinated on a regional basis, but it does not preclude the opening of private landfills so long as the technical requirements for construction and operation of a landfill are met. As we read the Act, the only authority the Department has over private landfills is through the permitting process. If technical requirements for a permit are met, the Department cannot deny the permit because it considers the location of the landfill to be an undesirable land use, or because another landfill exists where the applicant could dump his debris. See *Community College of Delaware County and Community College of Delaware County Authority, Appellants and Township of Marple, Intervening Appellant v. Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellee,* 654 C. D. 1974, (July 18, 1975) and *Central Delaware County Authority, Appellant v. Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellees,* 743 C. D. 1974 (July 18, 1975). Unless and until the Legislature and/or local municipalities act to require comprehensive land use planning this kind of anomaly will persist.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this appeal.

2. The Department did not abuse its discretion or apply the law in an arbitrary and capricious manner in granting the permit that is the subject of this appeal.

3. The location of a landfill for demolition debris within one-quarter mile of springs that are the source of a public water system requires that extra precautions be taken to protect the public water supply system.

O R D E R

AND NOW, this 15th day of August, 1975, this matter is remanded to the Department with instructions that the permit be issued with the further conditions that a monitoring well be placed on the site to the satisfaction of the Department and that no demolition debris from industrial establishments be placed in the landfill.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: August 15, 1975

Asc
Adj.
File

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

NEW ENTERPRISE STONE AND LIME COMPANY, INC.

Docket No. 73-157-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By The Board, August 15, 1975

This case is an appeal from an order of the Department of Environmental Resources (hereinafter Department) dated May 9, 1973, denying an application by New Enterprise Stone and Lime Company, Inc. (hereinafter New Enterprise) for a surface mine permit for an existing limestone quarry near the village of Bakersville in Jefferson Township, Somerset County (hereinafter sometimes referred to as the Bakersville Quarry). The permit application was submitted pursuant to the Act of May 31, 1945, P.L. 1198, as amended; 52 P.S. 1396.1 *et seq*, (the Surface Mining Conservation and Reclamation Act) and in accordance with sub-chapter C of 25 Pa. Code, Chapter 77, "Mining", which sub-chapter was entitled "Interim Requirements for Surface Mining". This application was reviewed by the Department and, after a discussion with representatives of the Appellant at a meeting held on February 6, 1973, Appellant submitted a supplement to the permit application dated March 1, 1973. After review of the original application and the March 1 submission, the Department issued its letter of May 6, 1973, denying the permit. The reason for the denial was that the operation was, in the view of the Department, causing siltation to be deposited in the groundwater underneath the quarry, which siltation appeared at a spring (hereinafter sometimes referred to as the Hatchery Spring) located some 1,400 feet from the quarry area and at an elevation lower than the floor of the Appellant's quarry.

On May 24, 1974, Appellant submitted its application for a permanent permit, application No. 4074SM12. This permit application called for, among other things, the construction of a settlement basin to treat the water in the

spring to remove settleable solids and have the discharge thereby comply with the applicable regulations of the Department. This was submitted as a proposed settlement of the matter and was neither intended as, nor taken by the Board as, an admission that the quarry was in fact causing the siltation problem in question. This application was denied by the Department pursuant to a letter dated July 11, 1974. The reasons for the denial, as given in the letter from counsel, quoted *infra*, and as elaborated on in the testimony, were that the application did not show that the discharge would comply with what the Department considered to be applicable water quality criteria. Both the original permit application and the second, permanent permit application, are at issue in this appeal.

The Bakersville Quarry was acquired by New Enterprise in 1953 through purchase of another company known as Somerset Limestone Company, Inc., which had owned and operated the quarry from around 1930.

The operation of the Bakersville Quarry consists of removal of overburden so as to expose a layer of Loyalhanna Limestone, which is then mined and processed through a stone crusher system thereby reducing the stone to various sizes useable for the construction and maintenance of highways. The finished material is stockpiled at the quarry until it is hauled away by trucks.

On July 12, 1968, the Commonwealth of Pennsylvania, Department of Health, pursuant to application, issued Industrial Waste Permit No. 4681002 to Somerset Limestone Company, Inc., which was directed to the removal of process dust and other suspended matter from the surface runoff at the quarry, pursuant to the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.1 *et seq*. Pursuant to the terms and conditions of that Industrial Waste Permit, New Enterprise constructed and thereafter employed sedimentation ponds on the quarry property.

Pursuant to the requirements of the Surface Mining Conservation and Reclamation Act, *supra*, as extensively amended in 1971 to apply to the surface mining of all minerals, New Enterprise secured a license to operate its various mining facilities and also filed, *inter alia*, an application for an interim permit on September 12, 1972, directed to the operation of the Bakersville Quarry. The application was for an interim permit inasmuch as permanent permit applications were not yet available for use.

By letter dated May 9, 1973, as already noted, application for permit was denied. On May 17, 1973, New Enterprise filed an appeal before the Environmental Hearing Board (hereinafter Board) from the May 9, 1973, letter from

DER which denied the permit application and directed termination of all quarry activities.

Also on May 17, 1973, New Enterprise filed a Petition for Supersedeas before the Board requesting allowance to resume and continue operations at the quarry pending outcome and final determination of the appeal. By order of the Board, the Supersedeas was granted through June 15, 1973.

On June 4, 1973, a view of the quarry was made and on June 5, 1973, a hearing was held before Robert Broughton, then Chairman of the Board, now hearing examiner. As a result of the discussions between the parties at the hearing, both on and off the record, the Supersedeas was extended through June 26, 1973, and the hearing was continued to a date and time thereafter to be determined.

Subsequently the Board, upon stipulation of the parties, extended the Supersedeas on June 25, 1973, July 27, 1973, August 30, 1973, October 26, 1973, November 28, 1973, January 15, 1974 and April 3, 1974. All of the extensions of Supersedeas contemplated probable settlement, and were subject to the conditions as decided at the June 5, 1973, hearing which *inter alia* encompassed the provisions that New Enterprise would refrain from additional overburden removal at the Quarry, except for two occasions noted below.

On approximately December 4, 1973, during the Supersedeas period, New Enterprise presented to the Department a proposal in the nature of an amendment to its original permit application. The proposal provided for the construction of an enclosed sediment basin to be located on land adjacent to the quarry property.

At a meeting held on May 14, 1974, between Robert Broughton and the parties, New Enterprise was verbally informed by the Department that its permit application as amended was still unacceptable to the Department. By order of the Board a continuation of the hearings was scheduled to commence on June 3, 1974.

On May 24, 1974, New Enterprise filed an application for permit directed to the operation at the quarry. The second application was for a permit of a permanent nature since permanent permit applications had since become available from the Department, and also proposed a sedimentation basin.

At a hearing held on June 3, 1974, the Department once again verbally denied New Enterprise's permit application and the hearing continued the rest of that day as well as the following day, June 4, 1974. Further hearings were held on July 15, 1974, July 16, 1974, July 25, 1974, July 26, 1974, and August 1, 1974, with the hearings concluding that day with another view of the quarry site.

During the period of time since the last date of hearing, New Enterprise had petitioned for permission from the Board to conduct overburden removal at the quarry, limited to a described area, which was granted by the Board by order of November 18, 1974. The Department has during the same period of time, petitioned the Board for an Order to Cease Work at the quarry. New Enterprise has subsequently petitioned the Board for an allowance of additional operation. A hearing was held on these petitions on April 3, 1975. By an Order dated June 23, 1975, the Board denied all these Petitions.

Hearing Examiner Robert Broughton submitted a proposed Adjudication that is being adopted by the Board with a few modifications.

FINDINGS OF FACT

1. Appellant is New Enterprise Stone & Lime Company, Inc., a corporation which owns and operates a quarry in Jefferson Township, Somerset County, known as the Bakersville Quarry. The quarry is engaged in the production of limestone.

2. On September 20, 1972, the Department received New Enterprise's interim permit application submitted pursuant to sub-chapter C of 25 Pa. Code, Section 77.81, *et seq.*

3. Prior to and following the date of this permit application, the Department's geologist made visits to the site to assess the geology of the area and how it related to the flow and quality of ground water in the area, and submitted a report of his investigations to the Bureau of Surface Mine Reclamation.

4. The geology in the area of the Bakersville Quarry consists of three sedimentary bedrock formations: (a) the Pocono Sandstone (lowermost unit), (b) Loyalhanna Formation--a formation having rock type characteristics somewhere between a very sandy limestone and a calcereous sandstone, which unit is approximately 50 to 60 feet thick, and (c) the Mauch Chunk Formation--predominately a red shale with some interbedded siltstone and sandstone.

5. The bedding planes of these formations in the quarry area dip approximately 2.3 degrees to the southeast, in the direction of the Laurel Hills Trout Hatchery Spring, which is at a lower elevation than the quarry floor.

6. Directly to the east of the toe of the ridge on which the quarry is located is the Laurel Hills Trout Hatchery, owned and operated by Messrs. Clair Bassett and Fred Vallango. It consists of 21 cold water fish runs or raceways (actually rectangular concrete troughs), and a hatch house. The upper portion, or series of fish runs, of this hatchery is watered by a spring that is directly between the hatchery and the quarry, referred to herein as the "Hatchery Spring".

7. The rock in the area is highly fractured or jointed, with the major

master joint set being a nearly vertical set of fractures which trends east-west. (A "master joint set" is a set of joints, or fractures, that crosses all three bedrock formations, i.e. the Mauch Chunk shale, the Loyalhanna, and the Pocono Formations))

8. The slope of the groundwater table contour in the area of the Quarry appears from the geological evidence to be due east (i.e., in the direction of the Hatchery Spring).

9. The east-west trending master joint set is one major control of groundwater moving within the Loyalhanna and Pocono Formations, with other controls being other, less major master joint sets in the area. This is confirmed by an aerial photographic investigation which revealed tonal patterns which trended in the general east, east-west direction through the quarry area, with the principal secondary patterns being south-southwest to north-northeast. This tonal pattern indicates the subsurface drainage pattern and is a recognized geologic technique to help determine groundwater flow.

10. Due to the bedrock formations at the Bakersville Quarry area, any pollutant that can enter the vertical fractures or any unconsolidated material within those fractures that could be shaken loose and get into the groundwater system, could affect the hatchery spring.

11. The primary pollutant at this spring is silt.

12. From the above geological evidence, it would appear that other potential groundwater pollution sources in the area, i.e., Hidden Valley Farm and the area to the north, along Route 31, would not tend to affect the Laurel Hill Fish Hatchery Spring. This is due in part to the fact (applicable to the Hidden Valley Farm pond) that a perennial stream would tend to act as a groundwater divide, preventing groundwater currents on one side of the stream from affecting groundwater on the other side of the stream.

13. The geologic evidence indicates that any water flowing from the area around the Hidden Valley impoundment would probably discharge to the perennial stream rather than to groundwater which affects the Laurel Hill Trout Hatchery Spring. This evidence is not conclusive, however.

14. The tracer studies conducted by Department's geologist, Mr. Peffer, did not yield positive results, in that the increases in the tracer medium discovered in the spring were too small to be statistically significant. Weather conditions prevalent at the time of the second study, it was believed by the Department, hampered the results of that study. Geologists for New Enterprise did

not accept the inconclusiveness of these tracer studies, but instead regarded them as conclusive evidence that New Enterprise was not causing pollution of the hatchery spring.

15. It is unlikely that silt from the uppermost of the two settling lagoons, which lagoon was excavated to bedrock, and has no artificial liner, could penetrate the bedrock and from there seep into the water table and ultimately to the Laurel Hill Trout Hatchery Spring. This pond, from the experience of employees at New Enterprise, consistently holds water.

16. A pond constructed at the Hidden Valley Farm area, to the south of the Quarry, and already referred to above, has consistently not held water. The water in the pond is frequently silt laden. Geologists for New Enterprise have been led to conclude that the siltation in the spring probably comes from the Hidden Valley area, or from Route 31, to the north of the Quarry.

17. Department Exhibit No. 6 is in part a rose diagram depicting approximately 100 joint attitude measurements in the quarry, and 28 joint attitude measurements at an outcrop of the Pocono Sandstone across from the Laurel Hill Fish Hatchery along Route 31, which diagram indicates as follows: the east-west joint set (the major master joint set) represents approximately 34 percent of the total number of measurements in the Quarry area. The next most frequent joint set represents approximately 14 percent of the measurements, it being a set which trends north 42 or 43 degrees west. The third most frequent joint set represented approximately 6 percent of the measurements which tended north 20 degrees east. This diagram and the measurements taken by the geologist, from which the chart was drawn, are consistent with the belief of the Department's Geologist concerning the movement of groundwater and the likelihood that work in the Quarry affects the Hatchery Spring by causing siltation to appear in the spring. The rose diagram and measurements are also consistent with the beliefs of the geologists for New Enterprise.

18. It is reasonable to conclude that the flow of the regional groundwater table under the Bakersville Quarry area is from the west to the east, i.e., from the Quarry area toward the Hatchery Spring.

19. This conclusion in turn leads us to find that it is reasonable for the Department to conclude that removal of overburden in the area of the quarry, based on the geologic evidence available, is likely to severely aggravate the siltation problem appearing in the Hatchery Spring due to the fact that fractures would be exposed and there would be no blanket of soil to act as a filter to prevent

the east access of contaminants into the fractures, which fractures are the primary conduits of groundwaters.

20. On December 5, 1973, Appellant submitted to the Department a proposal for a settlement basin to treat the water coming from the Laurel Hill Trout Hatchery Spring in order to provide removal of the siltation allegedly caused by quarry operation. This submittal included a number of samples depicted on a graph showing the turbidity of water taken from the spring and from the "pipe" (a water outlet in one of the raceways) and showed the relative turbidity of these samples after certain periods of settling time (Department Exhibits No. 7 and 8).

21. The recommendation from the Report of the National Technical Advisory Committee to the Secretary of the Interior, *Water Quality Criteria*, published by the Federal Water Pollution Control Administration in 1968, (commonly known as the "Green Book") as well as of the Department's Aquatic Biologist, Mr. Karl Sheaffer, were that the turbidity in the receiving water due to a discharge should not exceed 10 J.T.U. (Jackson Turbidity Units) in cold water streams.

22. Current literature, including that cited in the Green Book in support of its recommendation, tends to suggest a somewhat higher value. Of three articles cited in the Green Book (New Enterprise Exhibits 19-A, 19-B, and 19-C), and testified to by Dr. Edwin L. Cooper, one showed that trout stopped feeding at 70 J.T.U. (trout feed by sight, not smell or sound). The other two showed, respectively, no harm to trout at suspended solids levels of 60 milligrams per liter (mg/l) and some damage at 90 mg/l. (No very good correlation can be made between mg/l of suspended solids and turbidity levels in J.T.U.)

23. The samples taken from the spring and the pipe (Department Exhibit No. 8) show by the settling curves indicated on the exhibit that after three to five hours of retention time the curves level off and the degree or concentration of contaminents remaining in the water remains fairly constant thereafter. One sample showed a tapering off at approximately 20 J.T.U.'s, another sample showed leveling off at 40 J.T.U.'s, and a third showed a leveling off at about 75 J.T.U.'s.

24. There are possibilities for additional treatment (e.g., addition of polymers) other than those provided in the settlement basin proposal as part of permit application No. 4074SM12 (Department Exhibit No. 28), which methods were not included by Appellant as part of the proposal.

25. The Department's denial of the proposal for the settlement basin to treat the water from the Laurel Hill Trout Hatchery Spring was based in part on its conclusion that the data submitted did not demonstrate that the treatment facility

would be able to contain the level of turbidity below any given figure.

26. Despite considerable testimony, there was no significant correlation between blasting at the quarry site, (whether or not in conjunction with heavy rainfall), and siltation at the Hatchery Spring.

27. A Project 70 operation involving the development of trial facilities for Laurel Ridge State Park, (suggested at one time as source of siltation at the Hatchery Spring), being on top the mountain into which the quarry is cut, is unlikely to affect or cause siltation to occur in the spring in question because of the fact that it is well up into the Mauch Chunk Formation and there is a perched water zone within that area.

28. During the nine and one-half years of ownership by Mr. Bassett of the Laurel Hills Trout Hatchery, the problem of siltation has been worse during those periods of stripping of overburden at the quarry area.

29. The logs of Mr. Bassett and Mr. Vallango indicate that in a one-year period in 1972/73, out of 36 times that this spring was recorded as experiencing a condition of siltation, the following circumstances prevailed:

A. Twelve times there was no rain (i.e., no other reason for the spring to get dirty) and the spring got from dirty to muddy within six to eight hours following a blast at the quarry.

B. On five other days when the spring got muddy six to eight hours following a blast, the conditions could have been affected also by rain on those days.

C. Fourteen days no blast was heard, however, there was no rain and the spring got dirty to muddy.

30. Other log-records also indicate that there is not a significant correlation between blasting at the quarry and siltation at the spring. This is also what one would expect from the blast reports from the quarry, which in general show very low levels of ground vibration.

31. The correlation between periods of stripping of Mauch Chunk over-burden and siltation at the Hatchery Spring, noted above, is borne out by two periods of such stripping in January-February, 1974, and starting in December 1974 to the present. A close look at the dates and times of the siltation in the last time period leave one somewhat in doubt about that correlation however. For example, in this period, heavy siltation started on December 16, 1974, whereas actual clearing started on December 30, 1974. Timber removal started December 12, 1974, but soil would have filtered any silt at that time. On the other hand, mud would have been tracked onto

Route 31 by trucks in the course of taking out trees. The sequence of events may support New Enterprise's belief that silt in the spring may come from Route 31, as much as the Department's belief that it comes from the quarry.

32. There was surprisingly little correlation between rainfall--even averaged out over significant periods of time--and water flow at the Hatchery Spring. That flow is quite variable, and can change by a factor of 3 or 4 in a day, and back again, with no clear correlation to anything that was brought out in the record.

33. Mr. Bassett has observed correlations between the size and growth of fish and the siltation in the spring; growth diminishes and weight diminishes during periods when the spring is cloudy. (Cloudy in this context means when the water is so turbid or cloudy that the bottom of the raceways cannot be seen).

34. The hatchery experienced fish kills that were caused by siltation of the water on November 10, 1972, and January 20, 1974.

35. The siltation that caused the fish kill on January 20, 1974, followed stripping of the Mauch Chunk overburden from the southwest corner of the highwall and was of a nature that was quite red in color as compared to other mud samples taken or observed by Mr. Bassett when no overburden was being stripped. The color of the Mauch Chunk shale is a reddish color.[1]

36. During periods when the quarry was closed down the spring had little or no heavy siltation.

37. New Enterprise Exhibit No. 19-C (an article by Olson, Chase and Hanson) makes no findings or conclusions as to the effect of turbidity on trout feeding in a hatchery when the turbidity is below the level of 70 J.T.U.

38. Neither the proposal for the settlement basin, nor any of the studies or articles submitted to the Department to supplement that proposal, nor the testimony of Appellant's expert witness, Dr. Edwin L. Cooper, made any distinction between the hardness of the suspended solids matter shown in the various studies and papers presented, as opposed to the hardness of the likely solids in the New Enterprise Trout Hatchery and the Laurel Hill Trout Hatchery Spring.

39. No information was presented as to whether the effect, if any, of hardness of particles on the physical well being of trout was or was not significant.

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1. A sample of heavily silted water, also showing a reddish color similar to Mauch Chunk, was submitted in evidence at the April 3, 1975, hearing. It subsequently fell on the floor, and being in a glass jar, is no longer available.

40. In some situations smaller, younger fish can be killed or affected more easily than older fish by contaminants in the water. Smaller fish are likely to be more sensitive to turbidity and suspended solids contamination than are larger fish.

41. Fish subjected to concentrations of suspended solids might have a tendency to contact other diseases more easily and aggravate their effects with the result that fish exposed to such relatively higher rates of suspended solids might tend to have a higher mortality rate than fish without those concentrations.

42. The Department's general information as to the background quality of groundwater in Somerset County was, at the time of the hearing on July 15, 1974, and at the time of the consideration of the permanent permit application, that the turbidity of such water ranged between 0 and 5 J.T.U. with some exceptions. No information was available for the Hatchery Spring.

43. When the groundwater discharges at the Hatchery Spring at that point, it becomes a stream for purposes of applying Pennsylvania's stream standards. From this it follows that stream standards become, in effect, effluent standards for the Bakersville Quarry, assuming the conclusion that the flow of water in the spring emanated from the quarry, at least in part.

44. Kooser Run and its tributaries are part of the Laurel Hill Creek Watershed, which has been designated a conservation area by 25 Pa. Code, Chapter 93.

45. The Department's implementation plan for the Laurel Hill Creek Watershed incorporates an effluent limitation of 25 mg/l suspended solids (Department Exhibit No. 19). The 25 mg/l effluent criterion is the figure that the Department has calculated is necessary to attain a less than 10 mg/l rise in concentration of suspended solids in cold water streams in that watershed.

46. Based on the background papers for the Green Book, and on the record as a whole, there is no substantial evidence to support a stream standard of less than 50 J.T.U. turbidity, and 60 mg/l suspended solids in the stream and spring in question.

DISCUSSION

The Department in this case denied New Enterprise's interim permit application because it believed continued operation of the quarry would cause pollution of the waters of the Commonwealth. It denied the permanent permit application because it believed that the control facilities proposed by New Enterprise would not be sufficient to prevent that pollution.

In both instances, the outcome of this case depends crucially upon who has the burden of proof. The Department agreed to take the burden of going forward. It presented evidence based largely on patterns of jointing in the rocks in the

vicinity of the quarry that tended to show that siltation in the fish hatchery spring, downstream from the quarry, emanated from the quarrying operation.[2] This evidence was weakened by the fact that two tracer tests did not show a positive correlation. (The Department characterized the results as "inconclusive", New Enterprise as "negative".) The lack of positive results from the tracer tests was plausibly explained by the geologist who testified for the Department but the explanation, while plausible, is not conclusive. It still leaves a question mark, and only the patterns of jointing in the rock to go on. This is persuasive, but one would still like more in the way of corroberating evidence.[3]

Two geologists testifying for New Enterprise emphasized the lack of positive results of the tracer tests, and their non-acceptance of the Department's explanation of the failure of the tests to show positive results. Based on this they together developed an alternative explanation for where the siltation in the fish hatchery spring originated. This explanation, while plausable, is again only that. It was not proved -- and had somewhat less in the way of tangible evidence to support it than the explanation offered by the Department's experts. Its strongest support lies in the lack of positive results from the tracer tests conducted by the Department.

What we come to, then, is that the outcome depends on which party has the ultimate burden of proof. Since the case is an appeal from the denial of a permit--initially an interim permit and finally a permanent permit--under the Surface Mining Conservation and Reclamation Act, *supra*, the burden of proof would ordinarily fall on the applicant, New Enterprise. See the Board's Rules of Procedure, §21.42.

On the other hand, New Enterprise argues that the rule of law enunciated in *Bortz Coal Company v. Air Pollution Commission*, 2 Pa. Commonwealth Ct. 441, 279 A.2d 388 (1971), *North American Coal Corporation v. Air Pollution Commission*, 2 Pa.

2. Specifically, the most significant "master joint set"--a major set of joints running through both the Loyalhanna Limestone (the rock being quarried by New Enterprise) and the underlying Pocono Sandstone--ran almost directly from the quarry through the spring.

3. On two occasions, once in January, 1974, and again starting in December, 1974, stripping of overburden at the quarry was accompanied during the same general time period by heavier than usual siltation at the spring. This is some corroberation, but not the strongest imaginable. When one looks in detail at the dates of siltation, and tries to correlate that with specific activities (such as, e.g., blasting) at the quarry, one simply does not find a pattern. Nevertheless, the weak correlation that does exist does tend to bolster the Department's position more than New Enterprise's. But see Finding of Fact No. 32, *supra*.

Commonwealth Ct. 469, 279 A.2d 356 (1971), and the earlier case of *Sanitary Water Board v. Sunbeam Coal Corporation*, 47 D. & C.2d 378 (C.P. Dauph. 1969), applies here.

In *Bortz* and *North American*,[4] the enforcing agency predecessor to the Department of Environmental Resources issued abatement orders, and Commonwealth Court held that the Department had the burden of proving that there was a violation of the air pollution laws. Here, although on the surface what is involved is a simple permit denial, New Enterprise argues that because the law was changed to require a permit for its going operation for the first time in 1972, that the denial of the permit in effect amounts to an abatement order. If it should be regarded as an abatement order then it follows that the Department has the burden of proof.

Clearview v. Commonwealth, 15 Pa. Commonwealth Ct., 303, 327 A.2d 202 (1974), cited by the Department in its brief, is not relevant. We are not dealing with the question of whether there is a prescriptive right to continue to pollute. Clearly there is not. What we are dealing with is whether the pollution in a particular discharge is or is not caused by New Enterprise. To hold that the Department had the burden of proving that causation would not be the same as giving New Enterprise the right to continue it, even though proof of causation is difficult.

The fact that New Enterprise is required by the Surface Mining Conservation and Reclamation Act, *supra*, to get a permit is, however, controlling. An applicant for a permit is required, under that Act, to satisfy the Department that its operation will not cause a violation of applicable pollution control statutes, and valid regulations promulgated thereunder. The fact that this quarry is a going operation is not relevant--the statute applies to the future, not the past, and can shift legal obligations for the future. *Commonwealth v. Harmer Coal Co.*, 452 Pa. 77, 306 A.2d 308 (1973); *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392, 319 A.2d 871 (1974); *Clearview v. Commonwealth*, *supra*. While the Department, or the Environmental Quality Board, cannot shift legal obligations by shifting the burden of proof, *Commonwealth v. Leon E. Kocher Coal Company*, Pa. Commonwealth Ct., A.2d (1972),[5] no such limitation applies to the legislature. *Commonwealth v. Barnes & Tucker Co.*, *supra*, *Commonwealth v. Bortz Coal Company*, 2 Pa. Commonwealth

4. *Sunbeam* will be discussed *infra* in connection with another aspect of this case.

5. We note that here, that the balance of expertise, and of the availability of the means to satisfy a given burden of proof, is approximately evenly split between the Department and New Enterprise. New Enterprise does not lack expert geologists.

Ct. 441, 279 A.2d 388 (1971).

It follows, since the Department has valid reason to believe that the operation of the Bakersville Quarry is likely to cause pollution in the future, and since New Enterprise has not proved that it will not, that the Department properly rejected a permit application that called for no treatment of the discharge. Of the two motions presented by New Enterprise on November 25, 1974, therefore, the Appellant's "First Motion" is denied.

The rejection of the permit calling for treatment presents a different problem. The Department rejected the permanent permit for the following reasons (E.H.B. Exh. 1, Letter from Eugene E. Dice, Esq., Assistant Attorney General, to John DiRienzo, Esq.):

> "To summarize the reasons for the denial of the legal permit application and also denial of the proposal to build a settlement basin to treat the water issuing from the spring, the following reasons are submitted:
>
> 1. The water quality criteria for the watershed in question, among other things, prohibits an increase of suspended solids by more than 10 mg/l. The data submitted indicates that suspended solids in the effluent from the settlement basin will be in excess of 10 mg/l. The background quality of the water in the spring is such that the suspended solids content should be zero. Therefore, New Enterprise is affecting this water to a degree which exceeds the water quality criteria.
>
> 2. In addition to the above, there was an effluent limitation on suspended solids incorporated as part of an implementation plan which was the subject of a public hearing on August 1, 1972, in Uniontown, Pennsylvania. This limitation was that effluents into the watershed should not exceed 25 mg/l suspended solid; while this criteria was not published as part of a Departmental regulation, it is a limitation that the Department has decided is necessary to protect water quality in the watershed as a whole. The data submitted with the settlement basin proposal indicates that effluent from the basin may exceed 25 mg/l suspended solids.
>
> 3. Data submitted with the proposal indicates that the turbidity of the effluent will exceed 10 J.T.U. As Mr. Sheaffer testified, 10 J.T.U. is the maximum criteria for cold water fisheries, which classification is applicable to Kooser Run.
>
> 4. The quarry causes a discharge into an underground horizon of silt laden water. Pursuant to Section 97.74 of the Department Regulations, disposal of wastes into underground horizons shall only be accepted as an abatement of pollution when the applicant can show by the log of the strata penetrated by the stratagraphic structure of the reach that it is improbable

that the disposal would be prejudicial to the public interest. This section also provides that, if any pollution occurs, the disposal operation shall be stopped immediately. The evidence indicates that pollution is occurring as a result of disposal of silt laden wastes to the underground which is causing pollution and, therefore, prohibited by Departmental regulations.

5. In addition to the above problems, it is apparent that New Enterprise, at this point in time, does not have permission from Mr. Bassett to build a proposed treatment facility. Even if, however, such permission were to be obtained, the above referenced problems would still require the Department to deny the permit at issue.

This letter constitutes the Department's statement for reasons for the denial of a settlement basin proposal submitted to the Department along with the application for a permit."

There are two problems with these reasons. First, there are no specific water quality criteria that cover the streams in question, either with respect to suspended solids or with respect to turbidity. One therefore must fall back on §93.4 of the Regulations, 25 Pa. Code §93.4, which provides as follows (emphasis supplied):

§93.4 General water quality criteria.

(a) Water shall not contain substances attributable to municipal, industrial, or other waste discharges in concentration or amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant, or aquatic life.

(b) Specific substances to be controlled shall include, but shall not be limited to, floating debris, oil, scum and other floating materials, toxic substances, and substances which produce color, tastes, odors, turbidity, or settle to form deposits.

In connection with the application of the general principles set forth in §93.4, the Department is obligated to apply its best expert judgment. It cannot here fall back on specific regulations. It is obligated, moreover, to apply its discretion, its best judgment, in a reasonable, non-arbitrary way. Furthermore, as in *Commonwealth v. Sunbeam Coal Company, supra,* when the Department goes beyond explicit regulations, and falls back on general law or principles, the Department has the burden of proof-- in such a case, the presumption of administrative regularity no longer applies to its actions. See also *Creel Bros. v. Commonwealth,* E.H.B. Docket No. 73-071-B, (issued March 25, 1974). And as was noted in *North American Coal Corp. v. Commonwealth* 2 Pa. Commonwealth Ct. 469, 477, 279 A.2d 356, (1971), if no scientific tests are or reasonably can be made specifically on the plant in question, and if reliance

is to be on technical bulletins, articles, and the like, it should be possible to determine what data is relied on in those technical bulletins and articles, and to determine that the results are "properly applicable to the equipment or item being analyzed."

Here there is no direct evidence as to what the background water quality in the spring is. There was some general testimony as to what turbidity and suspended solids levels in a spring in this vicinity would be expected to be, but no data was offered that would tie this spring down to zero

Nor was any data offered to support either the 10 mg/l or the 25 mg/l suspended solids limitations, or the 10 J.T.U. turbidity limit.[6] (In fact, there are not even possible standards set forth for suspended solids in §93.5 of the Regulations, 25 Pa. Code §93.5, except insofar as they may be covered by turbidity standards.)

What was offered in support of the 25 mg/l was testimony by an eminently qualified aquatic biologist for the Department that the Department had made no independent study of the matter, but that this was a standard suggested by the Pennsylvania Fish Commission and accepted by the Department. While the Pennsylvania Fish Commission may have had excellent reasons for making that recommendation for the waters of Laurel Hill Creek basin, those reasons are not on the record in this case. The 10 mg/l limitation is similarly supported, or more accurately, unsupported.

In connection with the turbidity limit, as set forth in reason number 3, the Department based its conclusion on the Report of National Technical Advisory Committee to the Secretary of the Interior, *Water Quality Criteria* (April 1, 1968), commonly known as the "Green Book". The Green Book recommends, on p. 47, that "Turbidity in the receiving water due to a discharge should not exceed 50 J.T.U. in warm-water streams or 10 J.T.U. in cold-water streams". (The streams in question herein are cold-water streams). Since the Hatchery Spring itself is both the discharge and also the origin of the stream, the receiving water recommendation was taken as the effluent recommendation.

When one looks behind this recommendation to find its basis, one is drawn to the various papers testified to and introduced through Dr. Edwin L. Cooper. These are referenced in the Green Book, and introduced as New Enterprise Exhibits 19-A, 19-B,

6. Reason number 4 was agreed to be a restatement of reasons 1, 2, and 3, and not an independent and different reason. It will therefore not be separately discussed.

Reason number 5 was based on the fact that the treatment facility would have to located on Mr. Clair Bassett's land. This, it was agreed, would not be given as a reason for denial if the permit were otherwise acceptable. It would be made, and would have to be made, a condition of any permit issued on the basis of treatment facilities to be constructed that such treatment facilities actually be constructed and operated.

and 19-C. These showed studies, under assorted conditions, indicating that some adverse effect might be found at 90 parts per million (ppm, equivalent to mg/l) (Exh. 19-B), and that no adverse effects were present at 60 ppm (for Exh. 19-B) or at less than 70 J.T.U. Correlating ppm for mg/l of suspended solids with specific levels of turbidity is difficult. Dr. Cooper testified at the hearing on July 25, 1974, and said the following:

> Q. Based upon your experience and based upon the context of these articles, do you have an opinion as to what would constitute a level of turbidity whereby there would be no effect on trout in a hatchery situation? Do you have an opinion?
>
> A. Well, the best evidence, and essentially, the only evidence that is available is the article by Olson, Chase and Hanson in which they essentially place this threshold value at about 70 J.T.U.'s.
>
> And lacking more information as to, you know, other levels and effects, 70 seems to be a safe level. How much safety is involved or how much of a dilution factor you want to have additional safety factors built into the criterion is a matter of judgment.
>
> But at least there is no scientific evidence to indicate that levels below 70 J.T.U.'s are harmful, either as to feeding proclivities or as to their ability to get the food and digest it.
> . . .
>
> Q. Now, in correspondence and opinions rendered by you previously, I believe you mentioned a number of 50, 50 J.T.U.'s. Could you explain any differences between the 50 you mentioned earlier and the 70 you refer to now? Why is there a difference?
>
> A. My opinion was based on the same information of Herbert and Merkens' paper and Olson, Chase and Hanson, the hatchery study which essentially said that values below 70 J.T.U.'s were not harmful.
>
> I incorporated a reasonable safety factor in this and arbitrarily selected 50 J.T.U.'s as being certainly safe, with some margin for error.
>
> If I wanted to be ultraconservative, I could have adopted the ten J.T.U.'s.
>
> Q. In your opinion, is a safety factor from 70 to 10 warranted?
>
> A. I don't believe so. And the reason I say that is because in many natural trout stream situations, it is very common to have J.T.U. values much above ten parts per million for considerable periods of time.
>
> In fact, I am acquainted with a few streams, such as Spring Creek close to State College, and Penn's Creek.
>
> Again, these are limestone streams which seldom, if ever, drop below ten J.T.U.'s in turbidity And these have abundant trout populations. They are some of the most abundant trout streams in the state.

So ten, to me, is completely unreasonable when you are considering what we find in good natural trout populations existing in nature.

Where the 10 J.T.U. recommendation in the Green Book came from was never explained. We can only conclude, based on the papers cited in support of the Green Book recommendation, and Dr. Cooper's testimony, that the selection of that criterion by the Department must be characterized as arbitrary, because unsupported by any evidence.

Indeed, we must hold that on this record any criterion significantly more stringent than that suggested by Dr. Cooper [50 J.T.U. turbidity and 60 ppm (mg/l)[7] suspended solids] would also be arbitrary because unsupported by substantial evidence.

We must go further, however, and determine whether given these non-arbitrary effluent criteria, New Enterprise has shown that it can meet them by the operation of its proposed treatment facility.

New Enterprise's proposed settling basin (which would be covered, and essentially underground, in order to preserve cold water temperatures) was based on settling times that were in turn based on tests run by the engineering firm of Gwin, Dodson & Foreman, Inc., and submitted as Department Exh.'s 7 and 8. The Department questioned the sampling procedures, since they were run in completely still water, whereas in the settling basin itself the water would be moving, albeit very slowly. Given the fact that the time for leveling off of turbidity and suspended solids in the tests was in the range of 3-4 hours (for those samples where readings sufficient to determine this were taken), whereas the settling basin proposed a retention time in the range of 15-18 hours; this doubt does not seem well founded. Granted that the behavior of particles may be different in moving water, even very slowly moving water, because of the possibility of eddies and vertical currents, no testimony was given that it was likely to be that different.

On the other hand, one sample showed a leveling off for turbidity at over 75 J.T.U. However, this sample was taken by Gwin, Dobson and Foreman from a stand pipe; which connected via a horizontal piece of pipe under the fish run to the bottom of the spring catchment basin, before the spring water passed over a wier, where maximum suspended and settlable solids would be drawn from where earlier silt had settled. The testimony of Mr. Clair Bassett was that ... turbidity

7. We note that the only relevant specific reference to suspended solids in the Regulations is in 25 Pa. Code §97.32, dealing with mineral preparation plants, from which an analogous type of suspended solid would be released. The effluent limitation for such plants is 200 mg/l.

levels coming over the wier at the spring were at times extremely high but no specific number could be given by Mr. Bassett.

On the whole, we are pursuaded that a settling basin as proposed by the Appellant would, perhaps with additional treatment, succeed in achieving a standard of 60 mg/l suspended solids and 50 J.T.U. turbidity or below. The probability that turbidity levels might, after retention in the proposed settling basin, exceed 50 J.T.U. appears to us to be very low. This, combined with the inconclusiveness of the evidence establishing that the quarry is the cause of siltation at the Hatchery Spring and the obligation of the Board and the Department to weigh all of the values specified in §4 and 5 of the Clean Streams Law, *supra*, 35 P.S. §§691.4 and 691.5 including this economic impact of closing down the quarry, causes us to conclude that a permit requiring treatment to the standard recognized as justified by the Board should be issued. This case is somewhat unusual in that the treatment proposal arose as a proposed settlement of the appeal pending before the Board. Thus, although the Department acted upon the proposal by denying it, we do not feel that the Board's conclusion that a permit should be issued is so much a conclusion that the Department abused its discretion in retaining doubts about the proposed treatment basin. It is rather a conclusion that upon all of the evidence developed at the hearings, the treatment proposal, conditioned upon the achievement of the water quality standard found by the Board to be justified, is a reasonable solution of the problem here. See *Warren Sand & Gravel Co. v Commonwealth of Pennsylvania, Department of Environmental Resources,* 735 C. D. No. 1974, Issued July 9, 1975, pp 14-15. However, in conditioning the permit on the achievement of a certain water quality standard, we intend to place the burden of meeting that standard on New Enterprise. Thus, it would behoove the Appellant to conduct further tests to assure that the settlement basin without further treatment will achieve the effluent standard imposed. If such tests should suggest that further treatment, such as the addition of polymers, would be required it will be up to New Enterprise to decide whether it wishes to go to that expense to maintain its mine drainage permit.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over this case and over the parties before it.

2. The burden of proving that it is, under the applicable law and regulations, entitled to a permit is upon New Enterprise, even where the legislature amends

the law to apply for the first time to a going operation. That burden, in this case, includes the burden of proving that its operation will not cause water pollution.

3. That latter burden was, in the case of the application for a permit calling for no treatment facilities, not met.

4. If the Department, acting legally within its discretion, places additional requirements upon an applicant, the Department has the burden of proving that those requirements are within its legal authority, and are reasonable--not arbitrary or capricious -- within the scope of that legal authority.

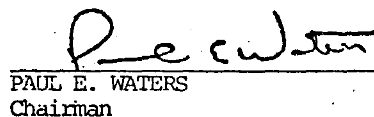
5. In the case at bar the Department's imposition of requirements that the effluent from New Enterprise's proposed settling basin not increase stream quality by more than 10 mg/l (or meet an effluent standard of 25 mg/l) suspended solids, and not exceed 10 J.T.U. turbidity, this latter burden was not met. There was substantial evidence to support a standard of 60 mg/l suspended solids, and 50 J.T.U. turbidity.

6. There was sufficient evidence to conclude that a standard of 60 mg/l suspended solids and 50 J.T.U. turbidity could be met by the construction of a settling basin as proposed by New Enterprise with additional treatment if required.

