COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

1978

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

Chairman.....PAUL E. WATERS

Member.....JOANNE R. DENWORTH

Member.....THOMAS M. BURKE

TABLE OF CASES REPORTED IN THIS VOLUME

ADJUDICATIONS

OPINIONS AND ORDERS

TABLE OF CASES REPORTED IN THIS VOLUME

OPINIONS AND ORDERS (CONTINUED)

FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1978.

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.
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> (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.
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> (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.
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> (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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INDEX TO 1978 OPINIONS AND ORDERS

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
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CITY OF JOHNSTOWN : Docket No. 77-050-W
: The Clean Streams Law
v. :
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
UPPER YODER ASSOCIATES and UPPER YODER TOWNSHIP
AUTHORITY, Intervenor

ADJUDICATION

By Paul E. Waters, Chairman, January 24, 1978

This matter comes before the board as an appeal from the grant by DER of two permits, one authorizing the construction of 9,200 feet of sanitary sewers to serve 150 mobile homes and the other for construction of a ten-inch relief sewer along Sell Street in Upper Yoder Township and an additional extension for an apartment complex. The City of Johnstown, which owns and operates the treatment plant which is to serve the new construction areas, opposes the permits because it does not have satisfactory service agreements with the township and because of sewer overflow problems presently existing during wet weather.

FINDINGS OF FACT

1. Appellant is the City of Johnstown, owner and operator of a primary sewage treatment plant and appurtenant sewer system, serving all or portions of 18 neighboring municipalities.

2. Appellee is the Department of Environmental Resources (Department), the agency of the Commonwealth charged with the responsibility for administering The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1 *et seq.*

3. Intervenor is Upper Yoder Township Authority, the municipal authority created by Upper Yoder Township charged with the responsibility for maintaining sewer system and service in the township. Upper Yoder Township is one of the 18 neighboring municipalities served by the Johnstown sewage treatment plant.

4. Intervenor, Upper Yoder Associates, is a corporation which intends to construct the apartment complex contingent on the permits here in question.

5. The "Greater Johnstown Area" includes, *inter alia*, Upper Yoder Township.

6. The City of Johnstown in the year 1960 reactivated the Johnstown Municipal Authority, a duly organized municipal authority, for the purpose of financing a sanitary disposal system and treatment plant to serve the city and surrounding municipalities.

7. On or about May 1, 1975, the City of Johnstown by resolution took complete possession and ownership of the system from the Johnstown Municipal Authority, thereby terminating all service agreements of the authority.

8. The City of Johnstown adopted Ordinance No. 4025 on October 8, 1975, effective as of May 1, 1975, setting forth sewer rental rates for all persons and properties connected to the sewer system.

9. Numerous suburban municipalities and municipal authorities, including Upper Yoder Township and Upper Yoder Township Authority, objected to the sewer rates of the city as being excessive and illegal under the pertinent provisions of the Pennsylvania Sewer Rental Act of 1935, *as amended*, 53 Purdon's Section 2231 *et seq*.

10. Proceedings in equity were commenced by various plaintiffs, including Upper Yoder Township and Upper Yoder Township Authority, against the City of Johnstown in the Court of Common Pleas of Cambria County, Pennsylvania, to Action No. 1975-2524 in Equity.

11. The Court of Common Pleas on November 6, 1975, entered its order discharging the proceeding providing that the city filed a tariff on its rates with the Pennsylvania Public Utility Commission within twenty (20) days, on the basis that service provided beyond the municipal limits of the city was subject to control as to reasonableness thereof by the Public Utility Commission.

12. The City of Johnstown filed its rates with the Public Utility Commission, but numerous surrounding municipalities and authorities objected to the rates as being excessive, burdensome and discriminatory.

13. Because the City of Johnstown had been threatening residents of various surrounding municipalities with termination of service and also with prosecution for violation of the ordinance, another proceeding was commenced before the Court of Common Pleas of Cambria County for a Rule to Show Cause against the City of Johnstown, being Action No. 1975-4363.

14. On July 12, 1976, the court, upon motion made by the attorneys for the City of Johnstown and for the plaintiffs entered its order continuing the original Order of November 7, 1975, with the following Supplemental Order:

"The City shall bill the individual users who in turn will make payment to their respective municipalities. The municipalities in turn will make payment to the City in accordance with the percentages they are currently paying. The balance to be kept in escrow by the respective municipalities until this matter is resolved by the Public Utility Commission or eventually by this Court."

15. The City of Johnstown and the suburban municipalities and municipal authorities have never been able to resolve their differences so that the question as to the reasonableness and validity of the sewer rental rates of the City of Johnstown has been and is now before the Pennsylvania Public Utility Commission to P.U.C. Complaint Docket No. 21,444.

16. None of the municipal units using the City of Johnstown sewer disposal system for sewer treatment service has entered into a service agreement with the City of Johnstown.

17. Upper Yoder Township Authority has been collecting sewer rentals for any charges for sewer service treatment by the City of Johnstown and placing the monies from such collections in escrow, pending the outcome of the litigation between the parties before the Public Utility Commission and the court.

18. On April 22, 1977, the Department of Environmental Resources issued Sewerage Permits No. 1177402 and No. 1177405 to the Upper Yoder Township Authority.

19. Sewerage Permit No. 1177402 authorized the Upper Yoder Township Authority to construct and maintain approximately 9200 linear feet of eight-inch diameter sanitary sewers. Said sewer extension was intended to permit the eventual connection of approximately 150 mobile homes as part of a proposed Phase II and III expansion plan for Camoset Village.

20. Camoset Village presently consists of approximately 37 mobile homes. Said homes are connected to sewer lines which then connect with the sewer system of Upper Yoder Township Authority which in turn is connected to the sewer system of the City of Johnstown. Presently, sewage from Camoset Village's Phase I development is treated at the City of Johnstown sewage treatment plant under authority of Department of Health Permit No. 1170406, issued March 26, 1970.

21. Sewerage Permit No. 1177405 authorizes the construction and maintenance of relief sewers along Bronx and Sell Streets in Upper Yoder Township as well as a sewer extension to serve a 96 unit-apartment complex proposed to be constructed.

22. Appellant's challenge to Sewerage Permit No. 1177402 is confined to the lack of a service agreement for sewage treatment between the City of Johnstown and Upper Yoder Township Authority.

23. Appellant's challenge to Sewerage Permit No. 1177405 includes both the claim of lack of a service agreement and the claim that the present sewer system line in

Sell Street which would receive the sewage authorized by said permit is incapable of handling the increased sewage flow.

24. The City of Johnstown has not claimed any lack of capacity of its sewage treatment plant to treat sewage generated by any additional flow resulting from the issuance of the present permits.

25. The City of Johnstown has not appealed from the issuance of other sewerage permits, namely from a permit issued to Westmont Borough on July 20, 1976, and from two permits issued to Highland Sewer and Water Authority on January 10, 1977, even though neither of these municipal units has a service agreement with the city.

26. On August 16, 1977, the Pennsylvania Public Utility Commission determined that sewage service being rendered by the City of Johnstown to the residents of surrounding municipalities was extra territorial service as defined under the Public Utility Law so that the Public Utility Commission has jurisdiction over the City of Johnstown's sewage rates, although the Public Utility Commission has not to this date entered a written order of this determination.

27. At the present time in heavy wet weather conditions, the city's sanitary sewer line in Sell Street runs full, with any excess sewage overflow going into a 10-inch storm sewer line in Palm Avenue in the city and thereby being discharged in diluted form into Cheney Run, also known as Cherry Run.

28. At the present time in heavy wet weather conditions, the township's sanitary sewer line in Sell Street may back up in the manholes and cause the manhole covers to pop, with any excess sewage overflow going into storm drains in the township streets and thereby also being discharged in diluted form into Cheney Run.

29. With the construction of the Bronx Street relief sewer within the township, the township's sanitary sewer lines will be capable of handling the present flow during both wet and dry weather conditions to the City's line in Sell Street.

30. George Bockel, a partner in the firm interested in constructing the 96-unit apartment complex, testified that his firm had offered to pay the city for the upgrading of the 462 feet of city sanitary sewer in Sell Street, but the city through its representatives had refused the offer.

31. The construction of the 96-unit apartment complex within Upper Yoder township will add about 10.6% increased quantity of flow from the township into the City on Sell Street which will overflow during heavy wet weather conditions into the City's storm sewer bypass line.

DISCUSSION

Appellant City of Johnstown has in operation a sewage treatment plant which is capable of adequately handling any additional sewage flows that would likely result from the sewer lines in Upper Yoder Township, authorized by the two permits here on appeal. Appellant, however, is clearly in a bind. We are able to take administrative notice of the fact that inflation is a part of every-day life in Pennsylvania and it is the cost of the sewage treatment more than anything else, that brings this matter before us. Upper Yoder Towsnhip, the permittee, has failed to reach a service agreement with appellant as to the cost of using the city plant.[1] The real bind to which we previously alluded, is however, caused by the fact that the court of Common Pleas of Cambria County has ordered the city to continue providing the sewage treatment service.[2] The appellant then comes before us pleading for relief from what to it clearly appears to be the short end of a bad deal, at least for the time being.

In addition to the court proceedings,[3] there is presently pending before the Pennsylvania Public Utility Commission, a request for a rate increase for the sewage treatment services here in question. The Commission is authorized to act in such matters by §401 of the Public Utility Code, 66 P. S. 1171 which provides:

> ". . . Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility."

with "Public Utility" being defined under §2 of the Public Utility Code, 66 P. S. 1101 to mean:

> ". . .persons or corporations now or hereafter owning or operating in this Commonwealth equipment, or facilities for:
>
> * * *
>
> "(g) Sewage collection, treatment, or disposal for the public for compensation."

The Public Utility Commission has indicated[4] that it will exercise jurisdiction over the rate question, which appears to be the major roadblock between the parties. Appellant apparently takes the position that DER has prematurely issued the permit here in question. We do not agree. This board has consistently held that where a

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1. The plant was previously owned and operated by the Johnstown Municipal Authority and there was a service agreement in existence. When the city took over the plant in May 1975 it became necessary for each municipality to reach a new agreement. Some may now have been successful and as in this case, some have not.

2. The disputed funds are being placed in escrow pursuant to the court order.

3. There were actually two suits.

4. Exhibit S-3 is a letter from the Pennsylvania Public Utility Commission which was received by Upper Yoder Township Authority on August 16, 1977, just prior to our hearing in the matter.

a matter outside of our jurisdiction is pending, this is not a sufficient reason to require the refusal of a permit for which an applicant is otherwise qualified. The zoning regulations in solid waste permit cases have come before us on the same argument. *Wrightstown Township, Wrightstown Township Civic Association, et al v. DER and Miller & Son Paving, Inc.*, EHB Docket No. 75-307-W, issued December 1, 1977; *Anthony J. Agosta, et al v. DER and City of Easton*, EHB Docket No. 75-208-W, issued March 25, 1977. Here there is no question about the ability to provide the sewage treatment service, at least with regard to Permit No. 1177402, but only the question of how much it will cost, i.e., what should the rate structure be. The Court of Common Pleas has decided that no service should be interrupted while the rate issue is being settled, and the P.U.C. has indicated it has jurisdiction and will settle that question. We simply refuse to overturn either determination in the meantime because we are in agreement with them.

Appellant also argues that Permit No. 1177405, which authorized two sewer extensions should be denied because of the overflow problem already being experienced in the Sell Street[5] area, without the added flow during wet weather. Intervenor, Upper Yoder Associates, would have us uphold this permit because the new apartment complex it desires to construct would only add an additional 10% to the excessive flow during wet weather. In effect, it argues that we should overlook a present health hazard because it is already there, and so they should be allowed to make it only slightly worse. Without indicating what we think of this logic, we reject it.

The only problem that we have with the appeal of Permit No. 1177405 is the fact that two projects are authorized by it, one which is clearly needed to help alleviate a problem[6] and the other which badly needs further study by the DER.[7]

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5. The one extension is for a 10" relief sewer which will bypass the overflow area in Sell Street. The other extension is for a line to service 96 new units of an apartment complex which intervenor, Upper Yoder Association, intends to construct.

6. Notes of Testimony of the Upper Yoder Township Authority Engineer, pages 19 & 20, lines 24 through 13:

> "Q. I see.
> "So that even without additional projects or additional sewers, which are contemplated by the Upper Yoder Township, the present sewer interceptor at Sell Street is not handling the capacity which it is required to do from time to time; it that correct?
> "A. That is correct.
>
> "MR. WATERS: What is happening now if, as you say, it does not handle that capacity?
> "THE WITNESS: The excess sewage, the inflow and wet weather flow is bypassed into the 10-inch bypass in the storm system.
> "MR. WATERS: It is getting no treatment at all?
> "THE WITNESS: That is correct."

7. The DER has asked for a remand of this permit.

It is the DER's position that it did not know about the overflow problem in Sell Street when it approved the 96-unit apartment complex under the permit. It raises serious doubts whether the permit would ever have been issued, had it known about the problem. Even without a determination on our part of how the present situation arose or whose fault it is, we are satisfied that a remand of the permit only as to this one project, is in order. We intend by this decision to sustain the permit with regard to the 10" relief sewer in Sell Street which it authorizes. We further intend to remand for further study, the action of the DER in authorizing a sewer extension for a 96-unit apartment building under the present circumstances. We are satisfied to have the DER determine how to best accomplish the above indicated results.

CONCLUSIONS OF LAW

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

2. The DER may properly issue a permit under The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1, *et seq.*, authorizing a sewer connection where there is adequate treatment capacity, even though the municipalities have failed to agree and are litigating the rate structure.

3. Where two sewer projects are authorized under one permit by the DER and one project is found to be proper and the other requires further study, the board will sustain the first determination and remand the second to the DER to be accomplished in accordance with the DER's best administrative procedure.

O R D E R

AND NOW, this 24th day of January, 1978, the appeal of Permit No. 1177402 is hereby dismissed. The appeal of Permit No. 1177405 is dismissed with regard to the 10" relief sewer in Sell Street, and the matter is otherwise remanded to the DER for further action in accordance with this adjudication.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

DATED: January 24, 1978

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

V. Docket No. 76-116-CP-W

TREVORTON ANTHRACITE COMPANY Complaint for Civil Penalty

ADJUDICATION

BY THE BOARD, January 24, 1978

This matter comes before the board on a complaint filed by the DER alleging, in four counts, violations of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.*, by defendant, Trevorton Anthracite, in its operation of an impoundment settling basin. The basin, used in connection with its anthracite coal coperation, was permitted in 1963, but a new, and allegedly unauthorized, siphon overflow pipe was added in 1974. The DER seeks the imposition of civil penalties because the pipe, on at least two occasions, allowed industrial waste to discharge to an unnamed tributary to South Branch of Zerbe Run in Northumberland County. The hearing in the matter was held before Chairman Paul E. Waters. His proposed adjudication is adopted by the board with significant modifications as to the liability for and the amount of civil penalties assessed for violation of Count 1.

FINDINGS OF FACT

1. The defendant is the Trevorton Anthracite Company, hereinafter Trevorton, a corporation duly organized and operating under the laws of the Commonwealth of Pennsylvania. It maintains its office at 200 Mahantango Street, P. O. Box 360, Pottsville, Pennsylvania 17901.

2. At all times material hereto, Trevorton has owned, operated and maintained its anthracite coal washery and the sedimentation basins located at Zerbe Township, Northumberland County, Pennsylvania.

3. On November 27, 1963, the Department of Health of the Commonwealth of Pennsylvania issued to Trevorton Anthracite Company, Industrial Waste Permit No. 66317. This permit was issued for the construction and operation of waste treatment facilities for the plant of Trevorton located at Zerbe Township, Northumberland County, Pennsylvania.

4. The proposed industrial waste treatment facilities to be constructed were to collect wastewater in a sump and pump it into a large single settling basin or slush pond for the settling of solids prior to discharging the wastewater into the South Branch of Zerbe Run, a tributary of Mahanoy Creek.

5. In order to accomplish the requirements of said permit, Trevorton constructed a large settling lagoon or silt dam approximately seven or eight acres in size. The dam is contained with a berm on the opposite side of the dam from the portion of the dam into which the water used in Trevorton's preparation plant enters the dam. There were originally installed three overflow weir boxes which discharged the effluent to a point in Zerbe Run just below the dam.

6. In the course of continuous use of said silt dam, two of the three overflow boxes became blocked.

7. In June of 1974, to overcome the blockage of the overflow boxes, a four-inch diameter overflow pipe was installed. This pipe was located at the northeast portion of the silt dam at approximately the same location where one of the original overflow weir boxes had been located.

8. The overflow pipe was installed as a substitute for the blocked weir box and discharge pipe from said blocked weir box.

9. In October of 1974, said four-inch diameter overflow pipe was observed by an employee of the Department of Environmental Resources of the Commonwealth of Pennsylvania. No statement was made at the time of observance by said employee to any employee of Trevorton regarding the alleged illegality of the construction and use of said pipe.

10. On December 10, 1975, employees of Trevorton dismantled the portion of the four-inch diameter overflow pipe entering the water and a plug was put on it to seal it permanently.

11. Special Condition B of Trevorton's permit provides that "no untreated or ineffectively treated industrial wastes shall at any time be discharged into the waters of the Commonwealth".

12. Standard Condition 14 of Trevorton's permit requires:

> "FOURTEEN: The design of the overflow device or devices shall provide such length of weir as will insure velocities of approach low enough to permit removal of the clarified water with the minimum outflow of suspended solids. To further insure such removal, the final overflow weir shall be level and the sides of the outlet structure shall be constructed and maintained in a tight condition by means of suitable watertight construction."

13. The purpose of Trevorton's sedimentation basin is to allow solid material suspended in the water coming from Trevorton's coal washery to settle out to the bottom of the basin, leaving clear liquid on the surface.

14. The purpose of the overflow boxes required by Trevorton's permit is to decant clear liquid off the surface of Trevorton's sedimentation basin, for discharge into the stream, while leaving the solids settled on the bottom of the basin.

15. The low side of an overflow box is a type of weir, in that water flows over the top of it like water over a dam. A siphon pipe does not fall within the meaning of the term "weir".

16. The wooden slat that forms the weir side of Trevorton's overflow box is approximately two inches below the surface of the water.

17. The pipe was installed so that its intake point extended downwards at least one foot under the surface of the water. From that point, the pipe rose up out of the water, crossed the flat top of the dam and extended down the breast of the dam, where it terminated in a manually operated valve, located below the level of the intake point.

18. Trevorton's siphon pipe was not an "overflow device" or "weir" within the meaning of Trevorton's permit, because it required priming, sucked in water under pressure, had its intake point at least a foot below the surface of the water in the basin, and did not provide any "length of weir" to insure a low approach velocity of the water. Because the intake point of the siphon pipe was located at least one foot below the surface of the water, the pipe would tend to entrain and discharge suspended solids that were in the process of settling down past the pipe.

19. On February 25, 1975, Trevorton allowed the discharge of industrial waste into the South Branch of Zerbe Run through its siphon pipe.

20. On December 9, 1975, Trevorton allowed the discharge of industrial wastes into the South Branch of Zerbe Run through its siphon pipe.

21. On December 9, 1975, as shown by a sample taken by the DER's inspector, Trevorton's industrial waste discharge, through its siphon pipe into the South Branch of Zerbe Run, had a suspended solid concentration of 382 mg/l. At that time the stream had a suspended solids concentration of 20 mg/l upstream from the siphon pipe and 104 mg/l downstream from the siphon pipe. [Measurements in milligrams per liter (mg/l) are equivalent to measurements in parts per million (ppm).]

22. The South Branch of Zerbe Run is a stream that has been given the designation as an acid stream by the DER.

23. Trevorton could have installed another overflow box, instead of a siphon pipe, by draining the basin and performing the work during a weekend or a vacation shutdown.

DISCUSSION

Defendant, Trevorton Anthracite, in an effort to open an outlet from its settling basin after two of the original three permitted weir box installations became inoperable, constructed in 1974, an overflow pipe[1] which operated on a siphon principal. Although it is not at all clear why the original permitted apparatus was not replaced, it was no doubt due to the difficulty and cost of a shutdown for that purpose. Was this decision penny wise and pound foolish? The result of the action or inaction on the part of defendant was the illegal discharge of industrial wastewater on at least two occasions. There is no doubt that a discharge of industrial waste was released by defendant to Zerbe Run on December 9, 1975. On February 15, 1975, the appearance of black wastewater eminating from the siphon pipe clearly indicated a similar discharge occurred although the discharge was not tested on this occasion.[2]

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1. Notes of Testimony of Ronald J. Ulmer, Vice President of Trevorton Anthracite, page 66, lines 5 through 25 and page 67, line 1:

> "The dam is contained with a berm, and on the so-called opposite end--in other words, the discharge water from the plant is coming in on the western side, and on the eastern end of the dam there is an overflow weir box which discharges to a point in the stream just below the dam.
>
> "Originally, there were three overflow boxes at three different locations. Two of them in the course of time became blocked. This plant was built new and put into operation in June of 1963 and has been operating continually approximately two shifts per day, five days per week since that time.
>
> Approximately June, I would say, of 1974 with my knowledge and approval, the Superintendent put in a four-inch diameter overflow pipe.
>
> BY MR. MARATECK:
>
> "Q. Mr. Ulmer, you said four inch. Are you familiar with this pipe and do you know it is four inches?
>
> "A. I am very familiar with it, yes. It is a four-inch diameter overflow pipe on what would be the northeastern portion of the settling basin at approximately the same location where one of the original overflow weir boxes had been located and was since blocked and out of service."

2. Notes of testimony of Ronald A. Topel, Environmental Protection Specialist for the Department of Environmental Resources, page 22, lines 6 through 23:

(Continued to Page 5)

The overflow pipe that replaced the weir box was not contemplated by defendant's permit and, in fact, was installed contrary to the terms of the permit. Section 605 of The Clean Streams Law, *supra*, provides for the assessment of a civil penalty of up to $10,000.00 for violation of a provision of The Clean Streams Law plus $500.00 per day each day of continued violation. Section 308 of The Clean Streams Law prohibits the erection or operation of an industrial waste facility not in accord with an industrial waste permit and Section 307 of The Clean Streams Law prohibits a discharge of industrial wastes contrary to the terms of an industrial waste permit. Hence, we hold that a civil penalty should be assessed for the installation of the overflow pipe and for the discharge of industrial wastes therefrom to the waters of the Commonwealth. In determining the amount of the civil penalty we must consider the willfulness of the violation, damage to the waters of the Commonwealth, the cost of restoration and other relevant factors.

In regard to the issue of willfulness, defendant argues that there was no intentional misuse of the permit. However, defendant should have known that it was required by law to comply with the terms of the permit, that it was required to construct and operate the facility as approved by the DER and that it could not propose to the DER one scheme for the treatment of wastes and later change that scheme without the DER's approval. Further, defendant's installation of a waste discharge scheme without the DER's review and approval was not only unlawful, but involved an unnecessary and unreasonable risk of causing untreated or inadequately treated industrial wastes to be discharged into the South Branch of Zerbe Run. Also, since the wastewater was drawn by the discharge pipe under negative pressure, the actual consequences of the installation of the pipe, i.e., the entrainment of solids into the wastewater

2. Continued from previous page

"As part of this particular inspection, Mr. Muolo and I took a ride around the berm of the silt basin. In doing so, I visually observed black water running down the side of the silt basin coming from a pipe extending--in the dam side extending down into the water through the berm of the dam and then extending down the stream side of the basin with black water being discharged from this particular pipe.

"Q. What was it that drew your attention to the pipe?

"A. The fact that there was black water coming from it. I did look down over the side of the basin as we were driving along the berm and did notice the black water coming down the side of the basin.

"Q. Where was the black water going?

"A. Into south branch Zerbe Run.

"Q. How obvious was the existence of the pipe?

"A. The existence of the pipe, it wasn't real obvious. The existence of the discharge was. That drew me to noticing the pipe itself."

being discharged to the South Branch of Zerbe Run, was foreseeable. In *DER v. Rushton Mining Company*, EHB Docket No. 73-361-CP-D, issued March 12, 1976, we stated that:

> "...although an act may not be wilful in the deliberate or intentional sense, there may be a degree of wilfulness evident from knowledge that certain consequences are likely to result if that act is done in this manner or from failure to take the care that is required to avoid likely injurious consequences from that act."

To the extent that defendant should have known that its action was prohibited by law and because it was foreseeable that pollution could result from the action, we find defendant's action to be willful.

No evidence was presented to show any actual damage to the South Branch of Zerbe Run, which is an acid impregnated stream or to any waters of the Commonwealth, nor was any evidence presented on cost of restoration. Therefore, we do not predicate the amount of civil penalty on those factors.

An additional factor to be considered in assessing the civil penalty is the general deterrance of violations by defendant and others similarly situated. See *DER v. Federal Oil and Gas Company and James V. Joyce*, EHB Docket No. 74-071-CP-C, issued July 1, 1975, and *DER v. Kopper's Company, Inc.*, EHB Docket No. 74-270-CP-C, issued March 2, 1977.

The effectiveness of the regulatory system employed by the DER to implement The Clean Streams Law depends on a viable permitting program. So long as all discharges of waste into Commonwealth waters and all waste treatment facilities are reviewed and approved by the DER, the objective of The Clean Streams Law, the prevention of future pollution of the waters of the Commonwealth, can be achieved. However, if treatment facilities or waste discharges are able to be altered arbitrarily by the operator, the quality of the discharges and eventually the quality of Commonwealth waters will rely on the whim of the operators. Thus, we find that the amount of civil penalty should be assessed in light of its effect as a deterrant against future abuse of permit requirements.