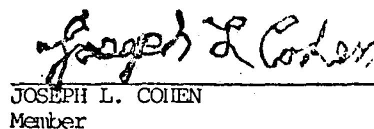
ORDER

AND NOW, this 15th day of August, 1975, it is hereby ordered that the Department's denial of an interim mine drainage permit is affirmed but Appellant's appeal from the denial of its application for a permanent mine drainage permit is sustained, and the case is remanded to the Department with the direction that the Department issue Appellant a permit conditioned on the construction of a treatment facility as proposed by Appellant, with whatever additional treatment may be required, to achieve an effluent water quality standard in the Hatchery Spring of no more than 60 mg/l suspended solids and 50 J.T.U. turbidity.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: August 15, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In The Matter Of:

COMPASS COAL COMPANY, INC.

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL
RESOURCES

Appellee

and

THE PENNSYLVANIA GAME COMMISSION

Intervenor

and

THE CITY OF DUBOIS

Intervenor-Appellant

Docket No. 72-312

ADJUDICATION

By The Board, August 26, 1975

History of the Case

Compass Coal Company, Inc. (hereinafter Appellant) has been seeking to operate a bituminous coal strip mining operation, designated as Baker Run #1, in Huston Township, Clearfield County, Pennsylvania.

In 1968, Appellant submitted an application for a permit to discharge mine drainage from this proposed operation for consideration by the Sanitary Water Board of The Commonwealth of Pennsylvania[1], such submission being required under and by virtue of Section 315 of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended to August 23, 1965, 35 P. S. §691.315. The Sanitary Water Board considered this application, caused public hearings to be held thereupon and, in the latter part of 1969 or early in 1970, refused to issue a mine drainage permit to Appellant.

1. The Department of Environmental Resources assumed the functions of the Sanitary Water Board in this regard by the enactment of Section 20 of the Act of December 3, 1970, P. L. 834, No. 275, which amended the Administrative Code of 1929, P. L. 177, as amended, 71 P. S. § 510-1 (22). This transfer of functions was effective January 19, 1971.

On or about January 18, 1972, Appellant submitted another application for a permit approving the discharge of mine drainage from this proposed operation for consideration by the Commonwealth of Pennsylvania Department of Environmental Resources (hereinafter DER), such submission being required, again, under and by virtue of Section 315 of The Clean Streams Law, *supra*, as amended to July 31, 1970, 35 P. S. §691.315.

In this application, No. 4572BSM3, Appellant set forth that it was seeking to strip mine 145 acres of coal in Huston Township, Clearfield County and that this mining would affect a 177 acre area.

On June 12, 1972, DER, by W. E. Guckert, Director, Mine Reclamation Division, issued a written denial of this application to Appellant based upon the finding that the strip mining as proposed by Appellant would cause acid mine drainage.

On June 21, 1972, Appellant filed an appeal from the June 12, 1972, denial to this Board.

On or about February 1, 1973, and prior to the date when a hearing on said appeal was scheduled, the City of DuBois (hereinafter referred to as DuBois) filed a Petition To Intervene with this Board. In this Petition, it was alleged that DuBois had a vital interest in the proceedings on said appeal since the area proposed to be stripped by Appellant is situate near a body of water which had been proposed as an additional source of drinking water for DuBois and other communities. Attached to this Petition To Intervene was the written consent to such intervention, executed on behalf of Appellant by David E. Blakley, Esquire, its counsel.

By Order dated February 7, 1973, we granted the Petition to Intervene filed by DuBois.

We scheduled a hearing on this appeal for April 4, 1973, before Louis R. Salamon, Esquire, Hearing Examiner.

At the inception of this hearing, Barbara Brandon, Esquire, counsel for the Department, indicated that on April 3, 1973, DER had changed its position with regard to this matter to the extent that there was a possibility that Appellant might be granted a mine drainage permit for its proposed operation. It was indicated that Appellant had agreed to amend its January 18, 1972, application and that DER would expeditiously process this amended application. Counsel for DuBois, Ernest

D. Preate, Jr., Esquire, indicated that his client would continue to object to the issuance of a mine drainage permit to Appellant and he moved for a continuance of the hearing pending the decision of D E R on such amended application. Counsel for Appellant and the Department joined in that motion for continuance and it was granted.

Although Appellant sent an amended application to the proper reviewing officer of DER on April 6, 1973, the Department delayed taking any action thereupon. On or about March 14, 1974, this Board sent a Notice to the parties that a hearing would be held on April 16, 1974, on the June 21, 1972, appeal of Appellant, notwithstanding the fact that D E R still had taken no action on the amended application.

On April 11, 1974, D E R, by Walter N. Heine, Associate Deputy Secretary for Mines & Land Protection, issued a written denial of this amended application for the reason that DER had been notified by the Pennsylvania Game Commission, owner of the surface rights in the area of the proposed strip mining operation, that it would not provide written consent to Appellant to enter upon any of its land to be affected by the said operation within a period of five years after said operation is completed or abandoned, for the purpose of reclamation, planting and inspection, or for the construction of any mine drainage facilities or for the prevention of stream pollution from mine drainage, as required under Section 5I of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P. L. 1198, as amended to November 30, 1971, 52 P. S. § 1396.4(a)(2)I.

At the inception of the April 16, 1974, hearing, counsel for Appellant requested, orally, that the appeal of June 21, 1972, be withdrawn, and that Appellant be permitted, then and there, to enter an appeal from the April 11, 1974 action of DER.[2]

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2. We received the written Appeal of Appellant on April 24, 1974.

Although none of the parties objected to this ruling, counsel for DER stated that by failing to object, DER waived no rights so to do thereafter. At this posture, counsel for DuBois clearly stated that his client continued to have an interest in the outcome of the proceeding, that his client was going to present evidence to the Board and that the "decision of the Department itself . . . is inadequate to protect the interest of the City of DuBois."[3]

Following this colloquy, Appellant began to present testimony in this matter and on April 16, 1974, Appellant completed its case in chief. The examiner then questioned counsel for DER as to whether DER had any testimony to offer in this matter. Counsel for DER indicated that it had no testimony to present. The hearing resumed on April 16, 1974, with testimony in chief offered on behalf of DuBois.

During the course of the April 16, 1974 hearing, a representative of the Pennsylvania Game Commission (hereinafter referred to as Commission) was present and was called as a witness by the Examiner. On May 2, 1974, the Commission filed a Petition To Intervene with this Board, and on May 9, 1974, this Petition was granted.

We took a view of the area in which Appellant proposed to conduct its operation on May 14, 1974, and we took further testimony in this matter, from witnesses called by DuBois, on May 14 and 15, 1974.

On or about June 13, 1974, DuBois filed an appeal to this Board from the April 11, 1974 action of DER on the amended application of Appellant. In this appeal, DuBois indicated that it supported the action of DER in that the stated reason for the denial of the amended application was correct. DuBois indicated further, however, that it objected to the action for the reason that the amended application should have been rejected for a variety of other reasons which it set forth in its appeal.

The hearing on this entire matter resumed on June 24, 1974. During the course of the hearing, counsel for DER moved to quash the appeal of DuBois on the ground that it was not timely filed. Counsel for

---

3. N. T. 14, April 16, 1974.

Appellant joined in this motion. The examiner reserved decision on this motion, and the hearing was finally concluded on June 26, 1974.

Hearing Examiner Louis R. Salamon submitted a proposed adjudication that is being adopted by the Board with a few modifications.

FINDINGS OF FACT

1. Appellant is a corporation, having its office in Punxsutawney, Pennsylvania.

2. Appellee is DER, which is the department of the Commonwealth of Pennsylvania which is vested with the responsibility, *inter alia,* to act on applications for mine drainage permits submitted pursuant to The Clean Streams Law, *supra*.

3. Intervenor, DuBois, is a municipal corporation, duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania.

4. Intervenor, Commission, is an independent Commission of the Commonwealth of Pennsylvania, duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania.

5. On or about January 18, 1972, Appellant submitted to D E R an application for a mine drainage permit to operate a strip mine, designated as Baker Run #1, in Huston Township, Clearfield County, Pennsylvania.

6. On June 12, 1972, D E R issued a written denial of this application to Appellant based upon the finding that the strip mining as proposed by Appellant would cause acid mine drainage. Appellant filed an appeal to this Board from that denial on June 21, 1972. On April 3, 1973, D E R advised Appellant that it might reconsider its decision after a review of an amended application to be submitted by Appellant. Appellant did submit an application to D E R on April 6, 1973. On April 11, 1974, D E R issued a written denial of this amended application for the reason that D E R had been notified by the Pennsylvania Game Commission, owner of the surface rights in the area of the proposed strip mining operation, that it would not provide written consent to Appellant to enter upon any of its land to be affected by the said operation within a

period of five years after said operation is completed or abandoned, for the purpose of reclamation, planting and inspection, or for the construction of any mine drainage facilities or for the prevention of stream pollution from mine drainage, as required under Section 4(a)(2)I. of the Surface Mining Conservation and Reclamation Act, *supra*, 52 P. S. §1396.4(a)(2)I. On April 24, 1974, Appellant filed a written appeal from said action to this Board.

7. In the proposed operation, 145 acres of coal would be mined and a total area of 177 acres would be affected. The method by which this coal would be mined would be the "modified block cut" method. In this method, one cut is made into the hill and a block is taken out; as each successive block is taken out next to the last one, the overburden is placed in the cut from which the coal has just been removed. By the employment of this method, the amount of coal and deep overburden exposed at any one time is held to a minimum.

8. Mine drainage from this proposed operation would be discharged to an unnamed tributary of the South Branch of Bennet Branch, which is sometimes referred to as Baker Run. This unnamed tributary is situate to the west of the area to be affected by the proposed stripping, and at certain points it is within 200 feet of the affected area.

9. The water quality of this unnamed tributary and of the South Branch of Bennet Branch at points into which this mine drainage would be discharged is excellent - the pH of these waters is almost neutral; there is little iron or maganese present; there are only small quantities of suspended solids present.

10. The surface owner of most of the land to be mined and affected by this proposed stripping operation is the Commission. This land is designated by the Commission as State Game Lands 93. This land is primarily forest area. There is a great deal of hunting and fishing on this land, and it is put to other recreational uses.

11. The Commission takes the position that no surface mining is permitted on said land. The Commission will not execute a written consent to Appellant to enter upon said land within a period of five years after said operation is completed or abandoned, for the purpose of reclamation, planting

and inspection, or for the construction of mine drainage facilities or for the prevention of stream pollution from mine drainage.

12. The present water supply of DuBois and several surrounding communities will be inadequate for the needs of the population of DuBois and those communities in 10 to 20 years.

13. DuBois has a plan to impound a portion of the waters in the South Branch of Bennet Branch by constructing a dam which would be situate immediately northwest of and downstream from the area to be mined and affected by this proposed stripping. The area which would be covered by water would include a small portion of the area under which there is coal which Appellant seeks to strip in its proposed operation. DuBois has taken no formal measures necessary for the implementation of this plan at present.

14. There is not sufficient information set forth in the amended application from which the nature of and from which the acid forming potential of the overburden in the area proposed to be stripped by Appellant can be ascertained. In Supplemental "A" of this amended application, Appellant has merely set forth the name and thickness of each stratum overlying the coal. Appellant performed no tests to determine the other chemical and physical properties thereof.

15. The sulfur content of the overburden and of the coal in the area proposed to be stripped by Appellant is high. The overburden in the area proposed to be stripped by Appellant has significant acid forming potential. This information was not supplied to D E R by Appellant in its application or otherwise.

16. There are numerous well defined streams or water courses which are situate in the area to be mined in this proposed operation, and which would be intercepted by this operation. There is no disclosure in Appellant's amended application, or on the map attached thereto and made a part thereof, of the existence of these streams or water courses. Appellant affirmatively set forth in the portion of its amended application known as "Supplemental D" that the proposed operation would not involve the relocation of any watercourse or stream.

17. There is a significant potential for acid mine drainage from this proposed strip mining operation to these said streams or water courses, to the said unnamed tributary and to the South Branch of Bennet Branch.

18. Because of the steepness of the slopes in the area proposed to be strip mined by Appellant, there is a significant potential for erosion to occur during and subsequent to the actual mining operation. As the result of such erosion, the waters of the Commonwealth in and near the area to be affected by this proposed operation will be subject to sedimentation and siltation which are damaging to these waters and to their use.

19. In Supplemental "B" of this amended application, Appellant has set forth that it will treat discharges of acid mine drainage from the various cuts which will be made into the earth by adding lime to the discharge with a mechanical liming device. Following this treatment, the discharge will be stilled and settled in two successive ponds, the dimensions of which are described in detail in the amended application, before it enters natural drainage courses.

20. In Supplemental "B" of this amended application, Appellant has made reference to the construction of diversion ditches for two purposes, as follows:

> A. To prevent surface water from entering the various cuts or pits, diversion ditches will be built and maintained above the highwall.
>
> B. To abate the problem of siltation from the spoil, ditches will be built below the spoils to carry the runoff to a stilling pond for settlement prior to entering natural drainage courses.

21. Although the precise location of these stilling ponds, which will seemingly serve a dual purpose, to-wit, settlement of the minerals in the mine drainage and settlement of the siltation and sedimentation which will result from erosion, is best determined once actual mining begins, the effectiveness of these ponds for the above purposes cannot be evaluated from the information contained in this amended application because Appellant has failed to provide data, information and calculations as to the amount of surface water and soil which can be expected to be discharged into these ponds.

22. Although the precise location of these diversion ditches is best determined once actual mining begins, the effectiveness of these diversion ditches for the purposes set forth in Finding of Fact No. 20, *supra,* cannot

be evaluated from the information contained in this amended application for the following reasons:

A. Appellant has failed to provide data, information and calculations as to the amount of surface water and soil which can be expected to be carried in these diversion ditches.

B. Appellant has failed to provide data, information and calculations as to the width, length, size and shape of these diversion ditches.

C. Appellant has failed to provide data, information and calculations as to the gradient at which the bottom of these diversion ditches would be constructed.

DISCUSSION

We have granted the Petition of DuBois to Intervene, pursuant to our Rules of Practice and Procedure, Section 21.14 (a), Chapter 21, Title 25, Rules and Regulations, Department of Environmental Resources, because we are satisfied that DuBois, as a potential user of the water into which mine drainage, siltation and sedimentation generated from this proposed operation would be discharged, had a sufficient interest in the outcome of said proceeding that it should participate therein. Appellant must also have been satisfied that DuBois had such sufficient interest because it consented to the prayer of the Petition. We were also satisfied that such interest could be inadequately represented if DuBois was not permitted to intervene.

Under Section 21.2 (7) of our Rules of Practice and Procedure, *supra*, DuBois became a party to this appeal when its Petition To Intervene was granted. Under Section 21.33 (b) of our Rules of Practice and Procedure, *supra*, DuBois, as a party, had the right to present relevant and material evidence which it deemed necessary to protect its interest and its standing in this matter. This included the right to present evidence which directed the attention of this Board, which was required to hold a hearing de novo in this matter, to certain mistakes and omissions in Appellant's amended application which, DuBois alleges, would have caused DER to include additional reasons for the denial of that amended application. See *Commonwealth v. Keystone Mutual Casualty Co.*, 366 Pa. 149, 76 A2d 867, 870 (1950).

When, on April 16, 1974, Appellant withdrew its Appeal from the June 21, 1972, action of DER, and orally appealed from the April 11, 1974, action of D E R, the procedural posture of DuBois would have been made completely clear if counsel for DuBois had made a formal statement on the record that his client again sought to intervene to continue to protect its interest and standing. Although no such formal statement was made by counsel, it is, nevertheless, clear to this Board, from the continued active participation of DuBois on the record, that DuBois considered itself to be a party to this "new" proceeding.

Neither Appellant nor DER can be heard to say that they were deprived of procedural due process by the continued participation of DuBois in this matter, in view of the fact that each such party had, for a long period of time, been on notice of the nature of the opposition of DuBois to this proposed strip mining operation and in view of the fact that each such party was not precluded from introducing evidence into the record in this matter to rebut evidence presented by DuBois on April 16, 1974, and thereafter.

We view the appeal which DuBois filed on June 13, 1974, as being an unnecessary effort to protect the interest and standing of DuBois in this matter. Furthermore, because said appeal was not filed within thirty days from April 15, 1974, the date when DuBois, by its counsel, received written notice of the April 11, 1974, action of DER, as is required under Section 21.21 (a) of our Practice and Procedure, *supra,* said appeal must be and is hereby quashed. See *Borough of Grove City v. Department of Environmental Resources*, E H B Docket No. 74-267-C (issued April 10, 1975).

If DuBois had not intervened in this appeal and if DuBois had not presented evidence in this matter, we would have been faced in this appeal solely with the following issue of law.

Was it proper for DER to deny Appellant's amended application for a mine drainage permit, required under Section 315 of The Cleam Streams Law, *supra,* 35 P. S. § 691.315, for the reason that DER had previously been notified by the Commission, the owner of most of the land

proposed to be mined and affected by this proposed strip mining operation, that the Commission would refuse to execute written consent to entry on its said land within a period of five years after the completion or abandonment of the proposed operation, for the purpose of reclamation, planting, inspection, construction of mine drainage facilities or prevention of stream pollution?

As we are convinced that this amended application should have been denied for reasons not articulated by DER in its denial action of April 11, 1974, we need not resolve the legal issue noted above. However, we deem it appropriate to offer our comments upon that issue, generally, and upon that issue as it relates to the present matter, in an effort to inject some clarity into a procedure which, at best, is quite confusing.

The "consent to entry" provision to which we have just referred is found in Section 4(a)(2)I. of the Surface Mining Conservation and Reclamation Act, *supra,* 52 P. S. § 1396.4(a)(2)I. Such a "consent to entry" must, under that last mentioned Section, be included in an application for a surface mining permit which is required under the Surface Mining Conservation and Reclamation Act, *supra,* before any surface mining can be conducted.

There is no specific provision in either The Clean Streams Law, supra, as it relates to the issuance of a mine drainage permit, or in the rules and regulations which deal with the criteria for the granting of a mine drainage permit, 25 Pa. Code §§ 99.1-99.40, that such a "consent to entry" must be secured as a prerequisite to the issuance of a mine drainage permit.

DER has argued that its action was proper because there is a necessary relationship between that which an applicant for a mine drainage permit must demonstrate, to-wit, that the proposed mining operation will be conducted in a manner which would prevent pollution, see 25 Pa. Code § 99.11, and the very existence of the "consent to entry provision." The Department argues, in effect, that if this "consent to entry" authorization does not exist, there is a fatal defect in the position of the applicant for a mine drainage permit from the outset in that he cannot assure DER that he will be able to enter onto the land of the surface owner to engage in pollution prevention activities within five years after the coal is taken from the cuts or the pits.

This argument, in a general context, is not unreasonable in view of the obvious concern of the Legislature, manifested in the July 31, 1970, amendments to The Clean Streams Law, *supra,* with post-mining activities, including discharges of mine drainage. The term "operation of a mine" in Section 315 of The Clean Streams Law, *supra,* includes backfilling, sealing, other closing procedures and other work done on land in connection with a mine. The term "discharge from a mine" includes a discharge which occurs after the mining operations have ceased. It can easily be said that the Department would not be complying with its Clean Streams Law responsibilities if it granted a mine drainage permit to an applicant whose ability to enter land which it had previously mined to abate a pollutional discharge or to perform reclamation or additional backfilling activities could be enjoined by the surface owner.[4,5]

Although it might be demonstrated that it is reasonable for DER to deny an application for a mine drainage permit because no "consent to entry" assurance was demonstrated, we would have had serious reservations about dismissing this appeal on that basis alone. In the first place, since the "consent to entry" provision has been in effect since January 1, 1972, and since DER and its predecessor well knew that the Commission has been opposed to this operation since January 21, 1969,[6] we wonder why it was that DER waited until April 11, 1974,

---

4. It must be noted that under Section 316 of The Clean Streams Law, *supra,* 35 P. S. § 691.316, a non-consenting surface owner can be ordered to allow a mine operator access to the land to, *inter alia,* abate a pollutional discharge. This provision would, in effect, negate a refusal of "consent to entry."

5. The Board has reservations about the constitutionality of this "consent to entry" provision. It can certainly be argued that a provision which, in effect, permits a surface owner to completely prohibit an activity which is otherwise lawful constitutes an invalid exercise of the police power, resulting in a taking of a coal company's property under the Fourteenth Amendment. It can also be argued that, if by deed reservation or other contractual provision, a coal company has long had the right to extract the minerals from the earth, this "consent to entry" provision has the effect of impairing the obligation of such deed reservation or contract. This is contrary to Article I, Section 10, cl. 1 of the Constitution. See also *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

6. See Commission Exhibit F, N. T. 767, 769, June 25, 1974.

to use this provision as the sword by which this amended application was cut down. We also question why DER even bothered to indicate to Appellant, and to this Board on April 16, 1973, that there was a possibility that Appellant might be granted a mine drainage permit after review of an amended application in view of the existence of this "consent to entry provision" and the well-known opposition of the Commission. Suffice it to say that we are seriously disturbed at the fundamental unfairness of DER, directed against Appellant, when it used this "consent to entry" requirement to defeat Appellant on April 11, 1974.

It would appear to this Board that the requirements for the issuance of a surface mining permit under the Surface Mining Conservation and Reclamation Act, *supra,* are inclusive of each and every requirement for the issuance of a mine drainage permit under The Clean Streams Law, *supra,* and the rules and regulations contained in 25 Pa. Code § § 99.1-99.40.

This present matter very clearly illustrates the need for DER to seek an amendment to the rules and regulations adopted by the Environmental Quality Board. By this amendment, the necessity for two distinct permits before a surface mining operation can be conducted should be eliminated. There is no absolute requirement in Section 315 of The Clean Streams Law, *supra,* that a mine drainage permit be secured, so long as the rules and regulations otherwise authorize the operation of a mine or a discharge from a mine. Such an amendment to the existing rules and regulations should provide that a single permit to conduct surface mining operations can be granted after DER considers a single application in which the applicant conforms to the criteria set forth in the Surface Mining Conservation and Reclamation Act, *supra.* Such action is logical and it would put an end to the confusion and potential for duplication of effort which this matter clearly illustrates could exist.

We indicated earlier in this discussion that this amended application should have been denied for reasons which were not articulated by DER in its denial action.

Our beginning point of reference in this regard is Section 315 of The Clean Streams Law. This Section prohibits a mining operation unless it is authorized by the rules and regulations of the Environmental Quality Board or by a permit issued by the Department. The general provision in the rules and regulations which is here applicable is contained in 25 Pa. Code § 99.11; it provides as follows:

> " Applications for mine drainage permits shall be submitted on forms provided by the Department and shall include such information that would enable the Department to determine whether or not the proposed mining operation would be conducted in a manner which would prevent pollution to waters of this Commonwealth."

We hold that the Department should have found that Appellant did not comply with the mandate of the foregoing regulation in the following particulars:

1. Appellant did not set forth sufficient information in its amended application from which either the nature of the overburden or the acid forming potential of the overburden could be ascertained. Furthermore, Appellant performed no tests to determine the chemical and physical properties of the overburden. If such information would have been set forth, DER would have been in a position to evaluate the extent and quality of the acid mine drainage which could be discharged from this operation and DER would have been in a better position to evaluate the nature and the extent of the acid mine drainage treatment facilities which Appellant had proposed.

2. Appellant did not set forth sufficient information in its amended application with regard to the amount of surface water runoff and soil runoff which could be expected to be discharged into its proposed stilling ponds. Without such information the effectiveness of these ponds, proposed for settlement of the minerals contained in the mine drainage and for settlement of the siltation and sedimentation which will result from erosion, could not be evaluated properly.

3. Appellant did not include sufficient information in its amended application with regard to erosion control measures. This is illustrated as follows:

Appellant has indicated that it would construct and maintain diversion ditches above the highwall to prevent surface water from entering the various cuts or pits. Appellant has also indicated that it would construct diversion ditches below the spoils to carry soil runoff to a stilling pond for settlement. However, Appellant did not set forth data, information and calculations as to the amount of surface water and soil which can be expected to be carried in these ditches, as to the width, length, size and shape of these ditches, and as to the gradient at which the bottom of these diversion ditches would be constructed. Without such information, data and calculations, a proper evaluation of the effectiveness of these erosion control devices could not be made.

There is also a specific provision in the rules and regulations which is here applicable. In 25 Pa. Code § 99.37 (b) it is provided that no drainage course shall be intercepted by the stripping operation, unless provision is first made for the conveyance of the natural drainage in an adequate enclosed watertight condition across the entire stripping operation for discharge to natural water courses. We have found that there are numerous well defined streams or water courses which are situate in the area to be mined in this proposed operation, and which would be intercepted by this operation. Appellant did not disclose that these waters even existed. This is an obvious deficiency in the amended application and it would have constituted, in itself, grounds for the denial thereof. Such disclosure and appropriate pollution control measures made necessary as the result of such disclosure should have been provided.

These deficiencies in the amended application were or should have been well known to DER for several years prior to April 11, 1974. Since DER elected to present no testimony at the hearing on this appeal, we will never know whether these deficiencies were ignored, whether they were deemed to be insignificant or whether DER, for some unknown reason, elected to have these deficiencies come to our attention via the diligence of DuBois.

It took the effective presentation of DuBois to bring these deficiencies to our attention. Although the result which the Department intended, the denial of this amended application, is affirmed by this Board, we express extreme displeasure at the performance of the Department in this entire matter.

As we have indicated previously, see *Joseph Rostosky, d/b/a Joseph Rostosky Coal Company v. Department of Environmental Resources,* E.H.B. Docket No. 73-178-C (issued June 26, 1974), the methods of review and decision making processes of DER in the area of mining applications must be seriously overhauled if there is to be confidence in the ability of the Department to make correct and prudent decisions.

CONCLUSIONS OF LAW

1. DuBois has standing to intervene in this proceeding. Under §21.2(7) of our Rules of Practice and Procedure, *supra,* an intervener becomes a party to the proceeding in which it has intervened. As a party, DuBois had the right to present relevant and material evidence which it deemed necessary to protect its interest and standing, including evidence which directed the attention of this Board to certain deficiencies in Appellant's amended application which would have caused DER to include additional reasons for the denial of said amended application.

2. The Board has jurisdiction over the parties and the subject matter of this proceeding.

3. In order to be entitled to a mine drainage permit under the provisions of The Clean Streams Law, *supra,* an applicant must show that it has met the requirements of that law and of the rules and regulations adopted pursuant thereto that are applicable to the permit application.

4. Where it has been demonstrated that an applicant for a mine drainage permit has not provided sufficient information in its application for such a permit so as to enable DER to determine whether the proposed mining operation would be conducted in a manner which would prevent pollution of the waters of the Commonwealth, the applicant for such a permit has not met its burden of showing its entitlement thereto.

5. DuBois has demonstrated, to the satisfaction of the Board, that there were reasons for the denial of this amended application for a mine drainage permit other than the reason articulated by DER in its denial action of April 11, 1974.

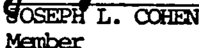
6. Appellant in this matter has not met its burden of showing its entitlement to a mine drainage permit.

ORDER

AND NOW, this 26th day of August, 1975, the appeal of Compass Coal Company, Inc. is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member, not participating in this Adjudication.

DATED: August 26, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

PRECISION TUBE CO., INC.

Docket No. 74-271-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES, and
PA DEPARTMENT OF TRANSPORTATION, Intervenor

ADJUDICATION

By Paul E. Waters, Chairman, August 29, 1975

This matter comes before the Board as an appeal from the grant by the Department of Environmental Resources, hereinafter DER, of two permits to the Pennsylvania Department of Transportation, hereinafter PennDOT, to construct necessary culverts for stream crossings for the planned North Penn Expressway. The new State highway will cross the Wissahickon Creek near the property of Precision Tube Co., Inc., the Intervenor herein, and because of the problems they expect this to create including a drastic reduction in their water supply, as well as for alleged statutory and constitutional violations they oppose DER's action.

FINDINGS OF FACT

1. Appellant, Precision Tube Co., hereinafter Precision, is a corporation conducting a business along the Wissahickon Creek in Upper Gwynedd Township, Montgomery County near where the stream crossing of the proposed North Penn Expressway will be constructed.

2. Intervenor is the permittee Pennsylvania Department of Transportation, hereinafter PennDOT, which received two permits issued under The Water Obstruction Act from the predecessor of DER in 1971.

3. The permits were issued for portions of the construction of Legislative Route 782, commonly known as the North Penn Expressway, hereinafter Expressway, a proposed four-lane limited access State highway, entirely State-funded, which is planned to go from Spring House to Kulpsville, Montgomery County, at a total cost of not less than $40 million in 1974 dollars; the current status of funding is that no funds are yet budgeted for construction, but funds are available for right-of-way acquisition.

4. PennDOT made application to DER in 1970 for the permits here in controversy, and the exhibits C-6, P.D. 9, and A-2 must be taken collectively, due to microfilming problems of DER, to establish the contents of PennDOT's application for these permits.

5. P.D. 9 includes the documents forwarded to DER for the 1970 application. This exhibit differs from Appellant's exhibit 2 which it alleges to be the application because of the missing stream profile and channel cross-section sheet.

6. Stream profiles and cross-sections were forwarded from PennDOT to DER as part of the application.

7. These stream profiles and cross-sections were missing from DER's files for this permit application and the Fish Commission reports in DER and PennDOT's files differ.

8. DER had its records microfilmed and, upon receiving the microfilm, found sheets missing and found instances where the entire permit and documentation is missing. The stream profiles and cross-sections were probably lost during the microfilming.

9. The area surrounding and in which the project is located is characterized by existing roads, railroad facilities, power lines, and residential and light industrial development such that it would be extremely difficult to establish a *greenbelt* system.

10. The work in the project area covered in this litigation begins at the downstream side of the Reading Railroad structure. Going downstream there will be a relocated rock lined channel for the Wissahickon Creek for about 260 feet. Then there will be a highway culvert 413 feet long. Then the relocated rock lined channel for the Wissahickon Creek will continue for about 394 feet. Then a second highway culvert 82 feet long will be constructed. Then the relocated rock lined channel will continue for 436 feet.

11. In a meeting on June 4, 1973, PennDOT was requested by DER to perform a secondary project study and in this study was advised to ignore the Reading Railroad Culvert in order to analyze the full impact of the PennDOT culvert disregarding the restriction caused by the Reading Railroad Culvert because the railroad structure may not exist in the future and PennDOT was also advised not to consider effects downstream of the culverts.

12. The study completed for PennDOT by Sandors and Thomas, Engineers, in 1974 was forwarded by DER to the Wissahickon Valley Watershed Association which commented on the report.

13. The project also includes pipes which carry storm water (as opposed to sewer water) runoff from the highway slopes shoulders and paving. If these pipes were not constructed, rainwater could pond on the highway or it could find its way to the stream another way.

14. The requirements of FWWR-23 which contain instructions for the permit application, were not absolute regulations nor were they enforced as such, they were only guidelines of the Department of Forests and Waters, predecessor to DER.

15. The plans for highway ramps were modified by PennDOT so that Precision could and did expand their plant.

16. PennDOT also will construct a retaining wall along the main line of the highway to further reduce the amount of right of way that would be needed from Precision.

17. In 1973, a report prepared by Valley Forge Laboratories for Precision was presented to PennDOT as a proposal to reroute the North Penn Expressway in the vicinity of Wissahickon Avenue.

18. This plan, not adopted, involved shifting the main line off of the property of Precision onto adjacent property, keeping Wissahickon Avenue open, and rearranging the ramp configuration.

19. PennDOT Exhibit 4 is a narrative description of the Erosion Control Plan which includes a discussion of the erodibility of the soil types in the area, the controls that will be implemented, and the sequence of operations that the contractor will follow during construction.

20. The purpose of the Erosion Control Plan is to stop the earth under the topsoil from eroding when it is exposed and to prevent the sediment from washing off the highway construction site, although no separate permit was issued for this plan.

21. A basic premise is that no more than 17 acres of land area within a watershed will be disturbed at any one time. The project is segmented and construction will take place on a defined sequence of operation. The project is divided into 15 distinct areas of work ranging from 2 to 17 acres.

22. The erosion control plan includes velocity dissipators to prevent erosion at culvert outlets, lined channels to prevent erosion in the channels, basins to take out the silt, seeding to keep erosion from occurring, and hay bales to filter out sediment during construction.

23. If grading doesn't proceed according to plan and an area remains exposed more than 21 days, temporary seeding is to be performed.

24. If construction proceeds in the winter, the plans in the Erosion Control Plan require sedimentation basins, straw bales, and other methods used in conjunction with seeding.

25. As a permanent feature, trees will be planted and these plantings are included on the construction drawings.

26. A velocity dissipator is to be constructed at any major outfall of a pipe carrying runoff from the highway to the stream. There is a rock sedimentation basin. It is a formed basin and fully lined with rocks. It will serve to lower or dissipate the velocity of the runoff water coming from the culverts and help to settle out any sediment during construction.

27. This rock lined channel will not only protect the channel but should also aid in ground water recharge.

28. The Standard Drawings and Specifications Form 408 and Standard Drawings RC 70 indicate the specifications for the rocks in the rock channels.

29. The decision was made by DER on or about January 10, 1975, to accept the 1974 Hydraulic Report as a suppliment to the permit application.

30. The Pennsylvania Department of Transportation, then the Department of Highways, PennDOT, was granted encroachment permits DH14153 and DH14159 by DER, then the Water and Power Resources Board of the Department of Forests and Waters on January 5, 1971.

31. Permit DH 14153 authorized two culverts and channel changes in the Wissahickon Creek at Station 701 and 108+, Route 782-7 in Upper Gwynedd Township, Montgomery County.

32. Permit DH 14159 authorized a bridge over the Wissahickon Creek at Station 60 + 75, Route 782-7 in Gwynedd Township, Montgomery County.

33. The culverts permitted by DH 14153 would extend for lengths of 60 feet and 400 feet, respectively, in the channel of the Wissahickon Creek. Each of the culverts would be a box type reinforced concrete structure with an opening of 16 feet by 10 feet.

34. PennDOT's structure plans now specify culvert lengths of 82 feet and 413 feet, respectively.

35. DER has neither received nor approved modifications to the culvert lengths as specified in the original permit application.

36. DER submitted the 1974 Sanders and Thomas report and the Watershed Association objections to Milton Johnson, Chief of the Division of Water Control Structures of DER, for analysis.

37. PennDOT's application for water obstruction permits was not accompanied by complete maps, plans, profiles, and specifications of the water obstruction which PennDOT now plans to construct.

38. The permits which are the subject of this appeal have in fact been amended by PennDOT and the acceptance by DER of a 1974 report evidences concurrence in said amendment.

39. The permits make no provision for a unilateral alteration of the plan, profiles and data and the proposed construction from that set forth in the application upon which the permits were based.

40. According to the Chief of the Division of Dams and Encroachments of DER, Mr. Butler, no time limits were placed on PennDOT permits because of the length of time it takes PennDOT to go into design and because of its own independent procedural requirements.

41. The permits do not authorize the construction of culverts 413 feet and 83 feet long, respectively. The permits do not authorize artificial channels of a length greater than 400 and, accordingly, do not allow construction of channels of approximately 1,100 feet in addition to the culverts.

42. Appellant herein, Precision, received written notice of the permits on November 20, 1974, when its counsel obtained photostatic

copies of the permits from DER.

43. Appellant filed its appeal and petition within thirty (30) days thereafter.

44. The reach of the Wissahickon which is the subject of this action, at Wissahickon Avenue in Upper Gwynedd Township, is approximately 12 feet wide at that point; there, the Wissahickon runs through gently rolling landscape in an area of single family residential, apartment and light industrial uses. The watershed at that point is approximately 2.6 square miles.

45. The Wissahickon is in the Piedmont region of the Commonwealth. In the area of this reach of the Wissahickon, the geology consists largely of Brunswick Shale, which is a very dense material with a very low primary porosity, while the soils are heavy type soils with low permeability.

46. The Wissahickon Watershed at the reach in question is urbanized and is likely to become more so, especially as a result of the construction of the North Penn Expressway and the interchange.

47. The obstructions were designed initially in 1971 for a 50 year flood frequency; a preferred flood frequency today for design purposes is 100 years.

48. The plans for the construction of the highway interchange over the Wissahickon provides for the piping of the untreated highway runoff into the Wissahickon through many pipes spouting directly into the stream; the pipes or *point sources* range in size from 12 to 48 inches in diameter.

49. As a result of the Expressway project, Appellant may lose a unique well which has been pump tested officially at 210 gallons per minute for 72 hours and reportedly yields over 500 gallons a minute.

50. Because of the poor water yield characteristics of the Brunswick formation and the fact that the Appellant's well most likely draws water from a fracture system, the likelihood of drilling a new well of the magnitude of this well is not good. Appellant uses approximately 20,000 gallons of water from its wells per day. After it is used, this water is treated and recycled into the Wissahickon.

51. The assumptions of the quantity of flow during a 50-year storm of 1930 c.f.s. and for a 100-year storm of 1600 c.f.s. form the basis of the 1974

hydraulic investigation submitted to DER by PennDOT. These assumptions and the figures indicated in the 1974 hydraulic investigation are very serious underestimates of the actual flood magnitudes of Wissahickon Creek at the point under consideration according to Appellant's calculations made by Dr. Hammer using another method which gave special emphasis to soil type.

52. In analyzing the hydrology and assumptions contained in the 1974 hydraulic investigation, Dr. Hammer applied to the problem a method he developed in his research with the Regional Science Research Institute; the methodology developed by the United States Department of Agriculture Soil Conservation Service; and a modified method which he based upon the soil conservation service methodology, making adjustments for rainfall distribution.

53. PennDOT has obtained no permits from DER or the United States Environmental Protection Agency permitting the discharge of storm water into the Wissahickon through these pipes.

54. The Sanders and Thomas erosion and sedimentation control plan prepared for PennDOT for the entire project, including the Wissahickon Creek crossing, was reviewed by the Montgomery County Soil Conservation Service and was approved in March of 1974.

55. In the opinions of Messrs. Butler and Johnson, DER experts, the culverts are hydraulically adequate and formed a reasonable basis for the granting of the permits.

56. The Division of Dams and Encroachments requested the Division of Water Quality of the Bureau of Water Quality Management of DER to undertake an environmental assessment.

57. The Division of Water Quality did not perform the assessment because of priorities in its work load.

58. DER through the Division of Dams and Encroachments has taken no further action with respect to the environmental assessment.

59. Exhibit P.D. 1 contains a public notice for the North Penn Expressway and includes the area where this project is located and requests citizen input for the Expressway itself and any part of the expressway.

60. Also, Exhibit P.D. 6 shows that the Department of Health, the Department of Mines and Mineral Industries, the Department of Forest and Waters, the Topographic and Geological Survey Unit, as well as DER were contacted for their comments and input to the project.

61. Mr. Johnson of DER, a qualified expert in the field of hydraulics performed an hydraulic analysis of the project area which included the Reading Railroad culvert. DER recieved profiles and cross-sections of the Wissahickon Creek for 4,000 feet upstream and 500 feet downstream. This was sufficient data to corroborate the study.

62. This study by DER was independent of the 1974 report and showed that even if the Reading Railroad culvert is included in the analysis, the highway culverts will have no detrimental effect. The highway culvert has no effect upstream of the railroad culvert.

63. The relocation of the channel and the backfilling of the existing channel with the same type of soil materials as currently exists should not adversely alter or affect the groundwater recharge of this area.

64. Municipal water supply is available to Appellant as well as the possibility of drilling another well.

65. There is no evidence of fish life nor significant fauna in the permitted area.

DISCUSSION

This case has raised many new, important, and difficult issues. The many propositions and arguments brought forth in lengthy testimony and voluminous briefs can be reduced to three categories for purposes of discussion and, hopefully, resolution. They are jurisdictional, statutory and constitutional objections.