For these reasons, we assess a $5,000.00 civil penalty for violation of Count 1 of the complaint.

The second count deals with the industrial wastewater discharge of February 25, 1975. Although no chemical test was made of the water discharged

on this occasion, we are satisfied from all of the testimony that a violation did occur. In light of the fact that there was no evidence of environmental damage, the discharge has been permanently abated and only occurred on two occasions,[3] we believe a penalty of $200.00 is appropriate for the February 25, 1975, incident.

In Counts III and IV, the DER would have us find two separate violations for the December 9, 1975, incident based on the discharge itself and then on the quality of the discharge. In fact, we are asked to impose two separate penalties for one offense. The doctrine of merger of offenses, although generally applicable to criminal offenses, must, we believe, be considered administratively as we seek fairness as well as reasonableness in exercising our civil penalty discretion. The settled law regarding when merger occurs of two offenses such as alleged in this case, is determined by whether each offense requires proof of facts additional to those involved in the other. *Commonwealth v. Cox*, 209 Pa. Super. 457; *Commonwealth ex rel Gaynor v. Maroney*, 199 Pa. Super. 81; *Commonwealth ex rel Sawchak v. Ashe*, 83 A.2d 497.[4] It must be borne in mind that we are not here talking even about two separate dishcarges, but only the one which occurred on December 9, 1975. At that time the analysis disclosed settleable solids unless there is, in fact, an illegal discharge of industrial waste. We, therefore, impose only one penalty of $500.00 for the two alleged offenses of December 9, 1975.

Defendant argues that the decision of the Commonwealth Court in *Commonwealth of Pennsylvania, Department of Environmental Resources v. Mill Service Inc.*, 21 Pa. Commonwealth Ct. 642, 347 A.2d 503 (1975) limits the civil penalty to be assessed here to a nominal $100.00. We disagree that *Mill Service Inc.* is determinative of the amount of civil penalty prescribed by The Clean Streams Law. In *Mill Service Inc.*, the court held that it was an abuse of discretion to revoke a permit because of an isolated industrial waste discharge through an unpermitted pipe. The court then, *sua sponte* and without discussion, imposed a civil penalty of $100.00 for the aforementioned violation. The court did not review the assessment of a civil penalty by this board. Where the court has reviewed the assessment of a civil penalty by the board, it has held that it must sustain a penalty that is supported by

3. DER inspectors were at the site on a number of occasions other than February 25 and December 9, 1975, but never saw other violations of this kind.

4. In a recent U.S. Supreme Court case *Iannelli v. U.S.*, 1975, 195 Supreme Ct. 1284, the Court held that in determining whether separate punishment could be imposed for conspiracy and the substantive offense, the courts must examine the offense to ascertain whether each provision requires proof of a fact which the other does not. If each requires proof of a fact that the other does not, the test is satisfied, notwithstanding a substantial overlap in proof offered to establish the violation.

law, whether or not it would have assessed the same penalty. See *Commonwealth of Pennsylvania, Department of Environmental Resources v. United States Steel Corporation*, 7 Pa. Commonwealth Court 429, 300 A.2d 508, 1973, wherein the court stated:

> ". . .Under the existing law, however, we cannot second-guess the imposition of the penalties. Generally speaking, we must find an error of law or an abuse of discretion before we can modify a penalty in question." ID. 300 A.2d at 514

Further the Commonwealth Court held in *Mill Service Inc.* that the board's finding of willfulness was not supported by the record. In sum, we believe that the facts of the case require the assessment of a civil penalty of $5,700.00. We don't believe that the Commonwealth Court, in *Mill Service Inc.*, intended to so limit our discretion, that notwithstanding the board's findings herein, we are bound to assess only a nominal penalty.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the persons and subject matter of this case.

2. The Clean Streams Law, Act of June 22, 1937, P. L. *as amended*, 35 P. S. §691.1, *et seq.* provides that a civil penalty may be imposed for violation of any provision of the act or regulation of the DER.

3. Defendant has violated Section 308 of the act which prohibits the erection or operation of any industrial waste facilities which are not in accord with a permit and regulations of the DER. A penalty of Five Thousand Dollars ($5,000.00) is imposed for said violation.

4. Defendant has, on February 25 and December 9, 1975, violated Section 307 of the act which prohibits the discharge of industrial waste into the waters of the Commonwealth contrary to the terms of a permit. A penalty of Seven Hundred Dollars ($700.00) is imposed for said violations, Two Hundred Dollars ($200.00) for the February 25 and Five Hundred Dollars ($500.00) for the December 9, 1975, violation.

O R D E R

AND NOW, this 24th day of January, 1978, in accordance with Section 605 of The Clean Streams Law, 35 P. S. §691.605, civil penalties are assessed against Defendant, Trevorton Anthracite Company, in the amount of Five Thousand Dollars ($5,000.00) on Count 1, Two Hundred Dollars ($200.00) on Count II, and Five Hundred Dollars ($500.00) on Counts III and IV for a total of Five Thousand Seven Hundred Dollars ($5,700.00).

This amount is due and payable into The Clean Water Fund immediately. The Prothonotary of Northumberland County is hereby ordered to enter these penalties as liens against any property of the aforesaid defendant with interest at the rate of 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

JOANNE R. DENWORTH
Member

BY: THOMAS M. BURKE
Member

DISSENTING OPINION

I agree substantially with the analysis of the majority, however, I would give more consideration to the *Mill Service Inc.* case, especially since there was no evidence to indicate violations were due to anything more than a technical oversight. I would impose a civil penalty of no more than $1,000.00 on the first count.

PAUL E. WATERS
Chairman

DATED: January 24, 1978

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

JOSEPH B. GABLE ESTATE

Docket No. 77-085-D

Official Sewage Facilities Plan Revision

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and SHAW CONSTRUCTION COMPANY, Intervenor

ADJUDICATION

By Joanne R. Denworth, Member, February 27, 1978

The estate of Joseph B. Gable has appealed from the Department of Environmental Resources' (DER) approval of Hopewell Township's adoption of a plan revision to its official sewage facilities plan that would permit the placement of ten on-lot septic systems on the Barton tract, which is adjacent to the Gable estate property. The estate contends that the developer, intervenor, Shaw Construction Company, should be required to connect to the Stewartstown Borough sewage system, which ends approximately 700 feet from the Barton tract.

FINDINGS OF FACT

1. Appellant is the estate of James B. Gable, represented by James B. Gable, co-executor, R. D. 1, Stewartstown, Pennsylvania.

2. Appellee is the Department of Environmental Resources, Commonwealth of Pennsylvania, which is authorized to administer the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.1 *et seq.*, and the regulations thereunder.

3. Intervenor, Shaw Construction Company, is the owner and developer of a tract of land on Route 24 in Hopewell Township, York County, Pennsylvania, known as the "Barton" tract.

4. On April 14, 1977, the Hopewell Township Board of Supervisors adopted a revision to its official sewage facilities plan permitting the installation of ten on-lot sewage systems on the Barton tract as proposed by the developer Shaw Construction Company.

5. Hopewell Township's plan revision was approved by the DER on July 7, 1977, and finally approved by the Hopewell Township Supervisors that same date by signatures on the developer's plans.

6. Stewartstown Borough, which is immediately adjacent to Hopewell Township in York County, has a sewage treatment plant that has excess capacity. The borough has an agreement with Hopewell Township to provide public sewerage treatment to township residents where appropriate.

7. Comprehensive planning for this area of York County calls for development in the northern section of Stewartstown Borough with public sewerage to be provided in that area. The area south of Stewartstown Borough, in which the Barton tract lies, has a small portion of land zoned residential, including the Barton tract, and the Gable estate. There are 17 properties, aside from the ten that intervenor wishes to build, that are zoned residential and have or could have houses on them. The area directly south of these properties is zoned agricultural. No development is currently planned in this area.

8. A main interceptor of the Stewartstown Borough treatment plant ends approximately 640 feet from the corner of the Barton tract at the boundary of Stewartstown Borough and Hopewell Township.

9. Because of topography, connection of the Barton tract lots to the Stewartstown Borough treatment system would require 1500 feet of force main and a pumping station.

10. The cost of public sewers to serve the ten houses in the Barton tract would be approximately $82,000 or $8,200 per lot. The lots were last sold at a price of $4,300 per lot. The cost of on-lot systems will range between $900 and $1,500 per lot.

11. The other properties along Route 24 would not be able to connect to the Stewartstown Borough treatment system simply by tying into the collection system intervenor might be required to build. Service to those properties would require a separate gravity line and possibly a second pumping station at additional cost.

12. The property owned by the Gable estate is of inestimable value because the Gables' father was a world reknowned nurseryman who specialized in the hybridization of rhododendrons and azaleas. The estate property of approximately 65 acres contains rare and original species of rhododendrons from which cuttings were taken and shipped and sold all over the world. Some of the plants were started from cuttings taken from plants in inland China that are no longer accessible to the rest of the world. Some plantings on the estate are more than 50 years old.

13. The Gables have no present intent to develop their property, but hope to continue to operate it as a nursery and farm and to preserve the valuable plants bequeathed to them by their father.

14. In 1974 intervenor purchased the Barton tract, which had previously received subdivision approval from Hopewell Township on a plan that called for on-lot systems. Intervenor sold lots, which it later had to buy back because the plan was not recorded within 90 days and the township would not issue building permits without another plan approval. Intervenor then sought and obtained the plan revision at issue to permit on-lot systems on the Barton tract.

15. Because of the Gables' objections to the Barton tract development, the developer has taken a number of steps to try to assure that no damage to the Gable property will occur. Intervenor has planned for a drainage system to control run-off. Intervenor removed two of the proposed housing sites from the plan so as to lessen traffic on Anderson Road, which separates the Barton tract from the Gable estate, and to provide a drainage area.

16. Because of the Gables' objections to this development and concern for the protection of their property, DER took special care in reviewing the developer's proposed plan revision to be sure that on-lot systems would comport with the department's regulations.

17. In this case the DER took the extra precaution of reviewing and ascertaining that the soils on each of these lots were in fact suitable for on-lot systems. It was determined that six of the lots could use standard systems and that four of the lots would use an aerobic tank with a standard tile field. In addition, enough area exists on each lot to install a replacement system in the event of any failure of the initial system.

18. In approving this plan revision the DER through its regional supervisory sanitarian, Gary E. German, evaluated the environmental impact of the proposed plan revision and concluded that any environmental harm to the property of the Gable estate would be unlikely.

DISCUSSION

We have no doubt whatever about the value of the legacy that the son and daughters of James B. Gable wish to preserve on the estate's property. However, we are convinced that the department exercised its discretion carefully and that there was no impropriety in the department's approval of Hopewell Township's plan revision to allow on-lot sewage systems in this development.

Intervenor has raised the question of unfairness and violation of Rule 21.21(c)(3) of the board's rules and regulations with regard to the estate's contentions. It is true that in their notice of appeal and pre-hearing memorandum, which was prepared by Mr. James B. Gable who is not an attorney, appellants did not raise the question of the estate's history and value as a unique horticultural resource. Instead, appellant concentrated on the issue of the availability of sewage facilities in Stewartstown Borough. We do regard that as unfair to the intervenor. However, if we saw any real risk to the estate's quite real treasure, we would overlook the procedural technicality of appellant's failure to raise the issue prior to the hearing. But we are simply not convinced that the proposed on-lot systems on the Barton tract will endanger the valuable plantings on the Gable estate property. Appellant assumes without proof that on-lot septic systems are an environmental hazard. This is not so. In fact, where on-lot systems are properly functioning and not limited by density considerations, they may be the most environmentally satisfactory means of treating sewerage.[1] In this case the department went to extra lengths to be sure that on-lot systems would meet the department's regulations. In reviewing a plan revision, the department generally considers a particular form of sewage treatment as an over-all concept and does not review specific lot suitability for on-lot systems as it did here. Further, under the Pennsylvania Sewage Facilities Act, *supra*, §7, the responsibility of permitting on-site systems lies with the local agency. Thus, there will be a second review of the suitability of each of these lots for an on-lot system when a permit for each system is sought.

Appellant takes the position that if public sewers are accessible they should be used in preference to on-lot systems no matter what the cost. Appellant points to a statement in a department letter that "It is the policy of this department that when public sewers are available within reasonable distances, all new developments must be served by them". Mr. German explained that although that is generally the department's policy, the department does not always regard public sewers as a blessing. The extension of sewer lines may have the detrimental affect of opening an area up for development. In the case at hand, the area south of the Stewartstown Borough line is not scheduled for development and the extension of the sewer lines could threaten the rural nature of the area, which appellants seek to preserve. Appellants suggest that other residents of the area, including themselves, could connect to the sewer line if it were extended. However, it appears that this would not be a simple matter of tying into any line the intervenor might be required to build. Instead it would require additional cost for another gravity line and possibly a pumping station, and

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1. See BNA, Environmental Reporter, Current Developments, June 17, 1977, p. 271; and see EIS, Eviroguide, DER Standards, Technical Manual for Sewerage Enforcement Officers, Chapters V, VI and VII, pp. 111:A:c:57 *et seq.*

it is unlikely that the residents of the area would choose to pay the costs of public sewerage when they have adequately functioning on-lot systems. Appellant, James B. Gable, acknowledged that his own on-lot system is functioning perfectly well and that he could connect to the public sewers but chose not to do so because of the expense.

The DER did consider, appropriately in our view, the economic cost to the developer of public sewers versus on-lot systems. The department is required to consider economics as well as other factors in considering official plans or plan revisions under the provisions of the Pennsylvania Sewage Facilities Act.[2] Further, the department is correct in its conclusion that if environmental harm were a significant risk from on-lot systems, the department would be required to disregard economics and require the developer to connect to public sewers.[3] Here the cost of connecting to the public sewer is so prohibitive as to preclude the developer from using the land if it were required to sewer the tract. While appellants might prefer that result, we do not believe the department should subvert the law to achieve that result where it is satisfied that an economically feasible proposal will not cause any environmental harm.

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 in approving Hopewell Township's plan revision to its official sewage facilities plan.

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2. Section 750.5(d)(4) of the Act provides:
"(d) Every official plan shall:
* * *
"(4) Take into consideration all aspects of planning, zoning, population estimates, engineering and economics so as to delineate with all practical precision those portions of the area which community systems may reasonably be expected to serve within ten years, after ten years, and any areas in which the provision of such services is not reasonably foreseeable;"

3. If, for example, the soils were not suitable for any type of on-lot system, it would not be proper to approve the plan revision.

O R D E R

AND NOW, this 27th day of February, 1978, the appeal of the estate of James B. Gable from the department's approval of a plan revision to Hopewell Township's sewage facilities plan to permit on-lot systems on the Barton tract is dismissed and the department's action is hereby affirmed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

DATED: February 27, 1978

COMMONWEALTH OF PENNSYLVANIA

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

In the Matter of:

TOBY CREEK WATERSHED ASSOCIATION, INC.,	)	
Appellant,	)	Docket No. 76-115-W
vs.	)	Mine Drainage Permit
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,	)	Clean Streams Law
Appellee,	)	Surface Mining
and	)	
DOAN COAL COMPANY,	)	
Intervenor.	)	

ADJUDICATION

BY THE BOARD:

The following adjudication was drafted by Louis R. Salamon, Esquire, and is issued by this board with minor modifications.

Before this board is the appeal of Toby Creek Watershed Association, Inc. (Toby Creek) from the issuance, by the Division of Mine Drainage Control and Reclamation, Bureau of Surface Mine Reclamation (Surface Mine Bureau), Department of Environmental Resources (DER), of a mine drainage permit to Doan Coal Company (Doan).

By virtue of the issuance of this mine drainage permit, Doan was authorized to construct industrial waste treatment facilities in connection with its operation of a bituminous coal strip and auger mining project in Snyder Township, Jefferson County, Pennsylvania, and to discharge treated industrial wastes generated as the result of such surface mining operation, into the waters of the Commonwealth.

In its appeal, Toby Creek raised, primarily, the following issues: 1) DER failed to include, in the section

of said mine drainage permit in which special conditions were imposed, a condition that Doan be required to comply with certain effluent guidelines for coal mining, published by the United States Environmental Protection Agency (E.P.A.) in the form of federal regulations. 2) The siltation which would be created by this surface mining project would pollute the waters of the Commonwealth to which discharges from this project would drain.

Doan was permitted to intervene in this appeal by this board. Doan filed a motion to quash this appeal on the ground that the appeal was not timely perfected and on the ground that Toby Creek raised no substantive violations of applicable statutory provisions or regulations therein. We denied this motion, and on August 31, 1977, the appeal was heard on its merits

We note, at the outset, that the only testimony which was received at the hearing on the merits was from witnesses called by Toby Creek, that DER and Doan were represented at this hearing by counsel who took part therein to the extent that each of them cross examined the witnesses, that Toby Creek and DER filed post-hearing briefs and that Doan chose not to file a post-hearing brief.

FINDINGS OF FACT

1. Doan, owned by David G. Doan, is engaged, *inter alia* in the business of bituminous coal surface mining. It operates an office in Reynoldsville, Pennsylvania.

2. DER , through its Surface Mine Bureau, is the agency of this Commonwealth which is responsible for the administration of those sections of The Clean Streams Law , Act of June 22, 1937, P.L. 1987, *as amended* , 35 P.S. §691.1 *et seq.* which relate to the operation of coal mines, including the discharge of industrial wastes generated by the operation proposed by Doan. DER , through its Surface Mine Bureau, is

also responsible for administering those regulations, adopted by the Environmental Quality Board of Pennsylvania, which were adopted pursuant to The Clean Streams Law , *supra* , and which also relate to the operation of coal mines.

3. Toby Creek is a non-profit Pennsylvania corporation of approximately 500 members who reside primarily in Clearfield, Elk and Jefferson Counties, in Pennsylvania. Toby Creek is concerned with the water quality of streams in a 110 square-mile area of Elk and Jefferson Counties.

4. On March 23, 1976, the Surface Mine Bureau of DER received from Doan an application on forms provided by DER , for a permit approving the discharge of industrial wastes and mine drainage pursuant to The Clean Streams Law , *supra* , (mine drainage permit).

5. In said application it was disclosed that Doan sought to remove coal by the methods of strip mining and auger mining from an area situate in Snyder Township, Jefferson County, Pennsylvania. According to the contents of this application, the ground surface area to be affected by this mining would be 30.11 acres.

6. Toby Creek registered its opposition to the granting of the requested permit in a letter to DER dated May 20, 1976. The concern manifested by Toby Creek was with regard to the pollutional effects which siltation, generated as the result of this surface mining operation, would have on the receiving streams, to-wit, a tributary to Rattlesnake Creek and Rattlesnake Creek itself.

7. Sediment, including silt, are soils and other surficial materials which are transported by surface waters to streams as the natural effect of erosion. Erosion occurs at a much greater rate when land surface is disturbed by the activities of man, a prime example of which is surface mining of coal. The

process by which sediment is deposited on stream bottoms is known as sedimentation.

8. One method designed to limit sedimentation which results from the surface mining of coal is the excavation of basins, called sedimentation or settling basins. Such basins are located and sized so as to enable the sediment generated as the result of the surface mining operation to flow into such basins. The water containing this sediment is impounded and detained in these basins. The sediment settles to the bottom of these basins during this detention period and, the goal is to have the receiving streams receive a great deal less sedimentation than that which would flow thereto without such treatment.

9. In its application for said Clean Streams Law mine drainage permit, Doan provided a picture of three settling basins which it proposed to excavate in connection with its surface mining project.

10. In its application for said mine drainage permit, Doan disclosed the volume of each of two of the three settling basins which were proposed.

11. The volume of these two settling basins, expressed in cubic feet, was determined by reference to the following formula: $V = A\ I\ C + \frac{A\ I\ C}{3}$.

A. The letter "A" in said formula refers to area drained. Doan included in the area drained the following areas:

(1) "The open pit area", containing 120,000 square feet.

(2) The area between the highwall of the mine and the point where a diversion ditch (designed to intercept the flow of surface water which would ordinarily

flow towards the open pit and to carry it around the pit) would be constructed, called the "highwall diversion area", containing 150,000 square feet.

(3) "The spoil area", containing 90,000 square feet.

B. The letter "I" in said formula refers to the most intense rainfall which could be expected in the area for a twenty-four hour period, expressed as a fraction in said formula.

C. The letter "C" in said formula refers to the velocity and amount of soil runoff which can be expected to constantly occur in the area, expressed as a constant figure.

12. The volume of these two settling basins, reached as the result of the above-described formula, was set forth in said application as follows:

Primary Basin	14,445 cubic feet
Secondary Basin	13,001 cubic feet
TOTAL	27,446 cubic feet

If it is assumed that the third basin, for the volume of which no calculations were set forth, would be a secondary basin, and if it is assumed that the volume of this third basin would be 13,001 cubic feet, the total projected settling basin volume for this surface mining operation would be 40,447 cubic feet.

13. The formula for determining the volume of the settling basins in this surface mining project, as contained in the application for said mine drainage permit submitted by Doan, was identical to the formula utilized by the Surface Mine Bureau for such purpose at the time when it received this application and for several years prior thereto.

14. On July 29, 1976, DER issued Mine Drainage Permit No. 38A76SM3 to Doan, pursuant to its said application. Appended to and made a part of this permit were numerous DER standard conditions accompanying permits authorizing the operation of coal mines, including a condition that no silt shall be conveyed or deposited to the waters of the Commonwealth. Also appended to and made a part of this permit were fourteen special conditions. Two of these special conditions which have particular relevance to this proceeding are as follows:

> "3. Prior to the activating of this mining operation, the applicant shall construct treatment facilities and settling basins in accordance with the specifications contained in the mine drainage application and the attached detailed plans. All facilities shall be inspected and approved by the District Mine Inspector prior to the activation of mining."

Additional Special Conditions:

> "2. Any discharge from settling basins designed for siltation below the toe of spoil shall have a pH between 6.0 and 9.0 and an iron concentration of less than 7.0 ppm. Collection basin shall be of sufficient dimensions to insure siltation shall be kept to a minimum at all times."

15. On September 21, 1972, the Environmental Quality Board of Pennsylvania adopted erosion control regulations, under The Clean Streams Law, *supra* which apply to earth moving activities, including surface mining. These regulations, which were effective on October 21, 1972, are contained in Chapter 102, Rules and Regulations, Department of Environmental Resources, 25 Pa. Code, Ch. 102.

16. In Section 102.23 (d)(1) of Chapter 102, *supra*, 25 Pa. Code §102.23 (d)(1), Control Facilities - Sedimentation asins, it is provided as follows:

"102.23. Control Facilities.

.

.

.

(d) Sedimentation Basins.

(1) A sedimentation basin shall have a capacity of 7,000 cubic feet for each area of project area tributary to it and shall be provided with a 24-inch freeboard."

17. The term "project area tributary to it" (sedimentation basin) as set forth in 25 Pa. Code §102.23 (d)(1), *supra* is not defined in any regulation to which the attention of this board has been directed.

18. If the term "project area tributary to the sedimentation basins" encompasses the sum of the areas of the open pit area, the highwall diversion area and the spoil area of Doan's surface mining operation, the project area tributary to Doan's sedimentation basins is 360,000 square feet, or 8.264 acres. If the project area tributary to these sedimentation basins is 8.264 acres, the total volume of Doan's sedimentation basins must be 57,848 cubic feet, pursuant to the provision contained in 25 Pa. Code, §102.23 (d)(1), *supra*.

19. In October, 1976, the United States Environmental Protection Agency (E.P.A.) published a book entitled "Erosion and Sediment Control, Surface Mining in the Eastern U.S." In that publication there is set forth, *inter alia*, information, data and calculations as to the design of sediment basins which are sufficient in area and volume to achieve a discharge of total suspended solids therefrom which is not greater than 70 mg./l (milligrams per liter) in any one day and in order to create a situation where the average of daily values for total

suspended solids so discharged for 30 consecutive days shall not exceed 35 mg./l.

20. Toby Creek attempted to determine, by reference to this E.P.A. publication, the total volume for basins to be utilized in this surface mining project necessary to achieve that degree of settlement and storage of sediment which would be required in order for Doan to discharge effluent to the waters of the Commonwealth the total suspended solids content of which was within the limits set forth in finding of fact no. 19, *infra*.

21. In attempting to reach such total volume figure Toby Creek utilized the data as to the area of the open pit, as to the area of the highwall diversion area and as to the area of the spoil area supplied by Doan; Toby Creek also utilized data as to rainfall intensity in Jefferson County, Pennsylvania, supplied by the United States Department of Agriculture (U.S.D.A.). Toby Creek also utilized data as to the degree of slope and as to the nature and content of the soil in the particular area to be surface mined by Doan, supplied by the U.S.D.A. Together with this data, Toby Creek utilized material contained in said publication as to velocity and amount of expected soil runoff. When this data and material was utilized in a calculation as set forth in said publication, Toby Creek reached the conclusion that such basins should have a volume of 141,672 cubic feet.

22. The calculations and procedures with regard to basin volume in said E.P.A. publication were not regulations and they were in no wise mandatory design criteria for settlement and storage basins. These calculations and procedures are a compendium of generally available engineering formulas and data.

23. On May 3, 1976, E.P.A. promulgated interim final regulations in which effluent guidelines and standards were established with regard to discharges from, *inter alia*, bituminous coal mines. These interim final regulations were published in Vol. 41, Fed. Reg. No. 94, pp. 19832-19843. In Subpart C - Acid

or Ferruginous Mine Drainage Category, §434.32(a), 40 CFR §434.32 (a), the following effluent limitations were established after application of the best practicable control technology available:

Effluent Characteristic	Maximum for any 1 day	Average of daily values for 30 consecutive days shall not exceed
Total Iron	7.0 mg./l	3.5 mg./l
Dissolved Iron	0.60 mg./l	0.30 mg./l
Total Manganese	4.0 mg./l	2.0 mg./l
Total Suspended Solids	70.0 mg./l	35.0 mg./l
pH	Within the range 6.0 to 9.0	

For existing sources, these effluent limitations were to be achieved not later than July 1, 1977. On April 26, 1977, E.P.A. amended §434.32(a), *supra* , to the extent that the effluent limitation with regard to dissolved iron was deleted. See Vol. 42, Fed. Reg., No. 80, p. 21385, 40 CFR §434.32(a).

24. These E.P.A. promulgated regulations, in which said effluent limitations were provided, were not expressly made binding upon Doan by DER when Doan received its said mine drainage permit.

25. On June 28, 1977, the Environmental Quality Board of Pennsylvania adopted an amendment to the existing waste water treatment requirements which had been contained in 25 Pa. Code, §95.1. In this amendment, it was provided as follows:

CHAPTER 95. WASTE WATER TREATMENT REQUIREMENTS

§ 95.1 General Requirements

(a) Specific treatment requirements and effluent limitations for each waste discharge shall be established based on the more stringent of subsection (b) of this section, the water quality criteria specified in Chapter 93 of this Title (relating to water quality criteria), the applicable treatment requirements and effluent limitations to which a discharge is subject

> under the Federal Water Pollution Control Act, as amended (33 U.S.C. §§1251 *et seq.*) or the treatment requirements and effluent limitations of this Title.

26. The E.P.A. promulgated regulations and the effluent limitations set forth therein, described in finding of fact no. 23, *infra* were promulgated under the Federal Water Pollution Control Act, *supra* , 33 U.S.C. §§1251 *et seq.* As such, in adopting the amendment to 25 Pa. Code §95.1, *supra* the Environmental Quality Board was expressly making said federal effluent limitations applicable to coal mines in Pennsylvania, including surface mines.

DISCUSSION

There can be no question that sediment, including silt, produced as the result of any earth moving activity and discharged to the waters of the Commonwealth can seriously contaminate those waters and adversely affect the quality of those waters.

It is clear that silt generated as the result of Pennsylvania surface mining operations is a serious threat to the waters of this Commonwealth. Silt is expressly included in the definition of the term "industrial waste" contained in Section 1 of The Clean Streams Law , *supra*, 35 P.S. §691.1.

It cannot be argued that DER was unaware of the potential pollution problems connected with the discharge of sediment, including silt, produced as the result of the surface mining of coal. Two examples of the concern manifested by DER in this regard are the limitation which DER imposes as to the length of open cuts and the requirement of prompt backfilling and planting.

Another significant manifestation of the concern of DER with regard to the problem of sedimentation in connection with a surface mining operation is the requirement that a surface mine operator must set forth in his application for a mine

drainage permit specifications for sedimentation or settling basins sufficient in area and volume to enable the sediment generated as the result of the surface mining operation to flow into such basins, to settle to the bottom thereof and to be stored therein.

In the application for the mine drainage permit, the issuance of which is the subject matter of this appeal, Doan indicated that it would provide three such basins in connection with its surface mining operation. Doan supplied to DER the data which it used to determine what it believed to be the appropriate volume for two of the three proposed basins. This data was made part of an equation, $V = A\ I\ C + \frac{A\ I\ C}{3}$, and as the result of the application of such equation, Doan determined the volume for two of the three proposed basins.

We have described the components of this equation in detail in finding of fact no. 11, *infra*. In summary, the component factors thereof are the area to be drained (A), the intensity of rainfall on the area to be drained (I) and the soil runoff constant (C).

The origin of this equation is unknown, but it is clear that this equation was universally used by DER in its determination as to the appropriate volume for settling basins to be excavated during a surface mining operation at all times material to this proceeding.

By its utilization of data and by its utilization of this equation, Doan disclosed to DER that two of its settling basins would have a volume of 27,446 cubic feet. If we assume that the third basin, for the volume of which no calculations were set forth, would have no less volume than the smallest of the two basins for which calculations were set forth, the volume for the three settling basins to be excavated in connection with Doan's operation would be 40,447 cubic feet.

It must be assumed, by reason of the fact that DER issued a mine drainage permit to Doan for this surface mining operation, that DER was satisfied with the settling basin aspect of Doan's application.

Toby Creek, which had, during the DER permit review process in this matter, directed a written objection to the granting of this permit to the Surface Mine Bureau on the basis that a severe siltation problem would occur to the waters of the Commonwealth if this permit were issued, was not satisfied with these settling basins as set forth in the application and as approved.

Toby Creek presented testimony, during the hearing on the merits in this matter, that these settling basins were not of sufficient capacity to meet the requirements contained in Chapter 102, Rules and Regulations, Department of Environmental Resources, Erosion Control, 25 Pa. Code, Ch. 102.

Before we review the specific allegations made by Toby Creek with regard to a violation of chapter 102, *supra*, it is necessary for us to determine whether these erosion control regulations are applicable to surface mining of coal. The answer to this question is, quite clearly, yes.

Chapter 102, *supra*, was adopted by the Environmental Quality Board of Pennsylvania, under The Clean Streams Law, *supra* on September 21, 1972; it became effective on October 21, 1972.

In Section 102.10 of Chapter 102, *supra*, 25 Pa. Code §102.10, it is provided that the purpose of this chapter is, *inter alia*, to control accelerated erosion and the resulting sedimentation of waters of this Commonwealth thereby preventing pollution of such waters from sediment.

In Section 102.11 of Chapter 102, *supra* Pa. Code §102.11, it is provided that the provisions of said chapter impose requirements on earth moving activities which create accelerated erosion.

In Section 102.13(4), of Chapter 102, *supra*, 25 Pa. Code §102.13(4), the term "earthmoving activity" is defined 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." (Emphasis added).

Finally, in Chapter 77, Rules and Regulations, Department of Environmental Resources, Mining, Subpart D. Requirements Accompanying Permits Authorizing the operation of Surface Coal Mines, Section 77.92(c)(1), it is provided, *inter alia*, that the permittee must take all necessary precautions to prevent the discharge of avoidable silt into the receiving stream as required by the "current Erosion and Sedimentation Control Regulations of the Department."

Toby Creek directs our attention to the provisions contained in Section 102.23(d)(1) of Chapter 102, *supra*, 25 Pa. Code §102.23(d)(1), as follows:

> "§102.23. Control Facilities
>
> .
>
> .
>
> (d) Sedimentation Basins
>
> (1) A sedimentation basin shall have a capacity of 7,000 cubic feet for each area of project area tributary to it and shall be provided with a 24-inch freeboard."

Toby Creek concludes that to be in compliance with this section, Doan should have been required to excavate settling basins the total volume of which is 57,848 cubic feet. The method by which this conclusion was reached is as follows: In its calculations to reach settling basin volume, as contained in its

application for this mine drainage permit, Doan used the equation $V = A\ I\ C + \frac{A\ I\ C}{3}$. The "A" in this equation means area drained. Doan determined the area of the open pit area, of the highwall diversion area and of the spoil area, and each separate area was utilized in the equation in order to reach the total volume needed. Toby Creek added these separate areas, converted the sum of these separate areas — 360,000 square feet — into acres — 8.264 acres — multiplied 8.264 acres by 7,000 cubic feet, and reached the conclusion that the total volume of Doan's settling basins should be 57,848 cubic feet, pursuant to the provisions contained in 25 Pa. Code, §102.23 (d)(1), *supra*, or more than 17,000 cubic feet in excess of the total settling basin volume proposed by Doan and approved by DER.

Unfortunately, the term "project area tributary" to sediment basins is not defined in Chapter 102, *supra*, or in any other statute or regulation to which our attention has been directed. It would be logical to assume that this term would refer to any land, disturbed by surface mining, sediment from which would drain to these settling basins. On the other hand, the term could be broader in scope and could refer to all "land affected" by surface mining as the term "land affected" is defined in Section 2 of the Surface Mining Conservation and Reclamation Act Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.3.[1]

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[1]The definition "land affected", as contained in Section 2 of the Surface Mining Conservation and Reclamation Act, *supra*, 52 P.S., §1396.3, is as follows:

" 'Land affected' shall mean the land from which the mineral is removed by surface mining, and all other land area in which the natural land surface has been disturbed as a result of or incidental to the surface mining activities of the operator, including but not limited to private ways and roads appurtenant to any such area, land excavations, workings, refuse banks, spoil banks, culm banks, tailings, repair areas, storage areas, processing areas, shipping areas, and areas in which structures, facilities, equipment, machines, tools or other materials or property which result from or are used in, surface mining operations are situated."

Even if this board would be inclined to adopt a definition of the term "project area tributary" to sediment basins in connection with a surface coal mining project, we could not arrive at a proper figure for total acreage applicable in this case, on the state of the record before us, unless we adopted the 8.264 acre figure to which reference has been made above.

We are reluctant to provide a definition of this term at this posture. We deem it to be necessary for DER , the agency which administers the provision in which this term is contained, to study this matter further and to provide its administrative and technical insight thereto. If, in the future, there is a dispute as to the meaning of this term, which reaches this board, we will review the question of the meaning of "project area tributary".

In a very candid statement contained in its post-hearing brief, DER admits that it never considered the provisions contained in 25 Pa. Code, §102.23(d)(1) when it reviewed this application as it pertained to settling basin volume. DER admits that this was error and we agree. DER states, by implication in its post-hearing brief, that it has reached no conclusion as to the meaning of the term "project area tributary" to sediment basins in connection with a surface coal mining project. Finally, DER submits that we should remand this matter to DER for a reconsideration of this permit application.

Although we are reluctant to, in effect, penalize Doan by delaying the commencement of its surface coal mining project, we see no alternative but to remand this matter to DER for a prompt consideration of the effect of the provisions contained in 25 Pa. Code, §102.23(d)(1) on the volume of settling basins necessary in this project. This regulation has the force of law, is as binding as a statute and there must be compliance with it. See *Rostosky v. Commonwealth of Pennsylvania, Dept. of Environmental Resources*, 26 Pa. Comm. Ct. 478, 364 A2d 761 (1976).

We cannot determine whether there has been such compliance at the present posture of this matter.[2]

The second issue raised by Toby Creek is that DER failed to include, in the section of the mine drainage permit issued to Doan in which special conditions were imposed, a condition that Doan be required to comply with the effluent guidelines and standards for coal mines contained in 40 C.F.R., §434.32(a), which we have reproduced in our finding of fact no. 23, *infra*.

These effluent guidelines and standards, which are federal regulations adopted pursuant to Sections 301 and 304(b) and (c) of the Federal Water Pollution Control Act, *as amended*, 33 U.S.C., §§ 1311 and 1314(b) and (c) and have been binding in Pennsylvania. DER should have, at the very least, included these guidelines, or effluent limitations in the "special conditions" section of the mine drainage permit issued to Doan. See Section 510 of the Federal Water Pollution Control Act, *as amended*, 33 U.S., §1370; *American Frozen Food Institute v. Train*, 537 F.2d 107, (C.A.D.C., 1976). DER can remedy this error in any amended permit issued to Doan following the remand which we have ordered.

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[2]At the hearing on the merits of this appeal, Toby Creek produced an E.P.A. publication entitled "Erosion and Sediment Control, Surface Mining in the Eastern U.S." In that publication there is set forth, *inter alia*, information, data and calculations as to the design of sediment basins which would be sufficient in area and volume to achieve a discharge which would, as to total suspended solids, meet certain federal effluent guidelines which will be hereinafter discussed. Toby Creek determined, by reference to this publication, the total volume for the settling basins in this surface mining project necessary to achieve that degree of settlement and storage of sediment which would be required to cause a discharge which would meet said federal effluent guidelines. Toby Creek reached the conclusion that such total volume should be 141,672 cubic feet. The calculations and procedures utilized in said publication were not reflected in any applicable statute or regulation. They were merely a compendium of generally available engineering formulas and data. While we do not suggest that DER should require Doan to design and excavate settling basins to achieve a total volume of 141,672 cubic feet, we would urge DER to analyze this E.P.A. publication to determine whether the information contained therein is appropriate for use in Pennsylvania. This study is, perhaps, made more appropriate by virtue of the enactment of the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, 30 U.S.C. 1201 *et seq.*, with its new requirements with regard to all aspects of surface mining.

In its post-hearing brief, DER called our attention to yet another reason why, in its judgment, this matter should be remanded. DER refers to the requirement, contained in 25 Pa. Code, §102.14, that an entity engaging in earthmoving activities in this Commonwealth is required to have an erosion and sedimentation control plan, the content of which is described in 25 Pa. Code, §102.15. DER indicated that it did not require Doan to have such a plan as a prerequisite to the issuance of this mine drainage permit, — which appears to be the case — and that such omission is violative of said regulation

While we agree that it was entirely appropriate for DER to require Doan to have in existence an erosion and sedimentation control plan as a prerequisite to the issuance of a mine drainage permit to Doan, we are aware that Doan is also subject to the permit requirements as contained in Section 5 of the Surface Mining Conservation and Reclamation Act, 52 P.S., §1396.4. It may very well be that Doan would have been required to submit such a plan to DER as a prerequisite to the issuance of a surface mining permit under this last mentioned statute, rather than as a prerequisite to the issuance of a mine drainage permit under The Clean Streams Law , It is our understanding of DER policy and procedure that the surface mining permit is issued subsequent to the issuance of the mine drainage permit. The two statutes overlap and we do not wish to bind DER or an applicant for these dual permits to a procedure which will result in unnecessary duplication of effort. So long as it is made clear that Doan is required to have an erosion and sedimentation control plan which complies with the above-cited regulations prior to the commencement of mining, we will not disturb the practice and procedure of DER.[4] In any case, this situation can easily be resolved during the period when this matter is with DER on remand.

Toby Creek has convinced us that there was an error with regard to the method by which the volume of the settling basins proposed by Doan was calculated and determined. In the resolution of this error, Doan might be required to significantly expand the volume of its settling basins. Toby Creek has also convinced us that federal effluent limitations must be included as a condition to any amended permit issued to Doan. The effect of the imposition of these effluent limitations on Doan could be that the entire discharge treatment plans of Doan could be significantly altered.

We are determined that there should be a prompt resolution of this matter. It is for this reason that we will place a time limitation as to the review of this matter on remand. We will also retain jurisdiction of this matter.

We urge Doan and DER to immediately begin the exchange of information necessary for a review of this matter in accordance with the findings and conclusions contained in this adjudication.

Doan and DER are directed to keep Toby Creek fully apprised of all developments in this matter, including, but not limited to, the issuance of an amended mine drainage permit to Doan.

CONCLUSIONS OF LAW

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

2. The provisions contained in Chapter 102, Rules and Regulations, Department of Environmental Resources, Erosion Control, 25 Pa. Code, Ch. 102, are applicable to projects wherein a mine drainage permit is sought in connection with the surface mining of coal and are binding upon DER and Doan.

3. In issuing this mine drainage permit to Doan, DER failed to consider the directives contained in Section 102.23(d)(1) of Chapter 102, *supra*, 25 Pa. Code, §102.23(d)(1), which relate to the manner in which the volume of sedimentation basins is determined.

4. The meaning of the term "project area tributary "to a sedimentation basin, as contained in 25 Pa. Code, §102.23(d)(1), is not disclosed in any applicable statute or regulation to which the attention of this board has been directed. Until this term is defined, it is impossible to calculate the volume of the sedimentation basins which Doan must excavate in order to be in compliance with the provisions of 25 Pa. Code, §102.23(d)(1).

5. DER , the agency of this Commonwealth which has the duty to administer the provisions contained in 25 Pa. Code, §102.23(d)(1), should be afforded the opportunity to provide a definition of said term and to apply said definition to the instant matter.

6. The effluent guidelines and standards, which are federal regulations, and which are contained in 40 C.F.R., §434.32(a) are applicable to projects wherein a Clean Streams Law mine drainage permit is sought in connection with the surface mining of coal and are binding upon DER and Doan.

7. In issuing this mine drainage permit to Doan, DER failed to consider said federal effluent guidelines and standards.

8. DER should be afforded the opportunity to include said federal effluent guidelines and standards in any amended mine drainage permit which may be issued to Doan and to review the entire application of Doan to determine the effect of said federal effluent guidelines and standards upon this entire application.

9. This matter should be remanded to DER for consideration of those matters to which we have addressed ourselves in this adjudication and in these conclusions of law.

O R D E R

AND NOW, this 31st day of March, 1978, the appeal of Toby Creek Watershed Association, Inc. from the issuance by the Commonwealth of Pennsylvania Department of Environmental Resources of Mine Drainage Permit No. 38A76SM3 to Doan Coal Company is sustained in part. Mine Drainage Permit No. 38A76SM3 is hereby rescinded.

It is further ordered that this matter is hereby remanded to said department for a period not to exceed sixty (60) days, during which period said department shall: 1) Apply the provisions contained in Chapter 102, Rules and Regulations, Department of Environmental Resources, Erosion Control, 25 Pa. Code, Ch. 102, to this matter as they are relevant hereto, and in particular the provisions contained in Section 102.23(d)(1) of Chapter 102, 25 Pa. Code, §102.23(d)(1) which relate to the manner in which the volume of sedimentation or settling basins for this surface mining project should be determined, which provision is relevant hereto; 2) Apply the effluent guidelines and standards contained in 40 C.F.R., §434.32(a) to this matter and assess the entire application of Doan Coal Company for said mine drainage permit in view of the applicability of said effluent guidelines and standards thereto.

It is further ordered that this board shall retain jurisdiction in this matter.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS, Chairman

JOANNE R. DENWORTH, Member

DATED: March 31, 1978

THOMAS M. BURKE, Member

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

EAGLES' VIEW LAKE, INC.

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and WILLIAM H. COHEA, *et al.*, Intervenor

Docket No. 76-086-W

Pennsylvania Sewage Facilities Act

ADJUDICATION

BY: Paul E. Waters, Chairman, April 4, 1978

This matter comes before the board as an appeal from the DER's denial of an Act 537 plan revision to allow appellant to develop, for housing purposes, a tract of more than 900 acres on a scenic mountain in Monroe County, Pennsylvania.

The application was made to both Stroud and Monroe Townships inasmuch as the project would cross township lines, and although they approved the plan, the DER has declined approval because the development proposes to use on-lot sewage disposal in an area which it deems to be unsuitable for a number of reasons, including the soils.

FINDINGS OF FACT

1. The appellant in this case is Eagles' View Lake, Inc. which is the owner of a tract of land located on the border of Monroe and Northampton Counties in Stroud and Hamilton Townships.

2. The appeal arises from the disapproval by the Department of Environmental Resources of sewage facility plan revisions submitted by Hamilton and Stroud Townships, Monroe County with reference to appellant's land.

3. Appellant proposes to develop its land by subdividing it into lots of one-half acre or more in size and selling the lots as sites for construction of family dwellings.

4. In December 1974, appellant contacted representatives of the DER's Monroe County office to discuss a method of sewage disposal for the Eagles' View development proposed by the developer. The proposal was to utilize sub-

surface sewage disposal systems.

5. On March 17, 1975, the supervising sanitarian for the DER's Monroe County office gave a reply to the December, 1974 proposal in which he said that approval of subsurface systems could only be given on an interim basis and that provision would have to be made for a replacement central sewer system. The reasons given for this position were the prevalence of marginal and unsuitable soils, the density of the proposed development and the eventual degradation of groundwater from nitrates which would be caused by the development.

6. On approximately April 15, 1975, appellant retained J. Donald Ryan to prepare and submit data on soils and geology at the site in order to satisfy the DER's sewage facility planning regulations for on-lot sewage.

7. On November 20, 1975, a sewage facilities plan revision for Sections B through G of the Eagles' View development was submitted to the DER by Hamilton Township. This plan revision was accompanied by *inter alia*, a report by J. Donald Ryan on soils and groundwater geology.

8. On February 13, 1976, the DER acknowledged receipt of a plan revision for the remaining section of the development which was submitted by Stroud Township.

9. The official date for the commencement of the 120-day review period was then established by the DER as February 13, 1976, for both plan revisions.

10. On June 10, 1976, before the expiration of the 120-day review period, the DER denied approval of the plan revisions.

11. The DER's planning module for land development is a form which must be filled out and submitted to the DER by an applicant for a sewage facilities plan revision for a new subdivision. This form, adopted by the DER after the Ryan Report was prepared, calls for detailed information regarding soils.

12. In its submission to the DER and its presentation of its case before the board, appellant relied heavily on Dr. J. Donald Ryan, a geologist, for information on the nature of the soils on the site.

13. Dr. Ryan concluded after investigation and testing that 80 to 90% of the soils on the site are suitable for some type of subsurface sewage disposal system. He attached a map to his report, partly prepared by him, which purported to map the areas of unsuitable or marginally suitable soils on the site.

14. Dr. Ryan's soils work primarily consisted of the following: (a) taking a soils map, which was derived from Soil Conservation Service (SCS) maps, and locating on it sites for 25 backhoe test pits; (b) locating the

sites in the field; (c) examining the soil of respective test pit profiles; (d) making conclusions as to local soil suitability based on his examination; (e) extrapolating as to suitability of soils on other areas of appellant's land; and (f) reporting on his findings.

15. DER did not observe any open test pits at the site. The sole occasion on which a DER soil scientist went to the site to examine soils was in December 1974, but the test pits dug prior to that time were already closed.

16. Dr. Ryan acknowledged a swampy area in the central portion of the property but did not measure or map its extent in his report. In testimony, he indicated it was approximately in the same place as the proposed Eagles' View Lake and he drew a circle so indicating. Subsequent measurement by a DER witness of the swampy area, based on examination of aerial photographs, showed that the swampy area was considerably larger than Dr. Ryan indicated.

17. Dr. Ryan entirely failed to report on several areas deemed by the DER to be unsuitable soils on subdivided portions of the tract. These included areas of steep slopes and extensive boulder fields which were found by the DER witnesses who walked over portions of the site.

18. Although the planning module specifically states that the applicant must submit "results of percolation tests which are representative of the general percolation trends, including depths, dates and rates", no percolation tests were conducted by appellant and submitted to the DER.

19. The use of subsurface sewage disposal systems on lots of less than one acre creates a threat of contamination of groundwater from nitrates in septic tank effluent under certain water table conditions.

20. Nitrates are compounds of nitrogen and oxygen which form in septic effluent as a result of decomposition of ammonia, organic nitrogen and other organic compounds present in domestic sewage wastes.

21. The amount of nitrates in septic effluent varies. Published research data shows a range of from 20 parts per million to 121 parts per million, expressed as N. An average value, computed by eliminating the highest and lowest values and averaging the remainder, is 65 parts per million.

22. Nitrates are harmful to human health. The present United States Public Health Service standard for nitrates in drinking water is 10 parts per million.

23. Excess loading of nitrates from subsurface sewage disposal systems, or other sources, coupled with insufficient dilution from rainfall recharge,

can cause levels of nitrate concentrations in groundwater to exceed the public health standard.

24. A limited amount of removal of nitrates from septic effluent does take place in the soil by a process called "denitrification".

25. The Applachian Trail is a 2,030 mile continuous foot path from Maine to Georgia. It has been designated a National Scenic Trail, pursuant to P. L. 90-543, 82 Stat. 919. Its route has been officially established by the U. S. Department of the Interior, 60 Fed. Register 19802, *et seq.*, October 9, 1971.

26. The Applachian Trail passes through the proposed Eagles' View development from the northeastern corner to the southwestern corner.

27. The DER contends that this proposed development is likely to have an adverse effect on the Trail.

28. Appellants have obtained final subdivision approval and final plans are recorded in Monroe County, pursuant to the Municipalities Planning Code. Appellants had to comply with two sets of subdivision regulations, process plans with two planning agencies (Monroe County and Stroud Township Planning Commissions) and obtain final approval from officials of both townships.

29. The consulting engineers conducted preliminary soil investigations, consisting of ten test pits and concluded that about 80% of soils on the site were suitable for on-site subsurface disposal by conventional or alternate systems under the regulations and standards. On the basis of their soils investigation and advice from local municipal officials, the consulting engineers recommended the construction of a central water supply system and sewage disposal by on-site systems. Subdivision plans were filed and approved on this basis.

30. Subdivision plans were filed initially with the Monroe County Planning Commission on December 21, 1972. Various revisions to the plans were required as a result of the review by the Monroe County Planning Commission and its consulting engineers, which included a site inspection. Final subdivision approval was obtained for Sections B to G, inclusive (Hamilton Township) on August 11, 1975, and for Section A (Stroud Township) on February 4, 1976. As a result of the site investigation by Monroe County Planning Commission and its consultant, 20 lots were excluded from subdivision approval because of drainage and soil limitations for on-site sewage disposal and the final plans are noted accordingly; thus, the subdivision contains only 706 lots as finally approved.