At the outset, of course, the question of jurisdiction was raised numerous times, by oral motion, motion for compulsory non-suit at the close of testimony and, finally, as a major argument urged upon us by Intervenor, in post-hearing briefs. Appellant argues that this appeal was filed timely. The basic jurisdiction of the Environmental Hearing Board arises from the Administrative

Code Section 1924 A, 71 P. S. 510-21(a) which provides:

> "(a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications . . . on any order, permit, license or decision of the Department of Environmental Resources."
> ...

In 1970 PennDOT applied for two permits which were subsequently issued to it in 1971 by DER's predecessor, for the construction of certain culverts and channels, which required a permit under the Pa. Water Obstructions Act for a crossing of the Wissahickon Creek by the projected North Penn Expressway. In 1972 or thereafter, PennDOT decided to change the culverts and channel and submitted new and additional information to DER. At no time, however, did PennDOT ask for or receive amended permits showing the changes which they proposed. Appellant was faced with the impossible task of determining exactly when DER "decided" to permit the changes in question, so that an appeal could be filed from that decision within the required 30 days. We have hereinafter determined that an amendment to the permits as issued was and is required. Unless Appellant is allowed to raise such question in the manner employed in this case, it could *never* do so at the proper time. If DER simply acquieses in the unilateral amendment action of PennDOT, how can a property owner who would be adversely affected by this decision (not to require an amended permit) mandated by statute, *ever* file a timely appeal? Although it is this problem which most troubles us, it is the Regulations of the Board which finally must decide the question. When this appeal was filed on December 19, 1974, 25 Pa. Code 21.21(a) provided:

> "(a) In cases where Appeals are authorized . . . such Appeal shall be in writing and shall be filed with the board thirty (30) days from the date of receipt of written notice of an action of the Department..."
> . . .

The evidence in this case convinces us that Appellant through its counsel did not receive written notice of the issuance of the permits in ques-

tion until November 20, 1974. This appeal was filed within 30 days, and was therefore timely.[1] See *Robert L. Anthony, Action for Community Survival, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources, Appellee, Springfield Associates, Intervenor,* EHB Docket No. 73-356-W (issued November 19, 1973).[2]

Precision next argues that it is not subject to the jurisdiction of the Board because the permits which it requested were not really required--inasmuch as it is a State agency and not a "person" under the Pa. Water Obstructions Act.[3]

The Governor's first and foremost obligation is to assure that all agencies under his jurisdiction comply with constitutional provisions. Among such constitutional provisions is Article I, Section 27, which provides that the people of the Commonwealth "have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." Executive Order 1973-9 issued on July 13, 1973, is designed to assure compliance with the dictates of Article I, Section 27, through delineating the duties of the agencies of the Commonwealth to act as trustees of the public natural resources. And secondly, the Governor, in promulgating this Executive Order, is fulfilling his duty to "take care that the laws of the Commonwealth be faithfully executed; . . ."

The question then becomes one of the status conferred on PennDOT by the Executive Order. PennDOT has correctly asserted that it and other State agencies are not within the definition of "person" in Section 2 of the Pa. Water Obstructions Act, *supra*: But, as a result of the Executive Order, PennDOT is

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1. The Rules previously provided for a fifteen (15) day appeal period but this was changed and the thirty (30) day provision became effective December 15, 1973. It would be turning back the clock in more ways than one, to now apply the fifteen (15) day rule and dismiss this appeal as untimely.

2. In *Robert L. Anthony, supra*, the Appellant was able to establish the belated date of written notice receipt and his appeal was allowed as timely filed.

3. The Pa. Water Obstructions Act, Act of June 25, 1913, P. L. 555, 32 P. S. S687 provides:

> "Any person or persons, partnership, association or corporation, county, city, borough, town or township, . . ."

legally obligated to comply with the standards and permit provisions of the Pa. Water Obstructions Act in the same manner as any person therein defined. In pertinent part, the Executive Order states:

> "Therefore, by virtue of the authority vested in me as Governor of the Commonwealth and in furtherance of the purposes and policies of . . . the Water Obstructions Act (Act of of June 25, 1913, P.L. 555 as amended), I hereby direct the following steps be taken:
>
> "1. The heads of all administrative departments, independent administrative boards and commissions and other state agencies under my jurisdiction shall ensure that state government facilities and activities comply with the above listed environmental laws and the regulations promulgated thereunder."

The requirement that PennDOT comply with the Pa. Water Obstructions Act, *supra*, includes the requirement that it comply with the permit application and approval provisions of that law like any private person. PennDOT must obtain "the consent or permit" of DER:

> ". . . to construct any dam or other water obstruction; or to make or construct, or permit to be made or constructed, any change therein or addition thereto; or to make, or permit to be made, any change in or addition to any existing water obstruction; or in any manner to change or diminish the course, current, or cross section of any stream or body of water, wholly or partly within, or forming a part of the boundary of, this Commonwealth, except the tidal waters of the Delaware River and of its navigable tributaries, . . ."

The Executive Order, itself, sustains the interpretation that PennDOT or any other Commonwealth agency must be treated like a person for purposes of complying with the enumerated statutes. This conclusion is reinforced by the stated purposes of the Executive Order:

> "In implementing environmental control programs, the Commonwealth is making demands on individuals and industry to stop practices which pollute. Government too must do its share to clean up our environment."

It is clear from this passage that the intent of the Governor was to require State agencies to comply with environmental protection laws, including permit provisions thereof, like any individual or corporation within the Commonwealth.

In complying with the Pa. Water Obstructions Act, *supra*, and the rules and regulations promulgated thereunder, PennDOT is not merely seeking the advice or gratuitous approval of DER, but is legally subject to the approval actions of DER.

The Appellant's statutory objections, which we must next discuss, are many in number. First, Appellant argues that The Clean Streams Law[4] and the regulations promulgated thereunder require PennDOT to have a soil erosion control permit--which was not required by DER.

The Regulations provide four exceptions to the erosion and sedimentation permit requirements, as follows, 25 Pa. Code 102.41(a):

> "Any person who engages in an earthmoving activity within the Commonwealth shall obtain a permit prior to commencement of the activity except a permit will not be required:
> "(1) where the earthmoving activity involves plowing or tilling for agricultural puposes [purposes];
>
> "(2) where an erosion and sedimentation control plan has been developed for an earthmoving activity by the U.S.D.A. Soil Conservation Service;
>
> "(3) where an activity is required to obtain a permit pursuant to the Clean Streams Law (35 P.S. §691.1 *et seq.*), the Surface Mining and Reclamation Act (52 P.S. §1396.1 *et seq.*), the Water Obstruction Act (32 P.S. §681 *et seq.*) or the provisions of Chapter 91 - 101 of this Title (relating to water pollution);
>
> "(4) where an earthmoving activity affects less than 25 acres."
> ..."

PennDOT believes that it fits within Section 4 inasmuch as the project will be carried out in sections of 17 acres at a time. We do not agree. This would not be compliance with, but could be a device to avoid compliance with th law. We do find, however, that the erosion control plan was developed with and approved by the Soil Conservation Service, and therefor falls under the provisions of Section 102.41(a) (2). It would take a strict legalistic approach to the Act and the Regulations to hold that the use of the words "developed by" the S.C.S., do not extend to erosion plans which are "developed

4. The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1, *et seq.*

with and approved by" it. We are explicitly admonished by *Payne v. Kassab*,[5] *not* to take that approach.[6]

The erosion control plan includes velocity dissipators to prevent erosion at culvert outlets, lined channels to prevent erosion in the channels, basins to take out the silt, seeding to keep erosion from occurring, hay bales to filter out sediment during construction. The plans include temporary as well as permanent features which will remain after the project is completed. The erosion control plan is incorporated into the construction contract, both in the plans as well as the contract proposal. In addition to the erosion control plan, unforeseen water pollution problems are considered by placing an item in the construction contract whereby the contractor could draw money from a special fund to take care of this possible problem. This convinces us that the plan is adequate and the procedure used reasonable.

Appellants next argue that permits for the outfall structures are required by The Clean Streams Law, *supra*.[7] The project, in the area of concern in this litigation, does include pipes which carry storm water runoff (as opposed to industrial and sewer water) from the highway slope shoulders and paving. If these pipes were not constructed, rainwater could pond on the highway creating a safety hazard to the motoring public or rainwater could find its way to the stream by another way.

The Clean Streams Law, *supra*, deals with sewage and industrial wastes and not with storm water. Storm water is different from sewage and industrial wastes in that it comes from a natural phenomenon. Rainfall is not now and never has been considered a pollutant. Rainfall may, during its travel from the time it falls to its eventual depository merge with other substances, but this is only natural. This rainfall will eventually find itself in a stream of the Commonwealth.

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5. *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973).

6. See *The Chesterbrook Conservancy v. Commonwealth of Pennsylvania, Department of Environmental Resources and The Fox Company, Intervenor*, EHB Docket No. 73-418-W (issued October 18, 1974), in which we upheld this procedure as not being an improper delegation of authority to S.C.S.

7. Appellant makes substantially the same argument under the provisions of the Federal Water Pollution Control Act 33 U.S.C. §1251-1376, which requires an N.P.D.E.S. permit for pollution discharges into certain waterways. Although not developed at hearings, it appears that the actual enforcement responsibilities of DER under the Act are not yet fixed and of course would not be reviewable at this time by the Board.

The Clean Streams Law is codified in 35 P. S. §691.1 *et seq.* Section 35 P. S. §691.3 states that:

> "The discharge of *sewage* or *industrial waste* or any *substance* . . . . which causes or contributes to *pollution* as herein defined or creates a danger of such pollution is hereby declared not to be a reasonable or natural use of such waters. . . . " (Emphasis added)

We agree with DER and the Intervenor that rainwater runoff does not presently fall within any of the enumerated criteria.[8]

Appellant has argued a violation by PennDOT of the Act of April 9, 1929, P. L. 177, as amended 71 P. S. 512(a) 15 which places certain consultation requirements upon it. We find that PennDOT, did, in accordance with the Code consult the other Departments of Government as required. Although Appellant is apparently not satisfied with the method or results of that consultation, we do not believe the statute goes quite so far as to require that. We are of the same view regarding the public hearings advertised by PennDOT in August and September, 1970.[9]

Finally, Appellant alleges violation of the Pa. Water Obstructions Act, *supra*, which creates a framwork whereby DER is charged with a continuing responsibility to safeguard the public interest by monitoring all construction and modification of water obstructions within the Commonwealth. Section 2 of the Pa. Water Obstructions Act as amended contains the operative proscription: Pa. Water Obstructions Act, Act of June 25, 1913, P. L. 555, 32 P. S. §682 provides:

---

8. Although some of the "substances" which accumulate along the roadway like salt and hydrocarbons could arguably fall within the provisionsof the Act, we do not find it an abuse of discretion on the part of DER in not so viewing storm water.

9. Appellant has not demonstrated that the project area is a "recreational area" within the meaning of 71 P. S. 512(a) 15, requiring special conditions before it can be used for highway purposes.

> "...it shall be unlawful for any person or persons. . . .to construct any dam or other water obstruction; or to make or construct, or permit to be made or constructed, any change therein or addition thereto;. . . . or in any manner to change or diminish the course, current, or cross section of any stream, or body of water. . . .without the consent or permit of the Water and Power Resources Board [Department of Environmental Resources], in writing, previously obtained upon written application to said board [Department] therefor."

The undisputed testimony of PennDOT in this proceeding, is that PennDOT presently proposes to encroach upon the Wissahickon Creek in the following manner, to wit: beginning from the downstream end of the PennDOT construction, PennDOT proposes the following changes in the stream: for a length of 436 feet the stream will flow in an artificial channel; at the upstream end of this artificial channel, PennDOT proposes to construct an 82-foot concrete box culvert, 16 feet wide and 10 feet high; from the upstream end of this box culvert PennDOT proposes to construct another artificial channel 394 feet in length; at the upstream end of the second artificial channel, PennDOT proposes to construct a third artificial channel for a length of an additional 260 feet. The total length of artificial channel is, therefore, 1,585 feet. Furthermore, the record is undisputed that these modifications of the stream will result in current changes, *i. e.*, changes in the velocity of flow of the stream. Also, these obstructions and channel modifications necessarily result in changes in the course and cross-section of the Wissahickon Creek throughout the entire length of the stream modification area. Each such water obstruction, course change, current change, and change in cross section of the Wissahickon Creek is prohibited unless a DER permit has been previously issued authorizing such changes. 32 P. S. §§682 and 687; *supra*.

The permits which are the subject of this appeal are the permits on which PennDOT relies to authorize the above-described water obstructions and changes in course, current and cross sections of the Wissahickon Creek. The Permits, however, do not authorize the planned obstructions or the planned changes in the course, current, and cross section of the Wissahickon Creek.

The Permit identified as File No. DH 14153 gives the consent of the

Water and Power Resources Board, now DER, to the construction of culverts with a clear span of 16.75 feet, on a 73 degree skew and a clearance above the stream bed of 10 feet across, and to change the channel of the Wissahickon Creek at station 701+ and 108+ route 782, section 7, ramp D in Upper Gwynedd Township, Montgomery County. Furthermore, the permits contain the following textual limitation:

> "This permit, issued with the understanding that the work herein approved shall be *performed in accordance with the plans, profiles and data sheet filed with the application,* does not give any property rights, either in real estate or material, nor does it authorize any injury to private property or invasion of private rights." (Emphasis supplied)

The second permit, identified by File No. DH 14159 gives the consent of the Water and Power Resources Board to the construction of a bridge with four different clear spans on an 87 degree, 30 feet skew and a clearance above the stream bed of 23 feet across, and to change the channel of the Wissahickon Creek at station 60+ 75, ramp G, route 782-7, in Upper Gwynedd Township, Montgomery County. This Permit also contains the textual identical limitation which is quoted above.

Since both permits specify approval only for work performed in accordance with the plans, profiles and data sheets filed with the application, the application must be examined to determine the nature and extent of permitted obstructions and other stream modifications. The description of the structures for which permits were sought is contained at page 5 of the narrative section of the application as follows (beginning from the downstream end of the obstructions and modifications and moving upstream):

> "The present proposal for a 60 foot long culvert under ramp "D", about 400 feet long channel with a bridge carrying ramp "G" and about 400 feet long culvert under L.R. 782 was studied (see layout scheme "D") and found most economical with equal construction feasibility."

The undisputed testimony of PennDOT verifies that the above quotation constitutes an accurate description of the structures and encroachments for which permits were sought.

As provided specifically in the Pa. Water Obstructions Act, *supra*, and

inherent in the nature of a permit-granting agency's responsibility, the proper procedure for a permit applicant when design changes are introduced in its proposed water obstructions is to describe those design changes and submit them to DER for its approval. Any change in a proposed project which adds additional artificial channel is a material change and one to be avoided unless absolutely necessary. PennDOT's presently proposed water obstructions, because they require 1,585 feet of artificial channel, constitute a substantial additional environmental incursion beyond the 860 linear feet permitted by the permits. Other planned changes in the location and length of the box culverts and the configuration of the channel may indeed have material environmental or hydraulic effects; and it is our view that this judgment is to be made in the first instance by DER in its action on a request for permit amendment. Until such a request is made and acted upon, no work is permitted except that specifically authorized by the extant permits.

In the case of *Commonwealth of Pennsylvania Water & Power Resources Board v. Green Spring Company*, 1 Pa. 349, the court sustained an equity action by the Commonwealth under the Act against a fish hatchery which increased the height of an encroachment of a non-navigable stream on its property only 17 inches. Clearly, then, the changes here are not *de minimis* or permitted by some theory of latitude not present in the language of the permits.[9]

The major question throughout this proceeding was whether DER abused its discretion or acted arbitrarily in relying upon culvert size figures for flood purposes calculated by the use of one accepted hydrological method rather than another. The extended battle of the experts which consumed most of the time in this lengthy hearing need not be resolved by a finding that the witnesses for one party are more worthy of belief than those of another. After hearing all of the very technical testimony offered on the question of the hydrological soundness of the culverts we find no real credibility issue,[10] only a gaping difference of expert opinion on methodology. Although we can find no abuse of discretion on the part of DER in accepting its own and PennDOT's calculations, reports and figures upon which it relied at the hearing stage in this case, we can nevertheless, not

9. It should also be noted that any person who makes or causes to be made a current change not authorized by a permit is guilty of a misdemeanor. 32 P. S. §687.

10. We found all of the technical witnesses to be knowledgeable, candid and truthful in expressing their differing opinions. The differences were to some degree due to the fact that different hydraulic calculation methods were used by each party. We need not decide that DER or PennDOT used the best method--only that a reasonable or acceptable method was relied upon by DER.

overlook what is a clear violation of statute when DER allows PennDOT to unilaterally amend water obstruction permits.

One of the few things on which all parties have agreed is that the three pronged test handed down in *Payne v. Kassab, supra*, is applicable to this case. When a Commonwealth action affecting the environment is under review, Article I, Section 27 of the Pennsylvania Constitution requires that the reviewing court or board test the decision by this standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh any benefits to be derived therefrom that to proceed further would be an abuse of discretion?

We have reviewed our findings in light of the first *Payne* test and in so doing we must answer *No* to that question. This is alone sufficient reason for us to remand this case to DER for further action with regard to the permit amendments. Consequently, we need not now speculate on matters as they might exist if there were no violation of statute.[12]

The Appellant has based many of its objections in this appeal, upon the matters controlled by the decision of this Board in *Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellants; Central Delaware County Authority, Permittee; Community College of Delaware County, Intervenor v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 73-078-B[13] (issued May 16, 1974). Subsequent to the filing of briefs in this matter that

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12. Appellant has raised a number of issues which relate to the alleged failure of DER to conduct what is referred to as an environmental review or assessment of matters related to the permit grant. In this category are such things as the salt and hydrocarbon content highway runoff. We believe these matters if relevant at all, in a proceeding of this kind, must be dealt with only in line with the third test laid down in *Payne v. Kassab, supra*. Having decided that the first test was not met by DER, we have not examined the record in detail with reference to the second and third tests.

13. We there held that an environmental review of secondary impacts of any action, should be considered by DER before issuing a permit.

decision of the Board was reversed by the Commonwealth Court. The Court speaking through Judge Blatt said:

> "...
>
> "It must be remembered, however, that the power of an administrative agency must be sculptured precisely so that its operational figure strictly resembles its legislative model.
>
> "... it *is not a proper function of the DER to second-guess the propriety of decisions properly made by individual local agencies in the areas of planning,* zoning, and such other concerns of local agencies, even though they obviously may be related to the plans approved. Moreover, *impropriety related to matters determined by those agencies is the proper subject for an appeal from or a* direct challenge to the actions of those agencies [here PennDOT] as the law provides, not *for an indirect challenge through the DER.*[14]
> ..."

The case goes on to hold that DER is not the only agency involved in the enforcement of Article I, Section 27 of the Pa. Constitution, and that secondary impacts and alternative uses of resources was not a proper inquiry for DER or this Board to make.

Finally, there should be some comment on Precision's well, which we believe has been the major impetus to this proceeding. We can, of course, add nothing to the Eminent Domain Law, but we are convinced that PennDOT has a proper concern for the tremendous economic benefit Appellant stands to lose if this well cannot be saved. Inasmuch as "just compensation" is the heart of our Eminent Domain Law, and the potential loss, inasmuch as public water is available, does appear to be purely economical, we feel that our action does not leave Appellant high and dry,[15] but with an adequate study.

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14. See *Community College of Delaware County and Community College of Delaware County Authority, Appellants and Township of Marple, Intervening Appellant v. Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellee,* 654 C. D. 1974, (July 18, 1975) and *Central Delaware County Authority, Appellant v. Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellees,* 743 C. D. 1974, (July 18, 1975) which further states:

> "We would agree with the EHB that 'some comprehensive planning is required of the trustee', but we simply cannot sustain the notion that Section 27 automatically designates and authorizes the DER either to act as sole trustee and do all such planning or to supervise and/or coordinate the planning responsibilities of local government agencies. Desirable as such supervision and/or coordination may be, neither Section 27 nor any pertinent legislation authorizes the DER to provide it."

15. Pun intended.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and subject matter of this appeal.

2. An appeal is timely if it is filed with the Environmental Hearing Board within thirty (30) days from the date of receipt of written notice, or the date of receipt of actual notice, of an action of DER.

3. The Pa. Water Obstructions Act, Act of June 25, 1913, P. L. 555; 32 P. S. §681, *et seq.* must be read in conjunction with Article I, Section 27 of the Pennsylvania Constitution.

4. The Water Obstructions Act, 32 P. S. §681 *et seq.* in conjunction with Article I, Section 27 of the Pennsylvania Constitution, prohibits the construction of the water obstructions which are the subject of this appeal unless permits therefor have been granted by DER prior to the construction.

5. The Executive Order of the Governor, dated July 13, 1973, in conjunction with Article I, Section 27 of the Pennsylvania Constitution, requires PennDOT to obtain a new or amended water obstructions permit from DER before constructing the water obstructions which are the subject of this appeal.

6. Appellant has established by a preponderance of the evidence that PennDOT's application for water obstruction permits was not accompanied by complete maps, plans, profiles and specifications of the water obstruction which PennDOT now plans to construct.

7. As provided in the Erosion Control Rules and Regulations, particularly 25 Pa. Code §102.41(a), PennDOT need not obtain an erosion and sedimentation control permit prior to the commencement of any earth-moving activity in connection with the North Penn Expressway because the plan was developed with and approved by the Soil Conservation Service.

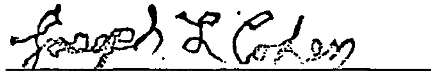
8. When a Commonwealth action affecting the environment is under review, Article I, Section 27 of the Pennsylvania Constitution requires that the reviewing Court or Board test the decision by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion? PennDOT has not fully met the first test.

ORDER

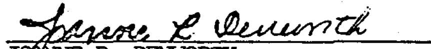
AND NOW, this 29th day of August, 1975, this matter of Precision Tube Co., Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources, PennDOT, Intervenor, is hereby remanded to DER for further action consistent with this opinion.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member



JOANNE R. DENWORTH
Member

DATED: August 29, 1975
llj

Main

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of: :

UNITED STATES STEEL CORPORATION :

(Fairless Works Plant) Docket No. 75-167-W

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

A D J U D I C A T I O N

BY Paul E. Waters, Chairman September 5, 1975

This matter arises from the certification process of the Department of Environmental Resources for a National Pollution Discharge Elimination System permit. On December 24, 1974, the Department certified the issuance of permit No. Pa. 0013463 to the Environmental Protection Agency, hereinafter EPA, and sent notice of this to U. S. Steel Corporation, the applicant for an industrial waste discharge permit for its Fairless Works plant. The notice to U. S. Steel, hereinafter Appellant, and the Rules of the Board indicate that the appeal period to this Board was thirty (30) days.

On July 14, 1975, an appeal was filed with this Board from the Department certification and although there is some question as to whether U. S. Steel fully understood the effect of its delay we find no basis for allowing it *nunc pro tunc*. We therefore enter the following:

ORDER

AND NOW, this 5th day of September, 1975, the motion to quash the appeal of U.S. Steel Corp. filed by the Department of Environmental Resources in the above matter is hereby granted because the appeal was filed more than thirty (30) days after the date of the decision which is the subject of this appeal.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member, not participating in this Adjudication.

DATED: September 5, 1975

psp

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
v.
TRINDLE CONSTRUCTION, INC. and
MR. CLARENCE DENDULK

EHB Docket No. 74-070-CP-W

ADJUDICATION

BY THE BOARD, September 15, 1975

This matter comes before the Board on a Complaint for Civil Penalties for violation of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. 691.1 *et seq.*, hereinafter Act. The Commonwealth charged defendants with allowing 7,000 gallons of oil to be discharged into Hagerman's Run, a tributary of the West Branch of the Susquehanna River. At the time of the discharge, Trindle Construction, Inc., hereinafter defendant, of which Mr. Clarence Dendulk is the President, was performing construction work and other activities related to the construction of a dam on Hagerman's Run in Lycoming County, Pennsylvania.

FINDINGS OF FACT

1. The Plaintiff herein is the Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter called Department) on Petition for Civil Penalties.

2. Defendant, Trindle, is a Pennsylvania corporation.

3. Defendant, Clarence Dendulk, is the President of Trindle.

4. On January 21 and 22, 1974, Trindle was performing construction work and other activities related to the construction of a dam on Hagerman's Run in Lycoming County.

5. The construction was being performed pursuant to a contract between Trindle and the Williamsport Water Authority.

6. Trindle owned and maintained physical control over seven thousand gallons of oil which it brought onto the job site in the vicinity of the dam construction.

7. The tanker containing the oil was located both upstream and upslope from the point of Hagerman's Run where the dam was under construction.

8. At some time after 3:00 P.M. on Monday, January 21, 1974, and 8:00 A.M. on Tuesday, January 22, 1974, the entire contents of the oil tanker discharged onto the ground. Much of said oil then went into the Waters of the Commonwealth, namely, Hagerman's Run.

9. The 7,000 gallons of oil or a major portion thereof was discharged into the waters of the Commonwealth without a permit and without authorization of any rule or regulation adopted pursuant to the Act, from a leak in the tank.

10. Hagerman's Run serves as a public water supply and supplies water to the City of Williamsport through facilities maintained and operated by the Williamsport Water Authority.

11. The Williamsport Water Authority incurred costs in the amount of $3,000.00 as a result of filtering oil from its collection and delivery system.

12. The $3,000.00 in costs incurred by the Williamsport Water Authority were paid by Trindle.

13. The oil which discharged into Hagerman's Run was still thick in downstream areas on the morning of Wednesday, January 23, 1974, more than twenty-four hours after the discharge.

14. The oil which was discharged into Hagerman's Run constituted the largest oil spill observed in Lycoming County, Pennsylvania by Department personnel.

15. The oil which was discharged into Hagerman's Run contaminated said waters so as to render them temporarily harmful, detrimental and injurious to fish, especially the brook trout, and to other acquatic organisms.

16. A limited portion of said waters remained in a contaminated condition for at least one year.

17. Defendants, Trindle and Clarence Dendulk had actual notice of the discharge at or about 8:00 A.M. on Tuesday, January 22, 1974, and, although DER was not immediately notified, Trindle moved to prevent further damage to the water without delay.

18. Clarence Dendulk, President of Trindle Construction, Inc., owns the controlling interest in the company and exercises managerial control over the company.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this proceeding.

2. Defendant, Trindle Construction, Inc. has violated The Clean Streams Law, Sections 301, 307 and 401, by allowing the unauthorized discharge of thousands of gallons of oil into the waters of the Commonwealth.

3. Trindle failed to forthwith notify the Department of the location and the nature of the discharge once it had actual notice of the discharge and, in so failing to notify the Department, violated Section 101.2(a) of the Rules and Regulations adopted pursuant to the Act.

4. A civil penalty may properly be imposed for the violations of which Trindle is responsible.

5. Clarence Dendulk , the President and Chief Executive Officer of Trindle is not personally liable for the company's violations and, civil penalties should not be assessed against him, under the facts of this case.

DISCUSSION

The Department has shown that Trindle violated Sections 301, 307 and 401 of the Act by allowing the discharge of up to seven thousand gallons of oil into Hagerman's Run. There is no merit to the Defendants' contention that the seven thousand gallons of oil constitute neither an industrial waste nor pollution.

The Department has also shown that Trindle violated Department Regulations, Section 101.2(a), by failing to notify the Department as required. The Regulations state that it is the responsibility of the person in charge or in possession of the premises or vehicle from which the substance is discharged to "forthwith notify the Department by telephone". The mandate of the Regulation is explicit and is clearly not fulfilled by expeditiously reporting the discharge to someone other than the Department. Although the circumstances regarding notification described by Defendants are properly considered in assessing a penalty, they do not relieve Trindle of the notice requirement.

Because of the aforementioned violations, Trindle is subject to a civil penalty under Section 605 of the Act. In fixing the amount of the penalty, the Board considered four critical factors:

1. The Department's acknowledgement and our finding that there was no element of willfulness involved.

The attorney for the Department noted in his opening remarks to the Hearing Examiner that there was no element of willfulness involved in this case and, although Section 605 of the Act states that a penalty may be assessed whether or not the violation was willful, the absence of willfulness certainly militates against the imposition of a substantial penalty.

2. The substantial but temporary nature of the damage done to the waters affected by the discharge.

There was considerable testimony regarding the destruction of acquatic life in the waters affected by the discharge. However, the testimony also sets the recovery time at approximately two years at most and much recovery was evident after only one year.

3. The full cost of restoration already borne by Trindle.

The costs to be incurred in restoring waters damaged by unlawful discharge are properly borne, by way of penalty, by the person who allowed the discharge. Here, those costs including $15,300 estimated by Trindle as the cost of the cleanup by its personnel, and $3,000 paid to the Williamsport Water Authority for its costs have already been paid by Trindle.

4. Trindle's cooperation with the Department at the site after the discharge.

Once the discharge occurred, Trindle's personnel attempted to minimize the injury to the waters affected. While the testimony suggests

that certain procedures, i.e. skimming oil, may not have been the most effective method, the testimony does support Clarence Dendulk's statement that his company cooperated fully with the Department and with the Williamsport Water Authority in every way to maintain and clear up the oil spill.

These factors considered, we enter the following:

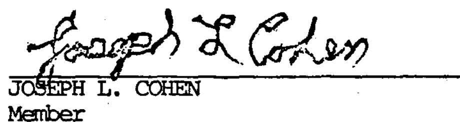
ORDER

AND NOW, this 15th day of September, 1975, in accordance with Section 605 of The Clean Streams Law, 35 P.S. §691.605, civil penalties are assessed against defendant, Trindle Construction Inc. in the amount of Three Thousand Dollars ($3,000.00).

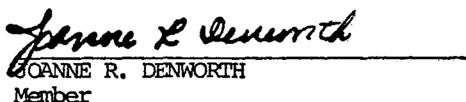
This amount is due and payable into The Clean Water Fund immediately. The Prothonotary of Lycoming County is hereby ordered to enter this penalty as a lien against any private property of the aforesaid defendants with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member



JOANNE R. DENWORTH
Member

DATED: September 15, 1975
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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

WEST PENN POWER COMPANY

Docket No. 73-161-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

A D J U D I C A T I O N

By the Board, September 17, 1975

This case is an appeal by West Penn Power Company (West Penn) from the denial by the Department of Environmental Resources (Department) of an application, No. 1472205 for an Industrial Waste permit for the discharge of cooling water from West Penn's Milesburg Power Station to Spring Creek, in Milesburg, Center County, Pennsylvania. The denial was based on the ground that the discharge would result in a violation of the water quality criteria contained in Chapter 93 of the Regulations of the Department, specifically (and only) as those water criteria related to temperature.

At issue are the interpretations of Chapter 93 of the Regulations read in conjunction with §§97.81, 97.82, 97.83, and 97.85 of the Regulations and with §§ 4 and 5 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.4 and 691.5, and Article I, Section 27 of the Constitution of Pennsylvania. There were 12 days of hearings held before Robert Broughton, who was Chairman of the Board when the hearings started, and who continued as a hearing examiner for the final 6 days of hearings. A proposed adjudication, including findings of fact, was submitted by Hearing Examiner Broughton to the Board. It is being adopted with some modifications.

FINDINGS OF FACT

The following findings incorporate the eighteen numbered paragraphs of the stipulation entered into between the parties on November 1, 1974. The parties

also stipulated the admission of a number of exhibits without objection as to authenticity, and without waiving the right to question the credibility of the documents or raise other objections. These were given EHB exhibit numbers.

1. West Penn Power Company is a Pennsylvania corporation and a public utility which has operated the Milesburg Power Station, an electric power generating facility located in the Borough of Milesburg in Centre County, since the year 1950.

2. West Penn's operation of the Milesburg Power Station has always been conducted pursuant to authority granted to it according to the provisions of the Pennsylvania Public Utility Law.

3. The Milesburg Power Station discharge which is the subject of this proceeding is located approximately eight hundred (800) feet upstream from the confluence of Spring Creek and Bald Eagle Creek along the west bank of Spring Creek.

4. A dam is located approximately four hundred (400) feet above the discharge on Spring Creek.

5. The dam on Spring Creek near the Milesburg Power Station is over forty-five years old and was acquired by West Penn in 1929.

6. Steam coming from the turbines at the Milesburg Power Station is cooled in two condensers. Water is taken from Spring Creek above the dam at a constant rate of 15,000 gallons per minute, per unit for each of two units and circulated through to cool the condensers of the electric generating units. The water is then discharged into Spring Creek approximately four hundred (400) feet below the dam.

7. The only issue in this case revolves around the thermal component of the Milesburg Power Station discharge.

8. Spring Creek is supplied by groundwater sources originating in limestone beds in the Nittany Valley. In the vicinity of the Milesburg Power Station it has an average water depth of one to three feet over a flat bottom of small rubble and is approximately seventy-three feet wide.

9. Bald Eagle Creek is fed basically by surface runoff. It has an average depth of two feet, but is slower-moving than Spring Creek.

10. On March 23, 1972, the Commonwealth and West Penn entered into an agreement wherein it was stipulated that West Penn would submit two applications and supporting data for a single permit to discharge condenser cooling water into Spring and Bald Eagle Creeks. One Application, No. 1472205, from the denial of which this appeal was taken, would provide for no treatment; the other, No. 1472204, would provide for predischarge cooling.

11. On December 22, 1972, West Penn submitted modules Number 2, 4 and 27 of the Sanitary Water Board's permit application form for industrial wastes, Application No. 1472205.

12. On March 8, 1973, West Penn submitted a Pollution Incident Prevention Plan for the Milesburg Power Station discharge as part of its Application No. 1472205 for a Sanitary Water Board Permit. Also, On March 8, 1973, modifications to module 27-1 and an additional module page 27-1 a were submitted.

13. The above mentioned March 8, 1973, modifications submitted by West Penn altered sheet 27-1 at the insistence of the Department to indicate in further response to the answers given regarding whether Spring Creek was "suitable for trout". However, West Penn further qualified the above alteration in additional sheet 27-1 a and stated as follows:

> "Spring Creek is presently classified as a trout stream by the Pennsylvania Department of Environmental Resources. However, recent aquatic impact studies immediately upstream from the power plant indicate that the average temperature of the stream at this location is 64°F. This stream average is well above the 58°F. temperature limit considered suitable for trout although indigenous trout may survive in this environment on short term basis. It is therefore concluded that although Spring Creek is presently classified as a trout stream, the lower reaches of the stream near the confluence of Spring and Bald Eagle Creek may not be a completely 'suitable' environment for trout."

14. During the period the Department was reviewing West Penn's application No. 1472205 for approval to continue its untreated discharge from the Milesburg Power Station, the highest designated use of Bald Creek between Laurel Run and Nittany Creek (which includes the area at and below Spring Creek's confluence with Bald Eagle Creek) was a "cold water fishery".

15. Effective May 12, 1974, the Environmental Quality Board changed the highest designated use of Bald Eagle Creek, from Laurel Run to Nittany Creek, from a "cold water fishery" to "trout stocking" (i.e., naturally capable of supporting trout stocking but not trout reproduction). This new classification is consistent with facts contained in the Milesburg Aquatic Impact Study.

16. By letter dated May 2, 1973, Ernest Giovanitti of the Department informed West Penn of the denial of its application No. 1472205 for a permit to discharge untreated water. It is from this denial that the present appeal is being taken.

17. In July of 1971, Howard Swartz, Executive Vice President of West Penn Power Company, received a violation notice directed to West Penn Power's Milesburg Power Station. This violation notice was from the Department of Environmental Resources, Commonwealth of Pennsylvania, signed by Charles Williams, Jr., Chief of the Administration & Enforcement Section of the Pennsylvania Bureau of Sanitary Engineering.

18. West Penn has submitted an application to the United States Environmental Protection Agency (hereinafter EPA) for a National Pollutant Discharge Elimination System (hereinafter NPDES) permit.

19. Pennsylvania has applied to the EPA for authority to administer the NPDES program in the Commonwealth.

20. The Milesburg Power Station has a full load capability of forty-six megawatts net output; and, until the conversion to No. 2 fuel oil in late 1973, was fueled by coal.

21. The Milesburg Power Station is predominantly a peaking facility, but it is also utilized when considerations of service require such utilization of power in its service area.

22. The only matter at issue in the denial of a permit to discharge untreated water from the Milesburg Power Station is the thermal component of the discharge.

23. There is no practical way of cooling the condensers at the Milesburg Station without discharging some water and even with a cooling tower the Milesburg Power Station would, periodically and during certain times of the year, discharge warm water into Spring Creek.

24. The cost, estimated at the time of the hearing, to install a cooling tower at the Milesburg Power Station, of the type mentioned in the permit for a treated discharge approved by the Department would be $936,000.00.

25. The annual operating costs, estimated at the time of the hearing, for the cooling tower approved by the Department for the Milesburg Power Station would be $474,000.00.

26. A wet cooling tower has an environmental impact of emitting water into the air which can result in increased fogging, hazing and icing. It may also increase the concentration of dissolved solids in Spring and Bald Eagle Creeks.

27. In approving West Penn's application for a permit to discharge treated water and to build a wet cooling tower at the Milesburg Power Station, as well as in denying the permit application at issue here, the Department had knowledge that the cooling tower which was proposed might have adverse environmental impacts within the vicinity of the Milesburg Station. What consideration, if any, was given this knowledge is not known.

28. The temperature of Spring Creek has been taken regularly at the Milesburg Power Station and has been recorded on log sheets since the year 1950. The temperature of the discharge water of the Milesburg Power Station has also been regularly taken for over eight years.

29. The ambient temperature of Spring Creek above the discharge rises in some years to 72°F in the summertime.

30. The temperature of Spring Creek at Axeman (located approximately four to five miles upstream from Milesburg), as measured by the United States Geological Survey measuring station, consistently exceeds 58°F during the months of May, June, July, August and September.

31. Both the Director of the Bureau of Fisheries and Engineering and the Chief of the Fisheries Management Section were of the opinion that for purposes of evaluating the cooling tower alternative, it was "not realistic" to insist upon a strict 58°F discharge in Spring Creek from the Milesburg Power Station to the confluence of Spring and Bald Eagle Creeks. This opinion was transmitted to the chief of the Division of Quality Control of the Department.

32. The mixed temperature of Bald Eagle Creek below the confluence of Spring and Bald Eagle Creeks is cooler, during the period between October and December, than the ambient temperature of Spring Creek.

33. At all times of the year, the natural temperature of Bald Eagle Creek below the confluence of Spring and Bald Eagle Creek is cooler than the existing ambient temperature in either one of the streams above the confluence.

34. During the critical months for temperature on Spring Creek of July and August, a passage zone for cold water fish exists which is approximately 50 percent of stream width.

35. During the months of September and October, when the highest mixed temperatures below the confluence of Bald Eagle and Spring Creeks exist, a fish passage zone of approximately 50 percent of river width exists.

36. The longitudinal extent of the Milesburg thermal plume is contained within the natural mixing zone of Spring and Bald Eagle Creeks.

37. The dynamics of the physical properties of any two rivers joining at a confluence are in a high state of flux, and generally the confluence area has a diversity different and, in most cases, higher than either of the two streams joining at the confluence.

38. For all months of the year except March, the mean flow of Spring Creek is larger than that of Bald Eagle Creek just above the confluence. During

March, Bald Eagle Creek's flow is larger than Spring Creek. The low flow for Spring Creek, based on a four-year (1967-1970) average, occurs during September, The combined flow for Spring and Bald Eagle Creeks has a low flow that occurs during October.

39. The ambient temperatures of lower Spring Creek naturally exceed 58°F consistently during the months of June, July, August and September.

40. Temperature requirements for freshwater fish vary during the year dependent upon particular biological functions (spawning, incubation, growth, etc.). Lethal temperatures for trout and other fish are dependent upon the temperature to which the fish were acclimated before exposure to the lethal temperature. These lethal temperatures are also dependent upon the length of exposure.

41. Brown trout begin their main spawning runs in the fall when the water temperature falls to about 44-48°F. Spawning will occasionally occur over a wider temperature range but would be reduced at higher and lower temperatures. Egg incubation times vary from 148 days at 35.5°F to 35 days at 52°F with hatching success being reduced at higher temperatures. Hatching will occasionally occur at 58-60°F and the variation probably depends on the particular race of the species. Water temperature is the main external environmental factor influencing growth rate; maximum growth rate was achieved at 54°F. As indicated, the lethal temperature for brown trout is dependent upon the acclimation temperatures; also, young fish generally have a greater heat tolerance than do the adults. Fifty percent of brown trout alevins died at 73.4°F during a 7-day exposure after acclimation at 68°F although some fish can endure temperatures up to 77-80°F for short periods.

42. Brook trout also spawn in the fall at mean daily water temperatures between 40-50°F. Optimal hatching occurred at 43°F with a 50 percent reduction at 55°F. Incubation time varied from 144 days at 35°F to 35 days at 55°F. Optimal growth for larvae was 54-59°F and for adult brook trout was 61°F. Growth rates are reduced at higher temperatures. Fifty percent of adult brook trout acclimated at 52, 68 and 75-77°F, died at temperatures between 77-78°F. Some fish could survive higher temperatures for short periods of time (a few hours).

43. Fish will avoid—swim away from—areas where they find temperatures which they do not like. Hence, fish are seldom killed by temperature changes under field (as distinguished from laboratory) conditions.

44. Spring Creek, in the area of the Milesburg discharge, will naturally support warm water fish as well as members of the family Salmonidae.

45. In order to ascertain the effect, if any, of the discharge from the Milesburg Power Station, West Penn had the Westinghouse Environmental Systems Department conduct two studies. The first of these was conducted from March through December of 1972. The second of these was referred to throughout the hearings as the "Milesburg Seasonal Aquatic Impact Study".

46. The area of Spring Creek that was designated as Zone No. 1 in the Milesburg Seasonal Aquatic Impact Study, which was above the dam upstream from the Milesburg Power Station, and therefore above any possible temperature influence of the power station, is a marginal trout stream.

47. The ambient temperature for Spring Creek upstream from any possible temperature influence of the Milesburg Power Station as determined from the Milesburg Seasonal Aquatic Impact Study and from records of the temperature of the intake water, during spawning season for brook trout and rainbow trout, exceeds the optimum spawning temperature of these respective species.

48. The calculated mixed temperatures of Bald Eagle Creek downstream from the Milesburg Power Station when the power plant is not operating, exceed the maximum weekly average temperature for spawning necessary for brook and rainbow trout.

49. The maximum weekly average temperature for brook trout,spawning is exceeded in Bald Eagle Creek during that species' spawning season; and during the early part of that spawning season the short-term maximum temperature for brook trout embryo survival is also exceeded.

50. The maximum weekly average temperature for rainbow trout spawning is exceeded during the latter part of the spawning season in Bald Eagle Creek; toward the latter part of that spawning season the maximum weekly average for spawning activity is exceeded; and during a period of the spawning season the short-term maximum temperature for embryo survival is exceeded.

51. The temperature range for brown trout spawning is exceeded during part of the spawning season by the natural temperature of Bald Eagle Creek and the preferred temperature of brown trout is exceeded during most of the summer months in Bald Eagle Creek.

52. The calculated mixed temperatures of Bald Eagle Creek below the confluence with Spring Creek, when the power plant is not operating, are such that this section of Bald Eagle Creek cannot naturally sustain a cold water fishery.

53. The calculated mixed temperature of Bald Eagle Creek below its confluence with Spring Creek with the Milesburg Power Station operation at full load, does not exceed the upper limit for survival of rainbow trout.

54. The calculated mixed temperature of Bald Eagle Creek below its confluence with Spring Creek, with the Milesburg Power Station operating at full load with a maximum heat output, does not exceed the upper limit for survival of brown trout.

55. The calculated mixed temperature of Bald Eagle Creek below its confluence with Spring Creek, with the power plant operating at a maximum, and a discharge temperature 18°F above the inlet temperature, does not affect the use of Bald Eagle Creek as a trout stocking stream.

56. The temperature of the discharge from the Milesburg Power Station, without mixing and at full output, causing a temperature difference between inlet and outlet of 18°F, exceeds the weekly average temperature for maximum growth of the white sucker only during the summer and by only a few degrees for a short period of time.

57. Under the usual operating conditions existing at the Milesburg Power Station, white sucker could live and grow in portions of the thermal plume.

58. Based upon temperature considerations alone, small mouth bass would live and grow well in all portions of the thermal plume during the summer months.

59. The maximum discharge temperature does not exceed the maximum weekly average temperature for spawning of the blue gill sunfish during approximately the first half of the blue gill sunfish spawning season.

60. The upper temperature limit for growth of the blue gill sunfish is not exceeded by the maximum discharge temperature of the Milesburg Power Station.

61. A study by the Commonwealth of fish and benthic communities in August and September, 1973, indicates that the east portion of Spring Creek opposite from and below the discharge supports a biological community with the species composition of a reasonably normal cold water fishery. The west portion, within the influence of the heated discharge, has a species composition representative of a reasonably healthy warm water fishery.

62. The biological data collected by Westinghouse Environmental Systems Department, at Milesburg during 1972, as well as by the Department in 1971 and 1973, indicated that, while there may be effects on aquatic biota which are attributable to the Milesburg Power Station discharge, such effects are restricted

to the thermal plume within the mixing zone, are limited to warmer summer months and do not threaten or disrupt the balance or stability of the ecosystem of Spring Creek or Bald Eagle Creek.

63. In order to determine the effect of any discharge on the stream into which such discharge is made,the aquatic populations, as well as all physical and chemical parameters of the stream must be studied on a case-by-case basis.

64. The Milesburg Power Station discharge does not interfere with present, and does not interfere significantly with possible future uses of Spring Creek.

65. In the permit granted to discharge treated wastes (Application No. 1472204) from the Milesburg Power Station, the Department, on its own initiative, stated that West Penn could take water from Spring Creek and discharge it into Bald Eagle Creek.

66. In passing on the applications for West Penn's Milesburg Power Station, the Department only looked at the temperature criteria for Spring Creek contained in Chapter 93 of the Pennsylvania Code,and considered a 58°F maximum temperature and a maximum 5°F rise above ambient stream temperature, assuming complete mixing and assuming the stream was at critical low flow.

67. In passing on West Penn's application for an untreated discharge, the Department made no evaluation of the actual impact of the Milesburg discharge and made no evaluation of the alleged effects of the discharge on the uses of the receiving stream.

68. In rejecting West Penn's application for a permit to discharge untreated water from the Milesburg Power Station, the Department in E. Giovanitti's letter of May 2, 1973, to West Penn Power Company, stated that the rejection was for failure to meet applicable temperature criteria.

69. When applying the temperature regulations of the Department, and deciding whether to select a mixing zone, and defining such mixing zones, it is of critical importance to take into account any confluence or other conditions which may be present in the area downstream.

70. The Department did not apply a mixing zone in passing on West Penn's application for an untreated discharge, but did apply a mixing zone in granting West Penn's application for a treated discharge, despite the fact that under the Department's interpretation the water quality criteria of 25 Pa. Code Chapter 93, and the strict requirements of §97.82 (a) would not be met under the Department's interpretation.

71. Natural mixing zones occur in nature, when streams with different characteristics merge.

72. Heat in discharges as an environmental factor, unlike many other components of discharges,dissipates and does not have extensive or cumulative downstream effects.

73. The Sunbury Station of Pennsylvania Power & Light was allowed a mixing zone within which compliance with the temperature water quality criteria of Chapter 93 was not had.

74. Dissolved oxygen levels in an aquatic environment are good indicators of the health of the aquatic ecosystem with a higher level of dissolved oxygen being more favorable to health, maintenance and strength of an aquatic community. The dissolved oxygen concentration in Spring and Bald Eagle Creeks are at or near saturation.

75. There is no synergism between the thermal discharge associated with the Milesburg Power Station and nutrients.

76. A diatom dominated stream is generally considered by aquatic biologists to be a healthier stream than a stream dominated by blue-green algae, and the diatom dominates the periphyton community in Spring and Bald Eagle Creeks, albeit less dominantly within the heated discharge than in other portions of those creeks.

77. The Westinghouse Environmental Systems Department made an evaluation of the seasonal impact on the benthic community which was based upon a benthic diversity index (at a family level) in each of the study zones. The results of these studies and evaluations show that there was no statistically significant difference in the benthic diversity between study zones due to the Milesburg Power Station thermal effluent. The only effects shown were between the heated area and other areas.

78. The zonal analysis of the benthic diversity index showed that the benthic diversities within the heated study zones were not statistically different from the diversities within the control zone thereby indicating a balanced, stable ecosystem.

79. Because fish represent the highest trophic level in most aquatic ecosystems, they hold a conspicuous position in being indicators of the general condition of the ecosystem.

80. Environmental stresses, including the effect of a thermal discharge, which may affect lower trophic levels such as benthos and periphyton, eventually may be reflected in the fish population structure.

81. The analyses of the fish data concerning fish composition, biomass, diversity index and condition factor for the dominant species revealed that the fish communities in the heated zones are either not significantly different from other study zones or that heated zones are better from a statistical viewpoint.

82. A species diversity index is a measure of the number of different species and the number of different organisms in each species. A species diversity index both defines a particular environment and indicates the health of that species diversity index is in the best measure of the strength and stability of an ecosystem.

83. The Department at one time concluded that the thermal discharge from the Milesburg Power Station was having no adverse impact on the benthic macroinvertibrate population of Spring Creek.

84. The 1973 survey by the Department failed to examine many of the parameters which the Department witnesses stated were important and which were studied by Westinghouse Environmental Systems Department.

85. The 1971 aquatic survey done by the Department was only a general survey of the entire Spring Creek--Logan Branch Spring Creek watershed.

86. The aquatic ecosystem of Spring Creek in the area of the Milesburg Power Station discharge, taken as a whole, is not adversely affected by the Milesburg discharge. A portion of the lower 800 feet of Spring Creek is changed by the discharge from a cold water to a warm water fishery.

87. A stable, balanced, indigenous, aquatic ecosystem is being maintained in both Bald Eagle Creek and in Spring Creek in the area of the Milesburg discharge.

88. The Milesburg discharge does not interfere with the use of either Bald Eagle or Spring Creeks as trout stocking streams.

89. In failing to allow a mixing zone to West Penn's Milesburg discharge (and in denying the permit), the Department failed to consider the factors listed in §5 of The Clean Streams Law, *supra*.

90. The Department failed to consider the adverse environmental effects of its approved alternate method of control (a cooling tower) in denying West Penn's application for a permit to discharge untreated condenser cooling water.

91. In rejecting West Penn's application for a permit to discharge untreated water and in approving the application to discharge treated water, the Department failed to adequately consider the relative economic burdens of such treatment in light of the level of environmental effect involved.

DISCUSSION

This case involves an apparent conflict between the water quality criteria for Spring Creek,[1] specified in §93.6 (b) (5), Table 9 (04.137.24) of the Regulations of the Department, as those water quality criteria apply to temperature,[2] and § 97.82 (a) of the Regulation and the language of §§97.81, 97.82 (b), 97.83 and 97.85[3] of the same Regulations. It also involves a dispute as to the

1. When the case was originally filed, the same water quality criteria applied to Bald Eagle Creek. While the case was pending, the water quality criteria for Bald Eagle Creek were changed, so the conflict referred to now applies severely only to the lower 800 feet of Spring Creek.

2. The water quality criteria for Spring Creek, designated as a cold water fishery are at present as follows, 25 Pa. Code §93.5 (c), (Table 3):

> "d Temperature
> "d_1 Not more than a 5°F. rise above ambient temperatures, that is the temperature of the water body upstream of a heated waste discharge or waste discharge complex. The ambient temperature sampling point should be unaffected by any sources of waste heat; not to be increased by heated waste discharges to temperatures in excess of 58°F., not to be changed by more than 2°F. during any one-hour period."

(This language was changed during the pendency of this litigation. We apply the currently applicable language. If a difference in result involving the exercise of the discretionary expertise of the Department arises we will deal with that situation then. It does not in this case.)

The present water quality criteria for Bald Eagle Creek, designated as trout stocking waters, is as follows, 25 Pa. Code §93.5 (c), (Table 3):

> "d Temperature
> "d_6 For the period February 15 to July 31 not more than 5°F. rise above ambient temperature or a maximum of 74°F., whichever is less, not to be changed by more than 2°F. during any one hour period; for the remainder of the year not more than a 5°F. rise above ambient temperature or a maximum of 87°F., whichever is less, not to be changed by more than 2°F. during any one-hour period"

3. These §§97.81, 97.82, 97.83, and 97.85 read as follows:

> "§97.81 Prohibition.
>
> The temperature of the waters of this Commonwealth shall not be increased artificially in amounts which shall be inimical or injurious to the public

scope of the Department's responsibilities under those Regulations, as affected by §§ 4 and 5 of The Clean Streams Law,[4] *supra*, and Article I, Section 27 of the

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(3 continued)

health or to animal or aquatic life or prevent the use of water for domestic, industrial or recreational purposes, or stimulate the production of aquatic plants or animals to the point where they interfere with these uses.

"§97.82 Allowable discharges.

"(a) The heat content of discharges shall be limited to an amount which would not raise the temperature of the entire stream at the point of discharge 5°F. above ambient temperature or a maximum of 87°F., whichever is less, nor change the temperature by more than 2°F. during any one-hour period, assuming complete mixing but the heat content of discharges may be increased or further limited where local conditions would be benefited thereby.

"(b) Where downstream circumstances warrant, the specific area in which the temperature may be artificially raised above 87°F. or greater than 5°F. above ambient temperature or by more than 2°F. during any one-hour period shall be prescribed.

"§97.83 Fishways.

"A fishway shall be required in streams receiving heated discharges where it is essential for the preservation of migratory pathways of game fish, or for the preservation of important aquatic life. The dimensions of the fishway shall be prescribed in each case, dependent upon the physical characteristics of individual streams whenever necessary.

"§97.85 Trout streams.

"There shall be no new discharge to waters providing a suitable environment for trout if as a result the temperature of the receiving stream would be by more than 5°F. above natural temperatures or be increased above 58°F."

4. Sections 4 and 5 of The Clean Streams Law provide in relevant part as follows:

"§691.4 Declaration of policy

"(1) Clean, unpolluted streams are absolutely essential if Pennsylvania is to attract new manufacturing industries and to develop Pennsylvania's full share of the tourist industry;

"(2) Clean, unpolluted water is absolutely essential if Pennsylvanians are to have adequate out of door recreational facilities in the decades ahead;

"(3) It is the objective of the Clean Steams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every

Constitution of Pennsylvania.[5]

Interestingly, the case does not involve significant dispute as to the basic underlying facts, although there is considerable disagreement between the parties as to the interpretation and legal significance of those facts. Both parties agree that, assuming complete mixing at the point of discharge, there would be, at full power plant load and minimum stream flow, a theoretical stream temperature change of almost 9°Farenheit (F). Therefore, the strict requirements of §97.82 (a) are not met. In reality, however, complete mixing does not occur at the point of discharge and, by the time complete mixing does occur, the heated water has been exposed to the natural environment for some period of time, and some cooling will have taken place.[6]

(4 continued)

stream in Pennsylvania that is presently polluted;

"(4) The prevention and elimination of water pollution is recognized as being directly related to the economic future of the Commonwealth; and

"(5) The achievement of the objective herein set forth requires a comprehensive program of watershed management and control.

"§691.5 Powers and duties

"(a) The board and the department, in adopting rules and regulations, in establishing policy and priorities, in issuing orders or permits, and in taking any other action pursuant to this act, shall, in the exercise of sound judgment and discretion, and for the purpose of implementing the declaration of policy set forth in section 4 of this act, consider, where applicable, the following:
"(1) Water quality management and pollution control in the watershed as a whole;
"(2) The present and possible future uses of particular waters;
"(3) The feasibility of combined or joint treatment facilities;
"(4) The state of scientific and technological knowledge;
"(5) The immediate and long-range economic impact upon the Commonwealth and its citizens."

5. Article I, Section 27 of the Constitution of Pennsylvania provides as follows:

"Natural resources and the public estate

"Section 27. The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

6. In this respect heat, as a pollutant, is unlike chemical pollutants. The latter may become diluted as they are carried downstream, but do not disappear or dissipate. Many even build up and become concentrated in the organisms and food chains at the aquatic ecosystem. Heat not only is diluted: it dissipates.

Unlike Regulation §97.82 (a), the water quality criteria do not refer to "the point of discharge" as the point at which the stream temperature may not be raised above the applicable limits. Hence, the water quality criteria do not preclude the allowance of a reasonable mixing zone if there is no significant effect on the ambient temperature of the stream outside such a mixing zone. The Department's initial analysis, which assumed the same theoretical calculation was applicable under both Chapter 93 and §97.82 (a) was therefore legally in error. That does not resolve the case, however. The thermal plume of the plant itself ranges as high as 19.5°F.[7] above the intake temperature, and amounts of 41% of the flow of Spring Creek. Pending complete mixing, stream temperatures within the plume are therefore raised considerably more than 5°F. This is not contested. Nor is it contested that there are significant effects on the aquatic ecosystem within the area occupied by the thermal plume in Spring Creek.[8] West Penn argues that these significant effects are limited to the area at the plume--aproximately one-half the width of the lower 800 feet of Spring Creek--and that the effects on the aquatic ecosystem of Spring Creek as a whole are insignificant.

The Department argues first that since the literal language of §97.82 (a) is violated, nothing else matters. Second, it argues that even if something else matters, any effect in any portion of the stream is a significant effect. See, e.g. the recommendations made in the Department's two studies of lower Spring Creek, Commonwealth Exhibits #1 and #12.

The legal argument thus turns on the issue of whether a "mixing zone", or area within which temperatures may be allowed to increase more than the strict numerical requirements of Chapter 93 and §97.82 (a) may (or more accurately in the context of this case, must) be allowed. The Department on this issue argues that Chapter 93 and §97.82 (a) effectively preclude any mixing zone. West Penn argues that Chapter 93 and §§97.81, 97.82 (a) *and* (b), 97.83, and 97.85 must be read together, and must be read also in light of §5 of The Clean Streams Law, *supra*. West Penn argues that, so read, the Regulations require that the Department define and approve some reasonable mixing zone, at least "if downstream circumstances warrant".

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7. 19.5°F. is acutually the maximum design temperature change of the power plant. 18.4°F. is the highest temperature change noted in the record.

8. See *supra* page 10 *et seq.*

On this issue we must hold that West Penn is correct. Sections 97.82 (b) and 97.83 purport to modify the requirements of at least §97.82 (a). And, as we have indicated, we do not believe that the requirements of Chapter 93 preclude the allowance of a reasonable mixing zone. To the extent these provisions are in apparent, but not irreconcilable conflict,[9] then §5 of The Clean Streams Law, *supra*, especially §§5 (a) (1), 5 (a) (2), would seem to require the more flexible interpretation.[10] And, indeed, since the Regulations, read as a whole, give the Department discretion, "where downstream circumstances warrant", to define a mixing zone, general principles of administrative law would seem to require the Department to exercize that discretion, and §5 of The Clean Streams Law[11] requires that all of the factors enumerated therein must be considered in connection with exercising it.[12]

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9. The conflict between Chapter 93 and §97.85 does, indeed, appear to be irreconcilable. The former limits all discharges, the latter only "new" discharges. See notes 2 and 3, *supra*. In relation to the enactment dates of either provision (whether we take the original dates of enactment by the Sanitary Water Board, in the middle 1960's, or the reenactment date, by the Environmental Quality Board in 1 Pa. Bull. 1804 (1971) the discharge in question is clearly an "old" discharge, the Milesburg Power Station having been operated by West Penn since 1950. Arguably the application of §97.85 to new discharges only is related to the fact that The Clean Streams Law at the time of §97.85's original proposal (before the 1965 Clean Streams Law amendments) was geared to keeping existing clean streams clean, not reclaiming polluted streams. The 1962 Report of the Division of Sanitary Engineering, "Heated Discharges . . . Their Effect on Streams" (EHB Exh. 19), which contains the recommendation for that provision, however, places the emphasis on the then limited nature of the environmental impact, and on what the Division regarded as unjustifiable costs of requiring treatment of existing discharges. The relative dates of enactment of Chapter 93 and §§ 97.81, 97.82, 97.83, and 97.85 do not especially help us in deciding which sections are applicable to this case, even with reference by analogy to §§ 81 and 66 of the Statutory Construction Act, Act of May 28, 1937, P.L. 1019, as amended, 46 P.S. §§ 581 and 566, since the wholesale reenactment by the Environmental Quality Board in 1 Pa. Bull. 1804 (1971) prompts at least a question as to whether that Board intended to enact inconsistent provisions. Since it is possible to read §§ 97.82 (b) and 97.83 as exceptions to Chapter 93 and §97.82 (a), we conclude that those provisions are not in irreconcilable conflict, but that the principle of §51 of the Statutory Construction Act, *supra*, 46 P.S. §551 applies — we can, and therefore should, give effect to all of these provisions. *Reese v. Hemphill*, 411 Pa. 236, 191 A.2d 835 (1968); *Fiddler v. Zoning Board of Adjustment of Upper McCungie Township*, 408 Pa. 260, 182 A.2d 692 (1962). Section 97.85 and Chapter 93 may well be in irreconcilable conflict; §97.85 is not crucial to our decision, however, and will be disregarded.

10. *Rochez Bros. Inc. v. Commonwealth*, Pa. Commonwealth Ct. A.2d (1975); *East Pennsboro Township Authority v. Commonwealth*, Pa. Commonwealth Ct. A.2d (1975).

11. As well as §4, taken in conjunction with the holding of *Bortz Coal Co. v. Commonwealth*, 2 Pa. Commonwealth Ct. 441 279 A.2d 388 (1971) and *Rochez Bros. Inc. v. Department of Environmental Resources*, 15 Pa. Commonwealth Ct. 324 A.2d 790 (1975), that factors set forth in the purpose of a statute must be considered when any discretionary action is taken under that statute.

12. Originally, at the hearing, we thought that it would be controlling whether the Department would be required to take the factors enumerated in §5 of The Clean Streams Law into account even in the event of a clear violation of the Regulations. Because we have concluded that the Regulations themselves leave an area of discretion that requires taking those factors into account, we do not reach the issue in this adjudication.

The fact that the Department was required to exercise its discretion, taking certain factors into account, and did not do so, dictates at least a remand to the Department. See *Burlington Truck Lines, Inc. v. United States,* 371 U. S. 156 (1962); *Bortz Coal Co. v. Air Pollution Commission,* 2 Pa. Commonwealth Ct. 441, 279 A.2d 388, (1971), on remand 7 Pa. Commonwealth Ct. 362, 299 A.2d 670 (1973).

In the recent case of *Warren Sand & Gravel Co., Inc. v. Commonwealth,* (No.'s 734 and 735 C. D. 1974, issued July 9, 1975) Commonwealth Court noted (pp. 14-15 of the slip opinion) that the Environmental Hearing Board has the power to substitute its discretion for that of the Department, at least in cases where there has been no compliance by the Department with the terms of the Administrative Agency Law, Act of June 4, 1945, P.L. 1388, as amended, 71 P.S. §§1710.1 *et seq.* In saying this, Commonwealth Court appeared to have been saying something very similar to what it said of its own power in *Buckeye Coal Co. v. Goddard,* 10 Pa. Commonwealth Ct. 15, 26-27, A.2d (1973) where it said:

> "...This proceeding comes to us not only without a record but without prior adversary presentation of the thing in issue. We are not, therefore, limited in our review to determining whether the Commission's order is supported by the evidence as would be the case of an adjudication made pursuant to the Administrative Agency Law , nor are we without power to modify the questioned order as are reviewing courts in the case of motor vehicle license suspensions, nor are we prevented from altering the order as in the case of appeals from Liquor Board decisions where the findings are unchanged, nor does the Commission's order have prima facie validity as do assessment records; rather, as the first true hearing body, we render 'such decision and order as may be proper and appropriate under the circumstances.' " (Footnote omitted.)

While we are in a similar position in this case and, while we have a copious record upon which to base a decision, we would, as in other cases, refrain from making the decision, at least insofar as it involves the exercise of judgment by experts in the Department, unless we were to conclude, based on applicable legal criteria, that it would be an abuse of discretion, or very close to that, for the Department to make the decision in other than a particular manner. As will be seen, we so conclude. We go on to a consideration of the decision itself, in light of applicable legal criteria.

The possible mixing zones, given the physical facts relating to the relative flows and temperatures of Spring and Bald Eagle Creeks, and of the Milesburg Power Station discharge, are (1) almost none at all [13], (2) approximately the western one-half of the lower 800 feet of Spring Creek, and a smaller portion of Bald Eagle Creek. A lesser degree of cooling, as by, e.g. a smaller cooling tower slightly lower temperature effluent might well cool sufficiently so that the mixing zone did not include any of Bald Eagle Creek; but in terms of impact on current uses of the streams in question, as well as in terms of significant deviations from water quality criteria, the principal concern, as we shall see, is with Spring Creek. In addition, the testimony did not indicate that a lesser degree of cooling would be significantly more practical or cheaper, and it strongly suggested that a lesser degree of cooling would be equally costly, at least in capital expenditures. (See Tr. 163, West Penn Exhibits ## 5 and 7.) The Department also concluded that (a) no treatment and (b) a cooling tower were the only two viable alternatives -- at least those were the only alternatives it treated.[14] We agree, and for the above reasons will deal with only those two.

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13. Actually, even a cooling tower with closed loop cooling would require some mixing zone, since blowdown water would have to be released periodically in small quantities during critical times of the year. This would not be major, however. While in theory the plant could close down, resulting in no thermal effect whatsoever on Spring Creek, this is not a practical alternative, in terms of West Penn's legal obligations to provide electric service. The plant is needed for peaking power and to provide reliability of service in the area, as well as to insure that phase requirements and certain other electrical requirements of the system are met in the service area of the plant.

14. The Department argued at the hearing (e.g. Tr. 286 *et seq.*) that the untreated water application that is directly at issue in this case must be dealt with by this Board separately and independently, and that any questions relating to the cooling tower application were and are irrelevant. We disagreed, and still disagree. The Department had both applications before it at the same time; and it both should have, and apparently did, see Tr. 281 *et seq.*, deal with them as alternatives to be compared.

In terms of the considerations required by §§ 4 and 5 of The Clean Streams Law, we note initially that we are dealing with the restoration of a stream (or portion thereof) that is currently "polluted"[15] by the addition of heat, and has been at least since 1950. The designation of Spring Creek as a cold water fishery by the Environmental Quality Board therefore refers to future use, at least insofar as the western half of the lower 800 feet is concerned.

The immediate and long-range economic impact upon the Commonwealth and its citizens was testified to primarily in terms of the costs of the cooling tower, and the intangible[16] costs and benefits associated with the possible future use of one-half of the lower 800 feet of Spring Creek as a trout stream. The capital cost of a cooling tower would be approximately one million dollars, with the annual operating cost being approximately one-half million dollars. While we would not be willing to make a judgment that a trout stream is worth less than this -- it may well be worth more[17] -- $1 million initially, plus $0.5 million per year thereafter, is a large enough figure that there should be substantial evidence that significant ecological damage is occurring before we remand to the Department to make the evaluative judgment.

In a larger sense, of course, the environmental impacts on the streams, and the comparative beneficial and adverse environmental impacts of the cooling tower (which, as we have noted, is the only viable alternative) are all part of the economic impact, since these impacts all relate to the activities, values, and desires of people. Recognizing that, we will nevertheless deal with these other matters without trying to attack specific "price tags" in the manner of traditional economic analysis. We note again that we are dealing with essentially only two alternatives, and that we will make the decision -- take it from the Department -- only if we find that only one of those two alternatives could be selected by a reasonable exercise of discretion.

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15. Change in temperature, and alteration of physical properties of the waters of the Commonwealth are included in the definition of "pollution" by the Clean Streams Law, *supra*, 35 P.S. §691.1, although these are not included within the definition of industrial waste. The latter fact, plus the fact that §97.81 *et seq* is included within the industrial waste portions of the Regulations, is not deemed significant. The classification is taken, for our purposes here, as a matter of form, not substance. There is no question that the Clean Streams Law and Regulations are applicable. There is some question, however, whether the Environmental Quality Board has defined this stream as polluted, gives the provisions of §§97.82 (d) and 97.83. Hence the quotation marks.

16. See B.A. Weisbrod, "Concept of Costs and Benefits", in S. T. Chase, Ed., Problems in Public Expediture Analysis 257 (1968).

17. §§4 (1), (2), and (4) of The Clean Streams Law certainly constitutes a warning not to undervalue such things.

What is the ecological impact of the discharge, exactly? To start with, Spring Creek does support trout reproduction and maintenance , although a 1971 Department study (Commonwealth Exhibit #1) concluded that it was "marginal" because of several sewage treatment plants. The Department's 1973 study (Commonwealth Exhibit #12) showed some trout young-of-the-year[18] below the discharge along the shore opposite the Milesburg Power Station, which may indicate some trout reproduction below the dam just upstream from the discharge. Below the discharge in Spring Creek, the 1973 study found the following significant differences between the area within the plume and the area along the opposite bank:

> "(1) The means of diversity indices in the plume differ significantly from that out of the plume.
>
> The heated discharge causes an undesirable decrease in the diversity of the benthos.
>
> "(2) The analysis reveals that interaction between locations and banks is present and significant.
>
> "It is concluded therefore that the diversity of the aquatic community (benthos) within that area affected by the plume is significantly less than in comparable areas not affected by the plume.
>
> "Because less diverse communities are less stable and less desirable., we conclude that the heated discharge is detrimental to the ecology of Spring Creek.[19]
>
> "Although there was not a significant difference between fish diversity from east to west bank, an examination of the species composition at each bank is necessary (Table V). It is obvious from this analysis that:
>
> "(1) The species composition is different between banks. The east bank, out of the plume, has a species composition comparable to the previous upstream stations. Several young-of-the-year brown trout were collected along with a three year + resident brown, indicating reproduction and carry-over.
>
> "(2) Within the influence of the discharge, the fish species were not comparable to those found on the east bank and were more like those of Bald Eagle Creek. Smallmouth bass and a high number of warm water shiner populations, along with the absence of white suckers and brown trout indicate a warm water environment.

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18. A "young-of-the-year" is a trout less than one year old. Unless it swam in from somewhere else its presence indicates that trout are reproducing in the area.

19. As will be seen, the Board does not feel there is substantial evidence for applying this statement beyond the area of the plume itself. Indeed, Commonwealth Exh. 12 itself, especially the statistical analysis of the benthos, supports limiting its applicability to the area of the plume.

The West Penn thermal dishcarge therefore alters that section of Spring Creek from a cold water to a warm water fishery.

With respect to Bald Eagle Creek below the confluence, it is noted that the temperatures of Bald Eagle Creek above the confluence are actually warmer than the mixed temperature below the confluence during the warmer months of the year (June through September). On the other hand, the mixed temperature is undoubtedly higher than it would be if the Power Station discharge did not exist. A theoretical calculation based on the hypothesis that the plant was in full operation at critical low flow[20], gave 12°F as the temperature rise. For more realistic conditions, using actual flows we note that assuming complete mixing, calculated temperature increases below the confluence, based on West Penn Power Exhibit 39, Fig. 8, are in the range of 5°-6°F for about 7 months, with a maximum of 8°F in October (which is the low flow month for the combined streams). West Penn argued that the relevant comparison is with the warmer of the two merging streams — which yields the result that October is the only month when this difference is greater than 5°F.

Since the question is whether a mixing zone must be granted we do not think any of these comparative figures of the mixed streams is relevant. What is relevant is the shape and temperature of the thermal plume itself, its size in relation to areas outside the plume, its relation to adjacent stream temperatures outside the plume, and its temperature(s) and the temperatures of adjacent waters in relation to temperatures necessary and/or ideal for the spawning, growth, and/or survival of various species of fish. For these purposes the information contained in West Penn Exhibit 39, Figures 9-12, in the Milesburg Seasonal Aquatic Impact Study (EHB Exhibit 1-C), especially Appendix A thereof, and in Commonwealth Exhibits 3 and 12, and testimony relating thereto, is relevant.

As we have already noted, quoting the conclusions of the Commonwealth's 1973 study, it is clear that there is an impact — even a significant impact -- within the area of the thermal plume itself, in Spring Creek. This is borne out by an examination of Commonwealth Exhibit 3, showing the benthic data for each collection point along the stream transects at each station for EHB

20. Defined as the 7 conservative days with the lowest flow in 10 years, 100 cubic feet per second (CFS) in this case for the combined flow, 2 DFS for Bald Eagle Creek, 98 CFS for Spring Creek. See Tr. 277 *et seq*. The 100 CFS figure itself appears to be an estimate.

Exhibit 1-C (see sheets 3 (b) and 3 (g) showing Station 2 benthic data for April and June, 1972; but query whether sheets 3 (l) and 3 (g), showing station benthic data for September and November, 1972, actually show any variation across Spring Creek). Commonwealth Exhibit 3 does not show any effect for the area below the confluence of Spring and Bald Eagle Creeks, though the sampling point is below the area where West Penn Exhibit 39 would indicate any impact would be likely to be observed.

We note that the very definition of a mixing zone would imply that some impact would be likely to be observable within the mixing zone itself. The reasonableness of selecting a particular mixing zone or, alternatively, rejecting it in a particular location, must turn on (a) the size of the zone and magnitude of impact, and (b) on whether the existence of a mixing zone of that size, and degree of impact, has significant repercussions on the biotic community of the stream as a whole.

West Penn Exhibit 39, comparing Figures 9 with 10 and 11 with 12, indicates that during October, 1972, when the ambient temperature of Spring Creek was 50.4°F, and the ambient temperature of Bald Eagle Creek was about 11°F higher, the actual temperature rise of the plume was 12.9°F above the ambient temperature of Spring Creek. This made it only 2°F above the temperature of Bald Eagle Creek, meaning that the plume, as such, was not traceable beyond the junction of the two creeks. The same lack of traceableness prevailed in August 1972, when the average plume temperature rise for that month, again about 12°F, resulted in a plume temperature that was actually lower than the temperature of Bald Eagle Creek. At times when Bald Eagle Creek was cooler, and/or the power station discharge was warmer, one would expect a tongue of warmer water to extend into Bald Eagle Creek below the confluence, as shown on Figures A-1-1 and A-1-3 (pages A-2 and A-4) of EHB Exhibit 1-C.

In any case, we conclude from Figures 10 and 12 of West Penn Exhibit 39, when compared with Figures 9 and 11, respectively, that there is an impact in Bald Eagle Creek below the confluence. In both instances the existence of the discharge results in the warmer section of Bald Eagle Creek being shifted from near the northern shore substantially southward, with the proportion of cooler water being much reduced. This is what one would expect, given that the left half of Spring Creek (looking downstream) is being warmed to approximately the temperature of Bald Eagle Creek upstream from the confluence. In no testimony or exhibits is there any indication that the temperatures in Bald Eagle Creek, of the plume itself, are actually raised above the absolute limits

of the water quality criteria for Bald Eagle Creek itself (74°F from February 15 to July 31, 87°F for the remainder of the year[21]). Assuming that plume temperatures do exceed those limits at times (and calculated mixed temperatures, not taking any cooling after discharge into account, indicate that this is possible) the indications from the evidence (see especially West Penn Exhibits 39 and EHB Exhibit 1-C) are that the area in Bald Eagle Creek within which temperatures do exceed these absolute criteria would not be extensive, and would hardly interfere at all with the use of Bald Eagle Creek as a trout stocking stream.

Any possible interference would be because trout avoid an area of high temperature. To quote William Brungs, Assistant Director of Water Quality Criteria of the Environmental Protection Agency's National Water Quality Laboratory at Duluth, Minnesota, and a recognized expert on the effects of various pollutants on fish:

> "Very seldom are there fish kills due to high temperature when fish are in a natural environment in which they can move from one place to another. Fish tend to avoid high temperatures as long as they can find a way out. If they are enclosed in a discharge lake or something like that, they might get trapped and might not get out and could die.
>
> "But in this case, even at 72, [a case where the ambient stream temperature was 72°F, and heated water sufficient to increase it to 77°F was added], I would think that most of the Brown Trout would try or have been trying to find a cooler spot, deeper water or where there is a spring in the bottom of the river or something like that. They will try to find cooler conditions.
>
> "Additional heat in this case where you have the population capable of moving and you don't -- you would not have isothermal conditions, you wouldn't have 72 top to bottom, bank to bank, mile after mile. That what you would be doing is excluding a larger part of the stream to the access of the Brown Trout.
>
> "In other words, if when it's naturally 72, the fish are excluded from some number of acres of surface water, and they are going to the cooler part, you add more heat there from whatever source, they will be excluded from even a larger area because more of the water will be unacceptable to them.

21. 74°F is the maximum temperature which adult Brown Trout can survive at all. Brook Trout can survive up to 77-78°F. The Board was not concerned about survival of stocked trout other than between February 15 and July 31.

"It does not follow that you have a high temperature fish kill until essentially the whole stream becomes somewhere up in the mid seventies, and that typically on a bigger stream doesn't happen. There are cool spots. The warm water tends to flow. The surface might be 72, but it might be 65 at the bottom.

"You add more temperature to that, and essentially you will be excluding the fish from a habitat -- from an increasingly larger habitat by adding more heat." (N.T. pp 982-983)

Since the area of Bald Eagle Creek from which trout would be excluded would be fairly small, and would be temporary only (judging from the testimony) the effect on Bald Eagle Creek's use for trout stocking would be negligible.

The area involved in Spring Creek is somewhat larger, a wedge shaped segment approximately 800 feet long, about one-half the width of Spring Creek at the downstream end. In terms of the biological effect of a mixing zone of that size, trout are excluded from that area for spawning, embryo survival, and optimal growth most of the time and for maintainance for substantial periods of time. In Dr. Brung's terms, trout are essentially excluded entirely from that portion of Spring Creek. In Karl Shaeffer's terms (Commonwealth Exhibit 12) that portion of Spring Creek is a warm water fishery.[22] There is even an initial impression from Commonwealth Exhibit 12 and EHB Exhibit 1-C that this exclusion is large enough to affect the productivity of the opposite half of the stream as a cold water fishery. The number of young-of-the-year trout on that shore is not as great as the number from upstream stations.

On the other hand, one would expect it to be less than half as great, since a very restricted area near one shore was being collected from, whereas larger areas were being collected from upstream. The sample size is too small to really have much confidence in a statistical statement, but the collection of two young-of-the-year does not appear to be far out of line -- slightly depressed perhaps, but not such that one can confidently say that there is an effect on the stream other than in the plume itself.

The statistical analysis that was done, on benthic microinvertebrates, tends to show no significant difference between the east bank (opposite the discharge) and upstream stations. See Commonwealth Exhibit 12, and testimony relating

22. We note that no expert was willing to testify that trout would spawn in the area now occupied by the plume in the event that a cooling tower was installed and operated, although it was felt that they would at least inhabit that area.

thereto. This tends to indicate that the warming of the western half of the lower 800 feet of Spring Creek is not having a significant impact on the ecosystem of the remainder of the stream.

We note in addition that the alternative to allowing a mixing zone, as indicated on West Penn Exhibit 39 and Appendix A of EHB Exhibit 1-C would result in significant fog creation in the area, which contains a major highway interchange between Interstate Route 80 and U. S. Route 322.[23]

We have, then, a situation where the building of a cooling tower at a capital cost of nearly $1 million and an annual operating cost of nearly $0.5 million, and at a probable cost of significant additional fogging in an area occupied by a major highway interchange, would probably produce additional habitat for young and adult trout in a wedge-shaped area of Spring Creek 800 feet long and 40 feet wide at its lower end, and might produce some additional spawning sites for trout in the same wedge-shaped area. We are mindful that the cost of this cooling tower should very likely be borne by already over-burdened consumers of electricity. Such an imposition does not seem justified where the environmental benefit is minimal and possibly, on balance, even negative.