31. Dr. Ryan obtained guidance from the DER in connection with his work. He met with Dr. Loughry and Mr. Osgood of the DER's technical staff to discuss the type of investigations desired by the DER. He discussed the number of test pits that would be required with Dr. Loughry and they agreed that 25 would be adequate. On the nitrate question, Dr. Loughry and Mr. Osgood suggested that he make a quantitative analysis of the total nitrates that may be transported to the groundwater by estimating the total nitrate concentrations in septic tank effluent and anticipated dilution.

32. As requested by the DER, the Ryan study also considered the groundwater geology of the site and a quantitative determination of the potential nitrate loading. He found that the predominate rock formation beneath the site was the Shawangunk, which was folded and broken by "numerous fractures and joints". Dr. Ryan has studied the Shawangunk formation from West Virginia through Maryland, Pennsylvania and into New Jersey and throughout "it is heavily fractured... which gives it its main permeability". The groundwater moves from beneath the site through factures and openings in the rock formation to the valleys on the north and south sides of the ridge.

33. The plan revision modules, together with the Ryan report were submitted to and approved by the Monroe County Planning Commission and were adopted by the Boards of Supervisors of the townships. Its review comments of the Monroe County Planning Commission were as follows:

> "Review was made with particular emphasis on the report by Dr. J. Donald Ryan relative to soil suitability and subsurface geology. The commission's engineer, Leo A. Achterman Jr., reviewed the same in considerable detail and finds it to be quite complete, well documented and prepared consistent with accepted practice.
>
> "Based upon the documentation accompanying the report, the commission concurs in the findings, conclusions and recommendations of Dr. Ryan and recommends approval of Eagles View Lake as a revision to Hamilton Townships Sewerage Official Plan."

DISCUSSION

At the outset, there are four matters that deserve brief attention before a proper discussion of the merits of the controversy are approached. The appellant, who seeks approval of a plan revision pursuant to the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.1, *et seq.*, would have the board place the burden of proof upon the DER. Rule 21.42 of the board's rules of practice and procedure provides:

> "In proceedings before the board the burden of proceeding and the burden of proof shall be the same as at common law in that such burden shall normally rest with the party asserting the affirmative of any issue. It shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of the evidence. In cases where a party has the burden of proof to establish his case by a preponderance of the evidence, the board may nonetheless require the other party to assume the burden of going forward with the evidence in whole or in part if that party is in possession of facts or should have knowledge of facts relevant to the issue."

The rules further provide:

> ". . . 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:
>
> "(a) Refusal to grant, issue or reissue any license or permit."

Although, strictly speaking, the plan approval sought by appellant is not a "permit", we agree with the DER that the Pennsylvania Sewage Facilities Act, *supra*, does prohibit installation of sewage disposal units without planning approval (§7), which is effectively the same as the prohibitions provided for activities requiring permits under The Clean Streams Law or the Air Pollution Control Act. We find the planning approval required by the Act to be analogous to a permit and with the same legal effect.

We, therefore, find that the burden of proof is properly upon appellant.

Secondly, appellant argues that the plan revision was not disapproved within one-hundred twenty (120) days from the date of receipt of the Hamilton Township Plan Revision and, therefore, must now be considered approved under §71.16 of the regulations.[1] We confess some confusion about the way the DER ap-

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1. ". . .(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 official plan shall be deemed to have been approved, unless the Department informs the municipality that an extension of time is necessary to complete review."

proached this deadline provision. A number of letters were written and meetings held and we are satisfied that the February 13, 1976, date was established as the date for the beginning of the 120-day review period precisely to avoid the issue presently before us. If appellant was not in accord with this method of resolving the confusion, we believe it had a greater duty to see that the DER was not lulled into the very position in which appellant would now have us declare it to be. The disapproval on June 10, 1976, was therefore timely.

Thirdly, the DER belatedly sought to raise an entirely new and unrelated issue into these proceedings after earlier taking the position that it was beyond the scope of the permit denial letter from which this appeal was taken.[2] The parties seem to agree that the Applachian Trail[3] does cross some portion of the tract here in question. At this point the agreement ends and the examiner, therefore decided, inasmuch as the exact location of the Trail was disputed and there is serious question about what if any interest in land it creates and our jurisdiction with regard thereto, that we would not permit testimony on what became known as the Trail issue. We here reaffirm that decision.

Finally, there is in addition to all of the other problems in this case, a boundary dispute between Monroe and Northampton Counties which remains unresolved to this day. This adjudication must, of necessity, be deemed to extend no farther than the boundaries of Stroud and Hamilton Townships. Nothing that we say here is intended to have any effect outside of these township boundaries of Monroe County—wherever that may be.

We move then to the real issues which separate the parties before us.

Keeping in mind that we said in *Township of Heidelberg et al v. Commonwealth of Pennsylvania, Department of Environmental Resources and C & H Development Company and Washington Township, Intervenors*, EHB Docket No. 76-150-D, issued October 21, 1977: "It is true that the statute and regulations provide for plan revisions. However, the law seems to us to require that there be some justification for a plan revision from the point of view of comprehensive planning other than the developer's desire to build in a particular place."

On the bottom layer of the voluminous testimony, extensive arguments and well prepared briefs, is the question of whether the soils on 906

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2. After the hearing was already in progress and appellant had presented much of its case, the DER moved to have the board permit testimony on the issue of whether its denial was proper because the proposed development would adversely affect the use of the Applachian Trail. The board had denied petitions to intervene earlier in the proceedings on the basis that the Trail issue was beyond the scope of the appealed order and would unnecessarily protract the proceedings.

3. See page 8

acres atop Kittatinny Mountain are suitable for on-lot sewage disposal. More precisely and indeed to appellant's benefit, the question can be stated to be whether the evidence before this board indicates that the tract is so clearly unsuitable that any plan for its use for residential purposes with on-lot sewage disposal should be blocked at the planning stage.

The puzzling matter which nags at one throughout this lengthy proceeding is why appellant would want to proceed with a project as expensive as this is alleged to be—unless there is every intention to fully meet the necessary requirements for finally obtaining sewage permits. On the other hand, why would the DER make such a gargantuan effort to prevent appellant from proceeding with a plan which it believes is doomed to failure in the future because sewage permits will not be issued in any event?

The appellant has shown that it is not running a fly-by night operation.[4] The DER, in exercising its discretion under the Pennsylvania Sewage Facilities Act and the regulations, has expressed a responsibility to protect the environment from those who would rapidly sell off unsuitable lots to unsuspecting vacation home buyers by making wild unkept promises and then leave behind a major pollution problem for others to solve. It is true that this can be prevented by proper planning—but we are satisfied that that is not our case.

There are two major factual issues which must be considered and resolved in order to reach a conclusion in this heatedly contested matter. The first concerns the general overall suitability of the proposed site and the second concerns the specific problem of water contamination by nitrate[5] from the proposed on-lot septic systems.

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3. The Trail, which extends from Main to Georgia, is alleged to be a unique, natural, scenic and aesthetic resource having been designated a National Scenic Trail pursuant to the National Trails System, Act of 1968.

4. They have developed land for residential use in the Pocono area over the last 15 years. Eight years have already been spent on this project.

5. Although there was no discussion or evidence on the harm to be avoided by nitrate loading in the water, except to indicate that Public Drinking Water Standards limit it to 10 parts per million, this board has previously found that excessive amounts can cause a malady in infants called methemoglobinema.
We do not intend to imply that this is not a serious matter, but merely note that it is not a deadly poison with which we are dealing. That could make a difference as to the tolerable risk involved.

The appellant suggests that inasmuch as the tract consists of 906 acres and the subdivided portion consists of 706[6] lots, the density is more than one acre per lot, and therefore, no plan approval should be required to build the development. We are impressed with the actual lot size of more than one-half acre in most cases, but clearly it is this actual lot size which is relevant and not the density of land available for purposes of §7 (5) (iii) of the Pennsylvania Sewage Facilities Act.[7]

With regard to the overall suitability testimony, one of the contentions of the DER is that the site is underlain by a rock formation that is a syncline[8] which will cause water to collect and eventually break out along the sides of the mountain. Although appellant disputes this theory, there has really not been sufficient geological testing to conclusively decide this question one way or the other.[9] It is our view that the real significance of this question relates to the problem of nitrate concentration in the groundwater coming from the sewage in the on-lot disposal systems. It is the overall density at final build-out which seems to be the major concern of the DER. We know the old saying about figures not lying and it comes to mind here because both parties have set out in contradicting detail, their graphic calculations of the nitrate level we can expect in the well water on this mountain 30 to 50 years from now!! What is of interest is the fact that using its formula, the DER expects a nitrate level of at least 13 parts per million, while appellant would no doubt agree on only 6 or 7 ppm at the most. There are standard charges and countercharges regarding the appropriate recharge rate,[10] the actual amount of nitrate in sewage effluent[11] and the expected

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6. Monroe Township disapproved 20 lots when it reviewed the plan, prior to granting its approval. This would seem to indicate more than a perfunctory review by the local government.

7. The limitation provisions on sewage permit issuance do not apply where there is provision for ". . .single family residential lots of one acre or more. . ."

8. Webster's New Collegiate Dictionary defines syncline as: "a trough of stratified rock in which the beds dip toward each other from either side".

9. Where testing was done that could shed some light on the question, the results indicated that there was no syncline—so the DER then contended that the syncline is on the other part of the tract.

10. Appellant expects recharge to occur from both on and off the site and, uses a figure more than double that of the DER, which alleges there are steep slopes and other natural conditions that will seriously reduce the recharge rate.

11. Again the estimates are all over the lot, ranging from 24 ppm to more than 100 ppm depending upon which authority or study you choose to believe. The parties have, however, agreed not without reluctance, upon the amount of dentrification (25%) that can be expected.

sewage volume.--

The board fully understands that planning by definition requires sagacity and some speculation, however, as in all of the law, we must undergird this with reasonableness and some pragmatism. Although we do not agree with appellant that our major concern is only for the next 10 years, we certainly would expect that there will be great improvements in our present-day methods for treatment of sewage wastes long before this development is complete and fully occupied.[13] We believe, based on all of the data supplied by both parties and their experts, that the danger of nitrate contamination at levels above public drinking water standards within the forseeable future, is extremely unlikely. This, coupled with the fact that appellant proposes proper monitoring wells, convinces us that even the slight chance or long range prospect of nitrate build-up can be forseen in plenty of time to take necessary corrective action. Appellant must be aware of the fact that such "corrective action" might include a ban on more on-lot sewage systems in completing the projected Eagles' View development.

Considering all that we have said, it is our view that this plan revision should not be summarily rejected on the basis of overall or general unsuitability.

As previously indicated, it was Dr. J. Donald Ryan, a geologist with wide experience who is presently a professor at Lehigh University, who initially carried the ball for appellant. His report, which served as the basis for the DER's denial, did omit some information to which the DER was properly entitled. Some of the criticism leveled by the DER was, however, properly categorized by appellant as "overly technical" and "quibbling".[14] After all, the DER is not charged with the responsibility to stop development in Pennsylvania, but simply to see that it is planned and orderly and, indeed, to provide technical assistance to municipalities seeking revisions in some cases.[15]

The major shortcoming, as we see it, with the information supplied by appellant both to the DER and before this board[16] concerns the question of percolation tests. Appellant persuasively argues that there should be no need for such tests on each of the proposed lots. The DER has not suggested this. It does,

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12. Although there is some disagreement on the daily per family usage (350-250 gpd), the major dispute here concerns the percentage of summer homes that will be converted for year-round use. The development is primarily seen by the developer appellant to be for vacation homes, but the DER forsees a large number of these becoming the permanent residence over time and thus projects a much greater waste water flow as build-out progresses.

13. This is projected to be 30-50 years.

14. We respect the DER's concern for precision in terminology, but we view the question of whether the soil is described as to "stoniness" as opposed to "coarse fragments" as much ado about nothing.

15. 35 P. S. §750.5(6)

however, and we believe properly, require that appellant test some of the lots. This is clearly a reasonable requirement when The Clean Streams Law is read in conjunction with the Sewage Facilities Act and the regulations. The DER, on its inspections, noted that a swampy area shown on certain maps was in fact much larger than depicted. There were a number of other inconsistencies pointed out by the DER specialists, but appellant insisted that these observations were actually made off of the site, or when pictures were presented to document wet, sloped or rocky areas, they were said to be areas not proposed for development as home sites. The burden of proof as indicated, is upon appellant, and it was obvious that the DER would otherwise have an impossible task, because of appellant's position. We believe the DER, under the circumstances of this case, is clearly entitled to withhold approval of the township's plan revision proposal unless and until a reasonable number of representative percolation tests are conducted on the site to satisfy it that The Clean Streams Law, Act of June 22, 1987, *as amended*, 35 P. S. §691.1, *et seq.*, can be complied with. As we said in *Heidelberg, supra*:

> "Third, in exercising its discretion to approve or disapprove plan revisions, the department must be guided by the policies of the Pennsylvania Sewage Facilities Act and The Clean Streams Law, since any sewage facility necessarily involves an affect on the waters of the Commonwealth. §71.17(e)(4), *supra*. Section 3 of the Sewage Facilities Act provides in relevant part:
>
> 'It is hereby declared to be the policy of the Commonwealth of Pennsylvania through this act:
> '(1) To protect the public health, safety and welfare of its citizens through the development and implementation of plans for the sanitary disposal of sewage waste.
> '(2) To promote intermunicipal cooperation in the implementation and administration of such plans by local government.
> '(3) To prevent and eliminate pollution of waters of the Commonwealth by coordinating planning for the sanitary disposal of sewage wastes with a comprehensive program of water quality management."
>
> * * *

Although deep probes were made and soils data indicating most of the site is suitable is available, we are somewhat concerned that the DER had no opportunity to verify these findings before the pits were closed. We will not require appellant to again open all 25 pits, but we believe a representative sample of four would be reasonable under the facts as developed.

The reason is that the probes were made at the express suggestion of the DER which did not indicate its interest in making arrangements for inspecting them before they were closed.

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16. See *Warren Sand and Gravel v. Dept. of Environmental Resources*, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975).

At the very least, the DER could have requested—prior to refusing approval—that additional arrangements be made for that purpose.

In the event that the DER is unable to confirm Dr. Ryan's findings, we have no doubt it will act accordingly.

One final matter deserves our attention. Appellant is understandably concerned about acquiring at great expense, more detailed information than is really necessary about the soils on the site. The DER wants a classification as provided in §71.14 (6)[17] and also seeks to have the deep probe soils data conform to its procedural requirements. Inasmuch as we are remanding this matter for further proceedings, we will simply note that the DER may require the indicated data as to the indicated test pits, but caution that it should not view the same in an overly technical way so as to allow semantics to supersede in importance the actual information supplied, nor form to control substance, as we believe occurred in the DER's previous consideration.

CONCLUSIONS OF LAW

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

2. The DER is authorized to exercise its independent discretion under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.1, *et seq.*, in approving or disapproving a plan revision, but should give considerable weight to the desires of the concerned municipality or municipalities.

3. The burden of proof in an appeal by a private party from a DER refusal to approve a sewage facilities act plan revision is upon the appellant, in accordance with similar appeals under §21.42 of the board's regulations.

4. The board, in its discretion, may properly limit the issues before it and the taking of testimony thereon to matters within the scope of the original appealed order and any necessarily related issues on which notice is adequately provided prior to the hearing.

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17. Section 71.14 (6) provides:

> "(6) A survey and analysis of soils and proposed sewerage needs in those areas not served by sewerage services including an evaluation of the soils to determine their suitability for individual and community sewage systems. Based on the analysis and evaluation of soils, a land classification system shall be established to determine the suitability of the area for on-lot disposal of sewage which shall indicate four categories, by degree of limitation, as follows:
> "(i) *None to slight* - Soils that are suitable for on-lot disposal of sewage;
> "(ii) *Moderate* - Soils that may be suitable providing the subsoil is permeable;

5. The DER may properly require a reasonable number of percolation tests before granting approval of an Act 537 plan revision where a large development is planned for vacation homes on top of a mountain where there is evidence of some swamp land and rock outcrops on the site.

6. Where proper provisions for monitoring are made and there is evidence indicating a very small likelihood of nitrate pollution in the forseeable future from an on-lot sewage proposal, this is not sufficient reason for the DER to disapprove a plan revision, which has been approved by the concerned municipalities.

7. The DER may properly require appellant to reopen, for inspection, four test pits to be selected by the DER, for purposes of confirming the findings reported by Dr. Ryan and accepted by this board.

ORDER

AND NOW, this 4th day of April, 1978, the matter of Eagles' View Lake, Inc., *et al* is hereby remanded to the DER for further action consistent with this adjudication.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

CONCURRING OPINION

By Joanne R. Denworth, Member, joined in by Member Thomas M. Burke

I concur in the conclusion that this matter should be remanded to the DER for further consideration, although I believe the area of inquiry on the remand should be somewhat broader than indicated in Chairman Waters' opinion. Although appellant has performed extensive studies and has demonstrated that a large portion of the proposed site can be developed without adverse affect on the groundwater, I am not satisfied that the extent of development proposed by appellant can be accommodated on this site. Nor do I subscribe to appellant's view that the determination of the amount of density on this site should be left solely to a lot by lot evaluation whenever a prospective buyer goes to obtain a permit for an on-lot system.

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17. Continued:
"(iii) *Severe* - Soils which are not satisfactory for use due to the presence of impervious water restricting layers, high water tables, periodic flooding, or other limiting characteristics; and
"(iv) *Hazardous* - Soils generally not suited for use due to the probability of ground water pollution or contamination."

In reviewing a plan revision, the department is called upon to make an independent planning judgment based upon the policies that it is required to consider under the Sewage Facilities Act and The Clean Streams Law and Chapter 71 of the regulations. *Township of Heidelberg v. DER*, EHB Docket No. 76-150-D, issued October 21, 1977. Under §71.16(e)(1) the department is to consider whether a plan revision meets the requirements of §71.14 of the regulations which includes under §17.14(a)(6) a survey and classification of soils "to determine their suitability for individual and community sewage systems". Further, in reviewing a plan revision that calls for individual on-lot systems, the department must be guided by the policy set forth in 25 Pa. Code §71.3(a):

> ". . . the provisions of this Subchapter do not preclude the use of individual sewage systems on lots less than one acre in size or community sewerage systems of equivalently sized lots. However, particular attention shall be given in official plans to the feasibility of using such systems on lots less than one acre, even though soils and geology may in fact be suitable for the installation of an individual or community sewage system, since the density of development can by itself create a public health hazard or pollution of the waters of the Commonwealth."

In this case appellant proposes ultimately to put 706 lots of approximately one-half acre density on a tract composed of four different soil types, three of which are classified by the department's regulations as only marginally suitable for on-lot systems because of seasonal high water tables. Appendix B of Chapter 73 of the Regulations, Group 14. Clearly the department is justified in giving "particular attention" to the feasibility of using these systems at this density without causing potential pollution or health hazard that might be created by malfunctioning systems. (The DER, as the agency authorized to administer the Pennsylvania Sewage Facilities Act, must be keenly aware of the problems caused by overly dense residential development with on-lot systems in the Poconos and elsewhere in Pennsylvania.) There is disagreement on how much of the lot the tract is suitable for on-lot systems, which cannot be totally resolved on this record. Although it is certainly true that appellant could not be required to submit a lot by lot evaluation of the soil in connection with a plan revision, I do not think that 25 test pits on a 678 acre tract that could contain 706 houses could adequately describe the general suitability of the soil, especially where the soil does not seem to fit the descriptions encountered on the SGS map.[18]

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18. Recently, in *Joseph B. Gable Estate v. DER*, EHB Docket No. 77-085-D, issued February 27, 1978, the board upheld the department's approval of a plan revision where the department did require a lot by lot assessment of soil suitability for on-lot systems in order to be sure that the on-lot systems would not result in any environmental problems for a neighboring property. That case involved only ten lots so it is considerably different from the one at hand; however, the lack of certainty about areas of unsuitability seems woefully inadequate by comparison.

I believe that DER has authority to approve this plan revision or any plan revision, subject to the deletion of areas where the DER has good reason to believe that the soils or site conditions (such as slope) are unsuitable for on-lot systems. The suitability of the areas of soil for on-lot systems is important to the question of density. Appellant prefers a *laissez-faire* approach to the delineation of areas of unsuitability. It wishes to have density determined by the ability of the prospective purchasers to get permits for on-lot systems for particular lots.[19] The DER points out that appellant developed a plot plan for Eagles' View Lake before it developed any information as to soils and suitability of areas of the tract for on-lot systems. It is in the planning process that general areas of unsuitability should be determined. The developer should submit a plan that attempts to conform the design of the site plan to the information obtained as to soils and geology rather than to overlay a soil map on top of a previously developed plot plan.[20] It is quite possible in our experience to have individual lots marginally qualified for on-lot systems that create no hazard in and of themselves; however, when on-lot systems are put on a series of such less-than-acre lots the result may be malfunctioning systems on some lots and groundwater pollution. See e.g. *Samuel Persky et al v. DER*, EHB Docket No. 76-038-D, issued March 7, 1977. The thrust of §71.43(a) is to question the use of on-lot systems on lots under one acre even where soils and geology are suitable. Surely it is appropriate for the DER to ascertain and eliminate areas that are clearly unsuitable. The DER should obtain accurate soil classifications from the developer and based on those and whatever reasonable; limited number of tests it requires, determine whether or not the limited areas that it believes to be questionable are generally suitable or unsuitable for on-lot systems.

I would further condition any plan revision that may be approved by the department on implementation of the monitoring program proposed by appellant with a long range committment on the part of appellant to perform the monitoring as long as it may be required. While I agree that the possibility of nitrate contamination seems quite small in the near future, accepting finding of fact 21 as found by the examiner in this case, I must conclude that there may very well be an unacceptable level of nitrate in the groundwater if there is an ultimate build out of this development (some 30 years from now according to appellant). Consequently, appellant

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19. Section 7 of the Sewage Facilities Act precludes the sale of property to a buyer where community sewerage is not available without notice that the buyer must obtain a permit for an on-lot system.

20. On appellant's map 2 attached to its plan revision module, certain areas are shown as unsuitable and left empty of lots, but others which seem to be in the unsuitable zone do have lots.

should be obligated and is apparently willing to be obligated, to monitor the groundwater on a long-range basis to be sure that unacceptable levels of nitrate are not reached and to stop further building if they should be reached.

While I have some question about the propriety of remanding a plan revision approval or denial to the department for reconsideration, it does seem appropriate in this case where it appears that evidence on both sides has been developed since the time that the plan revision module was submitted to the department and the department acted. Some of the evidence upon which both parties are relying has shifted since that time. For instance, the plan revision that appellant submitted stated that it had 590 dwelling units whereas the record now shows the proposed number is 706. Appellant at that time had not submitted any groundwater study as to the central water supply system and had not suggested any monitoring system, which it has since done. Also appellant has since supplemented its geology study and successfully demonstrated that DER's concerns as to geology were for the most part unfounded. Similarly, the DER's areas of concern have changed somewhat—e.g. the DER apparently is no longer concerned over the adequacy of the central water supply system (except for its potential pollution by nitrate concentration). It is quite proper that the DER's further action in this case be based on the evidence as brought out at this hearing as well as the further investigation of the department. *Warren Sand and Gravel, Inc. v. DER*, 20 Pa. Commonwealth Ct. 186 (1975).

The Appalachian Trail

Permeating this case *sub rosa* is the issue of the Appalachian Trail, which runs through appellant's property at an inexactly determined location on this record (although the DER has apparently surveyed the Trail since the hearings began). While this board may have no jurisdiction to determine that location, I do not believe that answers the question of the Trail presented by this case.

Prior to the hearings in this case, Chairman Waters denied the motion of the Sierra Club to intervene in this matter in support of the DER's action on the plan revision by arguing that the development would encroach on the Appalachian Trail. On a motion for reconsideration, the board supported his ruling on the basis that the department had denied this plan revision on grounds unrelated to the Appalachian Trail and that therefore it was unnecessary to consider that issue at this time. Later in the hearing, Chairman Waters denied a request by the department to present evidence on the Appalachian Trail issue as an additional ground for disapproving the

plan revision. This ruling is different in that it appears to constitute a determination that the presence of the Appalachian Trail could not be considered by the department in its review of this plan revision.

Reviewing the extensive record in this case, it is clear that the testimony was not confined to the information upon which the department acted when it sent its letter of June 10, 1976. It is also clear after reviewing the many memoranda in the department's files that although the department did not purport to act on the basis of the Appalachian Trail, it did in fact consider the Trail in reviewing this plan revision. Consequently, it is appropriate to consider whether and to what extent the DER can consider the Trail on remand.

Anyone who has ever enjoyed the primitive beauty of the Trail must be saddened (and even outraged) by the thought of a development of this size along the Trail. Appellant has the sense that it has been wrapped in bureaucratic red tape because of the Trail, and that the DER's requirements are a disguised objection to appellant's proposed land use. Whether or not this is true, appellant persuasively and correctly argues that the location of the development along the Trail is a land use decision which under the present state of the law is reserved to local municipal bodies. *Community College of Delaware County v. Fox*, 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975). The department is required to take account of comprehensive planning for an area in deciding whether or not a plan revision should be approved. *Township of Heidelberg, supra.* In this case, however, the Monroe County Planning Commission has approved this development, and as appellant points out there is no existing state plan for the protection of "water and other natural resources" that the department could take into consideration under §750.5(5) of Sewage Facilities Act. Although we have ruled that the department is to be guided by the policies set forth in §3 of the Sewage Facilities Act and §§4 and 5 of The Clean Streams Law in reviewing plan revisions, those policies refer to the prevention of pollution of the waters of the Commonwealth and a comprehensive program of water quality management. It is difficult to see how the protection of the Appalachian Trail, which is not a water resource, could be related to these policies.

However, another question remains. The department in asking to present further evidence in support of its decision on the basis of the Appalachian Trail relied largely on Article I, Section 27 of the Pennsylvania Constitution which provides:

"Natural Resources and the Public Estate
The people have a right to clean air, pure water, and to the preservation of the natural, scenic,historic and aesthetic 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."

I believe that the Appalachian Trail is exactly the sort of public natural resource that the Commonwealth is directed as trustee to preserve. (Indeed, it is difficult to think of a public resource about which there would be more ready agreement as to its natural, scenic and aesthetic value.[21]) Furthermore, I believe the DER may correctly perceive that the Commonwealth, of which it is an agency, will have breached its fiduciary duty if no action is taken to protect the Trail from proposed development. In its request to take further evidence on the Trail question, the DER sets forth facts, which, if proved, would show that the proposed development will encroach significantly on the Trail, and suggests that with reasonable limitations, the development could co-exist with the Trail.

While I think it is clear that DER could not disapprove this plan revision because of the Appalachian Trail, it may have the power to impose reasonable conditions for the preservation of a constitutionally protected public trust on any approval it gives. If Article I, Section 27 is self exacting, as it has been held to be, *Commonwealth v. National Gettysburg Battlefield Tower, Inc. et al,* 8 Pa. Commonwealth Ct. 231, 302 A.2d 886 (1973),aff'd., 454 Pa. 193, 311 A.2d 588 (1973); *Payne v. Kassab,* 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973), such action could be authorized where an action of the state agency would implicate the Commonwealth in a clearly perceived threat to environmental values that the Commonwealth is entrusted to preserve. I would, therefore, leave open the question of whether and to what extent the DER in approving a plan revision may seek to impose conditions to protect the Trail directly under the authority of the Constitution.

ENVIRONMENTAL HEARING BOARD

Joanne R. Denworth
JOANNE R. DENWORTH
Member

Thomas M. Burke
THOMAS M. BURKE
Member

DATED: April 4, 1978

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21 The Commonwealth's amended pre-hearing memoranda states that the Trail is a 2,030 mile continuous footpath from Georgia to Maine, which was designated a National Scenic Trail by the Congress in 1968. As such, it is certainly a "public natural resource".

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

TOWNSHIP OF SALFORD, ET AL

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and MIGNATTI CONSTRUCTION COMPANY, INC.

Docket No. 76-135-C

Article I, Section 27, PA Constitution
Clean Streams Law
Surface Mining Conservation and Reclamation Act

ADJUDICATION

BY: THOMAS M. BURKE, Member, dated May 3, 1978

This matter is before the board on an appeal by Salford Township, Montgomery County, West Rockhill Township, Bucks County and the Stop The Quarry Committee, an association of individuals residing in Salford Township and West Rockhill Township (jointly referred to herein as appellants)[1] from the action of the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) in granting Mignatti Construction Company, Inc., a Pennsylvania corporation (intervenor), a surface mining permit to operate a quarry in West Rockhill Township, Bucks County, Pennsylvania. Appellants aver that the DER, in issuing the permit, abridged its duties under Article I, Section 27 of the Pennsylvania Constitution[2] by not considering the adverse environmental impact of the quarry operation and that the DER abused its discretion by permitting a quarry operation which will constitute a public nuisance to the community.

Hearings on this matter were held in Norristown on April 11, 12, 13, 18, 19 and 20, May 23, 24 and 25 and July 6, 7 and 8, 1977, before the Honorable Joseph L. Cohen, who has since resigned from this board.

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1. It was stipulated at the hearing that testimony offered by each of the appellants would be considered offered on behalf of all of the appellants. See Notes of Testimony, p.4, lines 10 through 14.

2. 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 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."

The appellants and intervenor have filed proposed findings of fact and conclusions of law and briefs in support thereof[3]. On the basis of the foregoing, we enter the following:

FINDINGS OF FACT

1. Appellant, Township of Salford, is a township of the second class of the Commonwealth of Pennsylvania, with offices at Ridge Road, Tylersport, Montgomery County, Pennsylvania.

2. Appellant, Township of West Rockhill, is a township of the second class of the Commonwealth of Pennsylvania, with offices at Ridge Valley Road, Sellersville, Bucks County, Pennsylvania.

3. Appellant, Stop The Quarry Committee, is an unincorporated association of individuals residing in West Rockhill Township, Bucks County, and Salford Township, Montgomery County, Pennsylvania.

4. Appellee, Department of Environmental Resources, is 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.*, the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.1 *et seq.* and the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001 *et seq.*

5. Intervenor is Mignatti Construction Company, Inc., a Pennsylvania corporation.

6. On November 8, 1973, the Department of Environmental Resources received from Mignatti Construction Company, Inc., an application for a mine drainage permit under The Clean Streams Law and for a surface mining permit under the Surface Mining Conservation and Reclamation Act to operate a rock quarry in West Rockhill Township.

7. The quarry is proposed to be operated in the vicinity of the village of Naceville, on a 79.4 acre site bounded on the southwest by County Line Road and on the southeast by State Route No. 563 also known as Ridge Road (quarry site). County Line Road is the boundary between West Rockhill Township and Salford Township and Bucks County and Montgomery County.

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3. The DER chose not to file a post hearing brief.

8. On November 19, 1974, Mine Drainage Permit No. 7973SM4 was issued to Mignatti Construction Company, Inc.

9. On October 18, 1976, Surface Mining Permit No. 696-1 was issued to Mignatti Construction Company, Inc.

10. The quarry site is bounded on the northwest, north and northeast by a densely wooded area which extends for a distance in excess of 1,000 yards.

11. Immediate to the south of the quarry site (across County Line Road) is the township of Salford. Salford Township is sparsely populated, with a density of .17 persons per acre. Eighty-five (85%)percent of the area of Salford Township is devoted to woodland, open land and water. The village of Tylersport, the most densely populated area of Salford Township, with a density of approximately one home per three quarters of an acre, is located within one mile of the quarry site.

12. The character of the land use in Salford Township within one mile of the quarry site is residential with some commercial uses. The residential uses are largely single family homes.

13. Between the intersection of County Line Road and Shady Lane and the proposed quarry site is an intervening property owned by James Marx, Sr., on which two buildings are located. One of the buildings which is used as a residence is located more than 300 feet from the proposed quarry site. The other building which is used for auto body repair is located less than 300 feet from the quarry site.

14. Immediately to the north and adjacent to the quarry site is a 35 acre parcel owned by Mignatti Brothers.

15. The primary roads in the vicinity of the quarry site are Route 563 (Ridge Road), County Line Road, and Allentown Road, all of which are state-owned and maintained. Ridge Road has a width of twenty (20) feet; Allentown Road has a width of sixteen (16) to eighteen (18) feet;and County Line Road has a width of fourteen (14) feet. The roads do not have shoulders. A vehicle count on the three roads showed that the traffic is less than one hundred (100) vehicles per hour and is not anywhere near that on the portion of County Line Road and Allentown Road near the quarry site.

16. There are no public water or sewerage facilities in Salford Township in the area of the quarry site.

17. There are numerous houses within one-half mile of the quarry site which were constructed between 1820 and 1850. The houses are of stone construction or log construction covered with limestone plaster.

18. The Schimer dwelling located at 1805 Ridge Road is within 1/4 to 1/2 mile of the proposed quarry site. The house is constructed with stone, cemented by horsehair and mud and covered with plaster. It was constructed between 1680 and 1700 with an addition in 1718.

19. The Underkoffler residence located at 811 Thousand Acre Road is approximately 4,500 feet from the quarry site. The house, built in about 1795, is constructed of stone cemented with horsehair and mud and covered with plaster.

20. There are three other houses on Thousand Acre Road which were constructed in the 1700's. They are approximately the same distance as the Underkoffler house from the quarry site.

21. The quarry site is underlain with rock characterized as brunswick and lockatong which have been highly altered by the intrusion of diabase. The intrusion of diabase in a molten condition, under high pressure and high temperature, causes the surrounding lockatong and brunswick to become "altered" or "baked" thereby assuming the properties of the diabase.

22. Diabase, an igneous rock, is impermeable and tends to have few fractures.

23. The diabase and altered lockatong and brunswick are suitable for use in the construction of roads because of their ability to break in an angular fashion thereby creating a good interlocking road surface and because they are a hard rock which results in good surface stability.

24. The rock mining process starts with the removal of the soil or "overburden" by earth moving equipment and the storing of the soil in piles or berms. The underlying rock is then removed by detonating explosives placed into drilled holes. The pieces of rock are then transported by means of trucks to rock-crushing machinery on the site where they are crushed to a usable size. The crushed rock is then transported from the site by trucks or stored in piles depending on the demand for the product at that particular time.

25. The stripping of the overburden, blasting, the handling and crushing of the rock produces particulate air contaminants which may travel beyond the quarry site property lines.

26. Water from precipitation and surface water runoff accumulates in the quarry pit and must be pumped out. When the depth of the quarry pit penetrates the water table, groundwater will flow into the pit and must be pumped out.

27. The average depth of the water table at the quarry site is 50 feet below the surface of the ground.

28. The depth of the quarry pit will not extend to the groundwater table during the first five (5) years of the quarry's operation.

29. The groundwater table in the vicinity of the quarry site is between twenty-five (25) and thirty-eight (38) feet from the surface of the ground.

30. Groundwater movement in rock formations is through fractures or fracture systems in the rock. The ability of a rock formation to allow water to flow through is known as its "transmissibility".

31. Rock formations have the ability to hold water in fractures or voids. The "storage capacity" of a rock formation is its ability to hold water.

32. Diabase and altered rock formations have low transmissibility coefficients and low storage coefficients.

33. The pumping of groundwater from the quarry will lower the level of groundwater in the vicinity of the quarry. The groundwater table will tend to slope in towards the bottom of the quarry surface. The distance from the quarry affected by the lowering of the water table is termed the "radius of influence" of the quarry.

34. The transmissibility of the rock formation in the area of the quarry is estimated as ranging from 30 gallons per day per foot to 100 gallons per day per foot.

35. The tighter or less permeable the rock formation, the smaller the radius of influence from the quarry.

36. Blasting tends to tighten fractures in the underlain rock formation. The number of fractures in the rock formation tends to decrease as the depth of the rock increases.

37. Strike and dip measurements made at outcrops show two predominant joints or broken zones in the rock. The joints are essentially closed at the surface.

38. Three drillings for core samples were made at the quarry site. Groundwater was encountered at depths ranging from 24 to 76 feet. Water inflow was estimated at less than 10 gallons per minute and the water inflow at one drilling was estimated at approximately 2 1/2 gallons per minute.

39. An overpumped area is where groundwater pumping exceeds natural recharge. The area for which the quarry is proposed is not an overpumped area. The nearest overpumped area is 1 1/2 miles away.

40. A critical recharge area is where the rate of replenishment of groundwater is relatively low. The area for which the quarry is proposed is not a critical recharge area.

41. The soils in the area are characterized by a high perched water table.

42. Groundwater inflow to the proposed quarry can be estimated by using Darcy's Law. Darcy's Law states that Q = T I L where:

Q = groundwater inflow in gallons per day

T = coefficient of transmissibility

I = groundwater gradient

L = length of working face

43. Theis' nonequilibrium equation has been applied with reasonable success in determining the drawdown of groundwater by a water well.

Theis' equation states that $s = \frac{114.6 \times qw(u)}{T}$

Where: s = drawdown in feet at the house well

q = pumping rate from quarry in gpm

T = coefficient of transmissibility

w(u) = called the well function of u

Where: $u = \frac{1.87\ r^2 s}{Tt}$

r = distance in feet from the center of the quarry to the house well

s = coefficient of storage

T = transmissibility

t = time in days since pumping started

44. The Theis' equation is applied to a transmissibility coefficient of 30 gpd/ft for the rock formation at the site as follows:

r = 1,000 feet

$s = 2 \times 10^{-2}$

t = 300 days

T = 30 gpd/ft

Therefore:

$$u = \frac{1.87\ (1 \times 10^6)\ (2 \times 10^{-2})}{(30)\ (300)}$$

u = 4.16

Using tables derived from type curves developed by Theis:

w(u) = .002969

Therefore:

$$s = \frac{114.6\ (1.25)\ (.002969)}{30}$$

s = .01 feet or 1.2 inches of drawdown in the house well 1,000 feet from the quarry.

45. The Theis equation is applied to a transmissibility coefficient of 100 gpd/ft for the rock formation at the site as follows:

r = 1,000 feet

$s = 2 \times 10^{-2}$

t = 365 days

T = 30 gpd/ft

Therefore:

$$u = \frac{1.87\ (1 \times 10^6)\ (2 \times 10^{-2})}{(100)\ (300)}$$

u = 1.24

Using tables derived from type curves developed by Theis:

w(u) = .17

Therefore:

$$s = \frac{(114.6)\ (4.14)\ (.17)}{100}$$

Therefore:

s = .81 feet or 9.7 inches

46. The ability of an aquifer to hold or retain water is a function of the available interstitial or open space within the aquifer.

47. The gradient of the water table in the area of the proposed quarry is estimated at .03; that is, there is a 30 foot drop per 1,000 feet.

48. The Harrow Quarry in Bucks County is a diabase rock quarry with a depth of approximately 80 feet. Although the water table is near the surface of the ground, there is minimal groundwater flow into the quarry.

49. The Rushland Quarry in Bucks County is in unaltered lockatong rock. The depth of the quarry extends below the water table. There is minimal groundwater flow into the quarry and the quarry operation has had no effect on wells in the vicinity of the quarry, some of which are located within 750 feet of the quarry.

50. The Eureka Quarry, located off County Line Road on the border of Bucks and Montgomery Counties, is a lockatong rock quarry. Although the depth of the quarry extends below the water table, there is seldom a need to pump water out of the quarry except after precipitation.

51. The Kibblehouse Quarry in Montgomery County is an altered brunswick rock quarry. The depth of the quarry extends below the water table. However, there is very little groundwater flow into the quarry.

52. The proposed quarry will not affect the ability of the wells in the vicinity of the quarry to produce water.

53. The mine drainage and surface water runoff from the quarry site will drain into an intermittent stream which exists on the property in a northwesterly direction and enters a swamp area known as Argus Swamp. Argus Swamp drains to an intermittent stream which passes through a culvert under Thousand Acre Road and enters a swampy depression which drains to a tributary of Ridge Valley Creek.

54. The average amount of water collected in the quarry from precipitation is estimated at 130,000 gallons per day. The 130,000 gallons per day assumes a daily precipitation rate of 0.12 inches per day and a working quarry area of 40 acres.

55. The discharge of groundwater from the quarry is anticipated to be between 1,800 gallons per day and 6,000 gallons per day.

56. The total discharge from the site of mine drainage and surface water runoff will be substantially less than one million gallons per day.

57. The receiving streams under normal conditions will not be significantly affected by a discharge from the quarry of a million gallons a day.

58. A discharge of one million gallons a day from the quarry would raise the water level of downstream swamp areas approximately one inch.

59. The natural runoff of surface water from the watershed above the swamp areas has a much greater impact on the water level of the swamp areas than a million gallons a day discharge from the quarry.

60. One application is submitted for both the surface mining permit and the mine drainage permit.

61. Sediment, including silt, are soils and other surficial materials which are transported by surface waters to streams as the natural effect of erosion. Erosion occurs at a much greater rate when land surface is disturbed by the activities of man. The process by which sediment is deposited on stream bottoms is known as sedimentation.

62. One method designed to limit sedimentation is the excavation of basins, called sedimentation or settling basins. Such basins are located and sized as to enable the sediment generated as the result of the quarry operation to flow into such basins. The water containing this sediment is impounded and detained in these basins during this detention period. Also the water is released at a velocity considerably less than if it was uncontained runoff thereby lessening the eroding effect of the flow.

63. 25 Pa. Code §102 requires all persons engaged in earth moving activities to prepare a plan to prevent accelerated erosion and the resulting sedimentation. 25 Pa. Code §102.5(b) states that the plan must consider at least the following factors:

"(1) The topographic features of the project area.
(2) The types, depth, slope, and areal extent of the soils.
(3) The proposed alteration to the area.
(4) The amount of runoff from the project area and the upstream watershed area.
(5) The staging of earthmoving activities.
(6) Temporary control measures and facilities for use during earthmoving.

(7) Permanent control measures and facilities for long term protection; and
(8) A maintenance program for the control facilities including disposal of materials removed from the control facilities or project area."

64. Intervenor submitted as part of its application for the mine drainage permit and surface mining permit an erosion control plan consisting of design plans and an explanatory narrative. The narrative stated:

"2. and 2.b. The total area can be divided into five areas.

"A. The area (27 acres approx.) located across Shady Lane in the easterly direction is relatively flat with natural drainage NE and SW along Shady Lane. This will not change. Topsoil and subsoil will be stored in mounds with sides of approximately 35°. The piles will be neatly graded and vegetated as soon as possible for permanent storage.

"B. The area (12 acres approx.) directly up hill from new excavation will be controlled by berms with silt traps. Approximately one-half of the run-off flows into the woods. The berms will provide slow run-off to the remaining one-half of run-off water into the wooded area. Topsoil and subsoil will be handled as in A.

"C. The area (16.5 acres approx.) located SW of new quarry area and its uphill area will be handled similarly with natural run-off into a berm - silt trap construction with release to intermittent stream (sic).

"D. The quarry area (5.5 acres approx.) proper will be surrounded (sic) by berms. All rainwater and ground water will be drained into a low area in the quarry and pumped into two (2) settling basins and then released into the intermittent stream bed.

"E. The work area (16 acres approx.) which occupies the last NW segment will be covered with crushed stone in drive areas and vegetated in all remaining areas. The run-off water will be drained through two (2) settling basins. Temporary silt traps will be constructed initially.

The relatively flat access road area will drain naturally as before through grassland into the intermittent stream."

65. The four sedimentation basins proposed to handle runoff from areas D & E have the following capacity:

a. 82 ft. x 55 ft. x 7 ft. (31,570 cu. ft.)

b. 82 ft. x 55 ft. x 6.5 ft. (29,315 cu. ft.)

c. 41 ft. x 27 ft. x 6.5 ft. (7,195 cu. ft.)

d. 41 ft. x 27 ft. x 7 ft. (7,749 cu. ft.)

66. 25 Pa. Code §102.13 (d)(1) requires that sedimentation basins have a capacity of 7,000 cubic feet for each acre of project area tributary to it.

67. The capacity of the four sedimentation basins is not sufficient to accommodate the runoff from the 21.5 acres of areas D & E. 25 Pa. Code §102.13(d)(1) requires a sedimentation basin capacity of 21.5 x 7,000 cu. ft. or 150,500 cu. ft.

68. The erosion control plan referred to in Finding of Fact 64 does not comply with the requirements of 25 Pa. Code §102.5(b) and 25 Pa. Code §102.13(d)(1).

69. On or about the month of May, 1969, blasting was conducted at the quarry site. These blasts shook dwelling houses in the area and caused damage to subsurface domestic water supply facilities.

70. The residents in the area of the quarry are concerned that blasting at the quarry may cause damage to their homes.

71. Surface Mining Permit No. 696-1 was issued to intervenor subject to various conditions which imposed obligations upon intervenor. Certain of those conditions imposed limitations upon blasting at the quarry.

Special Condition No. 6 states that:

> "All blasts shall be designed for a minimum scaled distance of 50 and shall be limited to a maximum of 250 pounds per delay period on the 50 foot faces. However, if excessive toe or other abnormal conditions arise, the Department will consider at that time, upon inspection, a variance on a blast to blast basis. For variance blasts, the scaled distance shall be 50 or greater and the peak particle velocity shall not exceed 0.50 inches per second at any building not owned by the quarry operator."

Special Condition No. 7 states that:

> "The blasts shall be designed so that the maximum peak particle velocity shall not exceed 0.50 inches per second, as measured at the nearest building or accessory building, not owned by the quarry operator. (These buildings shall hereinafter be collectively referred to as "building")."

Special Condition No. 8 states that:

> "All blasts shall be monitored with seismographic equipment. For each blast, a reading shall be taken at the nearest building not owned by the quarry operator, or at a complainant's residence. The company analyzing the blast records shall certify that the seismographs were properly set up at the recording site prior to each blast. This certification shall be sent to the Department on a monthly basis or upon request from the Department."

Special Condition No. 9 states that:

> "Blasting activity, other than emergency blasting such as small shots in the crushers, shall take place only in daylight hours between 9:00 a.m. and 5:30 p.m., Monday through Saturday."

Special Condition No. 10 states that:

> "The wind direction shall be monitored prior to blasting. No blast shall be detonated with a prevailing wind from the north or northeast which exceeds 10 m.p.h."

Special Condition No. 12 states that:

"The permittee shall take noise level readings at the nearest building not owned by the quarry operator, or take readings at a complainant's residence. Noise levels from blasting shall not exceed 128 decibels (re 20 Micronewtowns per square meter) for linear frequency response."

Special Condition No. 13 states that:

"The permittee shall maintain a log of all complaints regarding blasting and the response taken to each. The log shall be submitted to the Chief of the Division of Quarries and Explosives of the Department bi-monthly or upon request."

72. Mine Drainage Permit No. 7973SM4 was issued to intervenor subject to various conditions. Three of those conditions imposed limitations upon blasting at the quarry.

Special Condition No. 24 states that:

"If, in the course of strip mining, the District Mine Conservation Inspector deems the established blasting practices are insufficient to insure adequate protection to the health and safety procedures, existing adjacent ground use, or protection to the receiving streams, blasting shall cease until a corrected blasting plan is approved by the Central Office.

Additional Special Condition No. 2 states that:

"The maximum pounds of explosive per delay period shall be 250 pounds."

Additional Special Condition No. 3 states that:

"The permittee shall not conduct blasting at this operation at a scaled distance of less than 50."

73. Appellants have not shown that the conditions placed upon the blasting operation at intervenor's proposed quarry are not adequate to protect the public well-being.

74. Rock crushers, trucks, screening equipment and blasting all produce noise during the normal operation of a quarry. The amount of noise from trucks depends upon, *inter alia*, their size, manufacturer and muffler equipment. The amount of noise from a rock crusher depends upon, *inter alia*, the design and manufacturer, the type of rock being crushed and the location of the crusher.

75. Appellants have not shown that the anticipated level of noise from the quarry site will be unreasonable.

76. Rao Kona, Regional Air Pollution Control Engineer, Bureau of Air Pollution Control, DER, by memo dated December 11, 1975, to Leon T. Gonshor,

the Regional Coordinator of the DER Bureaus, suggested that fugitive air contaminant emission problems and noise problems be addressed by intervenor prior to the issuance to intervenor of any permit to operate the quarry.

77. Intervenor by letter dated March 23, 1976, stated that:

> "The fugitive emissions from our haul roads will be controlled by the use of a water wagon with a spray bar.
>
> The dust from stockpiles will be controlled by the latent effect of the wetting agent used in the Chem-Jet Dust Control System in the crushing plant.
>
> Due to the momentary nature of blasting, we do not anticipate any significant dust problems arising from this activity."

78. The response by intervenor quoted in Finding of Fact 77 to the Bureau of Air Quality's concern over anticipated fugitive emissions was not satisfactory to the Bureau of Air Quality.

79. The proposed quarry is a stationary air contamination source as that term is used in the Air Pollution Control Act, *supra*.

80. Intervenor has not applied for, or received a permit pursuant to Section 6.1 of the Air Pollution Control Act, *supra*.

DISCUSSION

Intervenor proposes to establish a rock quarry on a 79.4 acre site on County Line Road in West Rockhill Township, Bucks County. County Line Road forms the boundary between West Rockhill Township, Bucks County and Salford Township, Montgomery County.

The topography of the general area is rolling hills and the land use is basically rural[4]. Immediately to the south of the quarry site is the township of Salford. The village of Tylersport, located within one mile

4. Salford Township has a density of .17 persons per acre. 85% of the township is dedicated to woodland, open land and water. Only 10% of West Rockhill Township is developed land, i.e. land devoted to housing, commerce, industry, and public uses.

of the quarry site is the most populated area of Salford Township, with an average density of approximately one dwelling for three quarters of an acre. The village consists mostly of older homes, some constructed in the eighteenth century. Some of the homes located within 1/2 mile of the quarry site were constructed between 1820 and 1850. The only commercial establishments in the area are small service shops typically located in concert with residences. The primary roads in the vicinity are narrow, between 14 and 20 feet wide, generally in poor shape and basically used for commuter and residential traffic. Public services are minimal. There are no public water supply or public sewerage facilities and little street lighting. Growth in the area is limited by the lack of a public sewerage system and the unsuitability of the soils to support on-lot systems.