Taking all factors into account, and giving due consideration both to the policies of § 4 of The Clean Streams Act and to the high priority given environmental concerns under Article I, Section 27 of the Constitution of Pennsylvania, as well as to the Regulations and other provisions of The Clean Streams Law, we conclude that the Department, in the proper exercise of discretion, could not reasonably conclude that the use of the mixing zone that has been used by West Penn since 1950 should be discontinued, given benefits of doing so and the methods and costs of discontinuing it.

Accordingly, we will order the issuance of the Industrial Waste permit the denial of which was appealed from in this case.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over this case and over the parties before it.

2. The Department has discretion under Chapter 93, and §§ 97.81, 97.82, 97.83, and 97.85 of the Regulations, 25 Pa. Code, Chapter 93 and §§ 97.81

23. Testimony as to these effects was objected to by the Department at the hearings on the grounds that West Penn had not brought such effects to the Department's attention during its consideration of the applications. We held that it was admissable.

97.82 and 97.83, read together, to designate a reasonable mixing zone for the heated effluent from the Milesburg Power Station where the facts demonstrate that there is little or no impact on the streams in question outside the mixing zone.

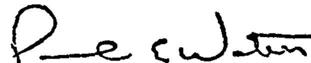
3. In exercising that discretion, the Department is required to take into account the factors set forth in §§ 4 and 5 of The Clean Streams Law, *supra* , and Article I, Section 27 of the Constitution of Pennsylvania, and in so doing to compare alternative mixing zones in order to determine what the environmental and economic opportunity costs of allowing a particular mixing zone might be.

4. Under the facts of this case, it would be an abuse of discretion for the Department to refuse to allow a mixing zone essentially equivalent to what appellant has been using for the past 25 years, where the only practicable alternative would be to require the construction of a cooling tower, with a very minimal mixing zone, and with substantial economic and environmental costs as enumerated in this opinion.

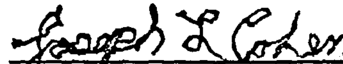
O R D E R

AND NOW, this 17th day of September 1975, the above captioned appeal of West Penn Power Company is sustained, and the Department is hereby ordered to issue an Industrial Waste permit to West Penn Power Company pursuant to that Company's Application No. 1472205.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: September 17, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

COUNTY OF MONTGOMERY
COMMISSIONERS OF THE COUNTY OF BUCKS
MRS. MARY BEAN ROGERS, President
STOPS (Stop The Oil Pipeline Society)
BOARD OF SUPERVISORS OF SPRINGFIELD
TOWNSHIP

Docket No. 74-262-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and Interstate Energy Company, Intervenor

ADJUDICATION

BY Paul E. Waters, Chairman, September 29, 1975

This matter comes before the Board as an appeal from the issuance by the Department of Environmental Resources, hereinafter DER, of a soil erosion and sedimentation permit and dams and encroachments permits as amended for the stream crossings by an 18" oil pipeline to be constructed by intervenor, Interstate Energy Company, from Marcus Hook to Martins Creek, Pennsylvania. The pipeline crosses five[1] counties including Montgomery and Bucks as well as Springfield Township and these three have filed appeals from the permit grant. Mary Bean Rogers on behalf of S.T.O.P.S., an organization interested in stopping the pipeline, has also appealed, and the matters were consolidated by the Board.

A supersedeas was requested early in the proceeding and, after all of the testimony was concluded, the same was granted because it appeared that Interstate Energy Company, hereinafter I.E.C., intended to have the pipeline cross a number of streams for which no permit had been granted by DER. Subsequently DER issued a permit for the additional crossings and the supersedeas expired by its own terms.

The appellants have extended their arguments to cover not only the limited permits but a number of matters concerning the water supply and the adequacy of the pipeline for the preservation thereof.

1. Delaware, Chester and Northampton Counties are not parties.

FINDINGS OF FACT

1. The Environmental Hearing Board, hereinafter EHB, received appeals from the issuance of certain permits issued to I.E.C. by DER. Appellants are County of Montgomery, the Commissioners of the County of Bucks, Mary Bean Rogers for Stop The Oil Pipeline Society (S.T.O.P.S.), and the Board of Supervisors of Springfield Township, Bucks County.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources.

3. The County of Montgomery, Mary Bean Rogers and the Commissioners of the County of Bucks filed appeals with the EHB on or about December 6, 1974, from the issuance by DER to I.E.C. of Erosion and Sedimentation Control Permit No. 4673802. The Board of Supervisors of Springfield Township filed an appeal with the EHB on or about November 27, 1974, from the issuance by DER to I.E.C. of Erosion and Sedimentation Control Permit No. 4673802, Dams and Encroachments Permits Nos. 0973708 and 0973709, later amended to include Dams and Encroachments Permit No. 20674.

4. The I.E.C. pipeline is to be constructed from Marcus Hook, Pennsylvania to Martins Creek, Pennsylvania.

5. On February 6, 1973, the Pennsylvania Public Utility Commission, hereinafter P.U.C., issued its Certificate of Public Convenience, together with an accompanying order of the same date, authorizing the alignment, construction and operation of the aforesaid I.E.C. pipeline for the purpose of transporting low sulfur boiler fuel for electric generating stations.

6. The P.U.C. Order of February 6, 1973, was affirmed by a unanimous Commonwealth Court of Pennsylvania, on appeal by Appellants herein, on December 12, 1973. *Bucks County Board of Commissioners, et al v. Pa. P.U.C.*, 11 Pa. Commonwealth Ct. 487, 313 A.2d 185, petition for reargument denied January 8, 1974, *al locatur* denied *per curiam* by the Pennsylvania Supreme Court of May 16, 1974.

7. On April 18, 1973, I.E.C. filed with the Delaware River Basin Commission, hereinafter DRBC, its application for the inclusion of the pipeline project in the DRBC's comprehensive plan for the Delaware River Basin. As required by DRBC's regulations, I.E.C. also filed its Environmental Impact Assessment for the Insulated Fuel-Oil Pipeline, hereinafter the Pace Report, at the same time.

8. The purpose of this report was to describe the environment and to

assess the impact of the proposed pipeline system on that environment as required by the DRBC pursuant to its obligations under the requirements of the National Environmental Policy Act, P. L. 91-190; 42 USCA §4321.

9. The DRBC gave notice of and circulated the Pace Report to numerous federal, State and local agencies and persons, including appellants herein and DER.

10. On January 14, 1974, the DRBC gave notice of and circulated its Draft Environmental Impact Statement, hereinafter EIS, on I.E.C.'s proposed oil-bearing pipeline to numerous federal, State and local agencies and persons, including appellants herein and DER.

11. By decision dated September 25, 1974, in Docket No. D-71-109-CP, the DRBC approved the inclusion of the I.E.C. pipeline in the comprehensive plan for the Delaware River Basin pursuant to Section 3.8 of the Delaware River Basin Compact, and directed its executive director to issue a Water Quality Certificate in accordance with Section 401 of the Federal Water Pollution Control Act Amendments of 1972.

12. Concurrently with proceedings before the DRBC, I.E.C. made application to DER for all permits required by DER for the pipeline, including, *inter alia*, an Erosion and Sedimentation Control Permit and various Dams and Encroachments Permits.

13. I.E.C. received the following permits which are those from which the instant appeals are taken:

(a) Erosion & Sedimentation Control Permit No. 4673802;
(b) Dams & Encroachments Permit No. 20674;
(c) Dams & Encroachments Permit No. 0973708; and
(d) Dams & Encroachments Permit No. 0973709 (as amended by letter dated July 24, 1975, from Mr. V. R. Butler, Chief, Division of Dams and Encroachments).

14. The P.U.C. reviewed the entire pipeline project from location, engineering and ecological standpoints and its actions with respect to the provisions of Article I, Section 27 of the Pennsylvania Constitution were approved by the Commonwealth Court.

15. Upon the completion of each stream crossing, the stream bed and banks will be stabilized and restored to their original contour, and appropriate vegetative cover will be added.

16. The pipeline passes near a potential underground water supply source for the Springtown Water Company.

17. I.E.C.'s construction procedure for crossing streams and potential water supply sources is sufficient to protect the stream integrity, aquatic biology and the subsurface waters.

18. The engineering design and method to be used by I.E.C. in constructing the pipeline under the bed and across the channel of the various streams and in other areas included within the Erosion and Sedimentation Permit and thereafter operating the pipeline is a standard design and method accepted by the engineering profession and regulatory agencies, and should provide an adequate and safe instrumentality.

19. The pipeline, as approved by the P.U.C., the DRBC and permitted by DER, will not have any material permanent adverse effects on the environment of each stream crossed or the terrain included within the Erosion and Sedimentation Permit.

DISCUSSION

The major and overriding issue which must be resolved by this proceeding concerns the matter of *res judicata* and its related concepts.

The record indicates that a previous battle in this pipeline war was fought in our Commonwealth Court. There, I.E.C. was called upon to defend the certificate of public convenience issued to it after hearing before the Pa. Public Utility Commission.[2] The Commission, of course, is authorized by the legislature to investigate utility proposals and to make the exact kinds of decisions as it reached in that case. I.E.C. was, in short, permitted to build an oil pipeline from Martins Creek to Marcus Hook, Pennsylvania, to carry oil to be used in generating needed electrical power. Most of the same parties in this Board proceeding previously appeared in Court,[3] along with some who have apparently dropped from the skirmish. The Court was called upon to decide among other things whether the certificate issued by P.U.C. violated Article I,

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2. See Act of May 28, 1937, P. L. 1053.

3. *Bucks County Board of Commissioners, Bucks County Planning Commission, Montgomery County Board of Commissioners, Montgomery County Planning Commission, Richardson Dilworth and Andrew L. Lewis, Jr., Trustees of the Property of Reading Co., Debtor, Stops, Bi-County Environmental Committee and Mary Bean Rogers, Appellant, v. Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Appellee, and Interstate Energy Company and Pennsylvania Power Light Company, Intervening Appellee. Commonwealth of Pennsylvania, Department of Transportation, Appellant, v . Commonwealth of Pennsylvania, Pennsylvania Public Utility Commission, Appellee, and Interstate Energy Company, Intervening Appellee,* 11 Pa. Commonwealth Ct., 1973-1974, 487, 496-499.

Section 27 of the Pa. Constitution.[4] Speaking through Judge Rogers the Court said:

> "The appellants further contend that the Commission erred in law in failing to evaluate IEC's application under Article I, Section 27, of the Pennsylvania Constitution, and in failing to apply that constitutional provision to IEC's application. The provision in question declares that the people have the right to clean air, pure water and the preservation of the natural, scenic, historic and esthetic values of the environment and requires the Commonwealth as trustee to conserve and maintain the State's natural resources. ..."
>
> We were presented the same argument in *Payne v. Kassab et al.*, 11 Pa. Commonwealth Ct. 14, 312 A. 2d 86 (No. 1061 C.D. 1971, filed November 21, 1973), which Judge Mencer answered as follows:
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> . . .
>
> "Likewise, it becomes difficult to imagine any activity in the vicinity of River Street that would not offend the interpretation of Article I, Section 27 which plaintiffs urge upon us. We hold that Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania. The result of our holding is a controlled development of resources rather than no development.
>
> "We must recognize, as a corollary of such a conclusion, that decision makers will be faced with the constant and difficult task of weighing conflicting environmental and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources.
>
> "Judicial review of the endless decisions that will result from such a balancing of environmental and social concerns must be realistic and not merely legalistic. The court's role must be to test the decision under review by a threefold standard: (1)

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4. Article I, Section 27 provides:

> "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all of the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
(2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
(3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?" The Commission here, although without the benefit of our opinion in *Payne*, in fact applied the standards of that case. It carefully considered the effects of the pipeline on the several values protected by Article I, Section 27 and balanced them against the necessity for increased energy. After assuring itself that IEC's proposal was carefully planned and the most acceptable means of providing fuel to the generators at Martins Creek, it concluded that the need for energy outweighed the indicated injury to the environment. Our consideration of the record compels agreement with that conclusion."
. . ."

In effect, appellants now call upon this Board to reverse or, at least, change the decision of our Commonwealth Court. Harboring serious doubts of our power to do so, even if so inclined, which we are not, we will fail to heed that call.

I.E.C., the Intervenor, has argued and relied upon the doctrine of *res judicata* from the very inception of this proceeding.[5] It is stated in various ways but basically provides: A judgment rendered by a court of competent jurisdiction is conclusive as to all rights, questions or facts put in issue in the action in which it was rendered and actually adjudicated therein, when those rights, questions or facts again come into controversy between the same parties or their privies. *Penn-O-Tax Oil & Leasehold Co. v. Big Four Oil & Gas Co.*, 1930, 298 Pa. 215, *Commonwealth v. Dooley*, 1973, 225 Pa. S. 454. It is unquestionably true that many of the questions arising under Article I, Section 27 were laid to rest by the Commonwealth Court. Appellant argues, however, that there were other specific matters, like the number and placement of

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5. A motion to dismiss the appeal based in part on this theory was denied without opinion.

check valves which were not raised in the earlier proceeding. The answer to that is simple. The doctrine of *res judicata* extends, not only to matters raised, but to all matters that could have been raised in the earlier proceeding. *Commonwealth, ex rel Baer*, 9 Adams L.J. 60, *Ohio Tp. v. Builders Enterprises, Inc.*, 1971, 2 Pa. Commonwealth Ct., 39, affd. 446 Pa. 319.

The more serious problem, however, is the identity of parties, which is also required in order for the doctrine to apply. The fact is that DER was not a party to the previous suit. Although it is not DER who opposes the application of the *res judicata* doctrine, that is not material. I.E.C. has asked this Board to find in its favor on legal grounds which are not fully made out by the essential supporting facts.

It does not follow, in our opinion, that the findings and decision of the Commonwealth Court have no relevance or value in this proceeding. This Board in reaching a final decision is guided by the following language in *Warren Sand & Gravel Co., Inc., Oil City Sand & Gravel Co., Inc. and Davison Sand & Gravel Company, Appellants v. Commonwealth of Pennsylvania, Department of Environmental Resources, Appellee*, 734 C. D. 1974, and *Commonwealth of Pennsylvania, Department of Environmental Resources, Appellant, v. Warren Sand & Gravel Co., Inc., Oil City Sand & Gravel Co., Inc. and Davison Sand & Gravel Company, Appellees*, 735 C. D. 1974, (issued March 5, 1975):

> ...
>
> "In cases such as this, we are not required to review an administrative decision by DER which was rendered without a due process hearing, because as we view the Administrative Agency Law and section 1921-A of the Code, when an appeal is taken from DER to the Board, the Board is required to conduct a hearing *de novo* in accordance with the provisions of the Administrative Agency Law. In cases such as this, the Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board. If DER

acts pursuant to a mandatory provision of a statute or regulation, then the only question before the Board is whether to uphold or vacate DER's action. If, however, DER acts with discretionary authority, then the Board, based upon the record made before it, may substitute its discretion for that of DER. See *East Pennsboro Township Authority v. Commonwealth of Pennsylvania, Department of Environmental Resources*, ___ Pa. Commonwealth Ct. ___, 334 A.2d 798 (1975) and *Rochez Bros., Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, ___ Pa. Commonwealth Ct. ___, 334 A.2d 790 (1975). DER's authority to attach terms and conditions to the permit in the instant case was obviously discretionary and, therefore, the Board could properly substitute its discretion concerning the terms and conditions for that of DER. ..."

The Board, therefore, has not ignored the conclusions reached by an Appellate Court of our State in an intimately related judicial proceeding. It is, of course, true that if appellant can show that there have been or will be violations of Article I, Section 27 of the Constitution, even though Commonwealth Court found full compliance, we are authorized to so declare as to the specific action of DER which brings this matter before us, and any additional conditions clearly called for, can be imposed.

There are a number of important matters which we believe to be foreclosed in this proceeding, not because of any technical doctrine of *res judicata*, but simply because they are not matters within the jurisdiction of this Board on the appeal before us. As indicated previously, it is the P.U.C. which has been designated to authorize such far reaching projects for oil transmission as is proposed by I.E.C. The Courts have consistently held that DER does not have the sole responsibility of enforcing Article I, Section 27, and preserving the environment.[6] The P.U.C. is equally charged with that duty within its sphere of influence which for purpose of this matter, covers the entire pipeline. That sphere, in our opinion, covers the pipeline design[7] and hardware, route and consequences of rupture, other than at stream crossings.

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6. See *Community College of Delaware County and Community College of Delaware County Authority, Appellants and Township of Marple, Intervening Appellant v. Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellee*, 654 C. D. 1974, (July 18, 1975) and *Central Delaware County Authority, Appellant v. Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellees*, 743 C. D. 1974, (July 18, 1975).

7. We believe that these matters by necessity include: The life of the pipeline, leak detection, results of oil spill, time and method of cleaning up and disposing of soil, valves needed and placement corrosion, oxidation, results of electricity, location with reference to water supply, control center use and placement.

Appellant, Bucks County, makes much of the fact that the pipeline will traverse terrain where there are substantial municipal water supplied, needed for present and perhaps future use.[8] Keeping in mind that we have before us appeals from a soil erosion and sedimentation permit and from permits allowing *stream crossings*, we are unable to expand our subject matter jurisdiction to span the many issues raised as to the pipeline in general.

Appellant, Mary Bean Rogers, has raised numerous questions because DER in notifying her of the issuance of the erosion and sedimentation permit, implied there was a single permit for the entire pipeline. In a sense it was, but we can see the basis for a misunderstanding. We cannot, however see any prejudice to appellant's rights by this notification—which led to the appeal now before us.

The difficult question which remains unanswered is: What decision making, if any has been left to DER by P.U.C. regarding the pipeline?

We will not attempt to enumerate every conceivable question that can properly be raised for decision with DER and before this Board after a decision has already been reached by another agency of government on a related matter with powers equal to our own, as in this case.[9] Suffice it to say that all matters related to the placement of a pipeline under the stream bed itself are proper for our review. The main questions raised by appellants range far beyond this limited inquiry. We believe the limitation is set by the nature of the permit from which the appeals are taken. With regard to the erosion and

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8. The Springtown Watershed and Lake Nockamixon as well as Tohickon and Cooks Creek have raised special concern.

9. The language of *Community College of Delaware County and Community College of Delaware County Authority, Appellants and Township of Marple, Intervening Appellat v. Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellee*, 654 C. D. 1974, (July 18, 1975) and *Central Delaware County Authority, Appellant v. Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellees*, 743 C. D. 1974, (July 18, 1975), is precisely on point:

> ...
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> "We would earnestly hope for some legislative clarification of the questions suggested here, or even for appropriate Executive Board action where such is possible. Until there is such clarification, however, we must hold that whenever and however the many agencies of the Commonwealth, state and local, share in the trusteeship responsibilities of Section 27, and however desirable some supervision and review of their efforts may be, the DER has not been designated and may not now function as the sole trustee, supervisor and/or coordinator of the Commonwealth's responsibilities as trustee under Section 27." ...

sedimentation permit covering the entire pipeline area, we are again limited to matters which are subject to control by such a permit. A review of the testimony and the briefs does not reveal any major objections to the method of controlling erosion during construction. There are, of course, questions about the need for the project and intense dissatisfaction with the construction taking place at all. We believe, however, our role does not extend to those concerns previously dealt with in another forum. Our view is the same with regard to any matters which the Pa. Fish Commission could have litigated based on concerns which it had.

The appellant Bucks County argues that, at most, the P.U.C. authorized a 3,000 foot corridor for the pipeline and that the line can be ordered moved by DER any place within that area. While we agree that to the extent a change was deemed necessary to protect streams or prevent erosion and sedimentation, this is true. The appellant, however, having the burden of proof, has not shown exactly what movement within the corridor would be in order.[10] I.E.C. has developed by extensive work, a program for crossing the streams with the pipeline under the stream bed and for detecting any leaks which may occur while the pipeline is in operation. No matter what precautions are taken there can be no guarantee that accidents or unexpected problems will not occur. It is easy enough to pinpoint areas where *more* precautions could be taken. This is easily done regardless of how much care or planning has been done on the matter. A concrete coating, for example, can always be argued to be insufficient for a stream crossing as required on all but minor streams in this case.

We are satisfied that the precautions taken or to be taken at stream crossings are reasonable under all of the circumstances. That is not to say, that no better or safer method could possibly be devised at any cost. That does not appear to be the case, nor is it required.

Our view with regard to the previous determinations made by the Delaware River Basin Commission,[11] to include this project in its comprehensive plan are

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10. We, of course, appreciate the problem faced by appellant if it must, in effect, redesign a pipeline project of this magnitude. The problem is that this Board is in no better position to do so without evidence from the party that alleges that it *should* be changed. The appellant is the only logical party to do this inasmuch as DER does not agree that any changes are needed.

11. We note that the DRBC decision approving this project stated that it was subject to all conditions imposed by DER. We believe the permit regulations under discussion here are themselves DER "conditions" to I.E.C. interpretation.

the same as indicated regarding P.U.C. action. It is a matter we have considered along with all of the other evidence.

One final matter deserves our attention. I.E.C., the intervenor, has relied as evidence upon the Environmental Impact Statement for the project prepared by the Pace Engineering Company and approved by DRBC. We received the report in evidence when offered by the President of I.E.C. under the Uniform Business Records as Evidence Act[12] and as a public record, both of which are exceptions to the hearsay rule in Pennsylvania. We believe that inasmuch as the President of the Company is deemed the custodian of all corporate business records and this Board can take administrative notice of any public document, which this became when filed with a public agency, the report qualifies as properly admitted evidence for both reasons.

CONCLUSIONS OF LAW

1. The Board has jurisdiction as limited hereinbefore, over the parties and subject matter of this proceeding.

2. Where appellants, having the burden of proof, allege that conditions should be added to or changes made in an authorized major pipeline project, they must demonstrate with exactness the changes needed as they relate to sedimentation and erosion and stream crossing plans, when the appeal is from permits authorizing the same.

3. DER has properly issued an erosion and sedimentation permit and Dams and Encroachments permits as amended to I.E.C., intervenor in this proceeding, for the construction of an oil pipeline.

4. DER's action after technical review of the application and supporting data for the instant Dams and Encroachments Permits and the Erosion and Sedimentation Control Permit, and its approval of the said permits adequately protected the environmental interests expressed in Article I, Section 27 of the Pennsylvania Constitution.

5. Resolution of issues such as coal versus oil, pipeline versus railroad, and possible federal allocation of oil, general pipeline location, and need are not within the jurisdiction ambit of the Pennsylvania Department of Environmental Resources and, therefore, not properly before the Environmental Hearing Board.

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12. Act of May 4, 1939, P. L. 42, 28 P.S. 91(a).

ORDER

AND NOW, this 29th day of September, 1975, the appeals of County of Montgomery, Montgomery County Commissioners, Commissioners of The County of Bucks, STOPS, and the Board of Supervisors of Springfield Township are hereby dismissed and the action of the Department of Environmental Resources in the above matter is hereby sustained.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: September 29, 1975

llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

JOSEPH C. DELENICK d/b/a

ST. CLAIR SANITARY LANDFILL

Docket No. 75-066-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Joanne R. Denworth, Member, September 30, 1975

DISCUSSION

This is an appeal from an order of the Department of Environmental Resources directing the appellant to cease all operation of his landfill and to take certain steps to terminate the operation. At the hearing in this matter the Department moved for summary judgment on the ground that appellant had admitted he was operating without a permit as required by the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P.L. 788, 35 P.S. §6001 *et seq.*, and that the order is therefore valid as a matter of law. Because of appellant's assertion at the hearing that he had applied for a permit, the examiner directed the taking of testimony as to the status of appellant's application. Although that testimony indicated that appellant was not making any real effort to obtain a permit, the examiner reserved judgment as to whether or not the Department's renewed request for summary judgment should be granted simply on the ground that appellant did not have a permit, and heard testimony from a witness for the Department as to the operational violations at appellant's landfill. That testimony, which consisted of slides and commentary by the Department's inspector of solid waste disposal facilities in Schuylkill County, showed numerous violations of Chapter 75 of the Department's Rules and Regulations, 25 Pa. Code §§75 *et seq.*, governing the operation of landfills. It appears on cross-examination that some,

though nowhere near all, of these defects had been corrected by the time of the hearing. However, as we are deciding this case simply on the ground that appellant does not have a permit and is not taking appropriate action to see that he gets a permit, it is unnecessary for us to consider further the operational violations that exist at the landfill.

The Department in this case asked for and received an admission from the appellant that he does not have a permit to operate his landfill. While we recognize that a permit is absolutely required by §7 of the Solid Waste Management Act, *supra*, we will not, especially at this relatively early stage of the application of the law, uphold a cease and desist order solely because of the lack of a permit where it is shown that an appellant has an application for a permit pending and is diligently acting to obtain that permit. Here, however, the facts indicate that the appellant made a token gesture of compliance by applying for a permit in August of 1974; but since being informed that the application was incomplete, he has taken no significant action (despite his assertion that he intends to comply with the law) to obtain a permit. Apparently, he believes the landfill will be full in about six more months of operation and, therefore, he does not want to go to the trouble and expense of changing his operation so as to secure a permit. (The Department's witness, however, believes that the landfill has three more years of capacity and that appellant intends to go on operating.) Under the facts of this case it is clear that the appellant is violating the provisions of the Solid Waste Management Act by operating without a permit and that the Department's order must be upheld on that ground alone.

FINDINGS OF FACT

1. Appellant is the owner and operator of St. Clair Landfill at 601 Wade Road, St. Clair, Schuylkill County, Pennsylvania.

2. Appellant does not have a permit to operate his landfill.

3. After conferring with Department personnel in the summer of 1974, appellant submitted a partial application for a permit in August of 1974.

4. The Department returned appellant's permit with a letter telling him that it was incomplete and that he would have to submit a complete application.

5. Although appellant at one point engaged an engineer for the purpose of devising a plan of operation that would meet the requirements of the Department's Regulations, the appellant has taken no further action to devise such a plan or to file a complete application with the Department.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter of this action and over the parties.

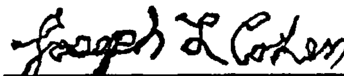
2. Where the appellant is operating a sanitary landfill without a permit and, after the filing of an incomplete application, has taken no further steps to secure a permit from the Department, the appellant is violating §7 of the Pennsylvania Solid Waste Management Act and, therefore, the Department's order to cease operation of the landfill and to follow certain termination procedures must be upheld.

ORDER

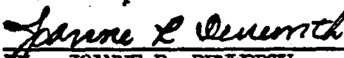
AND NOW, this 30th day of September, 1975, the Department's order to the appellant directing him to cease all operation of his landfill and to take certain termination procedures is sustained, and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member



BY: JOANNE R. DENWORTH
Member

DATED: September 30, 1975
vf

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

BETHLEHEM STEEL CORPORATION

Docket No. 75-077-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

A D J U D I C A T I O N

BY Paul E. Waters, Chairman, Issued October 3, 1975

This matter comes before the Board as an appeal from the refusal of a variance extension by the Department of Environmental Resources, hereinafter DER, which was requested by Bethlehem Steel Corp. appellant, for its steel manufacturing operation at Bethlehem, Pennsylvania. The extension was denied by DER because appellant is alleged to have failed to meet three requirements of the Regulations to qualify. Appellant needs the standby capacity generated by 11 coal fired boilers which it can have only if the extension is granted.

FINDINGS OF FACT

1. The appellant, Bethlehem Steel Corporation, is engaged in the manufacture of steel and steel products at a plant located in Bethlehem, Pennsylvania, and in other locations in Pennsylvania and elsewhere.

2. On September 19, 1972, Bethlehem Steel Corporation petitioned DER for a variance for 22 coal and/or coke fired boilers at its Bethlehem, Pennsylvania plant. In its petition Bethlehem Steel Corporation stated that the boilers were to be taken out of operation by the end of the variance period and replaced by a new high pressure boiler then under construction which was to be fired primarily by blast furnace gas and low sulfur No. 6 oil.

3. On August 8, 1973, DER issued its Order Number 73-701-V granting a temporary variance to permit the use of these boilers until July 1, 1974.

4. On April 16, 1974, more than two months prior to the expiration of the original variance, Bethlehem Steel Corporation petitioned the Commonwealth of Pennsylvania, Department of Environmental Resources for a two-year renewal of the temporary variance for 11 of the coal fired boilers.

5. On May 24, 1974, DER sent Bethlehem a letter requesting additional information on particulate loadings of the emissions from the boilers, inquiring why no plans for compliance were submitted with the petition for renewal and questioning the failure of Bethlehem to state when compliance with DER's Regulations would be achieved. In addition, DER also suggested alternatives for Bethlehem to consider, including another oil fired boiler or air pollution controls on the 11 coal fired boilers.

6. Bethlehem replied to DER's letter of May 24, 1974, on June 12, 1974, and reiterated that there were problems with getting a guaranteed source of fuel oil. Bethlehem stated that the 11 coal fired boilers were needed because the new high pressure boiler was not yet up to design capacity, and they were necessary to supply steam when other boilers, which comply with DER's Regulations, are taken out of service for repairs or inspections. Bethlehem further stated that at the end of this period they intended to discontinue using these boilers, and therefore did not need a plan for compliance.

7. On October 18, 1974, a meeting was held between Bethlehem and DER to discuss, *inter alia*, the petition for extension and renewal of the temporary variance for the coal fired boilers, however the discussions did not resolve the issue.

8. On March 3, 1975, DER denied Bethlehem's petition for the Temporary Variance Order No. 73-701-V.

9. DER denied Bethlehem Steel Corporation's request for an extension of the variance on the grounds that:

> "1) The grant of the extension would prevent or interfere with the attainment or maintenance of ambient air quality standards within the time prescribed for the attainment of such standards by the Clean Air Act.
>
> "2) The quantity and level of emissions from the sources at expiration of the variance extension are not likely to comply with the Department's particulate matter emission standard." (See Transcript, June 17, 1975, Hearing; Commonwealth Exhibit C-6)

10. Immediately following the receipt of the denial issued by DER,

Bethlehem Steel Corporation shut down the coal fired boilers and has not used them to date. Appeal proceedings were then initiated.

11. Bethlehem Steel Corporation has discussed the building and installation of a new package boiler at a cost of one million nine hundred fifty thousand dollars ($1,950,000.00), that would use coke oven gas and oil as fuel. This package boiler would eliminate the necessity of having the 11 coal fired boilers used on a standby basis. A request by the Bethlehem Steel Corporation Plant for the installation of the new package boiler is presently under consideration by the Board of Directors of the Bethlehem Steel Corporation and awaits their approval before the work can be done.

12. The shutting down of the coal fired boilers by Bethlehem Steel Corporation in compliance with the denial by DER of the request for an extension of the variance on March 3, 1975, has had no substantial immediate effect on the ambient air.

13. If these 11 boilers are not available for standby use in the event of emergency outages or in the event of a breakdown, a mill would have to be shut down resulting in loss of work and wages to 27 to 52 people for a period of a week to ten days. Such breakdowns occur in the ordinary course of business.

DISCUSSION

The Commonwealth of Pennsylvania, Department of Environmental Resources has the power to grant temporary variances under §13.5 of the Air Pollution Control Act, Act of January 8, 1960 P.L. 2119, added October 26, 1972 P.L. , No. 245, 35 P.S. §4013.5(a) Supp. 1975-76 which provides:

> "The department shall have the power to grant temporary variances from the effect of any provision of this act, or of any rule or regulation adopted hereunder, which limits the emission of any air contaminate, and the Environmental Quality Board, subject to the provisions of this section, shall adopt rules and regulations setting forth the terms and conditions subject to which such variances shall be granted. Such rules and regulations shall not authorize the grant of a variance which will prevent or interfere with the attainment or maintenance of any ambient air quality standard imposed by Federal law within the time prescribed by such law for the attainment of such standard."

Pursuant to this statutory provision, the Rules and Regulations of the Department of Environmental Resources provide that the Commonwealth of Pennsylvania, DER will grant a variance if the Commonwealth of Pennsylvania, DER finds that:

> "(1) Such action will not prevent or interfere with the attainment or maintenance of any ambient air quality standard contained in this Article within the time prescribed for the attainment of such ambient air quality standard by the Clean Air Act.
>
> "(2) The quantity and level of emissions from the source at the expiration of the temporary variance are likely to comply with the applicable standards of this Article.
>
> "(3) Such action is reasonable considering the toxicity and other effects of such emissions on the public health, safety and welfare, the meteorological factors affecting the dispersion of the emissions, the land use characteristics of the areas affected by the emissions, efforts taken by the petitioner to comply with those orders and regulations of the Department which were in effect prior to the effective date of this Chapter and which are related to those contaminants which are the subject of the petition, the status of compliance of the petitioner, and any other relevant factors." 25 Pa. Code §141.2 (b).

Reviewing the testimony in light of the above standards, we believe the evidence does indicate that the variance would not interfere with the attainment of the primary ambient air quality standard. This is certainly true as to particulate emission quantities. The primary standard for suspended particulate matter is 75 micrograms of particulate per cubic meter of air as an annual geometric mean, with a maximum 24 hour concentration of particulate of 260 micrograms per cubic meter of air. This standard appears to have been met in the area of the plant for 1974. There is some doubt, however, that the primary standard will be met for 1975, and it is clear the secondary standard will not be.[1] We have

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1. The secondary more stringent standard is:

> "...60 micrograms of particulate matter per cubic meter of air as an annual geometric mean, with a maximum 24 hour average of 150 micrograms of particulate matter per cubic meter of air not to be exceeded more than once per year."

the same doubt as to the maintenance, as opposed to attainment, of the air standards.

The real problem with appellant's request for a variance, however, is presented by the second reason given by DER for its refusal. In addition to requiring that there be no interference with the attainment and maintenance of air quality standards, there must also be a showing that the emissions are likely to comply with the applicable standards at the end of the proposed variance extension period[2] and a plan for compliance therefore is required.

We have considered all of the evidence and find no convincing plan on the part of appellant to achieve full compliance in the future. It is true that appellant has expressed an intention in July, 1976, to retire 11 coal fired boilers now needed for a backup source of steam in the plant. It is also true that if the company approves the expenditure of $1,950,000.00 for a new oil fired package boiler this change over can take place in the near future. The problem with all of this is that the Board of Directors of the Bethlehem Steel Corporation has *not* approved the expenditure and has not given any assurance that it will approve the change indicated. It is therefore clear that appellant fails to comply with the requirements of Section 141.2 of the Rules and Regulations of the Department and that the variance request was properly denied. The appellant has not presented a plan, but only a hope that a plan may be forthcoming at some future time--the date we are asked, to leave in the hands of its Board of Directors to establish. We are not disposed to do that. In fact the appellant will be in the same position in July, 1976, as it is today unless the Board of Directors decide to change the status quo. It is, presumably, this same Board which failed to solve the present problem that brings this matter before us, prior to the expiration of the previously granted variance. It was then and is now, within their power alone to change the intentions of the Bethlehem plant managers into a plan in compliance with DER Regulations.

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2. §141.2(b) provides:

> "(b) The Department will grant any petition for a temporary variance, in whole or in part, upon a review of the petition and accompanying material, and upon any additional investigations which the Department may conduct..."

We believe that any hardship faced by appellant is of its own creation inasmuch as it took no concrete steps to assure that the quantity and level of emissions from the 11 coal fired furnaces are "likely to comply" with the law. If they are to continue in operation past July of 1976, even on a standby basis, they are not likely to comply. If they are to be taken out of service at that time with nothing to replace them, appellant is in as good a position now as it would be then and should have no extension. If, as appellant contends, there will be a new installation in operation which is "likely to comply" by July, 1976, we hold that there should be something more to evidence this, than a bare hope that the Board of Directors will approve it--and, if so approved, that it will be in time to meet the indicated schedule.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal.

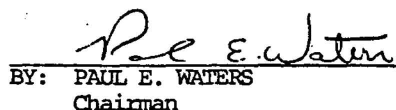
2. Appellant Bethlehem Steel Corporation failed to show entitlement to an extension of a variance inasmuch as the quantity and level of emissions from the coal fired boilers, even though used only on a standby basis, are not likely to comply with the applicable standard at the end of the proposed variance extension.

3. The appellant has failed to present a plan for compliance with the Air Quality Control Act and Regulations of DER at the expiration of the period for which the variance was requested and is therefore not entitled to a variance extension under 141.2 of the Department's Regulations.

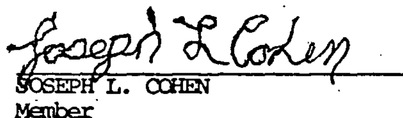
ORDER

AND NOW, this 3rd day of October, 1975, the appeal of Bethlehem Steel Corporation is hereby dismissed and the action of the Department of Environmental Resources in refusing to extend its temporary variance is hereby sustained.

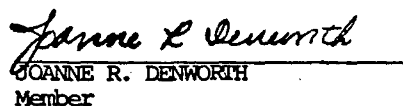
ENVIRONMENTAL HEARING BOARD



BY: PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member



JOANNE R. DENWORTH
Member

DATED: October 3, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of: :

DORAVILLE ENTERPRISES :

: Docket No. 73-433-C

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, October 21, 1975

This action is before the Board on the appeal of Doraville Enterprises (hereinafter Doraville) from the action of the Pennsylvania Department of Environmental Resources (hereinafter DER) of November 28, 1973, in denying Doraville's application for a permit to operate a strip mine in Upper Turkeyfoot Township, Somerset County, Pennsylvania. The location of the proposed mining operation is within the Laurel Hill Creek Watershed which DER has designated as a "conservation area". The stated reason for the permit denial was that the proposed operation would take place within a conservation area. The legal sufficiency of this reason for denial is the main issue involved in this matter.

For more than 20 years, DER and its predecessor agencies have refused to issue mine drainage permits in the Laurel Hill Creek Watershed. Because of the energy crisis and the consequent increase in the value of fossil fuels, the large reserves of coal in the Laurel Hill Creek Watershed tend to be viewed by enterprising business persons as an exploitable natural resource that should now be utilized. Conversely, conservation minded groups and individuals, hunters, fishermen, ecologists and others resist the intrusion of mining operations into the area for fear that strip mining will despoil a part of the Commonwealth of superb scenic beauty. Under such circumstances, it is not entirely surprising that DER would seek to preserve the watershed from the effects of strip mining.

The writer of this adjudication held six days of hearings in this matter between October 29, 1974, and March 26, 1975. Thereafter, the parties submitted proposed findings of fact, conclusions of law and briefs in support thereof. The Board then ordered the parties to submit additional briefs on the question of whether the department may legally deny a strip mining permit application for the reason that it has declared the area in which the proposed mining is to occur to be a "conservation area". The parties submitted briefs on this issue. On the basis of the foregoing, we enter the following:

FINDINGS OF FACT

1. Appellant is Doraville, a partnership engaged in the business of surface mining, located at R. D. 1, Somerset, Somerset County, Pennsylvania.

2. Appellee is DER, the department of the Commonwealth of Pennsylvania responsible for the administration and enforcement of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §690.1 *et seq*.

3. On or about April 3, 1973, Doraville submitted to DER Mine Drainage Application No. 4073SM3 to operate a strip mine of approximately 65.17 acres in Upper Turkeyfoot Township, Somerset County, Pennsylvania. The application proposed a treated discharge to an unnamed tributary of Laurel Hill Creek. The proposed mining site is approximately one mile from Laurel Hill Creek. The unnamed tributary of Laurel Hill Creek is a wet weather stream. Such a stream may have either reduced flow or no flow at all in periods of dry weather.

4. DER has designated the Laurel Hill Creek Watershed as a conservation area within the meaning of 25 Pa. Code §93.2.

5. The land on which Doraville proposes to mine is owned by Lloyd Pletcher, Rockwood, R. D. 3, Somerset County. Mr. Pletcher and appellant have entered into a lease whereby appellant will pay Pletcher a fixed royalty on each ton of coal mined.

6. On or about November 28, 1973, DER, after reviewing Doraville's application and making a detailed survey of the area and after considering the comments and recommendations of the Pennsylvania Fish Commission and of the Bureau of Water Quality Management of DER, denied Doraville's mine drainage application as follows:

"Your application for a Mine Drainage Permit has been considered. A permit has been refused because the watershed of Laurel Hill Creek has been declared a conservation area.