It is evident that the proposed 79.4 acre rock quarry will affect the character of this community and as could be expected, there is opposition to its existence. The issue before the board, however, is not whether the operation of a stone quarry at the proposed site offends our personal ideas on environmental values, but whether the DER acted in accordance with its statutory authority when it issued the mining permit. *Gabriel Elias, et al v. Environmental Hearing Board and DER*, 10Pa. Commonwealth Ct. 489. 312 A2d 486 (1973).

Appellants have alleged six separate objections to the issuance of the surface mining permit, all of which, they allege, support their contention that the quarry will constitute a public nuisance, or in the alternative, controvenes their rights under Article I, Section 27.

(1) The quarry will lower the groundwater in the area thereby dewatering domestic water wells.

(2) The discharge from the site will cause erosion of streams and flooding of adjacent areas.

(3) Blasting at the quarry will cause damage to historic structures.

(4) Noise from the site will adversely effect the public well-being.

(5) Truck traffic from the quarry will damage local roads and cause unsafe conditions to exist on the same roads.

(6) Dust from the quarry operation will cause air pollution.

DRAWDOWN OF WATER WELLS

Extensive testimony was presented concerning appellants' contention that the quarry will lower the groundwater in the area to the extent that the private water wells' ability to produce will be adversely affected.

Intervenor contends that the disruption of an adjoining property owner's private water supply by a quarry operation is *damnum absque injuria*. *Rothrauff v. Sinking Spring Water Co.*, 339 PA 129, 14 A2d 87 (1940). This board stated in a recent case, *Campbell v. Dept. of Environmental Resources*, EHB Docket No. 75-276-C (issued June 1, 1977) that Article I, Section 27 places upon the DER an affirmative duty to assess the degree to which a probability exists that a proposed mining activity will affect the flow of springs on an adjoining landowner's property. However, we questioned whether the DER could deny a mining permit based on the aforesaid as no statute existed which imposed such a duty and it is unclear under Pennsylvania law whether the disturbance of the water table by mining constitutes a public nuisance. Subsequent to the Campbell decision, the legislature amended the Surface Mining Conservation and Reclamation Act, *supra*, by the Act of July 25, 1977, P.L._____ by adding the following paragraphs f, g and h, to Section 4.2.

> "(f) Any surface mining operator who affects a public or private water supply by contamination or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply. If any operator shall fail to comply with this provision, the secretary may issue such orders to the operator as are necessary to assure compliance.
>
> (g) Any operator aggrieved by the secretary's order issued pursuant to subsection (f) shall have the right within thirty (30) days of receipt of such order to appeal to the Environmental Hearing Board. Hearings under this subsection and any subsequent appeal shall be in accordance with section 1921(a), act of April 9, 1929 (P.L.177, No. 175), known as "The Administrative Code of 1929," and the act of June 4, 1945 (P.L. 1388, No. 442), known as the "Administrative Agency Law."
>
> (h) If the secretary finds (i) that immediate replacement of an affected water supply used for potable or domestic needs is required to protect health and safety, and (ii) that the operator has appealed or failed to comply with an order issued pursuant to subsection (f), the secretary may, in his discretion, restore or replace the affected water supply with an alternate source of water utilizing moneys

> from the surface mining conservation and reclamation fund. The secretary shall recover the costs of restoration or replacement, including costs incurred for design and construction of facilities, from the responsible operator or operators. Any such costs recovered shall be deposited in the fund."

We need not decide the DER's obligations under the recent amendment at this time as the appellants have not shown the existence of a substantial possibility that the quarry operation will dewater the area water wells.

Appellants contend that as the quarry pit deepens and intersects the groundwater table or aquifer , groundwater will flow from the aquifer into the quarry thereby lowering the water table in the vicinity of the quarry and as a consequence thereof, dewater the wells of neighboring property owners. DER, during its review of the surface mining application, did consider the effect of the quarry on area wells. The DER requested and received an analysis of the potential of lowering or drawdown of the water table from intervenor, and based on that analysis and its own investigation, concluded that the quarry operation would not adversely affect area wells. Admittedly, Robert Biggi, Chief of the Pit and Quarry Section for the DER's Bureau of Surface Mine Reclamation, the DER employee who reviewed the application and determined that the permit should be granted, did not have the expertise to determine the effect of the quarry operation on the neighboring wells.[5] However, since we are required to conduct a *de novo* hearing on an appeal, the board is not restricted to a review of the DER's determination but can render a decision based on the record made before it. See *Warren Sand & Gravel v. Dept. of Environmental Resources*, 20 Pa. Commonwealth Ct. 186, 341 A2d 556 (1975). The appellants and the intervenor presented extensive expert testimony on the issue.

The quarry will operate for approximately five years before the pit will be deep enough to intersect the water table. Once the quarry

5. Counsel for the DER during the *voir dire* of Robert Biggi described the qualifications of Mr. Biggi as follows:

> "Mr. Cohen, I am willing to limit Mr. Biggi's expertise in the area of hydrology to his ability to determine the quantity of waters that will flow into the quarry and the ability to dispose and treat if necessary waters that flow into the quarry.
>
> "I'm not offering Mr. Biggi as an expert with respect to the question of drawdown of neighboring wells, et cetera." Notes of Testimony, page 1177, lines 7 through 13

penetrates the water table, groundwater will flow from the aquifer into the quarry pit and must be pumped out to allow the continued mining of the rock. The water table will then tend to slope toward the surface of the quarry bottom. This slope or cone of influence represents the distance from the quarry that the water table is lowered and the extent that it is lowered. It is over the prediction of this cone of influence of the proposed quarry that the parties disagree.

The quarry site is underlain with diabase, altered brunswick and altered lockatong rock. The brunswick and lockatong were altered by the intrusion of the diabase in a molten condition, under high pressure and high temperature. Through a process known as contact metamorphism. the lockatong and brunswick assumed the properties of diabase.

The diabase, an igneous rock, is impermeable and tends to have few fractures and therefore a minimum of interstitial or open space. The altered brunswick and altered lockatong are also characterized by a minimum of open space. Strike and dip measurements show the joints or fractures of the altered lockatong and brunswick to be tight and essentially closed. Since the ability of the aquifer to retain or transmit water is a function of the available interstitial space, the rock formation at the site has a low transmissibility coefficient, that is, a poor ability to retain or transmit water. It is, therefore, expected that relatively small amounts of water will be drawn into the quarry pit as it is excavated.

If only small amounts of water are drawn into the quarry, the water table will not be lowered or drawn down to any significant extent. Walter Satterthwaite, a geologist who testified on behalf of the intervenor, estimated the coefficient of transmissibility of the rock formation at the site to be 30 gallons per day per foot. Dennis Pennington, a geologist who testified on behalf of appellants, estimated the coefficient of transmissibility to be 100 gallons per day per foot.

When the coefficient of transmissibility is known, the amount of groundwater which will flow from the aquifer into the quarry can be determined by the use of Darcy's Law which states that the rate of movement of water through porous media is proportionate to the hydraulic gradient.

In simplified form: Q = T I L where Q = groundwater inflow in gallons per day (gpd), T = coefficient of transmissibility, I = groundwater gradient and L = length of working face. The length of the working face is projected at approximately 2,000 feet. The groundwater gradient of the site is estimated at .03, that is a 30 foot drop per 1,000 feet. If the coefficient of transmissibility is 30 gpd/ft, the groundwater inflow to the quarry would be 1,800 gpd/ft or 1.25 gallons per minute[6]. If appellants are correct and the coefficient of transmissibility is 100 gpd, the groundwater inflow would be 6,000 gpd or 4.14 gpm[7].

In instances where the potential drawdown of a water table from a water well is not known, the Theis non-equilibrium well formula can be used to determine the drawdown of the water table at a given distance. The equation developed in 1935 assumes that hydraulic conditions in an aquifer and thermal conditions in a thermal system are analogous in mathematical theory. Applying the Theis formula to either the 30 gpd/foot transmissibility coefficient and 1.25 gpm projected groundwater inflow of intervenor on the 100 gpd/ft transmissibility coefficient and 4.14 gpm of appellants, results in a projected drawdown of less than a foot of water at a water well 1,000 feet from the quarry. (See Findings of Fact 44 and 45 for the calculations.)

Appellants argue that the Theis formula should not be used to predict the drawdown as it was developed to predict drawdown caused by a well, not a quarry and it assumes several aquifer conditions which do not exist here.[8] However, Peter Bazakas a geologist who testified in behalf of appellants stated that the Thies formula could be used to predict the drawdown of a quarry if the various parameters of the equation were valid.

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6. Q = (30 gpd/ft) (.03) (2,000 ft)

7. Q = (100 gpd/ft) (.03) (2,000 ft)

8. The following assumptions are assumed in the application of the Theis equation:
   a. The aquifer is homogeneous and isotropic;
   b. the aquifer has infinite areal extent;
   c. the discharging well penetrates the entire thickness of the aquifer;
   d. the coefficient of transmissibility is constant at all times and places;
   e. the well has an infinitesimally (reasonably) small diameter;
   f. the water removed from storage is discharged instantaneously with decline in head.

Also, Stanley Davis and Roger DeWiest at page 125 of "Hydrogeology" state that "Although its derivation has been based on several assumptions which are seldom justified in field tests, the nonequilibrium formula has been applied with reasonable success..." (Page 215 of "Hydrogeology" was entered into the record by appellant Salford Township.)

The Theis equation was not the sole basis for our determination. We were impressed with the testimony that existing quarries in Bucks and Montgomery Counties corroborate the results predicted by the Theis equation. The Harrow Quarry in Bucks County is a diabase rock quarry. Although the quarry has been excavated to a depth penetrating the groundwater table, there is minimal groundwater flow into the quarry. There is very little groundwater flow into the Kibblehouse Quarry in Montgomery County, which is an altered brunswick rock quarry, even though the quarry extends below the groundwater table. The Rushland Quarry in Bucks County and the Eureka Quarry on the border of Bucks and Montgomery Counties are both in unaltered lockatong. There is minimal flow of groundwater into these quarries although the quarry has penetrated the water table. The Rushland Quarry has had no affect on wells, some of which are located within 750 feet of it.

Estimates of groundwater inflow made during the drilling for core samples also indicate that the rock formation has a low transmissibility as water inflow was estimated at less than 10 gallons a minute, and in one drilling, at less than 2 1/2 gallons a minute.

Also, there is a high perched water table in the quarry site area which impedes the assimilation of precipitation into the soil. This high perched water table, along with the slope of the site and the relative inability of the underlying rock strata to accept water combine to cause a high proportion of the precipitation and other surface water to run off thesite rather than seep into the water table. Thus the excavation of the quarry should not significantly disrupt the existing natural recharge of water to the water table.

Appellants argue that stream or well hydrographs and pump tests should be performed to provide greater certainty to the prediction of the drawdown potential of the quarry. Appellants refer to three water wells

located in the Trumbauersville, Bucks County, area which although drilled in altered brunswick rock have yields of 40-50 gallons per minute. It was agreed that these yields are exceptionally high for yields from altered brunswick. Intervenor contends that the high yields result from a difference in geology between the Trumbauersville area and the area where the quarry is proposed. The altered rock in the Trumbauersville area is surrounded on three sides by diabase rock which restricts and confines the water table thereby creating a pooling effect which results in a higher well yield from the aquifer in the altered rock. In any event, the wells drilled in the altered rock in the area of the proposed quarry have a lower yield than the aforementioned Trumbauersville wells.

Further, the stream and well hydrograph tests suggested by appellants are only used to determine the existing level of the water table. Darcy's Law and the Theis formula would still have to be used to determine transmissibility and drawdown. Pump tests might result in a more accurate determination of the transmissibility of the rock formation at the location the test was made, but the Theis formula or another similar formula based on geological analysis would have to be used to extrapolate the pump test results to the total quarry area and to predict the resulting drawdown of the water table.

We therefore find that appellants have not shown that there is a substantial possibility that the proposed quarry operation will adversely affect the area wells ability to produce water.

MINE DRAINAGE

Appellants contend that the DER did not properly consider the quantity of mine drainage which will be discharged from the site. Appellants argue that the addition to area streams of the drainage from the quarry will cause erosion and flooding of area waterways.

Initially, intervenor and the DER contend that the board does not have jurisdiction to entertain an objection to the DER's consideration of the mine drainage discharge in this appeal from surface mining permit No. 696-1 because a mine drainage permit was issued to intervenor for this proposed quarry on November 19, 1974, and no appeal was filed within 30 days of issuance of the permit. Therefore, the DER and intervenor argue that the

the action of the DER in issuing the mine drainage permit is final and cannot be collaterally attacked in this proceeding. See *Commonwealth of Pennsylvania, DER v. Wheeling Pittsburgh Steel Corporation*, ___Pa.___, 375 A.2d 320 (1977).

At the hearing, the hearing examiner ruled that the mine drainage issue was properly before the board. He reasoned that: (1) the DER's policy requires a prospective surface mine operator to submit one integrated application for both a mine drainage permit and a surface mining permit, therefore "the mine drainage permit is part of the process in its entirety"; and (2) Sections 4(a)(2)K and 4(b) of the Surface Mining Conservation and Reclamation Act, *supra*, require the applicant to submit to the DER a plan demonstrating compliance with The Clean Streams Law, *supra*, as a condition precedent to the receipt of a surface mining permit.[9] Thus, he concluded the propriety of the DER's action of issuing a surface mining permit would depend, in part, on compliance by the permittee with The Clean Streams Law, *supra*.

We now affirm the hearing examiner's ruling. We are unable to find that the issues raised by appellants in this appeal were finally determined by the DER's issuance of the mine drainage permit, and, thus, should have been raised on appeal from the mine drainage permit.

Appellants' objection to the discharge from the site presents two issues, erosion control and flooding caused by the addition of water to area streams. In order to control erosion all persons engaged in earth moving activities are required by 25 Pa. Code §102 to prepare a plan to prevent accelerated erosion and the resulting sedimentation. It is the anticipated earth moving activity at the site not the mine drainage discharge from the quarry which imposes upon intervenor the requirement to prepare a plan. Thus, especially when there was only one application for both permits, the DER could have conditioned either the mine drainage permit or the surface

9. See Notes of Testimony, pages 247-249.

mining permit on the submission of the plan[10]. We are therefore unable to find as a matter of law that the adequacy of the soil and erosion plan was "finally" determined by the issuance of the mine drainage permit.

Similarly we do not believe the mine drainage permit was determinative of the potential of the discharge to cause flooding of the streams. The mine drainage permit is intended to regulate the quality of the discharge in order to protect the quality of the receiving streams. Appellants contend that "a public nuisance is likely to result from the increased or accelerated water flow", an issue which the DER could have addressed prior to the issuance of either permit. We therefore find that the potential of the increased flow from the quarry to cause flooding is an issue properly raised in this appeal from the surface mining permit.

In regard to the control of accelerated erosion and sedimentation, the Commonwealth Court found in *Delaware Co. C.C. v. Fox*, 20 Pa. Commonwealth Ct. 335, 342 A2d 468, (1975) that the DER's obligation under Article I Section 27 is fulfilled by requiring compliance with the Chapter 102 regulations and that those regulations provide ample protection against accelerated erosion and sedimentation. Intervenor did submit to the DER an erosion control plan consisting of design plans and an explanatory narrative in response to a request from the DER. The soil and erosion plan states:

"2. and 2.b. The total area can be divided into five areas.

> "A. The area (27 acres approx.) located across Shady Lane in the easterly direction is relatively flat with natural drainage NE and SW along Shady Lane. This will not change. Topsoil and subsoil will be stored in mounds with sides of approximately 35°. The piles will be neatly graded and vegetated as soon as possible for permanent storage.
>
> "B. The area (12 acres approx.) directly up hill from new excavation will be controlled by berms with silt traps. Approximately one-half of the run-off flows into the woods. The berms will provide slow run-off to the remaining one-half of run-off water into the wooded area. Topsoil and subsoil will be handled as in A.
>
> "C. The area (16.5 acres approx.) located SW of new quarry area and its uphill area will be handled similarly with natural run-off into a berm - silt trap construction with release to intermittent stream(sic).

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10. We have reviewed both permits and, although both permits specify that the application and supporting documents are made a part thereof, neither specifically require compliance with an erosion and sedimentation plan. Since there is only one application we assume both permits incorporate the same application and supporting documents.

"D. The quarry area (5.5 acres approx.) proper will be surrounded (sic) by berms. All rainwater and ground water will be drained into a low area in the quarry and pumped into two (2) settling basins and then released into the intermittent stream bed.

"E. The work area (16 acres approx.) which occupies the last NW segment will be covered with crushed stone in drive areas and vegetated in all remaining areas. The run-off water will be drained through two (2) settling basins. Temporary silt traps will be constructed initially.

The relatively flat access road area will drain naturally as before through grassland into the intermittent stream."

Appellants contend that the plan is not adequate and does not comply with the requirements of 25 Pa.Code §102; that the factors required to be considered in the formulation of the plan by 25 Pa. Code §102.5(b) are absent and therefore the DER did not have enough information on which to base a competent decision on the ability of the plan to effectively prevent accelerated erosion. We agree. 25 Pa. Code §102.5(b) states that the plan must at a minimum consider the following factors:

(1) The topographic features of the project area.
(2) The types, depth, slope, and areal extent of the soils.
(3) The proposed alteration to the area.
(4) The amount of runoff from the project area and the upstream watershed area.
(5) The staging of earthmoving activities.
(6) Temporary control measures and facilities for use during earthmoving.
(7) Permanent control measures and facilities for long term protection; and
(8) A maintenance program for the control facilities including disposal of materials removed from the control facilities or project area.

Since the plan is silent on or contains insufficient information on such considerations as topographic features, soil characteristics, and the amount of runoff from the project and the upstream watershed, we do not know how the DER determined the adequacy of the control facilities and the control measures to be used in areas A, B & C.[11]

It is appellants' burden to show that the plan is inadequate to control accelerated erosion. However, when appellants' geologist testified that the factors required by 25 Pa.Code §102.5(b) and required to determine

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11. For example, in the sector of the site delineated as area A on the erosion control plan, there is no provision for erosion control even though the topsoil and subsoil will apparently be removed. Without the factors listed in §102.5(b) being explained, we wonder how the DER could find this satisfactory.

the adequacy of the control measures are absent from the plan, we believe the DER had the burden to explain how it made its decision.

The surface water runoff from sections D & E will be controlled by four settling basins. The purpose of a settling basin is to detain the surface runoff to allow sediment to settle out of the water; also the velocity of the runoff is controlled to prevent erosion. However, the capacity of the four basins does not appear to be sufficient to accommodate the runoff from the 21.5 acres of areas D & E. 25 Pa. Code §102.13(d)(1) requires that sedimentation basins have a capacity of 7,000 cubic feet for each acre of project area tributory to it. The 21.5 acres would therefore require a total settling basin capacity of 150,500 cu.ft. (21.5 x 7,000). The four settling basins proposed by intervenor have a total capacity of 75, 829 cu. ft.[12] (See Finding of Fact no. 65)

We therefore remand this matter to the DER to solicit from intervenor an erosion control plan consistent with the requirements of 25 Pa. Code 102.

Appellants contend that the development of the site as a quarry will increase the surface water runoff from the site and that the addition of this surface runoff to the groundwater pumped from the quarry pit to area waterways will cause flooding and the resulting encroachment of water onto private properties. Initially, the parties are in disagreement over the route that the discharge from the site will follow prior to entering Ridge Valley Creek. Appellants contend that the discharge leaves the site through an intermittent stream which flows in a northwesterly direction to a swampy area known as Argus swamp; from Argus swamp, appellants contend that the drainage flows through an intermittent stream which passes through a culvert under Thousand Acre Road and enters another swampy depression, marked for purposes of the hearing as swamp A, which drains to a tributary of Ridge Valley Creek. Intervenor contends that the drainage leaves the site in a northeasterly direction via an intermittent stream, named Old Naceville Tributary at the hearing, to Ridge Valley Creek. Intervenor disputes appellants' contention that the discharge from the site, whether

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12. The capacity of the settling basins is stated in Exhibit C-22.

it proceeds northeast or northwest, will pass through any swamp areas before it reaches Ridge Valley Creek. In either event appellants concede that the receiving streams are capable of handling the increased flow from the site. Dennis Pennington, appellants' geologist witness, testified that the "streams under normal conditions probably will not be significantly affected by a mine discharge of one million gallons per day".[13] Pennington further stated that he does not believe that the discharge from the quarry site "is going to be near a million gallons per day".[14]

Appellants did not attempt to calculate the quantity of runoff from the proposed quarry site in its present state, the anticipated runoff in its developed state, or the watershed area above or below the site. Rather, appellants argue that flooding conditions already exist during heavy rains at the swamp areas and at culverts in the area of Thousand Acre Road; therefore, any additional flow will aggrevate that existing condition.

The DER did consider the effect of the additional flow from the quarry. Biggi testified that the natural runoff from the watershed above the swamp area, which was calculated at 2,125 acres, has a much greater impact on the swamp area than even a million gallons a day discharge from the quarry. He estimated that a million gallon a day discharge from the quarry site would raise the level of the water in the swamp areas approximately one inch. Intervenor's geologist testified that based on a daily precipitation rate of 0.12 inches/day the average amount of surface runoff collected in the quarry would be 130,560 gallons per day. Since the groundwater pumped from the quarry was estimated at 1,800 gallons per day by intervenor and 6,000 gallons per day by appellants, it does not appear that the combined surface flow and groundwater flow will approach one million gallons per day. Therefore we find that appellants have not shown that the discharge of mine drainage and surface water runoff from the site will cause the flooding of area waterways. Although the operation of the quarry will add additional water to swamp areas and culverts which during periods of heavy rainfall encroach upon private properties, the extent of additional flooding, if any,

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13. See Notes of Testimony, page 540 and page 4 of Exhibit C-11.

14. See Notes of Testimony, page 539.

is speculative on this record. Article I, Section 27 does not require the DER to deny a permit for the otherwise lawful use of land as a quarry unless there is some showing of the environmental degradation directly caused by the operation permitted. The Commonwealth Court stated in *Community College of Delaware County v. Fox, supra,* that:

> "One can speculate forever, of course, upon possible secondary pollutional effects, but we must hold that for such secondary effects to preclude DER action, they must be more than merely speculative. They must be such conditions as will almost certainly occur as a result of the action taken, and conditions such that current law and technology provide *no* reasonable means to control them."
> Id. 342 A2d at 479.

NOISE, BLASTING AND TRAFFIC

Appellants also contend that the surface mining permit should have been denied under the DER's power to prohibit a public nuisance and under the authority of Article I, Section 27 because of the anticipated noise levels and blasting at the site and because of the vehicle traffic indigenous to a stone quarry operation.

In the course of the normal operation of a stone quarry, rock crushers, screening equipment and blasting all produce noise. However, a rock quarry, because of the noise generated, is not per se a nuisance, and appellants have not shown that the noise levels which will actually exist at the site will constitute a public nuisance. Testimony was presented by appellants on noise measurements of trucks and crusher equipment at the H & K Quarry in Hilltown Township. However, there was no competent testimony presented that the noise levels at the H & K Quarry operation constitute a public nuisance.[15] More importantly, appellants did not show that the noise levels measured at the H & K Quarry would exist at intervenors proposed quarry.

We believe that appellants' concern is with the manner of operating the quarry rather than the existence of the quarry. If it is operated in a manner that the noise levels become unreasonable, an abatement action can be brought by the local municipality either under its authority to abate a

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15. The only testimony presented on the health effects of noise was by Dennis Pennington, a geologist, who compared noise levels at the H & K Quarry with a publication referred to only as a 1970 publication of the Council on Environmental Quality.

public nuisance or by enforcing the local noise ordinance.[16]

Surface Mining Permit No. 696-1 was issued to intervenor subject to various conditions. One of those conditions, special condition no. 12, set a maximum noise level on the blasting conducted at the quarry. There was no testimony by appellants that the level set is not adequate to protect the well-being of area residents.

The appellants entered into evidence the zoning ordinance for Salford Township which, in Section 1104, lists maximum sound levels permitted by facilities located in various districts of the township. However, the quarry site, although contiguous to Salford Township, is located in West Rockhill Township. Thus, the ordinance is inapplicable to the quarry.

We therefore find that the appellants have not shown that the anticipated noise levels from the quarry will be unreasonable.

Residents of the area testified that they are concerned that blasting at the quarry may cause damage to their homes, many of which were constructed between 1820 and 1850. At least five of the homes located within 1/2 mile of the quarry were constructed in the 1700's. The homes were constructed with stone, cemented with horsehair and covered with plaster. There was no testimony that these houses are more susceptible to damage from blasting than those of more recent construction, but certainly any damage is, from a historical perspective, irreparable. Their concerns are intensified by the fact that blasting conducted by intervenor at the proposed quarry site about May 1969 shook houses in the area and caused damage to subsurface domestic water supply facilities.

The DER did consider the effect of blasting on surrounding buildings and to negate the effect of blasting imposed ten special conditions limiting the blasting on the surface mining and mine drainage permits. (The conditions are set forth in Findings of Fact 71 and 72.) Appellants did not offer any testimony to show that these conditions are not adequate to safeguard the public.

We therefore find that appellants have not shown that the special conditions of the surface mining and the mine drainage permits regulating

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16. There was testimony that a noise ordinance exists in West Rockhill Township. No testimony was presented on the substance of the ordinance.

the manner in which blasting is permitted are not sufficient to safeguard the public from damage to their property.

Appellants contend that the quarry operation will have an adverse effect on the public because of the truck traffic which will emanate from the quarry. Appellants argue that the primary roads in the vicinity, Ridge Road, County Line Road and Allentown Road, are not capable, because of width and construction, of adequately handling the truck traffic from the quarry. Appellants also are concerned that school children walking to and from school bus stops on County Line Road and waiting for school buses at the intersection of County Line Road and Ridge Road will be endangered by the trucks. Although we are sympathetic to appellants' concern, we do not believe this to be a proper reason for the DER to deny the permit in question. This is a subject peculiarly within the domain of the local government bodies.[17] In *Community College of Delaware v. Fox, supra,* the court stated: "...the power of an administrative agency must be sculptured precisely so that its operational figure strictly resembles its legislative model". The court continued: "...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." Id. 342 A2d 478

The proper local agency has previously ruled on this matter. The Common Pleas Court of Bucks County reversed a denial by the Bucks County Zoning Hearing Board of a special exception to intervenor to operate the quarry in question. The Bucks County Common Pleas Court held that:

> "...we are not satisfied that the increase in traffic as shown on this record is of such character as to bear a substantial relation to the health and safety of the community or a high degree of probability that such an increase will adversely [a]ffect the health and safety of the community."
>
> "...we are not convinced on this record of the high degree of probability of any clear and present danger to these school children by virtue of these trucks now being introduced to this highway network."
>
> *Mignatti Construction Co., Inc. v. Bucks County Zoning Hearing Board,* 20 Bucks Co. L. Rep. 483 at 491, 492 (1970) aff'd by Commonwealth Court at 3 Pa. Commonwealth Ct. 242, 281 A2d 355 (1971)

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17. There was no testimony that the size of the trucks will not comply with the Commonwealth Motor Vehicle Code.

Therefore since the proper local government agency has acted, the DER cannot entertain, through its permitting process, an indirect and collateral challenge to the action of that agency.

Finally, and perhaps of greatest significance, appellants contend that the DER did not properly fulfill its obligations under Article I, Section 27, for reason that it issued the surface mining permit without requiring compliance with its own Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, 35 P.S. §4001 *et seq.*, (APCA) by intervenor at the site.

The Commonwealth Court in *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973) aff'd by the Pa. Supreme Court at 468 Pa. 226, 361 A2d 263 (1976), set forth the following threefold standard to test whether an administrative agency complied with its obligation under Article I, Section 27.

> "(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 our judgment, the APCA is an applicable statute within the meaning of the first test of the *Payne* threefold standard. The APCA is administered solely by the DER, in contradistinction to those statutes administered by a different agency or level of government and it is intended to protect the environment from consequences directly resulting from the permitted source. See *Community College of Delaware v. Fox, supra.*

The Bureau of Air Quality was consulted by the Bureau of Surface Mine Reclamation during the review of intervenor's surface mining application for its opinion on air pollution problems which might occur at this proposed quarry. The permit application and supporting documents were sent to the Bureau's Norristown office for review. In response thereto, Rao Kona, the Regional Air Pollution Control Engineer for the Bureau's Norristown office, on December 11, 1975, directed a memo to Leon Gonshor, the regional coordinator of the

DER programs in the Norristown region, stating that before any permit is issued to intervenor, the problem of fugitive emissions from stripping of overburden, roads, loaded trucks, the blasting operation and stockpiles should be adequately addressed. Biggi requested the intervenor to respond to these concerns of the Bureau of Air Quality, and by letter dated March 23, 1976, intervenor responded as follows:

> "The fugitive emissions from our haul roads will be controlled by the use of a water wagon with a spray bar.
>
> "The dust from stockpiles will be controlled by the latent effect of the wetting agent used in the Chem-Jet Dust Control System in the crushing plant.
>
> "Due to the momentary nature of blasting, we do not anticipate any significant dust problems arising from this activity."

This response did not satisfy the Bureau of Air Quality's concern, prompting a meeting between representatives of the Bureau of Air Quality and the Bureau of Surface Mine Reclamation. The result of the meeting was that although Air Quality did not believe the intervenor's plans to control the fugitive emissions from the quarry were adequate, they declined to recommend denial of the permit, apparently for the reason that Air Quality would not defend the denial of the permit.[18] The surface mining

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18. Notes of Testimony. Pages 1244, 1245.

> "A. That the Air Quality people were not satisfied with the responses that they got so that this resulted in a meeting in Harrisburg with Jim Hambright who is Bureau Director of Air Quality and Noise Control and Walt Heine and myself.
>
> "Q. Identify Walt Heine.
>
> "A. Walt Heine was the Associate Deputy Secretary from Mines and Land Protection for DER.
>
> "Q. Can you give us an approximation of the date of this meeting?
>
> "A. It was subsequent to June of '76. I'm not sure exactly when.
>
> "Q. Subsequent to June of '76?
>
> "A. Yes, it was after June of '76. At that time we asked Mr. Hambright if his bureau was prepared to recommend denial of the permit based on their concern for this proposed quarry and he indicated to Mr. Heine and myself that they were not.
>
> "Q. Mr. who and yourself?
>
> "A. Mr. Heine and myself that they were not recommending denial. That they were concerned that normal quarrying activities may generate fugitive dust, may cause problems with blasting noise, but that they weren't recommending denial of the permit.
>
> "Q. Did they say they didn't recommend denial of the permit or did they say they wouldn't defend your denial of the permit?
>
> "A. Both. They were not recommending, nor could they deny, or defend a denial of the permit."

permit was subsequently issued without any further air quality considerations.

What we don't understand is why the DER did not require intervenor to acquire an air quality control permit for the quarry as required by Section 6.1(a) of the APCA. Section 6.1(a) states:

> "On or after July 1, 1972, no person shall construct, assemble, install or modify any stationary air contamination source, or install thereon any air pollution control equipment or device or reactivate any air contamination source after said source has been out of operation or production for a period of one year or more unless such person has applied to and received from the department written approval so to do: Provided, however, That no such written approval shall be necessary with respect to normal routine maintenance operations, nor to any such source, equipment or device used solely for the supplying of heat or hot water to one structure intended as a one-family or two-family dwelling, or with respect to any other class of units as the board, by rule or regulation, may exempt from the requirements of this section. All application for approval shall be made in writing and shall be on such forms and contain such information as the department shall prescribe and shall have appended thereto detailed plans and specifications related to the proposed installations."

Air contaminant is defined by Section 3(4) of the APCA as: "smoke, dust, fumes, gas, odor, mist, vapor, pollen, or any combination thereof".

Air contamination source is defined by Section 3(7) of the APCA as "Any place, facility or equipment, stationary or mobile, at, from or by reason of which there is emitted into the outdoor atmosphere any air contaminant."

Stationary air contamination source is defined by Section 3(8) of the APCA as "Any air contamination source other than that which, when operated, moves in a given direction under its own power."

Since the rock quarry is a place from, or by reason of which fugitive particulate matter or dust is emitted into the outdoor atmosphere, it requires a Section 6.1 permit prior to its operation unless it falls within one of the exceptions of Section 6.1. The only exception applicable to the quarry are those sources exempted by rule or regulation of the Environmental Quality Board.

25 Pa. Code 127.14 lists the air contamination sources exempted by regulation of the Environmental Quality Board. They are:

> "(1) Air conditioning or ventilation systems not designed to remove pollutants generated by or released from other sources.
>
> "(2) Combustion units rated at 2,500,000 or less B.t.u.'s per hour of heat input.

"(3) Combustion units fueled by natural gas supplied by a public utility and used only for space heating, air conditioning or heating water.

"(4) Sources used in residential premises designed to house four or less families.

"(5) Space heaters which heat by direct heat transfer.

"(6) Mobile sources.

"(7) Laboratory equipment used exclusively for chemical or physical analyses.

"(8) Other sources and classes of sources determined to be of minor significance by the Department."

The only exemption which could apply to a rock quarry are sources determined to be of minor significance by the DER. There is nothing in DER's rules and regulations or in the record on this matter which supports a categorization of a rock quarry as a source determined to be of minor significance.[19]

25 Pa. Code 127.12 requires that prior to receiving a permit, the applicant must show, *inter alia*, that the source will comply with federal and state air pollution control laws and that the emissions therefrom will be the minimum attainable through the use of the best available control technology. This is basically what appellants are requesting, that the intervenor be required to show the source will comply with the air pollution control laws and that the emissions from the source be the minimum attainable.[20]

There was some discussion by the DER during the review of intervenor's surface mining application of whether intervenor should acquire an air quality permit for the quarry. On October 10, 1975, Gonshor sent a memo to Biggi stating that "I have been informed by our Bureau of Air Quality and Noise Control that they will be meeting on October 17, 1975, to determine if a permit from this program will also be required at this time. In view of this, it is requested that you withhold issuance of the mining permit until Air Quality advises of their requirements in this matter."

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19. We note that 25 Pa. Code 123.1 prohibits fugitive emissions except from certain categories of sources, one of which are sources determined to be of minor significance. However, in order to be classified as such, the operator must apply to the DER for a determination of minor significance.

20. Rao Kona testified that the DER has experience with control devices and control measures which will alleviate fugitive emissions from quarries. See Notes of Testimony, page 754.

For reasons *de hors* the record, the DER decided not to require an air quality permit for the quarry.[21] Biggi and Kona both testified that the fugitive emission problems would be handled through inspection and enforcement after the quarry is in operation, however, that is the anthithesis of the permitting requirements of the APCA. The intent of the APCA is to insure that the emissions from the source will be controlled prior to its operation. See *Commonwealth v. Locust Point Quarries Inc.*, 27 Pa. Commonwealth Ct. 270 (1976), 367 A.2d 392, for an example of the difficulties the DER has had in the past in enforcing the APCA against quarry operations.

Therefore, we hold that the DER abused its discretion and acted contrary to Article I, Section 27, by not requiring compliance with the APCA, *supra*, prior to issuing the surface mining permit.

We emphasize that we are not requiring the DER to issue all permits relative to a single source at the same time.[22] Our holding herein is based solely on the undisputed fact that the DER has decided not to require an air quality permit for the quarry, a decision we believe to violate the APCA and Article I, Section 27.

We therefore remand this matter to the DER to require that intervenor acquire a permit pursuant to Section 6.1 of the APCA prior to or coincident with acquiring a surface mining permit.

CONCLUSIONS OF LAW

1. The board has jurisidiction over the parties and the subject matter of these proceedings.

2. The burden of proof in an appeal by a private party from the issuance of a surface mining permit by the DER is on the appellant.

3. Appellants have not shown by a preponderance of the evidence that a substantial possibility exists that intervenor's quarry operation will dewater area water wells.

4. Appellants can attack the propriety of the DER's approval of the soil and erosion plan in its appeal of the issuance of the surface

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21. It was decided that the DER would require an Air Quality Control permit for the rock crusher prior to its construction.

22. We do believe it to be preferable for the DER to coordinate the issuance of all permits to a single source, rather than issuing the permits *ad seriatim*.

mining permit as the adequacy of the plan was not finally determined by the issuance of Mine Drainage Permit No. 7973SM4.

5. Appellants are not foreclosed from raising in this proceeding the potential of flooding caused by the addition of mine drainage and surface runoff to area streams as that issue was not finally determined by the issuance of Mine Drainage Permit No. 7973SM4.

6. The soil and erosion plan submitted by intervenor does not comport with the requirements of 25 Pa. Code §102.5(b) and §102.13(d)(1).

7. Appellants have not shown by a preponderance of the evidence that a substantial possibility exists that the addition of mine drainage and surface water runoff to area streams will cause flooding.

8. Appellants have not shown that the anticipated noise levels at intervenor's quarry site will create a public nuisance.

9. Appellants have not shown that the special condition no. 12 of Surface Mining Permit No. 696-1 which set a maximum noise level on the blasting conducted at the quarry is not adequate to protect the public well-being.

10. Appellants have not shown that the conditions imposed by the DER on Surface Mining Permit No. 696-1 and Mine Drainage Permit No. 7973SM4 limiting intervenor's blasting operation are not adequate to safeguard the public.

11. Article I, Section 27, of the Pa. Constitution does not permit the DER to review decisions properly within the domain of local government bodies in its review of an application for a surface mining permit.

12. Article I, Section 27, of the Pa. Constitution requires the DER to determine compliance with the statutes administered by the DER relevant to the protection of the Commonwealth's public natural resources in its review of an application for a surface mining permit.

13. Intervenor's proposed quarry is an air contamination source as that term is defined by the Air Pollution Control Act.

14. The operation of an air contamination source is prohibited without a permit pursuant to Section 6.1 of the Air Pollution Control Act, *supra*.

O R D E R

AND NOW, this 3rd day of May , 1978, Surface Mining Permit No. 696-1 issued to Mignatti Construction Co. Inc. is hereby set aside.

It is further ordered that the matter is remanded to the Department of Environmental Resources to:

1) require Mignatti Construction Co. Inc. to submit a soil and erosion plan in accordance with the requirements of 25 Pa. Code §102, and in particular, the provisions contained in 25 Pa. Code §102.5(b) and §102.13(d)(1).

2) require Mignatti Construction Company to submit an application for an Air Quality permit for the proposed quarry in accordance with the requirements of Section 6.1 of the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4006.1.

When and if Surface Mining Permit No. 696-1 is reinstated by the DER, notice shall be given to all parties.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

DATED: May 3, 1978

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

J. NEVIN WHITE LUMBER COMPANY

Docket No. 77-210-W

Erosion and Sedimentation Regulations

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

BY: PAUL E. WATERS, Chairman, June 9, 1978

This matter comes before the board as an appeal from a DER order requiring appellant, J. Nevin White Lumber Company, to institute a program for erosion and sedimentation control for its large lumbering operation at Second Mountain in Dauphin County, Pennsylvania.

Appellant allegedly has made a number of efforts to satisfy the DER but now believes that it is obligated to do no more in an effort to preserve nearby Stony Creek.

FINDINGS OF FACT

1. Appellant is the J. Nevin White Lumber Company, which is and has been at all times material hereto, engaged in logging operations in the Second Mountain area of state game lands 211, Stony Creek Road, Middle Paxton Township, Dauphin County, pursuant to a contract executed in 1971.

2. On April 6, 1977, Mr. James Ruff, a forester with the Dauphin County Conservation District, along with another representative from his office (Mr. Feranchak) visited the site of the J. Nevin White Lumber operation on game lands 211. On this date, the following observations were made: there was a lack of erosion control structures on the site; severe rutting was taking place on the roads; only one cross drain was observed installed on the road which was a small culvert, located on a haul road.

3. On April 6, 1977, Mr. Ruff spoke with Mr. Charles Oakes, the operator working for Mr. White on a contractual basis, and informed him of the erosion and sedimentation control measures needed at the site.

4. On April 12, 1977, Mr. Ruff mailed a certified letter to Mr. White explaining the deficiencies insofar as the erosion and sedimentation control measures revealed by his April 6, 1977, inspection.

5. On April 19, 1977, Mr. Ruff observed water draining across flat land below the road, carrying silt from the lumbering area being deposited into Stony Creek.

6. As of May 26 and June 15, 1977, Mr. Ruff visited the site; again none of the proposed construction had been initiated.

7. Following a meeting of all parties on August 18, 1977, Mr. Ruff met with Mr. Frotscher on the site on August 22, 1977, on which tour Mr. Ruff pointed out the locations for and types of measure to be installed. Mr. Frotscher, the forester for the J. Nevin White Lumber Company, agreed to implement the measures suggested at that time. These measures included the installation of waterbars, turnouts, and dips.

8. On November 9, 1977, Mr. Ruff again visited the site, and observed that there were no new erosion and sedimentation control measures or structures installed. The existing structures were in very poor condition. These had been beaten down by trucks and were ineffective. On this date, there were violations of the regulations in that there was failure to maintain the structures that were in place, and a failure to install the structures that Mr. Frotscher agreed to install on August 22, 1977.

9. On November 21, 1977, Mr. Ruff again visited the site. The violations noted on the prior visit of November 9, 1977, were still in existence.

10. Appellant has been using the Texas Eastern pipeline right-of-way. Otherwise the right-of-way could have become well vegetated with grass and herbaceous vegetation. Accelerated erosion would not then be taking place but for the use Mr. White was making of the road in his lumbering operation.

11. Mr. White graded the Texas Eastern pipeline, changing its configuration, so that his trucks could travel on it.

12. On March 16, 1978, the day prior to the hearing, Mr. Ruff had been to the site in question and testified that no steps had been taken to correct the problems that had previously been observed there.

13. On the August 22nd meeting at the site between Mr. Ruff and Mr. Frotscher, Mr. Frotscher agreed to take specific steps to correct erosion sedimentation deficiencies which steps were never taken. Mr. Frotscher indicated

at some time that two days with a small dozer and a competent operator would solve most of his problems. This time was never devoted and the problems were never solved.

14. Mr. Shertzer, an environmental protection specialist for the DER, confirmed parts of Mr. Ruff's testimony. Specifically, on July 8, 1977, Mr. Shertzer accompanied Mr. Ruff on his inspection and agreed that there were violations of the regulations at that time. These violations included the following: there was inadequate control of accelerated erosion; structures that had been put in were not maintained so that at the point of the inspection they were not performing the function for which they were originally designed.

15. Mr. Shertzer went to the site again on December 7, 1977, and observed violations again, in that control measures had not been maintained properly. Water was existing on the secondary haul roads, entering the main pipeline access and being allowed to cut its own course down slope to Stony Creek.

16. Mr. White agreed that it would only take two to three days of work to complete the steps requested by Mr. Ruff and agreed to by Mr. Frotscher on their walking tour of the site in August of 1977.

DISCUSSION

Appellant entered a contract with the DER in 1971 providing that appellant could cut and remove timber from a large tract on Second Mountain, referred to herein as game lands 211. Subsquently on September 29, 1972, the DER adopted, for the first time, the regulations governing erosion control (Chapter 102) citing as authority, the Act of June 22, 1937, P.L. 1987 §5 and 402 (35 P.S. §691.5; §601.402), The Clean Streams Law. Appellant now contends that the order issued by the DER on December 24, 1977, in an effort to enforce certain provisions of the regulations, is invalid for three reasons. First, it is contended that the regulation retroactively effects its rights. To the contrary, the application of Chapter 102 to appellant's existing, on-going timbering operation does not constitute a retroactive application of law even though the timbering operation commenced prior to the effective date of the provisions of Chapter 102. Chapter 102 became effective 30 days after its adoption by the Environmental Quality Board on September 29, 1972, except that the effective date of the requirement to prepare an erosion and sedimentation control plan was postponed for "existing earth-moving activities" until January 1, 1974 (see §102.51 of Chapter 102[1]). It is thus clear that Chapter 102 was intended to apply to earth-moving activities in existence on the dates when its various provisions became effective. Further the application of a regulation to an on-going activity which commenced prior to its enactment does not constitute an unconstitutional

retroactive application of law. The Pennsylvania Supreme Court in *Commonwealth v. Barnes & Tucker Company*, 455 Pa. 392 (1974) stated:

> "Even if liability for the discharge of mine drainage was made abatable for the first time under any theory by the 1970 amendments, a recognition of the Commonwealth's claim based thereon would not require that we place a retrospective construction on these amendments. Rather, we would be applying that section to a condition which existed on the date when the amendments covering discharges from abandoned mines became effective, even though such conditions resulted from events which occurred prior to their effective date." Id. at 417-418.

See also *Philadelphia Chewing Gum Company v. Commonwealth of Pennsylvania, DER*, ___ Pa. ___, ___ A.2d ___ (No. 1389 C. D. 1976, filed May 4, 1978). As Chapter 102 is being applied to the existing, on-going operation of appellant, it is not a retroactive application of law. This moves us to the second major argument made by appellant, which raises a constitutional issue of impairment of contract obligations. Interestingly, both parties have cited *Creighton v. City of Pittsburgh*, 389 Pa. 569.

The *Creighton* case involved a claim by a fireman for disability benefits under the Heart and Lung Act, which did not become effective until after the alleged resignation from the company. The jury in finding in favor of plaintiff decided that the resignation was in fact a request for sick leave. It is true that the case made a general statement regarding impairment of obligation of contracts, but this case can in no way be construed as authority for appellant's position here. More to the point is *De Paul v. Kauffman*, 441 Pa. 385, 272 A.2d 500. The court there recognizes the long standing rule that a statute may indeed change contract obligations if it is done pursuant to the police power. In upholding the Rent Withholding Act, faced with the same attack based on Pennsylvania Constitution, Article I, §17 and the U. S. Constitution, Article I, §10, the court said:

Continued from page 3

> "(a) The provisions of this Chapter shall become effective 30 days after their adoption by the Environmental Quality Board, except that the provisions of § § 102.31 - 102.32 of this Title (relating to permits and plans), which require permits prior to the commencement of an activity became effective on July 1, 1973, and the provisions set forth in § 102.4 of this Title (relating to general requirements) which require preparation of erosion and sedimentation control plans shall become effective according to the following schedule:
>
> * * *
>
> "(2) All existing earthmoving activities - January 1, 1974."

"With regard to leases that predate the effective date of the Act, 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) (citations omitted) (sustaining minimum price regulation modifying price term of existing contract).

"We have already concluded that the Rent Withholding Act is a legitimate exercise of police power. In light of the paramount public interest in safe and decent housing, the landlord's pre-existing duty to comply with housing code standards, and the fact that in most instances there will be no permanent rent loss, we do not consider the Act to be an unconstitutional impairment of contract obligations."

There can be no doubt and appellant has not disputed that the regulations in question based as they are on The Clean Streams Law are clearly intended as an exercise of the police power.

The third and final argument made by appellant is that the order of the DER is unreasonable in light of the conditions of the site and the previous work done in an effort to comply with law. Appellant does not deny that much of the work requested by the DER has not been done. Appellant has apparently suffered some loss because of a bridge which was put in and later removed at the request of the DER and this has left a bitter taste in his mouth as well as a dent in his pocketbook. It would seem that these historical events can in no way abrogate the DER's authority and, indeed, duty to enforce the erosion control regulations. At most, we believe a rule of reasonableness would dictate that appellant be given ample time to comply with the new regulations. This has been done. The DER started on April 6, 1977, to urge compliance with the erosion regulations when a visit to the site took place. The order here in question was not issued until December 24, 1977, more than eight months later, and after numerous letters, promises and site inspections.[2] We can find nothing unreasonable in this. The DER acknowledges that over the hard winter of 1977-78 little was expected or done. But the evidence is that nothing more

2. It was appellant who submitted the plan for erosion and sedimentation control. Although this was done at the urging of the DER, clearly any objections to the submission requirements could have been raised by an appeal at that time. The DER now merely seeks compliance with the plan which appellant submitted.

had been done to establish controls even up to the day of hearing after the parties had agreed on a certain minimal amount of work.

Appellant now questions whether there is any pollution of Stony Creek from his earth-moving operations. Based on the photographic evidence we believe that there is, but this is not really the issue. The Environmental Quality Board has enacted the erosion control regulations based on the need for such a statewide program in carrying out The Clean Streams Law. If those regulations apply to appellant based on their effective date, as we have previously found that they do, then it is of no moment that appellant does not believe Stony Creek will be adversely affected by its failure to comply with the law.[3] Appellant goes on to argue that there would be some erosion and sedimentation taking place in the area even without its activity. No doubt this is true, but it is accelerated erosion[4] that is our concern. The fact that there is a power line right-of-way, for which appellant is not responsible, cannot be used to avoid its clear responsibilities under the regulations based on its use of that right away.

CONCLUSIONS OF LAW

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

2. The erosion control regulations of the DER which became effective on January 1, 1974, can be applied to earth-moving activities which began before that date inasmuch as the regulation itself, Chapter 102, Section 102.5 specifically indicates that it was so intended.

3. Where a regulation like a statute, is promulgated pursuant to the police powers of the state for the health, safety or welfare of the people, it will not be deemed to violate the constitutional prohibition of impairment of contract obligations, even though such obligations are thereby adversely affected.

---

3. It is too late in the day to argue that sedimentation in a stream is not "harmful, detrimental or injurious" to "animals, fish or other acquatic life".

4. Section 102.1 defines *accelerated erosion* as:

> "The removal of the surface of the land through the combined action of man's activities and the natural processes at a rate greater than would occur because of the natural process alone."

4. The order of the DER issued to appellant on December 21, 1977, after repeated efforts to have appellant comply with the erosion control requirements of its regulations was not unreasonable, and compliance has not yet been achieved.

O R D E R

AND NOW, this 9th day of June, 1978, the appeal of J. Nevin White Lumber Company is hereby dismissed and the order of the DER entered on December 21, 1977, is hereby affirmed.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

DATED: June 9, 1978

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

UPPER MORELAND TOWNSHIP LOWER MORELAND TOWNSHIP LOWER MORELAND TOWNSHIP AUTHORITY, Appellants and ABINGTON TOWNSHIP, Intervenor	Docket No.	77-198-D 77-199-D, as amended 77-200-D, as amended 78-050-D 78-051-D
v.		
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES Appellee and BRYN ATHYN BOROUGH AUTHORITY and PENNYPACK WATERSHED ASSOCIATION, Intervenors		

ADJUDICATION

By the Board, June 29, 1978

Appellants Lower Moreland Township, Lower Moreland Township Authority, and Upper Moreland Township have appealed from several related actions of the Department of Environmental Resources (DER). The primary action appealed from is the DER's publication of a study on November 15, 1977, entitled "Conclusions, Wastewater Management Study of the Central Pennypack" (Pennypack Study). That publication concluded that regional spray irrigation was the most "cost effective" method of sewage treatment for the region that includes appellant municipalities. Lower Moreland Township and Lower Moreland Township Authority are also appealing the DER's return of the authority's 1973 sewerage permit and federal construction grant applications, which were returned by the DER as "out of date". In addition, they are appealing, at docket nos. 78-050-D and 78-051-D, the submission of a 1978 priority list to the United States Environmental Protection Agency (EPA) listing the Central Pennypack Watershed Quality Management Area (Abington Township, Bryn Athyn Borough and Lower Moreland Township) as a single area with 72 priority points for Step 2 funding of $1,905,000. This action was taken by DER in implementation of the Pennypack conclusions.