"If you desire more specific information on this refusal, please contact this office.

"You may, within fifteen (15) days from the date of receipt of this letter, file an appeal to request a hearing before the Environmental Hearing Board on the attached notice of appeal forms. A copy of Chapter 21 of the Department of Environmental Resources Rules and Regulations, governing practice and procedure before the Board, is attached."

7. For many years DER and its predecessor agencies adopted a policy of denying mine drainage applications on the Laurel Hill Creek Watershed. This policy was never adopted in the form of a duly promulgated regulation.

8. Doraville's application for a mine drainage permit did not specifically address itself to the water quality criteria applicable to Laurel Hill Creek, nor did DER's review of said application consider whether the proposed treatment would produce an effluent which would conform to the criteria.

9. The water quality criteria applicable to the Laurel Hill Creek Watershed and relevant to the consideration of mine applications are as follows:

(1) the pH of the receiving waters shall be no less than 6.0 nor more than 8.5;

(2) the dissolved oxygen content of the stream shall be not less than 7.0 milligrams per liter; and

(3) the iron content of the stream shall not be greater than 1.5 milligrams per liter.

10. The treated effluent proposed in the application would have a pH value of between 6.0 and 9.0 and a maximum of 7 parts per million of iron.

11. The estimated value of the coal to be mined is $15,000,000.

12. The proposed mining operation would have a duration of approximately three years and would utilize the box cut method of strip mining with continuous backfilling of the previously mined cuts, although the application for the mining permit discloses another method of mining.

DISCUSSION

The stated reason for the denial of the Doraville application for a mine drainage permit was that the proposed operation in Upper Turkeyfoot Township, Somerset County, Pennsylvania, is located within a "conservation area", the Laurel Hill Creek Watershed. The stated reason for the denial is ambiguous. Such ambiguity is revealed by the contentions of the Commonwealth in its post-hearing brief and in its reply brief. On the one hand, the Commonwealth argues on page 12 of its post-hearing brief:

> "There is an inherent water pollution potential from any strip mining activity, as testified to by the Department's geologist and aquatic biologists (summarized in the findings of fact section, *supra*). These factors, coupled with the extensive recreational uses of the watershed, prompted the Department to deny the permit. The stated reason for the denial was that the watershed had been designated a Conservation Area—that is, that the waters were to be kept in a relatively primitive condition. Allowing strip mining in this area, with the quality of the water such a critical factor (N.T. p. 409), is inconsistent with the concept of Conservation Area as defined in the Regulations."

On the other hand, it argues on page 2 of its reply brief:

> "By denying the permit on the grounds that the watershed has been declared a conservation area, the Department was simply stating that, in its opinion, the specific and/or general criteria applicable to protect this use would not be met by drainage from the proposed operation."

It is clear from the evidence that DER produced at the hearings in this matter that its review of appellant's permit application did not concern itself with whether the proposed strip mine operation could be conducted in such a manner as not to endanger Laurel Hill Creek. Its review process never arrived at that point. DER merely ascertained the nature of the streams in the area and concluded that strip mining could not take place within the Laurel Hill Creek Watershed. In its reply brief, on page 3 thereof, the Commonwealth summarizes the testimony of its witnesses as follows:

> "The gravamen of the evidence presented by the Department's witnesses was that: (1) the potential for acid and iron bearing discharge was there (as it is for virtually every strip mine operation): (2) the high quality and low buffering capacity of this particular stream presented a condition of critical sensitivity to the kinds of discharges that could be expected, increasing the likelihood of degradation; and (3) the extensive, *actual* use of the stream as a scenic trout stream lent great significance to any degradation

that might result. All this goes to illustrate that the designation "conservation area" was appropriate and necessary for this watershed, and that the high degree of water quality applicable to this protected use is justified. It also shows something else—it shows what is at stake in the gamble of granting a permit. At best, the Appellant can only show that "There is reason to expect" the criteria can be met. At the very least, the designation conservation area means that the Department must be more conservative in exercising its judgment as to whether the specific criteria will be met."

Clearly, the Commonwealth is seeking to justify a policy in which it may deny applications for strip mining permits in conservation areas. Otherwise, it would have addressed whatever deficiencies existed in appellant's application in its reasons for the denial of that application. This being the case, we must analyze the pertinent provisions of 25 Pa. Code Chapter 93 to ascertain whether these rules and regulations authorize DER to ban strip mining operations in conservation areas.

An analysis of the pertinent provisions of 25 Pa. Code Chapter 93 clearly demonstrates that the designation "conservation area" has reference to one of the protected interests for which specific water quality standards may be promulgated for a particular stream. Thus, 25 Pa. Code §93.2 provides in relevant part:

> "Water uses which shall be protected, and upon which the development of water quality criteria shall be based, are set forth, accompanied by their identifying symbols, in the following Table 1:
>
> * * *
>
> "3.0 *Recreation*
> 3.1 *Boating*—Power boating, sail boating, canoeing and rowing for recreational purposes
> 3.2 *Fishing*—Use of the water for the legal taking of fish
> 3.3 *Water Contact Sports*—Use of the water for swimming and related activities
> 3.4 *Natural Area*—Use of the water as an esthetic setting to recreational pursuits
> 3.5 *Conservation Area*—Waters used within and suitable for the maintenance of an area now or in the future to be kept in a relatively primitive condition"

25 Pa. Code §93.3 provides:

> "(a) Those uses followed by an "X" in the Table in subsection (c) of this section were considered in determining the water quality criteria applicable to the particular waters listed in §93.6 of this Title (relating to designated water uses and water quality criteria) except where otherwise indicated in such section.

"(b) Those uses followed by an "O" in Table 2 in subsection (c) of this section were considered only where specifically set forth in §93.6 of this Title (relating to designated water uses and water quality criteria).

"(c) The following Table 2 sets forth standard water uses and their symbols:

TABLE 2

		Category	*Where Considered*
1.0			
	1.1	Cold Water Fish	O
	1.2	Warm Water Fish	X
	1.3	Migratory Fish	O
	1.4	Trout (Stocking Only)	O
2.0			
	2.1	Domestic	X
	2.2	Industrial	X
	2.3	Livestock	X
	2.4	Wildlife	X
	2.5	Irrigation	X
3.0			
	3.1	Boating	O
	3.2	Fishing	X
	3.3	Water Contact Sports	X
	3.4	Natural Area	X
	3.5	Conservation Area	O
4.0			
	4.1	Power	X
	4.2	Navigation	O
	4.3	Treated Waste Assimilation	X "

Inasmuch as the designation "conservation area" is followed by an "O", it follows that with respect to particular waters listed in §93.6 of Title 25, there must be a specific indication that category 3.5 "conservation area" applies to the stream in question. Laurel Hill Creek Watershed has specifically been designated as a conservation area by DER.

Under the provisions of 25 Pa. Code §93.5(c), Table 3 is set forth in three columns, column 1 representing an alphabetical symbol, column 2 representing the item and column 3 representing the criteria applicable to the item with letters having subscripts designating the applicable criteria with reference to a particular item. For example, the symbol "a" represents the item "pH" and the various criteria with regard to pH are designated "a_1", "a_2". etc. Table 4 of 25 Pa. Code §93.5(d) sets

forth groups to which streams of the Commonwealth belong and the various water quality criteria applicable to said stream. These are set forth in columnar fashion with a group of letters with subscripts under each category of stream representing the various water quality criteria applicable to such groups. There are three such groups, group A, group B and group C. The criteria are in the form of requirements with regard to pH, dissolved oxygen, iron, temperature, dissolved solids and bacteria.

Referring to Table 12 of 25 Pa. Code §93.6, we note that under Zone No. 07.108.43.11 Laurel Hill Creek Basin is noted. In the column relating to exceptions to general water use list, with regard to the Laurel Hill Creek we find the symbols 1.1, 3.1 and 3.5. These symbols indicate that water uses with regard to cold water fish, boating and conservation areas exist in the Laurel Hill Creek Water Basin and should, therefore, be protected, in addition to other categories of water use. With regard to specific criteria, Table 12 indicates that Laurel Hill Creek Basin falls within group A and that with reference to water quality criteria "b_1" and "b_8", usually part of group A, these specific criteria are deleted. In addition, it is necessary to add to group A specific criteria "b_6" and "v_1" referring to a dissolved oxygen value of no more than seven miligrams per liter and to ammonia nitrogen of not more than .5 milligrams per liter.

Nothing in 25 Pa. Code Chapter 93 nor any other provisions of any regulation promulgated by the Environmental Quality Board confers upon DER the authority to ban strip mining activity in conservation areas. That chapter only provides for water quality criteria applicable to waters of the Commonwealth. These regulations afford no public notice of any intent on the part of DER to ban all strip mining in conservation areas. If DER wishes to implement a policy which would ban strip mining in conservation areas, it must first cause to be adopted a regulation by the Environmental Quality Board in a matter consistent with the provisions of the Commonwealth Documents Law, Act of July 31, 1968, P. L. 769, No. 240, as amended 45 P. S. §1101 *et seq.* (1975-1976 pp.) Failure to reduce such a policy to a duly promulgated regulation prevents the policy from being utilized as a proper reason for denying a strip mining permit. Compare *Newport Homes, et al v. Kassab, et al,* 17 Pa. Commonwealth Ct. 317, 332 A.2d 575 (1975).

While DER predicated its disapproval of appellant's mine drainage application upon an improper basis, it does not follow that appellant is entitled to a permit. There is insufficient evidence before us to make a decision on whether appellant should be granted a permit. The appellant is entitled, however, to have its permit application reviewed by DER on the basis of whether its proposed operation would be consistent with maintaining the quality of the water in Laurel Hill Creek for which the applicable water quality criteria have been designed. We will therefore remand this matter to DER to evaluate appellant's application in light of the requirements of Chapter 93 of Title 25 of the Pennsylvania Code. In such review, DER is required to deal with the specifics of the application before it, not on the basis of whether this would open the entire Laurel Hill Creek Watershed to strip mining. In other words, it must look to the merits of the application before it and determine whether that application will or will not discharge an effluent which will result in degradation of the water quality of Laurel Hill Creek in terms of its protected uses designated under 25 Pa. Code §93.6, Table 12, Zone No. 07.108.43.11.

Because the Laurel Hill Watershed has not been opened to mining for many years, the prospect of granting a permit to strip mine in this area has generated myriad letters directed to the Board urging it to dismiss appellant's appeal. However well-intentioned these correspondents were, this Board can only adjudicate matters before it on the basis of the application of facts adduced at an evidentiary hearing conformable with the requirements of the Administrative Agency Law, Act of June 4, 1945, P. L. 1388, as amended, 71 P. S. §1710.1 *et seq.* in relation to the applicable law under which DER purports to act. For the Board to decide important issues brought before it on the basis of the promptings of members of the public would not be consistent with the *quasi-judicial* nature of the Board's functions. It is, in our view, the legislature to whom the public must look to set or change public policy—not this Board.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this proceeding.

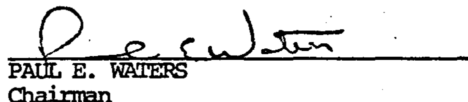
2. A DER policy, not reduced to a duly promulgated regulation, which denies applications for mine drainage permits in conservation areas, as defined in 25 Pa. Code §93.2, is a legally impermissible basis upon which to deny a permit.

3. Where it appears that DER did not evaluate a mine drainage permit application in terms of whether the proposed method of operation will produce an effluent which will meet applicable water quality standards, the Board will remand the matter to DER to make such determination.

ORDER

AND NOW, this 21st day of October, 1975, the appeal of Doraville Enterprises from the action of DER in denying it a mine drainage permit to operate a strip mine in Upper Turkeyfoot Township, Somerset County, Pennsylvania, is hereby sustained, and this matter is hereby remanded to DER to review Application No. 4073SM3, submitted by Doraville Enterprises, in a manner consistent with this adjudication and shall either grant or deny a permit to Doraville Enterprises on or before December 22 , 1975.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman

BY JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: October 21, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

GLENN I. SIBLEY, t/d/b/a SIBLEY BUILDERS
and CLARION AREA AUTHORITY

Docket No. 73-160-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By the Board, October 21, 1975

On May 9, 1973, the Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter DER) issued orders to Glenn I. Sibley, t/d/b/a Sibley Builders (hereinafter Sibley) and to Clarion Area Authority (hereinafter the Authority).

In these orders DER directed Sibley and the Authority to construct a previously authorized sewer extension which would convey sewage from a subdivision known as Applewood Valley, situate in Monroe Township, Clarion County, Pennsylvania, to an existing sewage treatment plant owned and operated by the Authority. This construction was to be completed within 90 days of the date when Sibley and the Authority received said Orders.

Both Sibley and the Authority filed timely appeals to this Board from these orders. In addition, the Authority filed a petition for a supersedeas from the enforcement of the order issued to it.

We scheduled a hearing on this petition for supersedeas which was to be held on June 11, 1973. This hearing was continued; on June 20, 1973, DER and the Authority entered a stipulation in which it was provided that no enforcement action would be taken against the Authority for violation of the order of May 9, 1973, until a hearing on said petition could be held. Although a hearing on this petition for supersedeas was never held, we were notified by counsel for DER on

January 24, 1974, that DER had agreed with the Authority that there would be a supersedeas, pending the resolution of its appeal on the merits. Sibley was not a party to the petition for supersedeas nor was he a party to the agreement for a supersedeas. We must assume, however, that Sibley was a beneficiary thereto since we are unaware of any further action taken against him by DER for violation of the order of May 9, 1973.

On March 1, 1974, we entered an order by which these appeals were consolidated under the Caption "Clarion-Sibley v. Commonwealth of Pennsylvania, Department of Environmental Resources," EHB Docket No. 73-160-B.

On July 24, 1974, a hearing was held in this matter before Louis R. Salamon, Esquire, Hearing Examiner. At the conclusion of the presentation of testimony on that date it was agreed that the record should remain open until August 15, 1974, so as to permit DER to take appropriate action to include Monroe Township, the municipality in which Applewood Valley is situate, as a party to this matter.

On or about September 18, 1974, we received written notice from DER, through its counsel, that on August 20, 1974, DER issued an order to Monroe Township, in which Monroe Township was directed to (1) enter into a binding agreement with the Authority by which Monroe Township was to convey and the Authority was to accept and treat all sewage from Applewood Valley; (2) begin construction of the same sewer extension which Sibley and the Authority were ordered to construct within 90 days of the date when Monroe Township received said order; (3) complete construction of said sewer extension within 180 days of the date when it received said order.[1] In this same notice, counsel for DER suggested that a further hearing in this matter be scheduled. Thereafter, new counsel for DER entered his appearance and on October 29, 1974, this suggestion was withdrawn.

Hearing Examiner Louis R. Salamon submitted a proposed adjudication that is being adopted by the Board with a few modifications.

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1. Monroe Township did not file an appeal to this Board from said order. As such, said order became "final" as to Monroe Township and it became an adjudication as to Monroe Township. *See* Section 20 of the Act of December 3, 1970, P. L. 834, No. 275, which amended the Administrative Code of 1929, P. L. 177, as amended, 71 P. S. §510-21(c). *See also* the Administrative Agency Law, Act of June 4, 1945, P. L. 1388, as amended, 71 P. S. §1710.2(a).

FINDINGS OF FACT

1. On September 18, 1962, and for some time prior thereto, William Flanagan (hereinafter Flanagan) and his wife and Robert Merryman (hereinafter Merryman) and his wife were the owners of a tract of land which is situate partly in Monroe Township and partly in Clarion Township, Clarion County, Pennsylvania. This tract of land was subdivided by or for Flanagan and Merryman. The resulting subdivision was called Applewood Valley.

2. At various times prior to 1966 Flanagan and Merryman sold between 15 and 20 lots in this subdivision and homes were built on these lots.

3. The Authority is a municipal authority duly organized and existing under and by virtue of the Municipal Authorities Act of 1945, Act of May 2, 1945, P. L. 382, as amended, 53 P. S. §301 *et seq*. The constituent municipalities of the Authority are Clarion Borough and Clarion Township.

4. The Authority owns and operates a sewage treatment plant which is situate in Monroe Township. If Applewood Valley would be sewered, it is most logical and feasible for the sewage from Applewood Valley to be treated at this sewage treatment plant.

5. In December 1965, Flanagan communicated with the Authority and inquired as to whether the Authority would treat sewage from Applewood Valley at its sewage treatment plant. The Authority was willing to accept such sewage provided that Flanagan would expend the funds necessary to construct and install the necessary sewage conveyance lines. The Authority retained Howard W. Warnick, its engineer, to prepare a study for Flanagan as to the cost of constructing and installing a sewer line from Applewood Valley to said sewage treatment plant. Mr. Warnick completed such a study and submitted it to the Authority. No further action was taken either by Flanagan or by the Authority at that time.

6. Sibley first became involved with Applewood Valley in 1966 when he contracted to build a home on a lot in Applewood Valley owned by a purchaser from Flanagan and Merryman. Later in 1966, he became directly involved with Flanagan and Merryman when he purchased a lot in Applewood Valley from them, built a home on that lot and later sold that home..

7. The relationship between Sibley and Flanagan and Merryman was formalized when they entered into an agreement on March 31, 1967, in which it was provided, *inter alia*, that Sibley was to improve and develop a certain portion of Applewood Valley, including the major portion of a street therein named Westwood Drive, that Sibley was to promote, locate buyers for and arrange for the sale of lots in the portion which he was developing, that Sibley was to receive a portion of the net proceeds of any sale of a lot in the portion which he was developing and that Sibley would receive payment from Flanagan and Merryman for improvements and lot development as to any unsold lots. Sibley was not formally obligated by virtue of this agreement to construct sewage facilities in Applewood Valley. The only reference to sewage facilities contained therein was a provision that Flanagan and Merryman reserved the right to establish a "sanitary lagoon" at a point in the portion of Applewood Valley which was to be developed by Sibley, to serve Applewood Valley.

8. Between 1966 and 1969, Sibley built homes on 15 lots in Applewood Valley. He received deeds from Flanagan and Merryman for 13 of these lots and conveyed these 13 lots, together with the homes which he built thereupon, to various purchasers. Fourteen of these lots are situate along Westwood Drive.

9. In 1967 and 1968, the exact dates being unknown, Sibley constructed and installed a sewer line, 1150 feet in length under Westwood Drive. This sewer line was constructed to collect sewage generated in the existing homes which he built along Westwood Drive. As new homes which Sibley built were occupied, he connected them to this line. For the reason that it was Sibley's intention that this line would be eventually connected to an interceptor sewer owned by the Authority, Sibley built it according to specifications previously furnished by the Authority. The Pennsylvania Department of Health (the predecessor in function to DER) did not authorize the construction of this sewer line in any manner. A representative of the Authority inspected the sewer line as it was being constructed.

10. At the terminus of this 1150 foot sewer line, and at a point on property owned by Flanagan and Merryman, Sibley built a lagoon into which sewage collected in this line flowed.

11. The Pennsylvania Department of Health did not authorize the construction and maintenance of this lagoon.

12. In the latter part of July 1968, the Department of Health arranged a meeting in an attempt to resolve the polluting problems which had been created by this partially completed sewer line and by this lagoon. Present at this meeting were representatives of the Department of Health, Sibley, Flanagan and Merryman, other property owners in Applewood Valley, representatives from the Authority and from the office of its said engineer, and representatives from Clarion and Monroe Townships.

13. At this meeting Sibley stated that he would cause an additional 850 feet of sewer line to be constructed and installed if the Applowood Valley property owners would share in the cost of the construction and installation of the additional sewer line necessary to cause a connection to the existing Authority sewer system. There was agreement by the property owners as to this proposal and some money was placed in a bank account for that purpose. Thereafter, Sibley proceeded to construct and install the additional 850 feet of sewer line as per his statement.

14. By Labor Day 1968, the homes which were being built along Westwood Drive were so close to the lagoon that Sibley built that he covered this lagoon and built a second lagoon, on property which he owned, to accomplish the same purpose that was accomplished by the original lagoon. This second lagoon was not authorized by the Department of Health.

15. The 2,000 feet of sewer line constructed by Sibley and the lagoon constructed by Sibley are situate wholly in Monroe Township.

16. In 1968 either Sibley or Flanagan contacted the Authority and requested that the Authority make application for construction and installation of a trunk line which would connect the 2,000 feet of sewer line constructed by Sibley to an existing trunk line in the Authority sewer system.

17. The Authority authorized its engineer, the Warnick Company, Inc., to prepare such an application. At no time did the Authority ever state or imply that the Authority would contribute to the costs of such construction and installation. The Authority agreed to prepare the application and to be the permittee

because it was well known that the Department of Health had a requirement that sewage permits be issued in the name of a municipality and because the authority wanted the additional customers that such construction and installation would bring to it.

18. On December 2, 1968, the Authority submitted an application for a sewerage permit to the Department of Health. In this application, the Authority set forth that the sewer line which Sibley had constructed would be extended to an existing trunk line in the Authority's sewerage system.

In this application, the Authority indicated that the proposed sewer extension would be designed to serve the entire Applewood Valley development and an estimated 30 undetermined lots outside this development.

19. On March 7, 1969, the Department of Health issued Sewerage Permit No. 1669401 to the Authority. By the issuance of this permit, the Department of Health authorized the proposal set forth by the Authority in its said application.

20. When the sewer extension project which was authorized by this sewerage permit was not undertaken as of September 1969, the Department of Health, by its authorized representative, issued an order to the Authority dated Setpember 4, 1969. In this order, the Department of Health directed the Authority to discontinue the discharge of raw sewage from the existing sewage facilities in Applewood Valley and to immediately begin to construct and to complete this project.

21. On September 6, 1969, the Authority, by its then manager, James L. Russell, sent a letter to the Department of Health in which it was stated that the Authority was powerless to abate the discharge of raw sewage from property and facilities over which it has no control and in which it was requested that this sewerage permit should either be transferred to list Sibley as the permittee or be immediately terminated.

22. The Department of Health did not specifically respond to this letter of September 6, 1969. However, on November 7, 1969, the Department of Health, by its said authorized representative, issued an order to Sibley. In this order, the Department of Health relieved the Authority from responsibility to discontinue the discharge of raw sewage from said facilities and from responsibility to construct and to complete said sewer extension project, and placed said responsibility so to perform upon Sibley. The sewage permit was, however, never transferred or terminated.

23. The sewer extension project which was authorized by this sewerage permit was not undertaken between November 7, 1969 and May 9, 1973. The apparent reason for this lack of action is that neither the Applewood Valley property owners, nor Flanagan and Merryman, nor Sibley were willing and/or able to advance the money necessary to undertake such project.

24. As of May 9, 1973, the 2,000 feet of sewer line which Sibley built was in existence and continued to be the facility in which sewage from 15 homes on Westwood Drive was conveyed to the second lagoon. As of May 9, 1973, this second lagoon was on property owned by Sibley.

25. As of May 8, 1973, inadequately treated sewage was being discharged to the waters of the Commonwealth from said lagoon. As the result thereof, there was pollution of the waters of the Commonwealth and a condition inimical to public health existed at that time.

26. On May 9, 1973, DER issued orders to Sibley and to the Authority in which both were directed to begin and to complete the construction of the sewer extension project as approved by Sewerage Permit No. 1669401.

27. Sibley and the Authority filed timely appeals to this Board from said orders and a hearing on said appeals was held on July 24, 1974. At the time of this hearing, the 2,000 feet of sewer line which Sibley built still existed; this sewer line continued to be the facility in which sewage from 15 homes on Westwood Drive was conveyed to the second lagoon which Sibley constructed; that second lagoon still existed; Sibley continued to own the property upon which that second lagoon was situate; inadequately treated sewage was being discharged to the waters of the Commonwealth from said lagoon; there was pollution to the waters of the Commonwealth as the result of such discharge; and, a public health nuisance still existed.

28. The Authority did not receive title to the sewer line which Sibley constructed. The Authority has never maintained or controlled either that sewer line or either of the lagoons. Ownership of the sewer line is uncertain. Sibley was reimbursed, in part by the Applewood Valley property owners for the construction of the line. Thereafter, a portion of Westwood Drive was dedicated to and accepted by Monroe Township.

29. During the course of this hearing it was disclosed that the Authority had applied for a Federal grant to gain partial funding for, *inter alia*, this sewer extension project. However, there was at that time no indication as to the status of that grant application.

30. At the conclusion of this hearing, the parties agreed that the record should remain open until August 15, 1974, so as to permit DER to take action to include Monroe Township, in some fashion, in this matter. On or about September 18, 1974, we received written notice from DER that on August 20, 1974, DER issued an order to Monroe Township, in which Monroe Township was directed to (1) enter into a binding agreement with the Authority by the terms of which Monroe Township was to convey and the Authority was to accept and treat all sewage from Applewood Valley; (2) begin construction of the same sewer extension which Sibley and the Authority were ordered to construct, within 90 days of the date when Monroe Township received said order; (3) complete construction of said sewer extension within 180 days of the date when it received said order. Monroe Township did not file an appeal to this Board from said order.

DISCUSSION

We begin our discussion by looking to the posture of Sibley in this matter.[2] It is the position of DER that the legal authorization for its order that Sibley begin and complete construction of this sewer extension is contained in Section 316 of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.316. This section provides as follows:

> "§691.316 Responsibilities of landowners and land occupiers
>
> "Whenever the Sanitary Water Board[3] finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the board may order the landowner or occupier to correct the condition in a manner satisfactory to the board or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, 'landowner' includes any person holding title to or having a proprietary interest in either surface or subsurface rights.

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2. The order to Sibley from the Department of Health, DER's predecessor in function, dated November 7, 1969, which was never appealed by Sibley, directed Sibley to do exactly what he was directed to do in the order of May 9, 1973. If it were not for the fact that at the hearing on July 24, 1974, DER by its counsel, stipulated in effect, N.T. 113-114, that this earlier order was discontinued, we would have declined to take jurisdiction of this matter as to Sibley, since the May 9, 1973, order to him did not alter his pre-existing obligation.

3. DER assumed the functions of The Sanitary Water Board in this regard as the result of the enactment of Section 20 of the Act of December 3, 1970, P. L. 834, No. 275, which amended the Administrative Code of 1929, P. L. 177, as amended, 71 P. S. §510-1 (22). This transfer of functions was effective January 19, 1971.

"For the purpose of collecting or recovering the expense involved in correcting the condition, the board may assess the amount due in the same manner as civil penalties are assessed under the provisions of section 605 of this act: Provided, however, That if the board finds that the condition causing pollution or a danger of pollution resulted from mining operations conducted prior to January 1, 1966, or, if subsequent to January 1, 1966, under circumstances which did not require a permit from the Sanitary Water Board under the provisions of section 315 (b) of this act as it existed under the amendatory act of August 23, 1965 (P. L. 372), then the amount assessed shall be limited to the increase in the value of the property as a result of the correction of the condition.

"If the board finds that the pollution or danger of pollution results from an act of God in the form of sediment from land for which a complete conservation plan has been developed by the local soil and water conservation district and the Soil Conservation Service, U.S.D.A. and the plan has been fully implemented and maintained, the landowner shall be excluded from the penalties of this act."

In the appeal document filed by Sibley, it is contended on his behalf that he never owned Applewood Valley, that he was merely a contract builder and developer for Flanagan and Merryman, that he did not undertake the responsibility to sewer Applewood Valley and that he is not a "landowner" as defined in Section 316 of The Clean Streams Law, *supra*.

Sibley built 2,000 feet of sewer line under Westwood Drive without any authorization from the Pennsylvania Department of Health.

It is obvious that he did this to "assure" prospective purchasers along Westwood Drive that they would have no sewage problems. What Sibley "accomplished" by his actions was a transfer of the sewage problems from one portion of Applewood Valley to another portion.

Sibley built two lagoons as the receiving point for this sewage. The second lagoon was built on property which he owned. The second lagoon is still in existence and Sibley has never divested himself of title to the land upon which it is situate.

At all times material to this matter—before and after May 9, 1973, the date of the DER order to Sibley—inadequately treated sewage has been discharged to the waters of the Commonwealth from this second lagoon. As the result thereof there has been pollution of the waters of the Commonwealth and this is and has been a public health nuisance.

That which is necessary to impose a duty upon Sibley under Section 316, *supra*, to wit, a finding that pollution or a danger of pollution is resulting from

a condition which exists on land in the Commonwealth (this "condition" being the second lagoon) has been made by DER and is completely supported by the evidence.

Sibley has made no attempt to challenge the constitutionality or the applicability of Section 316, *supra*, in the context of this case.

We hold that Section 316, *supra*, is applicable to Sibley. See *Department of Environmental Resources v. Harmuth*, EHB Docket No. 72-333 (issued February 5, 1973).

We also hold that Sibley has created a public health nuisance by his activities in this matter. As such, the Department could have availed itself of the remedy set forth in Section 20 of the Act of December 3, 1970, *supra*, 71 P. S. §510-17(3), to wit, the issuance of an order to Sibley to abate and remove this nuisance.

It is clear that DER has the power, under Section 316, to order Sibley to correct this "condition" in a manner which is satisfactory to DER. It is also clear that the entire problem, of which this "condition" is a part, cannot be corrected merely by directing Sibley to cover this lagoon. The only practical solution to this entire problem is for the lagoon to be eliminated and for the sewer extension to be constructed.

Although we do not question the power of DER to order Sibley to construct this sewer extension, we cannot foresee how such performance can be physically accomplished by Sibley in view of the fact that he has no power of eminent domain and cannot otherwise force any landowner over whose land this extension would travel to grant him the right to utilize such land for such purpose.

This problem must, however, be the subject of a subsequent inquiry if, as and when DER brings an enforcement action against Sibley. See *Rochez Bros., Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, Pa. Commonwealth Ct. , 334 A.2d 790, 795-796(1975). At this posture, Sibley's appeal must be dismissed.

We turn to a determination of the obligations and the liability of the Authority in this matter.

DER would have us rule that the fact that the Authority was the permittee on a sewerage permit to construct this sewer extension was sufficient justification, without more, for the issuance of an order by which the Authority was required to perform such construction.

There is no legal authority for the proposition that one who voluntarily seeks and then receives a permit to construct sewerage facilities must construct them. As we stated in *Milford-Trumbauersville Area Sewer Authority and Milford Township, Higman et ux, et al and Batco, Inc. v. Department of Environmental Resources*, EHB Docket No. 73-247-W (issued May 7, 1974), the grant of a permit (to construct certain facilities) is factually and legally separate from an order to construct certain facilities.

DER also contends that the evidence is overwhelming that the Authority and Sibley jointly undertook the creation of this nuisance. Hence, according to DER, it properly issued an order to the Authority.

This position by DER constitutes a complete reversal of the position which the Department of Health, DER's predecessor, took on November 7, 1969, when it relieved the Authority of the responsibility to construct this sewer extension and placed such responsibility squarely and solely upon Sibley.

We find nothing in the record which would lead us to conclude that the Authority played any part whatsoever in the creation of the problems in Applewood Valley. The Authority never authorized the construction of any part of the 2,000 feet of sewer line which Sibley built. The Authority never authorized the construction of either lagoon which Mr. Sibley built. The Authority has never maintained or controlled either that sewer line or either of the lagoons. The Authority has constructed no sewerage facilities in Applewood Valley.

While it is true that the Authority would be the beneficiary of a completed sewer extension project, the Authority has, at all times relevant to this matter, made it completely clear that full construction of this sewer extension by Sibley, Flanagan and Merryman or their representatives, was a condition precedent to any direct action (other than the necessary act of securing the sewerage permit) on the part of the Authority.

We turn to the provisions of The Clean Streams Law, *supra*, to determine whether, notwithstanding our findings that the Authority did not create the sewage pollution problems in Applewood Valley which gave rise to the May 9, 1973, orders issued by DER, the Authority can be properly required to cure these problems either solely or jointly.

The key section of The Clean Streams Law in this regard is Section 203 thereof, 35 P. S. §691.203. It provides as follows:

> "(a) Whether or not a municipality is required by other provisions of this act to have a permit for the discharge of sewage, if the department finds that the acquisition, construction, repair, alteration, completion, extension or operation of a sewer system or treatment facility is necessary to properly provide for the prevention of pollution or prevention of a public health nuisance, the department may order such municipality to acquire, construct, repair, alter, complete, extend, or operate a sewer system and/or treatment facility. Such order shall specify the length of time, after receipt of the order, within which such action shall be taken.
>
> "(b) The department may from time to time order a municipality to file a report with the department pertaining to sewer systems or treatment facilities owned, operated, or maintained by such municipality or pertaining to the effect upon the waters of the Commonwealth of any sewage discharges originating from sources within the municipality. The report shall contain such plans, facts and information which the department may require to enable it to determine whether existing sewer systems and treatment facilities are adequate to meet the present and future needs or whether the acquisition, construction, repair, alteration, completion, extension, or operation of a sewer system or treatment facility should be required to meet the objectives of this act. Whether or not such reports are required or received by the department, the department may issue appropriate orders to municipalities where such orders are found to be necessary to assure that there will be adequate sewer systems and treatment facilities to meet present and future needs or otherwise to meet the objectives of this act. Such orders may include, but shall not be limited to, orders requiring municipalities to undertake studies, to prepare and submit plans, to acquire, construct, repair, alter, complete, extend, or operate a sewer system or treatment facility, or to negotiate with other municipalities for combined or joint sewer systems or treatment facilities. Such orders may prohibit sewer system extensions, additional connections, or any other action that would result in an increase in the sewage that would be discharged into an existing sewer system or treatment facility."

We have held in *City of Uniontown v. Department of Environmental Resources*, EHB Docket No. 72-203 (issued June 18, 1973) that, under the authority granted in this Section, DER may order a municipality which is not in violation of The Clean Streams Law to enter into an agreement with a neighboring municipality which is violating The Clean Streams Law to treat all or part of the sewage generated in that neighboring municipality.

We have never been faced with the issue of whether DER may order a municipality[4] which is not in violation of The Clean Streams Law to treat sewage

4. A "municipality" as defined in Section 1 of The Clean Streams Law, *supra* , 35 P. S. §691.1, includes an authority.

generated in a neighboring municipality which is in violation without the participation of that neighboring municipality.

Although we are well aware that the broadest possible construction of The Clean Streams Law to achieve the purpose behind this Act—clean streams—must be applied, *Township of Monroe v. Commonwealth of Pennsylvania, Department of Environmental Resources,* Pa. Commonwealth Ct. , 328 A.2d 209, 211(1975), we are not now prepared to extend such a broad construction of the provisions of Section 203 so as to sanction a mandate by DER which could result in a situation where the Authority, alone, would be required to construct this sewer extension.

We do, however, find that DER would have had the power, under Section 203, to order the Authority to participate in this project. We find that such an order would have been fair and reasonable, given the contacts which the Authority has had throughout the history of this entire matter—its sewage treatment plant is in Monroe Township; this plant is the most logical and feasible entity in which sewage from Applewood Valley can be presently treated; the Authority is a service entity which has continually expressed the desire to gain the new customers which this sewer extension would bring; the Authority has attempted to expedite the construction of this sewer extension by causing its engineer to provide specifications for such construction and by causing an application to be submitted and a permit to be issued by the Department of Health therefor.

We will, therefore, substitute our discretion in this matter for that of DER. We will modify the order of May 9, 1973, to the Authority to provide that the Authority must participate with Monroe Township in the construction of this sewer extension. Our authority for such an exercise of our discretion has been upheld by the Commonwealth Court of Pennsylvania in *Warren Sand & Gravel Co., Inc., et al v. Department of Environmental Resources,* Pa. Commonwealth Ct. , 341 A.2d 556(1975); *East Pennsboro Township Authority v. Commonwealth of Pennsylvania, Department of Environmental Resources,* Pa. Commonwealth Ct. , 332 A.2d 798, 804(1975).

We have found that DER has issued an order to Monroe Township, which is final as to Monroe Township, under the terms of which Monroe Township is directed to enter into a binding agreement with the Authority by which Monroe Township is

to convey and the Authority is to accept and treat all sewage from Applewood Valley, by the terms of which Monroe Township is to begin construction of said sewer extension and by the terms of which Monroe Township is to complete the construction of said sewer extension.

As such, our modified order to the Authority will in effect "complete" the order to Monroe Township by providing, for the first time, the other party to the agreement into which Monroe Township was directed to enter.

Such action on the part of this Board does not alter the rights or obligations of Monroe Township at this point, and it could clear the way for a prompt solution to the sewage problems in Applewood Valley.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this proceeding.

2. Pollution is resulting from a condition which exists on land in the Commonwealth which is owned by Sibley.

3. The issuance by DER of the order of May 9, 1973, to Sibley was a proper exercise of the authority of DER under Section 316 of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.316.

4. Sibley has created a public health nuisance by virtue of his activities with regard to sewage conveyance at Applewood Valley.

5. The Authority has not created, did not authorize and is not operating and maintaining a condition and facilities in Applewood Valley which have been and are causing pollution of the waters of the Commonwealth and which have caused a public health nuisance to exist.

6. The fact that the Authority received a sewerage permit following its voluntary action in submitting an application therefor, cannot be the sole justification for an order by DER to the Authority to construct the sewage facilities authorized in said permit.

7. Section 203 of The Clean Streams Law, *supra*, does provide the authority to DER to issue an order to the Authority to participate with Monroe Township in the construction of a sewer extension in Monroe Township.

8. Where DER issues an order pursuant to the exercise of its discretion this Board, based upon the record before us on appeal from such order, may substitute our discretion for that of DER and modify or amend such order.

ORDER

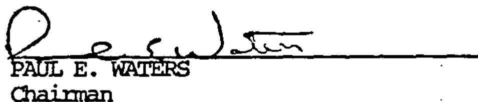
AND NOW, this 21st day of October, 1975, the order of May 9, 1973, issued by the Commonwealth of Pennsylvania, Department of Environmental Resources to Glenn I. Sibley, t/d/b/a Sibley Builders is hereby sustained and the appeal taken from said order is hereby dismissed.

It is further ordered that the order of May 9, 1973, issued by the Commonwealth of Pennsylvania, Department of Environmental Resources to Clarion Area Authority is hereby modified to provide as follows:

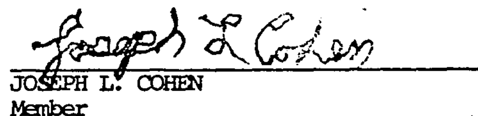
A. Within 60 days of the entry of this order, Clarion Authority shall commence construction of the sanitary sewer extension as approved by Permit No. 1669401 or, in the alternative, shall forthwith enter into an agreement with Monroe Township and/or Sibley whereby the contracting parties, intending to be legally bound, shall provide for the construction of said sewer extension to commence within 60 days of the entry of this order. Said agreement shall also provide that Clarion Area Authority shall render assistance to the other party or parties to the agreement in securing such funds as may be available to aid in the construction of said sewer extension.

B. The sewer extension authorized by Sewerage Permit No. 1669401 shall be completed within 180 days of the entry of this order and Clarion Area Authority shall accept and treat the sewage flowing through said extension upon such reasonable terms and conditions as it ordinarily imposes upon its customers or as otherwise agreed upon in an agreement between it, Monroe Township and/or Sibley.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member

DATED: October 21, 1975

JOANNE R. DENWORTH
Member

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

v:

BUCKS COUNTY WATER AND SEWER AUTHORITY
714 Administration Building
Doylestown, Pennsylvania 18901

AND

THE KORMAN CORPORATION
Jenkintown Plaza
Jenkintown, Pennsylvania 19046

Docket No. 73-030-CP-W

ASSESSMENT OF CIVIL PENALTY

ADJUDICATION

BY Paul E. Waters, Chairman, (issued October 22, 1975)

This matter comes before the Board on Complaint for Civil Penalties filed by the Department of Environmental Resources, hereinafter DER, against Bucks County Sewer and Water Authority, hereinafter Authority, and The Korman Corporation, hereinafter Korman. Korman, a building corporation, developed Neshaminy Village in Bensalem Township, Bucks County, Pennsylvania, and is alleged to have caused sewage to flow into the Neshaminy Interceptor in violation of a sewer ban order issued by DER and upheld by the Sanitary Water Board in 1970. It is alleged that the Authority also allowed an unlawful discharge into the same line and that Korman enjoyed substantial savings because it did not have to haul and treat the improperly discharged sewage.

FINDINGS OF FACT

1. The Neshaminy Interceptor is a facility owned and operated by the Bucks County Water and Sewer Authority. Its lower terminous from 1970 through September 18, 1972, was the Township of Falls Authority Sewage Treatment Plant.

2. An order prohibiting further construction of sewers and/or connections to existing sewers tributary to the Township of Falls Authority Treat-

ment Plant because of hydraulic overloading was issued by DER in 1970 and upheld by the Sanitary Water Board on December 15, 1970.

3. The effect of this order was to prohibit any further connections to the Neshaminy Interceptor from January 16, 1970, until September 18, 1972, when the ban was lifted.

4. From August, 1971 through September 1972, The Korman Corporation was the owner and developer of Neshaminy Village, a portion of the Neshaminy Valley housing development in Bensalem Township.

5. In either August or September of 1971, Korman began construction of houses in Section 5 of Village 2 of Neshaminy Village.

6. Occupancy of homes in Section 5 of Village 2 began in late November of 1971.

7. Sometime after January 16, 1970, Korman constructed a sewage line from manhole 258 to manhole K-1 with the intention of connection into the Neshaminy Interceptor at manhole 50 at some future time, the line to serve as a sewage outlet for portions of Village 2.

8. At the time of completion of the line at K-1, Korman requested permission from the Authority to connect to the Neshaminy Interceptor at manhole 50 because the water conditions surrounding K-1 and manhole 50 caused by the Neshaminy Creek would have made the reopening of K-1 for the connection at a later time to manhole 50 almost impossible,and because the construction of K-1 was in danger unless the connection could be made.

9. The Authority approved the immediate connection by Korman between K-1 and manhole 50 upon condition that two brick and mortar bulkheads be put in at K-1 and one at manhole 50 to prevent entry of sewage from the Korman lines to the Neshaminy Interceptor during the period of the ban.

10. At least one brick and mortar bulkhead was installed in K-1 and possibly all three bulkheads ordered were so installed.

11. During the period prior to August 18, 1971, treatment of sewage in Village 2 was handled at either the lower treatment plant or the upper treatment plant, both of which were owned and operated by the Authority on behalf of Korman at cost.

12. On August 18, 1971, an order was issued by DER and notice given to the Authority, the Bensalem Township Authority, and the Bensalem Township Supervisors and Korman banning any new connections to the upper treatment plant or the

lower treatment plant because they were receiving waste loads in excess of capacity.

13. During the fall of 1971, Korman constructed another internal sewage line to drain Section 5 of Village 2. This new line was connected into manhole 258 which was part of the earlier internal line that had connected into the Neshaminy Interceptor at K-1 and manhole 50.

14. All homes occupied in Section 5 after August 18, 1971, were connected to the new internal sewage line. Since this sewage line could not enter into the Neshaminy Interceptor or the upper treatment plant because of the previous order, Korman proposed to "honeydip" the sewage daily out of a storage area behind manhole K-3 where a bulkhead was constructed.

15. Because of the small storage capacity at K-3, Korman removed the bulkhead proposing to let the sewage run to K-1 where the bulkhead installed would cause the sewage to back up to manhole 258 where honeydipping would be more efficiently accomplished.

16. Korman never honeydipped out of manhole 258 because no sewage ever backed up to that point.

17. Between the time of completion of the connection between K-1 and manhole 50 and the unplugging of K-3, the bulkheads at K-1 and manhole 50 were removed permitting sewage to flow from Section 5 of Village 2 into the Neshaminy Interceptor.

18. Michael Giantisco, Construction Superintendent for Korman, had knowledge on or about December 1, 1971, that no bulkheads were in the Korman sewer lines or at manhole 50 and that, therefore, Korman was pumping sewage into the Neshaminy Interceptor on a daily basis in violation of the Order of January 16, 1970, by DER.

19. The Director of Land Planning and Development for Korman on December 1, 1971, and the Vice-President of Engineering and Planning on January 1, 1972, were informed in either December 1971, or January 1972, that sewage was being pumped by Korman into the Neshaminy Interceptor in violation of the Order of January 16, 1970.

20. No representative of Korman ever informed DER that sewage was being pumped into the Neshaminy Interceptor from Village 2 of the Neshaminy Village.

21. From December 1, 1971, the approximate date on which Korman unplugged K-3 and permitted sewage to flow into the Neshaminy Interceptor at manhole 50, to September 18, 1972, when the ban on connections into Neshaminy Interceptor was lifted, millions of gallons of sewage flowed from Section 5 of Village 2 into the

Neshaminy Interceptor and the overloaded Falls Authority Sewage Plant.

22. The cost to Korman for honeydipping the estimated 5 million gallons of sewage at the rate of 1-2/3 cents per gallon, the rate being paid for sewage removal from the lower treatment plant, would have been approximately $80,000.00.

23. There is no evidence that any member of the Authority participated in removal of or ever granted permission to remove the bulkheads at K-1 or at manhole 50.

24. There is insufficient evidence to support a finding that any sewage was pumped from the upper treatment plant through the Korman lines into the Neshaminy Interceptor during the period from December 1, 1971, through September 18, 1972.

25. There is no evidence that any member of the Authority had knowledge that Korman was pumping sewage into the Neshaminy Interceptor prior to Labor Day 1972.

26. The sewage generated by Village 2 during the entire period of the alleged violation totaled between 4 and 5 million gallons.

27. Korman admits a saving of approximately $14,000.00 based on 5 million gallons in honeydipping costs during the period of the alleged violations.

28. There was no direct testimony as to who actually removed the bulkheads at K-1, K-2 or at manhole 50.

29. There is no direct testimony as to the actual date the violation first occurred.

30. There is no testimony of the extent of pollution of the waters of the Commonwealth as a result of the violation of the Order of January 16, 1970, or the cost of restoration thereof.

DISCUSSION

Perhaps it will never be known exactly when and by whom the bulkheads which had been placed in the newly constructed sewer line were removed, allowing a discharge to the Neshaminy Interceptor. It was this simple act[1] which now brings this matter before us for the assessment of civil penalties.

A review of all of the testimony leaves us with no doubt that Korman is clearly liable for civil penalties. Indeed, although they have raised questions

1. It was estimated that the bulkhead could be removed with proper equipment in a matter of hours. This Board could never find Korman incapable of doing the act based simply on its own declaration that it did not *have* equipment, which in fact, it could easily obtain.

about their liability, they cannot seriously contend that they are without blame. Their major effort, relying, it would seem, on the adage that "misery loves company", has been spent trying to prove that the Authority should share some of the blame for the incident from which Korman alone benefited.[2]

We cannot on this record find out when the bulkhead was actually removed, which allowed this illegal discharge. It is clear, however, that Korman knew they had been removed as early as December 1971, and failed to bring this violation to the attention of DER.

We believe Korman had a duty under all of the facts of this case, to prevent a further discharge and violation of DER's Order of January 16, 1970, or at least to notify DER or the Authority of the on-going violation. It did neither. In fact, Korman was obligated to periodically remove the sewage waste from the manhole where it was to be blocked up. Obviously when the sewage backup did not occur there were only two possible reasons. Either someone else was taking over the job of removing the sewage free of charge to Korman, or it was going into the interceptor. No reasonable person would accept the first possibility, times being what they are. We, therefore, find that Korman knew or should have known of the violation of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1, *et seq.*

We are urged by Korman alone to find that the Authority also allowed sewage from its upper treatment plant to go into the Neshaminy Interceptor in violation of the DER order. The evidence is woefully inadequate for such a finding. The inferences and logical deductions that can be drawn from the facts available lead us in the opposite direction. The question recurs, why would the Authority violate the law in a way that would benefit only Korman? It was, after all, Korman's responsibility to remove by truck any sewage overload. Although the Authority was named in the original complaint, even DER now conceeds there has been no showing of its liability.[3] We have therefore imposed no penalty on the Authority.

Let us turn to the question of the amount of the civil penalty which

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2. Korman has raised the question of the failure of the Authority to notify it of the violation in September 1972. It is clear that Korman knew about the discharge long before that.

3. Korman has argued that Bensalem Township did not have a permit for one of the sewer lines in this dispute and DER did nothing about it. While we do not condone this, if true, it is obviously irrelevant to the present inquiry.

should be imposed upon Korman on this record. Although we are led to believe "silence is golden", this is certainly not the law when, as in this case, there is a duty to speak. Korman is alleged to have saved as much as $80,000.00 by the violation of DER's order. DER would have us impose a penalty in excess of that amount to deter others from similar activities. We do, of course, agree that the amount Korman saved through failing to carry out the trucking of sewage from the manhole is a proper matter for our consideration. The statute provides:

> "The Civil Penalty so assessed shall not exceed ten thousand ($10,000.00), plus five hundred ($500.00) for each day of continued violation. In determining the amount of the Civil Penalty, the Board shall consider the wilfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors." Act as amended 1970, July 31, P. L. 653 No. 222

The law, however, does not require that we assess a civil penalty in the actual amount that has been saved by the Defendant. That amount is only one of several factors which we must consider. Turning to the question of damage to "the waters of the Commonwealth", we can of course take judicial notice of the fact that an overloaded treatment plant does adversely effect the waters of the Commonwealth. We are not however, prepared to guess at the extent of the damage and cost of restoration and assess a heavy penalty supported only by that guess. As to the willfulness of Korman's act, we can only say that it was, if not willful, at least gross negligence on its part, which brings this matter before us for imposition of a penalty.

We believe this case does call for a substantial penalty. In *DER v. Mount Royal Associates*, EHB Docket No. 72-392-W, (issued January 25, 1974), we said:

> "There would seem to be generally three categories of Civil Penalties as I view the possibilities.
>
> "1. The first is nominal, ie., a penalty in name only, and so small an amount as to imply no more than a technical violation. Of course all things being relative, what is nominal to one party might throw another into bankruptcy. For clarity, I refer generally to amounts of $500 or less.
>
> "2. The next penalty category from $500—$10,000 would seem to cover a large number of the Civil Penalty cases expected to occur under normal circumstances. Where there is real but not overwhelming damage and corrective measures are being taken or have been taken, and there is no continuing pollution problem, this would be the category involved.

"3. Finally, some cases because of the nature of the damage, the type of Defendant and the poor attitude displayed, may call for a severe civil penalty above $10,000 and indeed up to $500 per day."

* * *

As previously indicated, we cannot avoid the inference that this was a willful or grossly negligent violation. The defendant has saved a substantial sum of money by its violation. Under all of the facts, a penalty of fifteen thousand dollars ($15,000.00) is clearly called for in this case.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal.

2. The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.605 provides civil penalties for the violation of any order of the department whether or not the violation was willful. The Civil Penalty assessed shall not exceed $10,000.00 plus $500.00 for each day of continued violation. Factors to be considered in determining the amount of civil penalty are the willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors.

3. During a period beginning on or about December 1, 1971, and continuing through September 18, 1972, approximately 5 million gallons of untreated sewage were discharged into the Neshaminy Interceptor through manhole 50 from Section 5 of Village 2 of the Neshaminy Village development owned and operated by the Korman Corporation, in violation of a proper DER order.

4. Korman is the owner of the internal sewer lines that emptied into the Neshaminy Interceptor and since Korman officials had knowledge that from December 1971, through September 18, 1972, Korman was pumping sewage into the Neshaminy Interceptor in violation of the DER order, Korman has knowingly and willfully violated the Department Order of January 16, 1970, The Clean Streams Law, Sections 201 and 202 and Section 91.33 of the Regulations of the Department.

ORDER

AND NOW, this 22nd day of October, 1975, in accordance with Section 605 of The Clean Streams Law, 35 P. S. 691.605, civil penalties are assessed against Defendant, The Korman Corporation, in the amount of Fifteen Thousand Dollars ($15,000.00).

This amount is due and payable into The Clean Water Fund immediately. The Prothonotary is hereby ordered to enter these penalties as liens against any property of the aforesaid Defendant with interest at the rate of 6 per cent per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

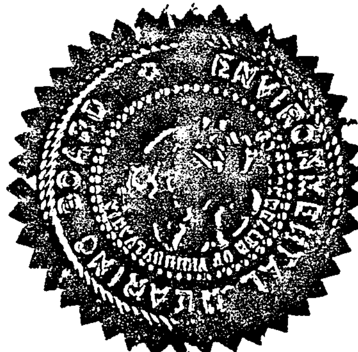
BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

CONCURRING OPINION

Inasmuch as the violations in this case are deliberate and willful and have continued for a period of at least nine months, I am of the opinion that a $50,000.00 civil penalty would not be out of line.

JOSEPH L. COHEN
Member



DATED: October 22, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

LATROBE MUNICIPAL AUTHORITY,

UNITY TOWNSHIP MUNICIPAL AUTHORITY, Docket No. 75-111-C

YOUNGSTOWN BOROUGH

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Joanne R. Denworth, Member, October 22, 1975

Appellants, Latrobe Municipal Authority, Unity Township Municipal Authority and Youngstown Borough, all in Westmoreland County, Pennsylvania, have appealed the action of the Pennsylvania Department of Environmental Resources (hereinafter DER) in awarding them each 61 priority points in connection with their applications for Federal funding under the provisions of the Federal Water Pollution Control Act (hereinafter FWPCA), 33 U. S. C. §1251 *et seq*. Sixty-one priority points were not sufficient for appellants to be certified to the regional administrator of EPA (the Federal Environmental Protection Agency) for receipt of construction grant funds. Had each of these appellants been awarded 63 points, they would have been entitled to be certified to the Federal government for funding.

The effluent from the sewage treatment plant of Latrobe Municipal Authority flows into Loyalhanna Creek. This creek is part of the Kiskiminetas-Conemaugh Basin. Both the basin itself and Loyalhanna Creek downstream from the discharge point of the Latrobe Municipal Authority Treatment Plant are affected by mine drainage. Under DER regulations, stream segments which are significantly affected by mine drainage or pollution from non-point sources fall within a stream segment priority category III. The regulations assign eight priority points for stream segments in this category.

Appellant, Latrobe Municipal Authority, has been required by DER to provide a degree of treatment for its proposed improved and enlarged treatment plant greater

than the degree of treatment usually required for treatment facilities discharging into streams affected with mine drainage. DER is requiring this greater degree of treatment because it has embarked upon a program to reclaim Loyalhanna Creek that will take approximately ten years to complete. It is thus requiring a degree of treatment that will not degrade stream quality after the program is completed. It is appellants' contention that there is a basic irrationality and inconsistency between the two actions taken by DER—namely, requiring a greater degree of treatment than is usually required for acid affected streams, on the one hand, and awarding them priority points on the basis that the stream into which they are discharging is significantly acid affected.

In order to dispose of this matter in an expeditious manner, the parties have submitted a stipulation of facts material to the disposition of this appeal. Hence, no evidentiary hearing has been held in this matter. However, the parties requested and the Board granted oral argument before the Board *en banc* to elucidate the complex issues presented by this appeal—in particular the issue of whether or not the Board has jurisdiction to act in this matter. Oral argument was held on July 31, 1975.

On the basis of the stipulation, the supporting briefs and oral arguments of the parties, we enter the following:

FINDINGS OF FACT

1. Appellants are Latrobe Municipal Authority, Unity Township Municipal Authority and Youngstown Borough, all in Westmoreland County, Pennsylvania.

2. Appellee is DER, the agency of the Commonwealth authorized to make priority determinations regarding Federal grants for the construction of sewerage facilities pursuant to the provisions of FWPCA.

3. Prior to March 1, 1973, and subsequent to that date, appellants each filed applications for sewerage construction projects; Youngstown for a lateral sewer system; Unity Township for a lateral and interceptor sewer system; and Latrobe Municipal Authority for the improvement and enlargement of its sewage treatment plant to treat the sewage emanating from the Loyalhanna Creek watershed in the appropriate portions of Unity Township, Derry Township and all of Youngstown Borough and Latrobe Borough in Westmoreland County.

4. The completed and submitted plans of Latrobe Municipal Authority expanded treatment plant provide for treatment in accordance with the Department's Water Quality Standards, Group B, with the addition of specific criteria for modified limits for the treatment of ammonia.

5. The treatment requirements, which exceed secondary treatment requirements, usually imposed upon treatment plants discharging into mine acid streams, were imposed upon the Latrobe plant because the Department advises that its Bureau of Planning and Developmental Research has scheduled an abatement project for the significant mine acid drainage discharge into the Loyalhanna Creek at a location approximately one mile upstream from the Latrobe treatment plant. The estimated additional construction cost for the difference between a secondary treatment plant and the nature of the plant which the Department is requiring Latrobe Municipal Authority to build is $3,000,000.00.

6. However, the Bureau of Water Quality Standards, in awarding federal funding list priority points to the Latrobe-Unity-Youngstown projects has determined said projects to be entitled to the following priority points:

(1)	Water Pollution Control	33
(2)	Stream Segment Priority	8
(3)	Population Affected	10
(4)	Enforcement Status	10
	TOTAL	61

7. Appellants received "credit" for impact on aquatic life, in that the Department's calculation of Appellants' Water Pollution Control Factor included nine priority points (equivalent to "moderate" effect) for the "Fish and Aquatic Life" Use Factor.

8. The specific area of priority points objected to by Appellants is the assignment of but 8 points under Stream Segment Priority. The Latrobe project was placed in Category III of Stream Segment Priority, which is defined under Title 25 of the Rules and Regulations of the Department Chapter 103, as ". . . segments in which streams are significantly affected by mine drainage or pollution from nonpoint sources—eight points".

9. The Department calculated Appellants' priority points in accordance with applicable Regulations, namely, 25 Pa. Code, Chapter 103, Subchapter A.

10. Appellants' treatment plant discharges into Loyalhanna Creek, which is part of the Kiskiminetas-Conemaugh Basin. The Kiskiminetas-Conemaugh Basin has been classified by the Department as Category III, Mine Drainage Affected.

11. Considering the Kiskiminetas- Conemaugh Basin as a whole, it is correct that the basin is properly classified as "mine drainage affected".

12. At the point of discharge from appellants' plant, Loyalhanna Creek is polluted by acid mine drainage.

13. The Department received and rejected written and oral arguments submitted at its February 27, 1975, public hearing that Latrobe, if it is being required to construct a treatment plant as if it were not on a mine acid stream, should then have been consistently awarded at least the category II, 10 points, if not the category I, 15 points under stream segment priority.

14. Had the Department awarded the Latrobe-Unity-Youngstown projects the requested two or more additional points, the appellants, with 63 or more points, would have been upon the list of fundable projects submitted to the Environmental Protection Agency.

DISCUSSION

This case presents one of the many issues of federal vs. state responsibility under the provisions of the FWPCA. Under the federal act, grants are authorized out of allotments to states for the construction of sewage treatment plants. Applications, to be approved, must meet the limitations and conditions set forth in §204 of the FWPCA, 33 USCA §1284. The specific requirement of that section most germane to the issues of these appeals is §204 (a) (3), which provides:

> "Before approving grants for any project for any treatment works under section 201 (g) (1) the Administrator shall determine—
>
> * * *
>
> "(3) that such works have been certified by the appropriate State water pollution control agency as entitled to priority over such other works in the State in accordance with any applicable State plan under section 303(e) of this Act;"

Section 303 (e) (H) requires the state planning process to include an inventory and ranking in order of priority of need for construction of waste treatment works required to meet the applicable requirements of §§301 and 302 of the FWPCA. The federal act requires that the administrator of EPA approve state plans submitted to him pursuant to these provisions. See 40 C. F. R. §§35.555, 35.557, 35.915 (d). Thus, FWPCA mandates the establishment of a priority list of eligible applicants for grants derived from a priority system approved by the federal government as part of the state planning process required under §303 (e) of the FWPCA. In the Commonwealth of Pennsylvania, the priority system has

been embodied in DER regulations. These regulations, 25 Pa. Code §103.1 *et seq.*, are consistent with the requirements of 40 C. F. R. §35.915 (c) (1) which provides:

> "In determining which projects to fund the State shall consider the severity of pollution problems, the population affected, the need for preservation of high quality waters, and national priorities as well as total funds available, project and treatment works sequence and additional factors identified by the State in its priority system. The list of projects to be funded should be developed in conjunction with the municipal discharge inventory. It should be consistent with the municipal discharge inventory but need not rigidly follow the ranking of discharges in the inventory. The net result should be a concentration of projects to be funded in high priority areas. The Regional Administrator may require the State agency to explain the basis for priority determination for specific projects located in low priority areas (e.g., court orders, critical dischargers on lower priority segments, etc.)."

Chapter 103 of the Department's Regulations, which we presume has at one time been approved by the Administrator in accordance with 40 C. F. R. §35.555, 35.557, 35.915 (d) provides for the assignment of priority points in four categories— water pollution control, stream segment priority, population affected, and enforcement status. The particular Regulation, 25 Pa. Code §103.6 (a)-(b) dealing with stream segment priority is as follows:

> "(a) Priority points attributable to this factor will be assigned in accordance with the following:
>
> (1) *Category I*—These segments represent water quality segments and certain designated effluent limited segments, based on high growth potential and complexity of pollution problems—15 points.
>
> (2) *Category II*—These segments represent effluent limited segments, except those in Category I and certain designated water quality limited segments, based on lower growth potential and less complex pollution problems—ten points.
>
> (3) *Category III*—These segments represent segments in which streams are significantly affected by mine drainage or pollution from nonpoint sources—eight points.
>
> "(b) Designated stream segment categories shall be those identified in the Program Plan submitted to the United States Environmental Protection Agency in accordance with section 106 of the Federal Act."

The Department has strenuously argued that this Board has no jurisdiction to review this matter on the grounds first, that the assignment of priority points for stream segment is simply a ministerial action and not a discretionary "decision" of the Department, see *Fricchione v. Department of Education*, 4 Pa. Commonwealth 288, 287 A2d 442 (1972); second, that the appellants' interest in federal funds is only an expectancy and not a right, privilege, immunity duty or obligation as to which there can be an appealable "adjudication" under the Administrative Agency Law, Act of June 4, 1945, P.L. 1388, as amended, 71 P.S. §1710.1 *et seq.*, see

Department of Public Instruction v. Parker Body & Fender School, 79 D & C 573 (C. P. Dauphin, 1951), and/or third, that the practical problems inherent in review of a challenge to the priority list by one municipality make the Department's action unreviewable at the State level.

Our view of the matter, which includes some elements of the Department's arguments, is that the Board may have jurisdiction to review actions of the Department in implementation of the federal law, but that it cannot exercise jurisdiction in a case of this sort because of the nature of the question involved and the failure of appellants to make out a sufficient claim for review. The State's function here is to implement the federal scheme for funding municipal sewage treatment projects through a priority list that is part of the State's federally "approved" plan. However, we do not see the fact that there is an ultimate federal approval of the State's plan and yearly list as necessarily removing the matter from the Board's review. Where the federal legislative scheme delegates responsibility to the State environmental agency—in this case for establishing a priority ranking system and coming up with an annual priority list—the consequence must normally be to subject the State agency's action to the State's administrative review process.[1] This is clear, for instance, in certification cases under the

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1. The State statutes governing this Board's jurisdiction do not appear to us to preclude review of State action taken under federal law:

§1921-A (a) of the Administrative Code of 1929, 71 P.S. §510-21 (a).

> "(a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the 'Administrative Agency Law,' on any order, permit, license or decision of the Department of Environmental Resources."

Reviewable "actions"of the Department are defined in the Board's rules as:

25 Pa. Code §21.2 (1).

> "Any order, decree, decision, determination or ruling by the department or local agency affecting personal or property rights, privileges, immunities, duties, liabilites [liabilities] or obligations of any person, including, but not limited to, denials, modifications, supensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers and treatment facilities; and orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties."

We think that the assignment of priority points would clearly be a "decision" or "determination" of the Department if it were solely a matter of State law, so that the essential question is whether the relationship of the Department's action to the federal law removes it from the Board's jurisdiction.

FWPCA where the State's certification to the federal EPA administrator of new conditions to be attached to the grant of an National Pollutional Discharge Elimination System permit is a State action reviewable by this Board, even though it is an implementation of the federal law and the permit is still subject to federal approval by the Administrator. See 40 C. F. R. §§125.15, 125.35, 125.36. We are not willing to say that there could never be any challenge to the State's priority list that this Board could consider because it is conceivable that there might be some unauthorized or otherwise invalid action taken by the Department in the implementation of this aspect of the federal law that would thus elude redress. However, because of the nature of the question and the consequence of any order the Board might issue, we believe that the Board must refrain from exercising jurisdiction over challenges to the priority list on any but the most creditable showing of invalidity of the State's implementing regulations under State or federal law or misapplication of its own rules by the State agency.

The primary practical as well as legal, obstacle to review here is that only one of the numerous parties affected by the State's priority list is before the Board. Thus, the Board is in no position to weigh the relative merits of claimants to federal funds, and might indeed produce havoc by ordering that one municipality's project should be included on that list when there are no more funds to go around. It would seem, therefore, that, in general, review of conflicting claims must be sorted out by the federal Administrator simply because all the affected parties are before him. And it may be, as the Commonwealth suggests, that no review of his determinations is available under the federal law other than by the public hearing (which is actually prior to his final determination) provided for in 40 C. F. F. §35.915 (f). It is true that the FWPCA does not provide for review of the Administrator's final determinations in this area as it does in some other areas, see, e.g., §509 (b) of the FWPCA, 33 USCA §1369 (b) and 40 C. F. R. 125.34 (c) and 125.36, *supra*, and it may be that this absence is an indication that Congress did not think the allocation of these federal grants should be subject to judicial review.[2] That, however, is a question of federal

2. See on this subject Davis, Administrative Law Treatise, Vol. IV, Ch. 28, "Unreviewable Action", particularly, §28.09 "Statutes Inexplicitly Precluding Review" and cases cited therein, particularly, *Butte, A. P. R. Co. v. U. S.* 290 US 127 (1933); *Rural Electrifiction Administration v. Northern State Power Co.* 373 F2d 686, 700 (8th Cir. 1967), cert, den. 387 U.S. 945 (1967); *Alabama Electric Cooperative*, 394 F2d 672, 675 (5th Cir. 1968) cert. den. 393 U.S. 1000 (1968). Cf. *Z. & F. Assets Corp. v. Hull*, 311 U.S. (1940), particularly concurring opinion of Justices Black and Douglas at pp. 492-93, which holds, although in the context of foreign policy, that administrative certification and payment of claims out of a limited fund is a political question and, as such, is not reviewable.

law that we need not resolve here.

So far as our power is concerned, we conclude that this Board cannot review a challenge to the priority list without a colorable showing that the State's Regulations establishing the bases for priority ranking, 25 Pa. Code §103.1 *et seq.*, are invalid under State or even federal law, or that the Department flagrantly misapplied those Regulations. No such showing is made here. Appellants have not claimed that the priority Regulations are invalid under State or federal law or that they were misapplied to them. They do perhaps suggest that the stream segment regulation is invalid *as applied to them* because it is inconsistent with what they are obliged to do under other provisions of State law. We do not agree. Appellants are, perhaps unfortunately, saddled with the consequences of two different, but reasonable and appropriate State goals--cleaning up acid mine drainage affected waters of the Commonwealth under The Clean Streams Law on the one hand, and allocating federal funds to the most urgently needed municipal sewerage treatment projects on the other. It is not really inconsistent for the State to require a tertiary plant in order to achieve its long term goal of reclaiming an acid mine drainage affected stream, and yet to regard that objective as not equivalent to protecting less polluted streams when it comes to funding priorities. We are sympathetic to the appellants' worry that the federal funds will dry up before their project comes up for funding, and that they will be left with an expensive obligation under State law. However, they have not shown that the State's action was invalid (or even, really, inconsistent) and, hence, they have not made out a sufficient claim for review by this Board. Although this conclusion is in some sense a judgment of the insufficiency of appellants' claim on the merits, our conclusion is jurisdictional in that we refuse to consider relative claims to federal funds on such a claim.

CONCLUSIONS OF LAW

1. As part of the State plan that is annually approved by the federal Administrator under the FWPCA and implementing regulations, the Department of Environmental Resources has responsibility for establishing a priority ranking system and using it to compile an annual priority list of municipal sewage treatment projects that are entitled to the State's share of federal funding.

2. Where the federal legislative scheme under the FWPCA delegates responsibility to the State's environmental agency for implementation of the federal law, the normal consequence must be to subject the State agency's action

to the State's administrative review process, even though there may be further approval by the federal Administrator.

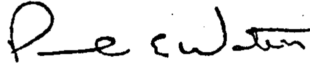
3. Because of the nature of the question involved here—namely, the right to federal funds—and the fact that the Board does not have all the interested parties before it, the Board cannot entertain a challenge to the priority list without a colorable showing that the State's implementing regulations are invalid under State or federal law or that the state has flagrantly misapplied its own regulations.

4. Appellants have not made a showing that the Department's action was in any way invalid and hence have not made out a sufficient claim for review by this Board.

O R D E R

AND NOW, this 22nd day of October, 1975, the appeals of Latrobe Municipal Authority, Unity Township Municipal Authority and Youngstown Borough, all in Westmoreland County, Pennsylvania, are quashed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

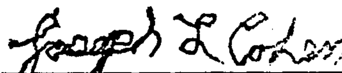
CONCURRING OPINION

I concur in the disposition of this matter on the basis that we lack jurisdiction to entertain the appeal. However, I disagree that even in those limited circumstances set forth in the adjudication, we may exercise our jurisdiction to review priority determination made by DER pursuant to the mandate of the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*

In my opinion, we lack jurisdiction to hear *any* appeals of this nature for the reason that we have jurisdiction neither over EPA nor those municipalities who have been awarded a sufficient number of priority points to enable them to be eligible for Federal funding. Since we have no jurisdiction over EPA, we can make

no binding decision regarding its responsibilities in matters of this sort. Our lack of jurisdiction over the other municipalities who have been determined to be eligible for grants would not enable us to make a determination with regard to the entire list submitted to EPA. Inasmuch as there is a finite sum of money available, it follows that were we to determine in favor of any appellant, we would be adversely affecting other municipalities without their being a party to the proceedings. Such a result could not be justified under any circumstances.

It appears to me that a much fairer method of dealing with this type of matter is to initiate proceedings in a Federal court to restrain DER and EPA from making any awards to Pennsylvania municipalities until it is determined whether a given municipality was properly excluded from priority certification. In such a proceeding, the court could obtain the jurisdiction over the municipalities who have been certified and those who have not been certified and make a determination as to the propriety of the entire list on the basis of evaluating the total process involved in its compilation. However, to suggest that a party may come before this Board to have its priority point determination reviewed without regard to other municipalities and without regard to what the Federal government might do is a clear invitation to parties to engage in an exercise of futility.



JOSEPH L. COHEN
Member

DATED: October 22, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

COUNTY COMMISSIONERS OF DELAWARE COUNTY

Docket No. 74-261-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joanne R. Denworth, Member, October 23, 1975

On July 18, 1975, this Board entered an adjudication that ruled that the appeal in this matter would be dismissed unless the County Commissioners of Delaware County certified to the Board by September 1, 1975, that they had perfected their request for extension of their temporary variance from air pollution control standards by complying with the requirements of §§141.11, 141.12 and 141.13 of the Department's Regulations governing variances and extension of variances, 25 Pa. Code §§141.1 *et seq.* Nothing was received by the Board by September 1, 1975. However, on September 22, 1975, the Board received from the Department a motion to dismiss in accordance with the EHB's adjudication dated July 18, 1975, and thereby learned that the County had in fact submitted a petition for extension of its variance to the Department on August 15, 1975, in an attempt to comply with §141.11 of the Regulations, and did comply with the publication of notice requirement of §§141.12 and 141.13. In our adjudication of July 18, we concluded that the County's appeal from the denial of its request for an extension of its temporary variance could be dismissed as a matter of law because of its failure to submit an adequate plan and schedule for compliance in applying for the extension; but we gave the County 45 days to perfect its request in the hope that it could submit a plan that would deserve the Department's consideration. The Department has now moved to dismiss finally the County's appeal for denial of its request for an extension on the grounds that the petition for extension submitted

August 15th still does not conform to the requirements of Chapter 141 since the County still has not submitted a plan and schedule for compliance and, further, that the County failed to certify its action to this Board as required by the Board's adjudication of July 18, 1975.

On September 26, 1975, the Board received from the County an answer to the Commonwealth's motion to dismiss and a "certification of request for variance filed *nunc pro tunc*". Apparently, in part due to the illness of counsel, the County failed to file the certification on September 1, 1975, and now asks that the September 26th document be treated by the Board as filed as of September 1st. We would be inclined to do that since the Department was aware of the County's efforts to comply with the Board's adjudication and was, therefore, not prejudiced by the delay in certifying. Although we feel the Board's orders should be complied with more precisely, we would not dismiss the appeal on this technicality if the substance of the Board's order had been complied with.

The problem is that the County has still not submitted a plan and schedule for compliance with air pollution control standards. Instead, its petition of August 15, 1975, is a plan to go on planning. While it has perhaps met the formal requirements for a "petition" for a requested extension, 25 Pa. Code §141.4 (b), its petition on its face does not include the information required by §141.11 (b) (5):

> "(5) A detailed plan setting forth all steps the petitioner proposes to take to reduce emissions to a level permitted by this Article, including a schedule indicating the dates upon which each intermediate step would be completed, and the date upon which full compliance with the standards and requirements of this Article would be achieved."

In its petition the County has described all of the alternative plans and combinations of plans it is considering, including a recycling program and the use of landfills to replace incinerators 2 and 3. While, as a practical matter, it may be that the County simply cannot offer any more definite statement of its intent, it is apparent that it cannot submit a detailed plan and schedule for compliance because it has not yet decided upon the system it will use for the disposal of solid waste. Under these circumstances we do not see how the Department could grant an extension of the County's variance since the variance regulations clearly contemplate the granting of variances and extensions only where there is a specific plan for compliance. Among the conditions which the Department must find before it grants a temporary variance, or, as we concluded in our adjudication of July 18, 1975, an extension of a temporary variance, is:

§141.2 (b) (2).

> "(2) The quantity and level of emissions from the source at the expiration of the temporary variance are likely to comply with the applicable standards of this Article."

On the granting of initial temporary variances it has been customary for the Department to include in the variance order the requirement that an abatement plan be submitted by a certain date, equipment purchased at a later date, and installation completed by the end of the term. Thus, although a specific plan for compliance may not be sumitted prior to the grant of a temporary variance, it is submitted early in the variance period. It may be appropriate then to grant an extension of the variance because of delays in the delivery or installation of equipment—in this case, for instance, the failure to receive bids on ESP's for incinerator number 1 would seem to us to be the sort of circumstance that would warrant the extension of a variance if the County had an overall plan and schedule for compliance. We do not see, however, how an extension can be granted for purpose of arriving at a plan without the consequence that the time for compliance will not be known and will almost surely fall outside the variance period. Here the County has had a two year variance period during which it failed to submit a plan, or take any actual steps toward compliance. Now the County wishes to have until December 31, 1976, the limit of the extended variance period the Department could grant, to decide on a plan and implement it. Its petition does not give a definite schedule for compliance. Instead it gives "time estimates" "if several alternatives were to be combined for planning purposes". As to a time schedule the petition then states:

> "...For example, *if*, as a result of the preliminary evaluation *it is decided to proceed* with a source separation-recycle program, convert two incinerators to transfer stations, and add ESP's to Plant No. 1, the time required for each alternative would be as follows:
>
> "1. Recycle program — 9 months
>
> "2. Transfer to landfills
>
> Transfer station — 12 months
>
> Equipment — 6 to 18 months
>
> "3. ESP's for Plant No. 1 — 2 years and 3 months"
>
> (emphasis supplied)

Aside from the fact that compliance under this time schedule would be slightly outside the limits of the possible variance period, the problem with this time schedule is that it is not a commitment but a speculation. If the County decides *not* to proceed with the proposed plan, but to do something else, such as an all

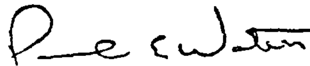
incineration plan, then this schedule, rough as it is, would have no applicability. We think that the intent and meaning of the variance Regulations is to allow variances and extensions for specific plans that detail how compliance will be achieved by the end of the period. See *Bethlehem Steel Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-077-W, (issued October 3, 1975), wherein this Board recently decided that an extension for a variance was properly denied because the company had not committed itself to a method of achieving compliance by the end of the period for which it desired an extended variance.

As we stated in our adjudication of July 18, 1975, we recognized that is may be difficult for a political entity such as the County, which has a number of constituent municipalities, to come up with a solid waste management plan and related air pollution control plan in the time permitted by the Department under its Regulations. However, the validity of the County's claim of impossibility will have to be resolved in whatever enforcement or other proceeding may follow the dismissal of this appeal. In the context of a request for an extension of a variance, we conclude as a matter of law that the Department could not grant the County's request because of the inadequacy of its submissions under Chapter 141 of the Regulations, and that, therefore, the County's appeal must be dismissed.

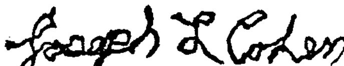
ORDER

AND NOW, this 23rd day of October, 1975, the appeal of the County Commissioners of Delaware County is hereby dismissed and the action of the Department of Environmental Resources in refusing to extend its temporary variance is hereby sustained.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: October 23, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

SHREWSBURY TOWNSHIP BOARD
OF SUPERVISORS

Docket No. 75-059-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joanne R. Denworth, Member, November 10, 1975

This is one of two appeals by the Shrewsbury Township Board of Supervisors from the Department of Environmental Resources' (hereinafter Department) denial of permits to construct sewerage collection systems to serve proposed development areas of Shrewsbury Township. In the instant case, which is application No. 6774410, the Township applied for a permit to build an interceptor line and two pump stations to serve a proposed development area of Shrewsbury Township, and to pump the sewage for treatment to the Glen Rock Borough Authority Sewerage Treatment Plant, which discharges to Codorus Creek in the Susquehanna River Basin. The Department's denial was based on the grounds that the Township did not have an agreement with Glen Rock Sewer Authority for the treatment of its sewage, that the additional sewage from the proposed project would overload the Glen Rock treatment facility, and that neither Glen Rock Borough nor Shrewsbury Township has an "officially approved" municipal treatment plan.

FINDINGS OF FACT

1. On May 9, 1974, appellant, the Shrewsbury Township Board of Supervisors, submitted sewerage application No. 6774410 to the Department requesting a permit for proposed sanitary sewers and pumping stations to serve areas of Shrewsbury Township adjacent to Glen Rock Borough. The application proposed that the sewage would be pumped to the sewerage treatment plant of Glen Rock Borough.

2. On September 26, 1974, the Department wrote to engineers for Shrewsbury Township concerning the Township's sewerage application and requested, *inter alia*, a copy of an agreement allowing Shrewsbury Township to discharge to the Glen Rock Borough sewerage treatment plant. In addition, this letter requested the engineers to detail in what manner the proposed project could avoid overloading the Glen Rock Borough sewerage treatment plant since that plant, on the basis of 1974 operation reports, was receiving an average daily flow of 287,000 gallons, had a permitted maximum average daily flow of 300,000 gallons and the projected flow from the project was in the neighborhood of 28,000 gallons; and, therefore, the projected flow plus the average daily flow measured in 1974 would have exceeded the rated maximum average daily flow of 300,000 gallons.

3. By letter of October 31, 1974, the Township's engineer asserted, *inter alia*, that the Department's 287,000 gallon figure was too high and that the figure was more like 250,000 gallons per day, but he did not at that time offer any proof of the lower figure.

4. By letter of November 26, 1974, the Department notified the appellant that the information provided by its October 31 letter was inadequate and that unless adequate information was received before December 18, 1974, the application would be processed for refusal. The Department also returned the application modules to the appellant with that letter.

5. By letter of December 20, 1974, the appellant's engineers indicated that they wished to have the flow meter at the Glen Rock treatment plant recalibrated and thereafter collect data that they believed would demonstrate that the daily flow was actually lower than the operational records indicated.

6. The Department issued a letter denying appellant's application on February 7, 1975.

7. On February 13, 1975, the appellant's engineers sent a letter and list of daily flows to the Department tending to show that after two months of testing with the recalibrated meter it appeared that the Glen Rock plant's actual daily flow was less than 200,000 gallons per day.

8. The allowable load of waste flow to the stream for the Glen Rock Borough treatment plant is 0.30 MGD or 300,000 gallons per day.

9. Whether the actual daily flow at the Glen Rock plant is 287,000, 250,000 or under 200,000 gallons per day, appellant's module 6-4 indicates that, counting the additional loads to the Glen Rock plant expected from other sources in the next five years, the addition of the proposed sewerage project to the Glen Rock plant would overload that facility.

10. Although the Shrewsbury Township Board of Supervisors have requested that Glen Rock enter into agreement with them for sewerage treatment, no such agreement exists.

11. Shrewsbury Township submitted a municipal sewerage plan to the Department on November 5, 1973.

12. Within 120 days from that date the Department orally notified the Township Sewerage Enforcement Officer that the plan submission was inadequate because it did not include any comments from the York County Planning Commission as required by §5 (7) of the Pennsylvania Sewerage Facilities Act and §71.15 (b) (2) of the Department's Regulations. A representative of the Department has continued to work with the Township concerning the revision of its plan.

DISCUSSION

The Department's denial of a permit in this case must be upheld because of the Township's failure to secure an agreement for sewerage treatment at the Glen Rock treatment plant, as well as the fact that the addition of the proposed sewerage flow would exceed the capacity of the Glen Rock plant under any of the various flow rates advanced by the appellant's engineers. The Department's authority to require permits for any sewerage construction comes from §5 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. 691.202. That section prohibits the discharge of sewage "in any manner directly or indirectly into the waters of the Commonwealth" without a permit.[1] Chapter 91 of the Department's Regulations, 25 Pa. Code §91.1 *et seq.* governs the requirements that the plan set forth in the application provide ample capacity for the present and future needs of the proposed project. Clearly, this requirement is not met here where it is shown by appellant's engineers' own calculations that the addition of sewage from the proposed project would exceed the capacity of the plant appellant wishes to use. Further, we think that the Department was correct in denying the application because of the lack of an agreement between the Township and Glen Rock Borough Sewer Authority to treat the projected sewage. The Department, which is charged with abating pollution and considering "water quality management and pollution control in the watershed as a whole" in the exercise of its sound judgment and discretion under The Clean Streams Law, 35 P.S. §691.5 (1), would surely violate its duty if it were to authorize a collection system that might not lead to a treatment plant.

1. The statute specifically defines a discharge to include a discharge into a sewerage system that discharges into the waters of the Commonwealth.

Appellant argues that the Department has power to force Glen Rock to agree to accept its sewage under §5 of The Clean Streams Law, *supra*, 35 P.S. §691.203 (b), which authorizes the Department to order municipalities to take certain actions to assure "that there will be adequate sewer systems and treatment facilities to meet present and future needs or otherwise to meet the objectives of this act". Under this section the Department does have power to issue orders to municipalities requiring them to join in regional facilities or negotiate with other municipalities for joint treatment. However, the Department is not required to issue orders of this nature. Apparently, the Department's general policy is to issue such orders where they are necessary to abate existing pollution. The Department's brief explains:

> "However, the Department has not exercised the power set forth in Section 203 of The Clean Streams Law to date where the exercise thereof would result merely in addressing the future needs of one municipality without addressing the present needs of a neighboring municipality. In other words, where there are no present needs in any of the municipalities being ordered to agree, the Department has not issued Section 203 orders and would not be inclined so to do. In these situations, it is up to the local municipalities to negotiate and agree with each other for needed public sewerage and other utilities in the manner in which said agreements are traditionally handled."

This appears to us to be a reasonable policy. Certainly the Department did not abuse its discretion or act arbitrarily or unreasonably in requiring that the appellant show evidence of an agreement for the treatment of its projected sewage.

Since we view the lack of an agreement for treatment at the Glen Rock plant and the insufficient capacity of that plant as sufficient grounds for denial of the permit, it is unnecessary to a resolution of this matter to decide whether Shrewsbury Township has an official sewerage facilities plan. However, we wish to comment upon the questions raised by this issue. The Regulation in §91.31 provides that the Department cannot approve a project unless it "... is included in and conforms with a comprehensive program of water quality management and pollution control ..." or is necessary to abate a nuisance. Under §91.31 (b) the basis for determining whether a project so conforms is by review of the C.O.W.A.M.P. plan for the region (which does not yet exist) and the official plans for sewage systems that are required by Chapter 71.

In this case the Department determined that neither Shrewsbury nor Glen Rock had official plans which had been approved by the Department[2]. Appellant

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2. "Official plan" means one that has been adopted by the municipality and approved by the Department. See 25 Pa. Code §71.1.

contests this conclusion because of §71.16 (c) & (d) which provide:

> "(c) Within 120 days after submission of the official plan or revision, the Department shall either approve or disapprove the plan or revision.
>
> "(d) Upon the Department's failure to approve an official plan within 120 days of its submission, the offical plan shall be deemed to have been approved, unless the Department informs the municipality that an extension of time is necessary to complete review."

Appellant argues that since it never received written notification that its plan was disapproved, it has been approved under these provisions. The Department, on the other hand, cites §71.16 (b), which provides:

> "(b) No official plan or revision shall be considered for approval unless accompanied by:
>
> "(1) Evidence that establishes municipal adoption; and
>
> "(2) A statement by the appropriate planning agency with areawide jurisdiction if one exists, and the appropriate existing county or joint county Department of Health commenting on the official plan, or revision thereto, whenever such agency shall have reviewed the plan or revision pursuant to the requirements of the Municipalities Planning Code (The Act of July 31, 1968, P.L. 805, No. 247, 53 P.S. § 10101 *et seq.*); provided, however, that, whenever such agency is not required to review the said offical plan or revision thereto pursuant to the Municipalities Planning Code, evidence that the said official plan or revision thereto has been before the said agency 60 days without comments shall be sufficient to satisfy the provisions of this paragraph of this subsection."

The Department argues that under this provision the plan could not begin to be considered unless the York County Planning Commission's comments were submitted, which never were. They point out, further, that the Township had actual knowledge of this within the 120 day period and that the Department is still conferring with the Township as to revisions in its plan that will satisfy the York County Planning Commission and the Department.

Because of the Township's actual knowledge and the ambiguity of the Regulations on this point, we do not think that the Township's plan should be deemed to have been approved under §71.16 (d). However, in the future we think the Department's practice in such a situation should be to notify a municipality *in writing* within 120 days (more promptly if possible) that the plan is disapproved because the submission does not comply with §71.16 (b) (2). A recurring problem in the administration of the law and regulations that we are called upon to consider is the length of time the Department has or should have to make a decision and the fairness of the date upon which the Department chooses to make its final decision. In this case, for instance, the Department has not taken final action on the Township's plan in two years, apparently for the laudable purpose of working with the Township to enable them to submit an acceptable revised plan. On the

other hand, in the case of the denial of the permit appealed from here, the Department took final action, after threatening to do so on December 18, 1974, on the inexplicable date of February 7, 1975. At the hearing the Department's counsel vigorously argued that the appellant's letter of February 13th, giving lower MGD figures for the Glen Rock plant, should not be considered because it was submitted after the permit was denied[3].

We cannot agree with the contention of the Department that the Board cannot consider evidence submitted after the action appealed from was taken. The Board generally admits evidence of probative value collected up to a reasonable time before hearing. In *Joseph Rostosky d/b/a Joseph Rostosky Coal Company*, E.H.B. Docket No. 73-178-C, Issued June 26, 1974, for example, we sustained the Department's action on the basis of evidence collected after it denied the permit in question. If the issues in this matter were solely a question of whether appellant had failed to receive approval of its official plan amendment, it certainly would have been appropriate to consider whether the revision was currently being considered by the Department and whether the Department would in all likelihood approve the revision. There may be cases where it is inappropriate to consider any evidence submitted by a permit applicant after the date of the denial of therpermit on the ground that such evidence was not before the Department when it made its decision. However, we think there should be some rational policy in such cases to sustain the point in time at which the Department chooses to act and that it cannot have it both ways--keeping some matters open for as long as it likes and closing down others when it suits. With its brief the Department submitted a copy of its policy and procedure that states that final action on applications should be taken within 60 days. In this case the application was denied 9 months after it was received. While it may be that delays of this sort are sometimes for the purpose of giving the applicant time to make a proper submission, such delays lead to inconsistent and perhaps unfair treatment of applicants. We think at least that applications should be processed within the 60 day period if the Department wants to argue that its denial date should exclude later evidence. Otherwise there must be a case by case examination of whether it is appropriate to exclude evidence presented to the Department after the date it chose to act. Certainly where the Regulations provide that action must be taken within 120 days the Department should send written notice of its disapproval to the applicant within that time and then continue to work with the applicant to revise its plan for resubmission.

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3. As it turned out the evidence made no difference to a determination of the case and therefore the issue is not critical.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this proceeding.

2. The Department did not err in denying a permit for a proposed sewerage collection system where it was shown that the appellant had no agreement for the treatment of sewage at the plant its proposed to use and that, in any event, that plant would be overloaded by the addition of the proposed sewage.

ORDER

AND NOW, this 10th day of November, 1975, the appeal of the Shrewsbury Township Board of Supervisors is dismissed and the action of the Department is sustained.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: November 10, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

SHREWSBURY TOWNSHIP BOARD
OF SUPERVISORS

Docket No. 75-060-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joanne R. Denworth, Member, November 10, 1975

This is a companion case to E.H.B. 75-059-D. In this case the Department of Environmental Resources (Department) denied a permit for a proposed pump station and a sewer main to service a proposed development area of the Township known as Heritage Farms. Here,however, the Township proposed to connect to the New Freedom Borough treatment plant, but New Freedom Borough specifically declined to enter into an agreement for treatment of the Township's projected sewage. The Department rejected the Township's application primarily on the grounds that the Township did not submit any evidence of an agreement for treatment of the sewage from the proposed development and that the project was not included in and conformed with a comprehensive program of water quality management and pollution control because the Township has no official sewage facilities plan. By stipulation such evidence presented in Docket Number 75-059-D as is relevant to a determination of this matter is incorporated by reference in the record. For the reasons given in our opinion in Docket Number 75-059-D, which is issued simultaneously, we conclude that the Department was correct in denying appellant's application for a sewerage facility permit.

FINDINGS OF FACT

1. Appellant, the Shrewsbury Township Board of Supervisors, submitted sewerage application No. 6774411 to the Department on May 9, 1974, requesting that the Department issue a permit for a proposed sewerage collection system to serve

a proposed development area of the Township known as Heritage Farms.

2. Appellant's application proposed that the projected sewage be treated at the New Freedom Borough's wastewater treatment plant.

3. On September 26, and December 2, 1974, the Department notified appellant's engineers that the application could not be approved unless certain revisions were made, including the submission of a copy of an agreement with the New Freedom Borough Sewer Authority for the discharge of sewage to the New Freedom plant. In its letter of December 2, 1974, the Department advised the appellant that if the requested revisions were not received by December 23, 1974, the application would be processed for refusal.

4. By letter of December 24, 1974, appellant's engineer advised the Department that the Township was still negotiating with New Freedom Borough for treatment of sewerage at its treatment plant.

5. By letter of January 3, 1975, New Freedom Borough informed the Department that it had not agreed to treat sewerage from the Heritage Farms project.

6. The Department denied appellant's sewerage application on February 7, 1975.

7. On March 19, 1975, the York County Planning Commission advised appellant's engineer, as well as the Department, that it could not approve a revision to Shrewsbury Township's official sewerage plan for the proposed Heritage Farms development until the overall environmental impact of the development had been further studied.[1]

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this proceeding.

2. The Department did not err in denying a permit for a proposed sewage collection system where the appellant had no agreement for the treatment of sewerage at the plant it proposed to use.

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1. The proposal submitted to the York County Planning Commission did not contemplate the use of the New Freedom Borough treatment plant. Instead, the Township proposed to use the treatment plant at Stewartstown Borough, which was apparently willing to receive the sewage.

ORDER

AND NOW, this 10th day of November, 1975, the appeal of the Shrewsbury Township Board of Supervisors is dismissed and the action of the Department of Environmental Resources is sustained.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: November 10, 1975

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of:

CONSOLIDATION COAL COMPANY, et al

Docket No. 72-297-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

RULING ON THE COMMONWEALTH'S
MOTION TO DISMISS

These cases, which have been consolidated, arise on appeals by Harmar Coal Company and Consolidation Coal Company, from letters from the Department of Environmental Resources consolidating their permits for mine discharges into one permit for each of several mine operations. The Commonwealth has moved to dismiss the appeals on the ground that the Board lacks jurisdiction because the Department's action was merely administrative and has not "adversely affected" Appellants.

Under §1921-A(c) of the Administrative Code, 71 P.S. §510-21(c), a party who is "adversely affected" by action of the Department of Environmental Resources is entitled to appeal to the Environmental Hearing Board before such action becomes final. The Board's Rules, 25 Pa. Code §21.2 define an action as follows:

> "(1) Action--Any order, decree, decision, determination or ruling by the department or local agency affecting personal or property rights, privileges, immunities, duties, liabilites [liabilities] or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers and treatment facilities; and orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties."

The consolidation of Appellants' discharge permits into single permits for each mine seems clearly to fall within this broad description of action by the Department which is appealable to this Board.

The Commonwealth argues that the consolidations were merely administrative measures for the convenience of the Department. Whether or not the Department has the power to consolidate permits for administrative convenience, we think that the

action did result in modifications of Appellants' permits, which they are entitled to appeal.

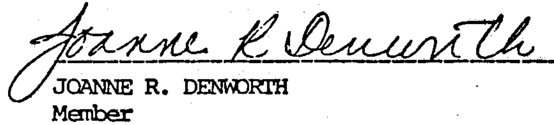
This case is not like Toma and Toma v. Commonwealth of Pennsylvania, Department of Environmental Resources, EHB Docket No. 73-406-C, decided August 13, 1974, where the Appellants filed an appeal from an advisory letter to a municipality concerning the requirements of the Pennsylvania Sewage Facilities Act. The distinguishing circumstances in that case were that the local municipality rather than the Department was responsible for issuance of an order under the Act and the Department's letter to it was therefore simply advisory; and the letter, even if it could be considered an order, was directed to someone other than Appellant. The Board's order stated that an appealable agency "action" had to meet the criteria of an "adjudication" under the Administrative Agency Law, 71 P.S. §1710.2 (a)—meaning that it had to be a final order or other final action of the Department rather than some interim or advisory action of the Department or some action by an agency other than the Department. See McKinley v. State Board of Funeral Directors 5 Pa. Commonwealth C 42, 288 A2d 840 (1972).

Here the Department's orders were final actions by it directed to Appellants, and Appellants believe the actions changed the conditions under which their permits are held. Appellants believe that these consolidations will be detrimental to them because the Department might revoke a permit for an entire mine operation for a violation related to only one discharge, which was not the practice when permits were issued for each discharge. This is a sufficient allegation of adverse effect to sustain Appellants' appeals even though the alleged harm is prospective. "Adversely affected" may include anticipated injury as well as past injury so long as the party asserting such injury is a party whose property rights or pecuniary interests are directly affected. See State Board of Funeral Directors v. Fryer 84 Dauph 98, 37 D&C2d 726 (1965). Although there is some plausibility to the Department's argument that the Appellants are not "adversely affected" by the consolidations unless a revocation actually occurs, we think that argument is answered by the consideration that if such a revocation did occur, the Appellants might be foreclosed from making any argument about the validity of the consolidations because the appeal period on the Department's consolidation orders had run. See Monongahela and Ohio Dredging Co. v. Commonwealth of Pennsylvania, Department of Environmental Resources, EHB Docket No. 72-388-B (issued December 27, 1974). Cf. Cohen v. Beneficial Loan Corp. 337 U.S. 541, 545-47 (1948). If, as we believe, Appellants are entitled to raise the issue of the legitimacy of the consolidations, the appropriate time for raising that issue is now.

ORDER

AND NOW, this 25th day of February, 1975, the Commonwealth's Motion to Dismiss on the ground of lack of jurisdiction is dismissed.

ENVIRONMENTAL HEARING BOARD



JOANNE R. DENWORTH
Member

Dated: February 25, 1975
vf

cc: Bureau of Administrative Enforcement
508 Executive House
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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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In the Matter of:

U. S. STEEL CORPORATION

Docket No. 72-397-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

FINAL RULING ON

ENVIRONMENT PITTSBURGH'S PETITION TO INTERVENE

DISCUSSION

On July 24, 1973, the Board member previously responsible for this case ruled that Environment Pittsburgh, a citizens group that petitioned to intervene as a party in this action by petition dated May 24, 1973, was granted a temporary status analagous to amicus curiae with the right to participate in all aspects of the case (conferences, discovery, etc.) "as if it were a party". In that ruling Chairman Broughton promised a later ruling on the permanent status of Environment Pittsburgh.

Upon consideration of the record in this case bearing on the question of intervention, I have decided that the temporary status as defined in the order of July 24, 1973, should be converted into a permanent one with some modifications.

There are a number of reasons why it seems inappropriate to allow Environment Pittsburgh to intervene fully as a party in this case.

First, the fifty-four counts of violation of the Clean Streams Law that Environment Pittsburgh sought to add to this case in its petition to intervene have been added by the Commonwealth's amended complaint filed October 30, 1973. The record indicates that Environment Pittsburgh's witness will testify on behalf of the Commonwealth, and that Environment Pittsburgh will be actively involved in the preparation of the case for the Commonwealth. Thus, the evidence that Environment Pittsburgh sought to introduce will be presented without its intervention as a party.

Second, this case is one of enormous proportions and threatens to become totally unwieldy if another party is allowed to be the cause of further discovery and to put on and cross-examine witnesses. As it is the hearing is expected to take six to eight weeks and the case has already been delayed three years by pre-hearing continuances and discovery and a general slowness that seems to afflict cases of this magnitude. As intervention is a matter completely within the discretion of the Board (§21.14 (b) of the Rules and Regulations of the Environmental Hearing Board) it may clearly take account of such practical considerations as delay and unwieldiness in denying a petition to intervene where these are no compelling reasons why the petition should be granted.

Third, this is a civil penalty action, which is an action peculiarly within the province of the Commonwealth to pursue. Clearly, Environment Pittsburgh could not have initiated this action. See Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.604. While Environment Pittsburgh may have sufficiently established an "injury in fact" within the meaning of Sierra Club v. Morton, 405 U. S. 727, 733-34 (1971), for purposes of bringing certain suits, we do not think this is enough to entitle it to intervene as a party in this civil penalty action.

Under Section 35.28 of the General Rules of Administrative Practice & Procedure, 1 Pa. Code 31.1 et seq, which is to guide Pennsylvania administrative agencies in exercising their discretion as to intervention, intervention may be appropriate where the intervenor has :

(1) a right conferred by statute, or

(2) an interest which may be directly affected and which is not adequately represented by existing parties and as to which petitioners may be bound by the action of the agency in that proceeding, or

(3) any other interest of such nature that participation of the petitioner may be in the public interest.

Petitioner here argues that its interest falls in the third category and also partakes of the second. It argues that its participation is in the public interest because the Commonwealth may be too lenient in agreeing to settlement terms and/or a compliance schedule.

The second category of interest defined above, as well as the cases cited by petitioner in its memorandum, are clearly directed to rate cases and the like where a party will be bound in direct economic consequence by the agency's action.

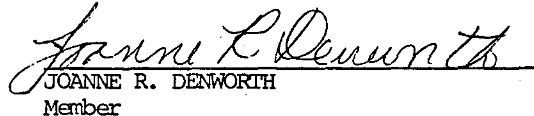
A civil penalty case is in nature more like a criminal action which, while it lies for the general protection and benefit of the public, is a statutory remedy available only to the Commonwealth. We do not think that the Petitioner's reasons are sufficient to permit its intervention "in the public interest" in this civil penalty action without a substantial showing that the Commonwealth is not performing its statutory functions.

Fourth, we think that petitioner's interest in this case will be sufficiently protected if it is allowed to participate as an amicus curiae with the further right to attend and participate as an observer in discovery proceedings and settlement conferences.

ORDER

AND NOW, this 30th day of April, 1975, it is hereby ordered that Environment Pittsburgh shall have permanent status in this case before the Board as an amicus curiae with the right to attend and participate as an observer in any discovery proceedings and settlement conferences.

ENVIRONMENTAL HEARING BOARD



JOANNE R. DENWORTH
Member

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DATED: April 30, 1975
vf

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In the Matter of: :

ALAN WOOD STEEL COMPANY :

Docket No. 73-416 :

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER ON COMMONWEALTH'S
OBJECTIONS TO RESPONDENT'S INTERROGATORIES

Alan Wood Steel Company, the Respondent in this civil penalty action, served interrogatories on the Complainant, the Department of Environmental Resources, (Department) on March 3, 1975. The Department answered certain interrogatories and parts of certain other interrogatories and filed objections to the remaining interrogatories or parts of interrogatories. The Department's primary objection to a number of the interrogatories (Interrogatories 4 through 10 and 12 and 14, particularly) is that they seek information as to the Department's action with regard to other sintering operations, which the Department claims is irrelevant to this civil penalty action. The Department's answers, filed March 25, 1975, were limited to identifying persons and documents that dealt specifically with its action with regard to Alan Wood.

In general principle, I agree with the Department's contention that information concerning the operations of other sinter plants and the Department's action with regard to them is not relevant to this proceeding within the meaning of Pennsylvania Rules of Civil Procedure 4005 (c) and 4007 (a), which are applicable to proceedings before the Board by virtue of Rule 21.15 (d) of the Rules and Regulations of the Environmental Hearing Board; and that such discovery requests are unduly burdensome and require unreasonable investigation, within the meaning of Rule 4011 (b) and (e), in that they require the Department to compile a great deal of information that is of dubious value on the merits of the case.

Deciding what is relevant and what is not for purposes of discovery is a difficult task that consists mainly of drawing a line in a reasonable place. It is really a combination of the burdensome aspects of the request with the tangential nature of the material sought that militates against allowing all of the discovery requested here. See Anderson, Pennsylvania Civil Practice, §4011.66, and cases cited therein, particularly *Venito v. Pennsylvania R. R. Co.*, 10 Chester 237 (1962); c.f., *Brownstein v. P. T. C.*, 46 D & C 2nd 463 (C.P. Phila. 1969). The question in this case is whether Alan Wood violated provisions of the Air Pollution Control Act and the Regulations thereunder and, if so, what civil penalties are appropriate. The resolution of these questions does not depend on what other sintering plants are doing or what the Department is doing with regard to them. While I can understand the Respondent's interest in this information, it is impractical, undesirable and unnecessary from the point of view of administering a statewide environmental program to require the Department to collect and present exhaustive industry-wide information to each defendant it chooses to pursue in a civil penalty action.

The Respondent here argues that all of the information as to other sintering operations will show that its own plant is performing comparatively well in emission control and, therefore, that the emissions that were the cause of this action were not willful. The Respondent's lack of willfulness can be shown by much less complicated evidence, since it is a relatively simple question as to whether or not any violations were willful. Furthermore, to the extent that Respondent's position in the industry with regard to pollution control is relevant, it can be shown by expert testimony, since any expert on the control of emissions from sinter plant operations would presumably be familiar with emission levels in the industry generally.

Alan Wood also argues that it is entitled to the requested discovery because of Section 13.2 of the Air Pollution Control Act, 35 P. S. §4013.2, which provides:

> 4013.2 Confidential information
>
> All records, reports or information obtained by the department or referred to at public hearings under the provisions of this act shall be available to the public, except that upon cause shown by any person that the records, reports or information, or a particular portion thereof, but not emission data, to which the department has access under the provisions of this act, if made public, would divulge production or sales figures or methods, processes or production unique to such person or would otherwise tend to affect adversely the competitive position of such person by revealing trade secrets, the department shall consider such record, report or information,

> or particular portion thereof confidential in the administration of this act. Nothing herein shall be construed to prevent disclosure of such report, record or information to Federal, State or local representatives as necessary for purposes of administration of any Federal, State or local air pollution control laws, or when relevant in any proceeding under this act. 1960, Jan. 8, P.L. 2119, §13.2, added 1972, Oct. 26, P.L.—, No. 245, §13, imd. effective.

This provision has only limited application here because it applies to information "obtained" by the Department from others, particularly emission data, and, as is clear from the title of the section, "Confidential information", is intended only to say what information obtained from others will be available to the public and what will not. Thus, it does not refer to the Department's own tests, reports and records, which are sought by the Respondent in Interrogatories 4 through 10. Insofar as the Respondent is requesting emission data from the records of other sintering plants in the possession of the Department[1], it has the same right to such records of reports as the rest of the public. However, it does not have a special right to have the information collected on a statewide basis at the expense of the Department. I do not know what procedure, if any, the Department generally follows in making reports, records and information available to the public, but it would be sufficient here if the Department would indicate who in the Department has custody of emission data for the sintering plants referred to in answer to Interrogatory 3. The Respondent can then make arrangements to inspect those records or reports at its convenience.

It is, on the other hand, clearly relevant to the Respondent's case to know what general information the Department has relied on in formulating standards for sinter plant emissions, and what general information on this subject it is or is not aware of. Thus, Interrogatories 1 and 11, which appear to be directed to obtaining such general information as may form the basis of the Department's decisions, are proper and should be answered fully. The answers to these interrogatories do not, however, need to identify reports, records or information specifically concerning other sinter plants within the Commonwealth.

The Department has also objected to Interrogatories 4, 5, 6 and 10 insofar as they apply to the Department's tests and records concerning Alan Wood that were developed after the complaint in this action was filed on the

1. The Respondent does not suggest that the information it is seeking has or will be "referred to at public hearings" other than by its own use of such information.

ground that such records were developed in anticipation of litigation and are, therefore, protected. Pa R. C. P. §4011 (d). This objection must be sustained. The Respondent is entitled to all tests and reports that form the basis of the Department's action against it. However, it is not entitled to information assembled by the Department solely for the trial of its case, and it has generally been held that investigations and reports undertaken or prepared after a complaint has been filed are within this category. See Anderson Pennsylvania Civil Practice, Vol. 5A, §§4011.156, 4011.157, 4011.163; and see, *Commonwealth of Pennsylvania, Department of Environmental Resources v. West Penn Power Company,* Docket No. 73-161-B.

Interrogatory 12 asks the Department to identify all of the persons who have submitted complaints to the Department concerning sinter plant operations. The Department objects to this on the ground that the identity of the informers who complain to government enforcement agencies is privileged under Rule 4011 (c) of the Pennsylvania Rules of Civil Procedure, in accordance with the principles announced in cases such as *Roviaro v. U. S.* 353 U. S. 53 (1957); *Mitchell v. Roma* 265 F 2d 633 (3rd Cir. 1959); *U. S. v. Sun Oil Co.,*10 FRD 448 (E. D. Pa 1950); *U. S. v. Kohler Co.* 9 FRD 289 (E.D. Pa 1949). I agree that the policy of protecting informers is applicable here and the Respondent has not shown a sufficiently strong counter-balancing interest in such information to overcome the privilege within the test described in *Roviaro v. U. S., supra* at 60. However, Alan Wood has suggested in its brief that it would be satisfied to receive information as to the number and substance of such complaints without learning the names of the complainants. That information seems relevant and may in fact aid the Respondent in the preparation of its case. Therefore, it is appropriate to require that the Department furnish Alan Wood with a list of the number of complaints received concerning Alan Wood's emissions and the dates and substances of such complaints without revealing the names of the complainants.

ORDER

In accordance with the foregoing opinion it is hereby ordered,

(1) that the Department's objections to Interrogatories 1 and 11 are overruled and the Department is ordered to answer those interrogatories to the extent described in the above opinion;

(2) that the Department's objections to Interrogatories 4, 5, 6, 7, 8, 9, 10 and 14 are sustained with the exception that the Department is required to furnish to the Respondent in answers to Interrogatories 4, 5, and 10, the names of persons in the Department having custody of emission data obtained from the sinter plants in the Commonwealth identified in answer to Interrogatory 3;

(3) that the Department's objection to Interrogatory 12 is sustained, but the Department shall furnish to the Respondent a list showing the number, date and substance of complaints concerning the Respondent's emissions;

(4) that the Department's objections to Interrogatories 4, 5, 6, and 10 are sustained insofar as they require the identification of tests and reports concerning Alan Wood's emission levels that were performed or prepared after the Department's complaint was filed and solely for the purpose of trial.

Where available, the information required to be furnished here shall be furnished for the period commencing October 21, 1970, to the present. The Department shall provide the information required herein to the Respondent by June 30, 1975.

ENVIRONMENTAL HEARING BOARD

JOANNE R. DENWORTH
Member

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Robert A. Clancy, Esquire
Alan Wood Steel Company
Conshohocken, PA 19428

DATED: June 3, 1975

psp

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
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(717) 787-3483

In the Matter of:

UPPER PROVIDENCE TOWNSHIP
SUPERVISORS

Docket No. 74-050-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

The Department of Environmental Resources (Department) has filed a motion to dismiss the Upper Providence Township Supervisor's appeal from an order of the Department directing the Township to cease operating a landfill on certain property leased by the Township. The Department says that the Township is operating a landfill without a permit and recites a long list of violations of the Department's Regulations. The Department argues that in view of the lack of a permit and the recorded violations, the Department is obliged to shut down the landfill; and since the Appellant has not challenged the validity of the Regulations, its appeal should be dismissed. The Township, on the other hand, says that it did not apply for a permit because it is not operating a landfill on the site, and it denies that the violations found by the Department exist.

This is a clear case of a factual dispute that must be resolved by a hearing. The Appellant points out that there is no such thing as a "motion to dismiss" under the Board's Rule §21.18, which incorporates the pleadings allowable under the Pennsylvania Rules of Civil Procedure. We must acknowledge that the practice of the Board of recognizing motions to dismiss is not specifically provided for in the Board's rules or the Rules of Civil Procedure. It appears that by practice rather than rule the most common way of raising preliminary questions of jurisdiction and law before the Board has been by a motion to dismiss. Although the Board hopes soon to propose revisions to its rules to authorize a standard method of raising preliminary issues, we do not think that the fact that a preliminary motion is called a "motion to dismiss" makes it unable to be consid-

ered. Essentially, this is a motion for summary judgment, see Rule 1035 of the Rules of Civil Procedure, and Rule 126 of the Rules of Civil Procedure permits the Board to treat it as such.

On such a motion we must resolve all questions of fact in favor of the Appellant in order to determine whether the Appellee is entitled to dismissal as a matter of law. See, e.g., Coal Operators Casualty Co. v. Charles T. Easterby and Co., Inc., 440 Pa. 218, 269 A.2d 671 (1970); Anna Ritmanich et al v. Jonnell Enterprises, Inc., et al, 219 Pa. Super. 198, 280 A.2d 570 (1971); Samuel McFadden, Jr. v. American Oil Company, 215 Pa. Super. 44, 257 A.2d 283 (1969). Looked at from that point of view, the motion for dismissal must be denied since the Appellant claims that it is not operating a landfill and is not in violation of the Regulations. In fact, we feel that the Department's motion to dismiss in this case is somewhat frivolous, in view of the obvious factual questions to be resolved.

The Appellant's request for sanctions against the Department for failure to file its pre-hearing memorandum will, however, be denied, because the filing of a motion to dismiss and the resolution of the questions raised by such a motion do generally stay the requirement for filing a pre-hearing memorandum unless the motion was not filed in good faith--which was not shown here. Further, since the Appellant has indicated that it will not be available for hearing prior to September, 1975, there is no reason at this point for requiring the Department to file its pre-hearing memorandum with haste.

ORDER

AND NOW, this 24th day of June, 1975, the Commonwealth's motion to dismiss is denied. The Commonwealth is ordered to file its pre-hearing memorandum on or before Wednesday, July 30, 1975.

ENVIRONMENTAL HEARING BOARD

JOANNE R. DENWORTH
Member

cc: Bureau of Administrative Enforcement
Dennis M. Coyne, Esquire
John P. Trevaskis, Jr. Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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In the Matter of: :

BETHLEHEM STEEL CORPORATION :

: Docket No. 75-070-D

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

The Commonwealth has moved to dismiss Bethlehem Steel Corporation's appeal from the Department of Environmental Resources (Department) denial of a requested amendment to Bethlehem's air pollution control program for the coke oven batteries at its Johnstown plant. Under the terms of the consent order entered into between Bethlehem and the Department on February 25, 1972, Bethlehem was to submit an air pollution abatement plan for control of air contaminants at its Johnstown coke oven batteries, which consist of three batteries situated in Franklin Borough and referred to as the "Franklin Batteries" and two batteries of ovens known as the "Rosedale Batteries". Bethlehem submitted a plan in compliance with the Order, and that plan was approved by the Department on July 23, 1973. In general, the plan called for closing the Franklin batteries and installing staged charging and a coke-side shed to control charging and pushing emissions from the Rosedale batteries. Under the approved plan, application to the Department for permit and detailed plan approval was due on October 1, 1973, and installation of the shed was to have begun on one of the Rosedale batteries by February 1, 1974. Bethlehem never complied with these requirements. On January 21, 1975, the Department sent a violation notice to the company regarding its failure to implement its control plan pursuant to the Order. On January 31, 1975, Bethlehem sent to the Department a petition to amend the control plan for the Rosedale batteries, essentially by replacing the coke-side shed with a Koppers-Erie quench car and related emission control system. The petition to amend was denied by the Department in a letter dated February 18, 1975. By stipulation

of the parties that portion of this appeal dealing with the Franklin batteries was dismissed as moot because of Bethlehem's submission of a superseding control plan amendment for the Franklin batteries, which Bethlehem is no longer planning to phase out.

Paragraph nine of the original consent order specifies the conditions for amendment of Bethlehem's air pollution control plan. It reads as follows:

> "9. Upon application of Bethlehem Steel Corporation, the provisions of this order, and plans and schedules submitted and approved hereunder, may be modified by the Department, when
>
> A. delivery or installation of equipment is delayed by events not in the control of Bethlehem Steel Corporation;
>
> B. revision of the plans and schedules submitted or approved is necessary to incorporate changes in technology or corporate planning to achieve within the time specified in paragraph 5 hereof, significant improvement in air pollution control; or
>
> C. air pollution control standards applicable to the by-product, slot-type coke ovens are changed."

The Commonwealth points out that Bethlehem's petition to amend was specifically submitted under paragraph 9 B of the Order and argues that Bethlehem's appeal should be dismissed because it did not allege any facts, either in its petition or its appeal, showing "changes in technology or corporate planning" "necessary" to achieve "significant improvement in air pollution control". Bethlehem's notice of appeal recites several reasons for the proposed change in the method of control of pushing emissions. One is cost - a single shed for one coke oven battery is alleged to cost five million dollars whereas the Koppers-Erie quench car allegedly would cost 2.5 million and would serve both Rosedale batteries. Bethlehem also recites that a clarification of section 123.1 of the Department's Regulations issued on November 17, 1974, indicates that <u>all</u> emissions need not be controlled in order to achieve ambient air quality standards whereas when the coke-side shed plan was submitted, the Department was interpreting section 123.1 as an absolute prohibition against certain fugitive emissions. The Commonwealth argues that cost figures are not a ground for amendment under § 9 B of the order and that § 9 B permits amendment only where the change in technology or corporate planning will result in greater control of pollution rather than less control. The Commonwealth further argues that the clarification of §123.1 was not a "change" in the air pollution control standards under § 9 C of the order, - particularly as in

Bethlehem's case, the specific air pollution control standards contained in paragraph five of the consent order are the only applicable standards that may be considered. The Commonwealth also points out that Bethlehem purported to be amending its plan under § 9 B and not § 9 C, and therefore a change in air pollution control standards cannot be considered here.

We do not think that Bethlehem's appeal can be dismissed on the grounds alleged by the Commonwealth. The language of paragraph 9 B is quite general and we are not persuaded that considerations of cost and experimentation with different technology do not come within necessary "changes in technology or corporate planning". We are also not persuaded that "significant improvement in air pollution control" means significant improvement over the control standards achieved in the plan previously submitted. It seems possible to us that §9 of the Order was intended to permit changes in Bethlehem's control plan if a substituted technology at a lower cost could achieve satisfactory air quality standards in compliance with the Order. The question of whether the technology proposed by Bethlehem will achieve those standards is one that must be resolved at a hearing.

The Commonwealth also argues - in fact it is in some sense its primary contention - that the appeal must be dismissed because the petition to amend was as a matter of law untimely, having been filed a year after construction was to have been begun under Bethlehem's originally filed air pollution control plan. While we agree that the delay in the implementation of the plan is an unhappy event for residents of the Johnstown air basin, we do not see this delay as grounds for dismissal of the appeal, since § 9 B of the order does not put any limit on the time in which petitions to amend the plan may be submitted. It should be noted that the amendment proposed by Bethlehem still would result in compliance with air pollution control standards by July 1, 1977, the date called for in the original order. Also, it does not appear that Bethlehem intends by the substituted emission control method proposed in the amendment to achieve a lesser standard of air pollution control than that set forth in paragraph 5 of the order. However, it is clearly a factual question whether or not the methods proposed by Bethlehem can achieve that standard. Bethlehem argues that so far as the untimely appeal is concerned the Department can bring an enforcement action to penalize Bethlehem for the failure to start construction. We are sympathetic to the Department's concern that such an enforcement action would be stayed pending a resolution of this case; however, we do not see the delay in filing an application for amendment as sufficient grounds for dismissal under the terms of the Order.

The last ground upon which the Commonwealth seeks dismissal is that the petition to amend, having been filed ten days after receiving the violation notice from the Department, was submitted in bad faith for the purpose of preventing the Department from taking any enforcement action. Apparently, Bethlehem first mentioned the change it wished to make in the pushing emission control technology at a meeting with the Department on December 12, 1974. We are not disposed to believe that the amendment application was submitted by Bethlehem in bad faith. However, since under § 9 B of the Order there is a question whether any proposed amendment is "necessary to incorporate changes in technology or corporate planning" we think that the Department's Interrogatories one through 13 (with the exception of interrogatories eight and nine, which relate to the Franklin batteries and have therefore been withdrawn) are relevant and should be answered. Since the corporate process by which Bethlehem arrived at a decision to propose a substitute technology is a factual question, the Commonwealth can make whatever arguments it wishes to make on that point after the facts become known. As to Bethlehem's position with regard to both the motion to dismiss and the Department's Interrogatories, that these are all inappropriate because the Department is still considering the resubmission of the proposal for the Rosedale batteries that was made on May 15, 1975, along with a larger proposal covering a number of Bethlehem's sources, we think that the Department has clearly denied the proposal that is the subject of the appeal once and is not required to take action on it again before the Board proceeds with the appeal.

ORDER

AND NOW, this 11th day of July, 1975, it is hereby ordered that the Commonwealth's Motion to Dismiss is denied. Appellant, Bethlehem Steel Corporation, is ordered to answer the Commonwealth's Interrogatories one through 13 (with the exception of interrogatories eight and nine which have been withdrawn) by Wednesday, July 30, 1975. Appellant shall file its pre-hearing memorandum on or before Friday, August 15, 1975, after which the Commonwealth shall have fifteen days to file its pre-hearing memorandum.

ENVIRONMENTAL HEARING BOARD

Joanne R. Denworth

JOANNE R. DENWORTH
Member

DATED: July 11, 1975

psp

cc: Robert E. Yuhnke, Esquire
Blair S. McMillin, Esquire
Brent W. Robbins, Esquire
Mr. Thomas N. Crowley
Bureau of Administrative Enforcement