The DER has moved to dismiss all of the appeals on the ground that none of the department's actions complained of constitute appealable actions. Bryn Athyn Borough Authority and the Pennypack Watershed Association, which support the DER's Pennypack Study conclusions, were permitted to intervene and have filed a brief in support of the DER's motion to dismiss. Abington Township, one of the

municipalities affected by the DER's conclusions, did not appeal any of the actionsthus far taken by the DER, but did petition to intervene in these appeals in April of 1978 and its petition to intervene was granted. All of the parties filed briefs and oral argument was held on the DER's motion on May 11, 1978.

There is no disagreement as to the facts and history of this matter, which are as follows:

Findings of Fact

1. In March of 1973, the Lower Moreland Township Authority and the Abington Township Commissioners submitted permit and grant applications to the DER for the construction and operation of sewers and an interceptor to service portions of Lower Moreland and Abington Townships.

2. At about the same time, the Bryn Athyn Borough Authority submitted permit and grant applications to the DER for the construction and operation of sewers and a spray irrigation system to service the borough.

3. By letter dated August 12, 1974, the DER submitted to the EPA the fiscal year 1975 construction grant priority list, requesting funding for those projects with priority ratings of 1 through 58; the Lower Moreland and Abington projects being eligible as the 33rd project; and the Bryn Athyn project being ineligible as the 91st project on the priority list.

4. By letter dated September 18, 1974, the EPA approved Pennsylvania's fiscal year 1975 construction grant priority list, with the exception of certain projects, including the Lower Moreland project. Neither Lower Moreland Township Authority nor Lower Moreland Township appealed the decision by the EPA.

5. EPA's elimination of the Lower Moreland and Abington project from the 1974 funding list was based on its inconsistency with the Bryn Athyn project. In the letter discussing this, the EPA regional administrator suggested to DER that a task force be created to study sewage treatment for the watershed on a regional basis.

6. In October of 1974, the DER established a task force to study the sewerage alternatives for the Central Pennypack Watershed region, the service area comprising portions of Abington and Lower Moreland Townships and Bryn Athyn Borough. Representatives of the Lower Moreland Township Authority and Lower Moreland Township participated in the task force, together with representatives of other municipalities, including Abington Township and Bryn Athyn Borough, and representatives of federal, state and local regulatory agencies.

7. On June 2, 1976, the draft final report, Pennypack Creek Watershed Interim Planning Study, was released. This draft report was subsequently revised on September 28, 1976. The reports considered various regional plans for the Central

Pennypack Watershed, the principal alternatives being a regional interceptor plan and a regional spray irrigation plan. These regional facilities plans differed from the plans submitted in 1973 by Lower Moreland and Abington Townships for the construction of an interceptor system and by Bryn Athyn Borough for the construction of a municipal spray irrigation system.

8. In June of 1977, an "Independent Evaluation of Wastewater Treatment and Disposal Alternatives" prepared by R. F. Weston, Inc. for the Upper Moreland, Lower Moreland and Abington Townships was submitted to the department for its consideration. This study evaluated the regional interceptor and spray irrigation alternatives previously considered in the draft reports and also presented and evaluated a third alternative, a combined interceptor and spray irrigation plan designed to serve the Central Pennypack Watershed. The third alternative differed from the plans submitted in 1973 by Lower Moreland and Abington Townships and by Bryn Athyn Borough.

9. Upper Moreland Township would not be provided with sewerage service by any of the sewerage alternatives proposed for the Pennypack Watershed. However, approximately 206 acres of the spray irrigation system proposed by the Pennypack Study would be located in Upper Moreland Township.

10. On November 15, 1977, a DER Bureau of Water Quality Management publication No. 53, entitled "Conclusions, Wastewater Management Study of the Central Pennypack" (Pennypack Study), was distributed. The Pennypack Study concluded that the regional spray irrigation alternative was the most cost-effective of the three alternatives investigated during the course of the task force study.

11. By letters dated December 14, 1977, the DER returned the grant and permit applications previously submitted in 1973 by Lower Moreland Township Authority, Abington Township and the Bryn Athyn Borough Authority; each letter read as follows:

> "Your Step III application for a federal construction grant and Permit Application . . . were received by the Department in February, 1973. As a result of the evaluations which have been undertaken since that time for the development of a wastewater management program for the Central Pennypack Watershed, your applications are now considered to be out of date. Therefore, we are hereby returning your applications."

12. On December 14, 1977, Upper Moreland Township, Lower Moreland Township and Lower Moreland Township Authority filed appeals to the Environmental Hearing Board challenging the conclusions set forth in the Pennypack Study. Those appeals were docketed before the Environmental Hearing Board at 77-198, 77-199 and 77-200-D.

13. On December 27, 1977, Lower Moreland Township and the Lower Moreland Township Authority filed appeals with the Environmental Hearing Board from the DER's return of Lower Moreland's grant and permit applications. At the request of Lower Moreland Township and the Lower Moreland Township Authority, these appeals were docketed

as amendments to the pending appeals challenging the Pennypack Study. The Lower Moreland Township appeal was docketed as an amendment to EHB Docket No. 77-199-D and the Lower Moreland Township Authority appeal was docketed as an amendment to EHB Docket No. 77-200-D.

14. On February 3, 1978, DER published its 1978 Federal Construction Grant priority list and showed on that list the "Central Pennypack Water Quality Management Project" as a Step II project with a target date of 1978 and as a Step III project with a target date of March 1979 on DER's extended project list, both listings showing the Pennypack project as having 72 priority points. It is understood that funding will be made available for projects having more than 70 priority points.

15. Lower Moreland Township and Lower Moreland Township Authority received notice of these actions on March 9, 1978, and March 14, 1978, respectively. Both filed appeals from these listingson April 10, 1978.

DISCUSSION

The Pennypack Study

The authority of the Environmental Hearing Board to hold hearings and issue adjudications is derived from the provisions of Section 1921-A(a)-(c) of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §510 *et seq.*, which provides:

> "(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.
>
> "(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."

The DER argues that the conclusion or decision arrived at in studies such as the Pennypack Study is not the sort of action over which the board has jurisdiction. Certainly it is not an "order" or "permit" or "license". Appellants vigorously assert that it is a "decision" of the DER. The board's own rules define an "action" of the department as follows:

> "*Action* - Any order, decree, decision, determination or ruling by the department or local agency affecting personal or property rights, privileges, immunities, duties, 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 board has previously ruled that in order for an action to be appealable, it must come within the definition of an adjudication as defined in the Administrative Agency Law, *supra*, Section 2:

> "'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, . . ."

Thus, in *George Eremic v. Commonwealth, Department of Environmental Resources*, No. 75-283-C (June 16, 1976 and December 2, 1976) the board refused to review the DER's refusal to revoke a solid waste permit at the request of appellant on the ground that the refusal was not final and did not affect personal or property rights. The Commonwealth Court has ruled in several cases that the EHB's jurisdiction is limited to actions of the DER that impose obligations or restrict an aggrieved party's rights. *Standard Lime and Refractories Co. v. Department of Environmental Resources*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971), *Sunbeam Coal Corporation v. Department of Environmental Resources*, 8 Pa. Commonwealth Ct. 622, 304 A.2d 169 (1973); *Commonwealth, DER v. New Enterprise Stone & Lime Co., Inc.*, 25 Pa. Commonwealth Ct. 389, 359 A.2d 845 (1976). The board has also held that a violation notice, which requested that the appellant submit to the DER whatever corrective action it proposed to take, was a warning or recommendation and unappealable because premature. *Hooversville Water Company v. Commonwealth, Department of Environmental Resources*, EHB Docket No. 75-067-D (issued June 6, 1975); see *McKinley v. State Board of Funeral Directors*, 5 Pa. Commonwealth Ct. 45, 288 A.2d 840 (1972).

Both sides rely on *Man O'War Racing Association v. State Horse Racing Comm.*, 433 Pa. 432, 250 A.2d 172 (1969) in which the Pennsylvania Supreme Court set forth a three part test for determining whether an administrative action is appealable[1]:

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1. It must be noted, however, that the question of appealability in this case was somewhat different in that there was no statutory provision for appeal from a State Horse Racing Commission decision.

1. The decision making power and the manner in which it functions must be judicial;

2. The decision must be fraught with public interest; and

3. The decision must substantially affect property rights.

DER and intervenors, Bryn Athyn and Pennypack Watershed Association, argue that although the municipalities may be "concerned" by the Pennypack Study conclusions, they are not yet "aggrieved". They say that although the DER has come to a conclusion as to the most cost effective sewage treatment for the Pennypack area, it has taken no specific action with respect to the appellant municipal bodies by way of ordering them to construct a particular sewage facility or denying a request to construct an interceptor system. DER points out that there are no specific proposals for systems to serve the municipalities that have appealed, since the 1973 applications are now out of date and do not comply with Chapter 103 of the department's regulations. DER also contends that the municipalities have to do further studies in order to prepare a proposal for a sewage treatment system, specifically in response to EPA Construction Grants Program Requirements Memorandum no. 78-9 which requires the investigation of on-lot sewage treatment systems where feasible and limits the funding of collector systems to areas of "substantial human habitation".

For their part, appellants claim that the DER has in fact decided what course to take in the Pennypack Watershed and that it would be useless for the authority to submit an application for a sewage treatment system that is not a spray irrigation system. Appellants and intervenor Abington Township point to the conclusions that were cited on pages 36 and 37 of the study as follows:

> "(3) Overall Conclusion
> "On the basis of the foregoing analysis and evaluation, it is DER's conclusion that the spray irrigation alternative is the most cost-effective of the three alternatives investigated."
>
> "IV. Implementation
> "Now that the decision that the spray irrigation alternative is the most cost-effective project has been made, the remaining steps needed to facilitate construction and operation of the project should be taken as quickly as possible.
>
> * * *
>
> "In addition to the steps outlined in Table IV-1, DER will also do the following to facilitate implementation of the spray irrigation system.

"(1) DER will, within the next 30 days, return the outstanding permit and grant applications that were submitted by Lower Moreland, Abington and Bryn Athyn. These applications are out-of-date.

"(2) DER will ask the three municipalities to jointly apply for permits and grants to implement the spray irrigation project.

"(3) ...DER will take appropriate steps to modify its construction grants priority list to rank all portions of the regional project as a single project. . .

"(4) DER will request the DRBC, DVRPC, the Montgomery County Planning Commission, and EPA to review this report within 30-days, and to provide comments to DER and the affected municipalities.

"(5) DER will request DVRPC and the Montgomery County Planning Commission to provide assistance to Lower Moreland, Abington, and Bryn Athyn in reaching the necessary agreements to facilitate joint implementation of the project. DER staff will also be available for this purpose."

Lower Moreland claims that all five implementation steps have been taken by the DER and argues that if the DER has not made an appealable decision it should not be able to implement its conclusion in favor of a spray irrigation system for the Pennypack Watershed.

Although the cases cited by the DER and Bryn Athyn and Pennypack Watershed Association announce a principle that is clearly relevant to the appeals at hand, these appeals present a novel question: To what extent can the board review conclusions that the DER has arrived at as a result of investigating alternatives and determining a policy for future action that will be taken by the DER in a regional area? We have here no specific proposal by appellants for a particular sewage treatment system. Rather, appellants are asking the board to review the DER's conclusions as to the cost effectiveness of the alternatives discussed in this study and come to a different conclusion. Even if the board reviewed the alternatives discussed in the study, appellants would not be bound to implement the alternative the board determined to be most cost effective. Appellants could ultimately submit an application for a permit for a system not considered by the Pennypack Study.

Reviewing the Pennypack Study document, we must conclude that as a matter of sound administrative law the board cannot review the DER's conclusions by the vehicle of these appeals. The Pennypack Study document appears to be a culmination of what is said to be many volumes that contain engineering reports and reports of public meetings and task force meetings considering the question of interceptors versus spray irrigation. Specifically, the report addresses the "independent" study of Roy F. Weston, Inc. presented to the DER in June of 1977. That study concluded that the interceptors were the most cost effective method of sewage treatment for the Pennypack Watershed. The Pennypack Study under consideration is primarily a consideration of points raised by the Weston report accepting some and rejecting others but coming finally to the conclusion that spray irrigation is the most "cost effective" of the

three alternatives investigated. The term "cost effective" comes from the EPA regulations, 40 C.F.R. §35.925, Appendix A to 40 C.F.R., part 35, which detail the many cost benefit considerations that are to be addressed in considering the advantages of a particular project. EPA's memorandum 78-9 states that:

> "All treatment works funded under the Construction Grants Program must be cost-effective to comply with the requirements of the Acts."

As must be apparent, cost effectiveness does not refer simply to dollar costs but includes such considerations as lost opportunity costs, contribution to water quality goals and environmental and social effects.

The Pennypack Study appealed from does refer to many details of the interceptor system as well as the spray irrigation system and a mixed system, but does not really outline what the system would be in the form of a specific proposal. We believe that in order for this board to have jurisdiction, it must have before it a specific proposal that has been accepted or rejected by the DER and may be compared to the policy judgment that the DER has made in this study. We recognize that this study is limited to a small area and makes a policy decision in terms of DER's future action with regard to that area, and we do not wish to put these municipalities to useless expense. However, those considerations are outweighed by the administrative principle that the board, which is a quasi-judicial rather than a legislative body, must have before it a case or controversy in which its function is to determine particular rights, duties and obligations. *Standard Lime and Refractories Company v. Department of Environmental Resources, supra,* and *Sunbeam Coal Corporation v. Department of Environmental Resources, supra.* We believe that the decision in *Man O'War Racing Association v. State Horse Racing Comm., supra,* also supports this conclusion in that the appealable decision in that case was a judicial one—the denial of a horse racing license.

Appellants claim that their property rights are substantially affected by the DER's conclusions in that their rights to federal funds for an interceptor system have been precluded by DER's action. First, it is not clear that this is so since if appellants do decide to make an application for an individual interceptor system to serve the municipality of Lower Moreland Township, it may be that they will be able to demonstrate that their proposal is more cost effective on an item by item basis than the spray irrigation concept subscribed to by the DER, and therefore, eligible for federal funding. Second, we are not at all certain that appellants have such a right or entitlement to federal funds for an interceptor system that it can be considered a property right or privilege that should be protected by this board's review of a governmental policy decision prior to specific enforcement of that decision.

The practical situation here is that Lower Moreland Township and Abington Township spent a good deal of money developing an interceptor proposal that was not funded by EPA in the final construction stage, but was returned to the state for study on a regional basis. The state's study has resulted in the conclusion that another type of regional system should be built. Lower Moreland and possibly Abington Township prefer the interceptor system for cost and development reasons. They have not yet developed specific proposals for their communities and now feel they are being coerced into building a different kind of system. The fact remains they have not yet been coerced. Although they have been asked by Dr. Goddard, Secretary of the DER, (letter of March 22, 1978) to cooperate in preparing applications for a joint regional spray irrigation system, they do not have to do that. Although the DER has moved to implement the conclusions of its study, it has done nothing to force the municipalities to build a spray irrigation system. There is no question that appellants are forced to make a difficult political choice between whether to go along with the state preference for a spray irrigation system, or whether to pursue their own preference for an interceptor system. Nonetheless, we believe they may be required to make that choice before the board may be called upon to make a judicial determination as to the correctness of the DER's policy.

Governmental entities are entitled in the proper exercise of their duties to come to policy conclusions and thereafter to set about to implement those conclusions by specific actions. Undoubtedly those conclusions will not be popular with everyone. But the mountainous litigation that could result from treating a study such as the Pennypack Study as a reviewable decision is brought into focus by the prospect, alluded to at oral argument, of the board's reviewing the conclusions that the DER may reach in the COWAMP Studies that have been going on since 1972 in Pennsylvania. These are regional studies aimed at determining a water policy program for specific regions of the state.[2] The studies have many participants representing interested groups in the particular regions. Presumably the conclusions that are

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2. These studies are authorized under §4 of The Clean Streams Law, which provides in relevant part:

> "(b) The board (now DER) shall have the power and its duty shall be to:
>
> * * *
>
> "(2) Establish policies for effective water quality control and water quality management in the Commonwealth of Pennsylvania and coordinate and be responsible for the development and implementation of comprehensive public water supply, waste management and other water quality plans."

finally reached by the DER in these studies after years of public meetings and project studies could be said to "affect" many persons or municipalities within the regions. However, the prospect of the board's reviewing these studies as to the accuracy of the conclusions reached is an appalling one that would surely slow government action to below the present snail's pace. Appellants argue that the board would not have to review the entire study in this case but only specific untenable conclusions such as the availability of land and the conclusion that spray irrigation is more "cost effective" than interceptors. We fail to see how the latter does not entail review of the entire study since that seems to have been the question posed by the study and the focus of all investigations and comments.

Return of the 1973 Permit and Grant Applications

We believe that the return of the applications for a permit and federal funding submitted to the DER by the Lower Moreland Township Authority and Abington Township in March 1973 does constitute a decision of the DER which is appealable to this board. However, the pleadings filed with the board including the admissions filed by Lower Moreland Township and the Lower Moreland Township Authority in appellant's answer to the DER's motion to dismiss show that as a matter of law the DER acted properly when it returned the applications and therefore we hold that the appeals therefrom must be dismissed. See *Summerhill Bor. v. Commonwealth, Department of Environmental Resources*, ___Pa. Commonwealth Ct. ___, 383 A.2d 1320 (1978), wherein the Commonwealth Court held that the Environmental Hearing Board properly granted summary judgment where the record revealed no dispute as to any material fact.

The EPA by letter dated September 18, 1974, refused to approve the Lower Moreland Township, Abington Township sewage project described in the March 1973 applications for fiscal year 1975 funding because the project was inconsistent with a separate sewage treatment project proposed by Bryn Athyn Borough in the same Pennypack Creek Watershed. The EPA rejection prompted the DER to establish a task force to study the sewerage projects proposed for the watershed and determine the most cost effective system on a regional basis. DER contracted with Chester Betz Engineering to perform engineering services for it in the task force. Representatives of Lower Moreland Township, the Lower Moreland Township Authority, Abington Township and Bryn Athyn Borough participated. On November 15, 1977, three years after the creation of the task force, the DER published the results of the study, i.e. the Pennypack Study. Understandably, the 1973 applications remained dormant while the study was conducted. On December 14, 1977, the DER returned the 1973 permit and grant applications under cover of a letter which reads as follows:

> "Your Step III application for a federal construction grant and Permit Application . . . were received by the Department in February, 1973. As a result of the evaluations which have been undertaken since that time for the development of a wastewater management program for the Central Pennypack Watershed, your applications are now considered to be out of date. Therefore, we are hereby returning your applications."

There is no relief that the board can give to appellants through the vehicle of an appeal of the return of these applications. The DER cannot approve the applications in their present outdated form as they do not comport with several DER and EPA criteria that have been enacted since 1973. For instance, under 25 Pa. Code §103.2 and 103.3, which were amended in April of 1977, a project plan must be developed "that demonstrates the need for such facilities, and by systematic evaluation of feasible alternatives, determines the most cost-effective means of meeting established effluent requirements and water quality goals, while recognizing environmental and social considerations." EPA's new requirements would also have to be met, see Regulation 103.3(a). EPA memorandum 78-9 requires the study of alternatives as well as the investigation of on-lot treatment where feasible. Lower Moreland Township acknowledges that certain "minor" changes in the 1973 application would be required to update it. It also indicates that it may wish to alter that proposal in some manner based on current statistics and projections.

Further, because of the EPA action, no funds from the fiscal year 1975 construction grant priority list were ever obligated by the DER for the Lower Moreland Township, Abington Township project, and all the funds from fiscal year 1975 have been spent. There is therefore no action that this board could take on the 1973 grant application which would secure federal funds.

Thus we find that because of the obsolescence of the aforesaid permit and grant applications, the DER's decision to return the applications was proper and appellants must re-apply for a sewage treatment plant permit and federal funding assistance.

The 1978 Priority List

We are also of the opinion that the DER's listing of the Central Pennypack area in the 1978 priority list submitted to the EPA is not appealable as it does not affect the rights of appellants. Chapter 103 of the DER's regulations require the DER to prepare and submit to the EPA an annual priority list of sewerage projects which the DER expects to be eligible for federal funding assistance during the following fiscal year. The 1978 fiscal year priority list contains, among other projects, the Central Pennypack area. Neither the placing of a project on the priority list or the approval of the list by the EPA assures that a project will receive federal funds as each project is evaluated separately on the merits of its application for a permit to construct a sewerage system and on the merits of its application for federal funding for the system. Projects which are determined to

be ineligible for federal funding are dropped from the list and the funds are allocated to other projects further down the priority list.

In this instance, the Central Pennypack area is presently ineligible for federal assistance as the municipalities have not submitted either an application for a permit to construct any sewerage system or an application for federal funds. We therefore fail to see how appellants' rights or privileges are affected by the development of the priority list. While appellants may be entitled at some point to demonstrate that their particular approach to sewage treatment should be approved and certified by the DER to the EPA for funding, we believe they must go to the trouble of preparing a specific proposal in order to be entitled to litigate that question.

In summary, these appeals have been filed because appellants disagree with the recommendations stated in the DER-sponsored Pennypack Study. However, the DER has not attempted to implement these recommendations either by requiring appellants to comply therewith or by denying applications for permits or federal grants. Until or unless the DER takes some action to compel appellants to construct a sewerage project in accordance with the recommendation of the study, the appellants remain free to make application for the project they contend is most cost effective and to make application for federal grant assistance for that project. Thus appellants are not aggrieved by the publication of the Pennypack Study and the DER's motion to dismiss must be granted.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board lacks jurisdiction over an appeal from the publication of the study titled "Conclusions, Wastewater Management Study of the Central Pennypack" as the publication is not a final action of the DER which has adversely affected appellants in a legally cognizable manner.

2. The Environmental Hearing Board has jurisdiction over the appeal from the return by the DER of applications for a permit and federal construction grants filed with the DER in March of 1973, as the return of the applications constituted a decision of the DER adversely affecting the Lower Moreland Township Authority and Abington Township.

3. The DER acted properly when it returned the March 1973 applications for permit and construction grants because the applications do not comport with present regulatory requirements.

4. The DER acted properly when it returned the 1973 applications for construction grants because the funds from which the applications must be funded, i.e. the fiscal year 1975 construction grants, were previously obligated to other projects.

5. The Environmental Hearing Board lacks jurisdiction over the appeal by appellants from the listing by the DER of the Central Pennypack area in the 1978 priority list submitted to EPA as the listing is not a final action of the DER which adversely affects the rights of appellants.

O R D E R

AND NOW, this 29th day of June, 1978, the appeals of Lower Moreland Township, Lower Moreland Township Authority and Upper Moreland Township at docket nos. 77-199-D, 77-200-D, 77-198-D, 78-050-D and 78-051-D are dismissed in accordance with the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY THOMAS M. BURKE
Member

Member Joanne R. Denworth did not participate in the final decision on this matter.

DATED: June 29, 1978

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the matter of:	:	
DELMAR COWARD and COWARD CONTRACTING COMPANY, INC.,	:	Docket No. 77-032-W
v.	:	Pennsylvania Solid Waste Management Act
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES		

ADJUDICATION

BY THE BOARD: July 10,1978

The following adjudication was drafted by Louis R. Salamon, Hearing Examiner, and is issued by this board with minor modifications.

This matter is before the board on an appeal filed by Delmar Coward (Coward) from an order issued to Coward and Coward Contracting Company, Inc., by representatives of the Commonwealth of Pennsylvania, Department of Environmental Resources (DER).

Under the terms of this order, Coward and Coward Contracting Company, Inc., were directed to cease the operation of a landfill situate in the City of Lower Burrell and the Township of Upper Burrell, Westmoreland County, Pennsylvania, and to close said landfill pursuant to the applicable rules and regulations of DER.

The principal issue raised by Coward in this matter is that DER engaged in arbitrary and discriminatory enforcement of the Pennsylvania Solid Waste Management Act , Act of July 31, 1968, P.L. 788, *as amended*, 35 P.S.§ 6001, *et seq.* , and the rules and regulations adopted pursuant thereto, against him.

The hearing on this appeal was held on July 7 and July 8, 1977, before Board Chairman Paul E. Waters, and on September 2, 1977, before Hearing Examiner Louis R. Salamon.

FINDINGS OF FACT

1. Coward has, since the late 1960's, operated a landfill situate in the City of Lower Burrell and the Township of Upper Burrell, Westmoreland County, into which solid waste has continually been deposited.

2. Leachate is an industrial waste which is commonly generated in the course of the operation of landfills. Leachate is generated in a landfill when surface water or groundwater is introduced into the solid waste which has been deposited therein. The presence of this water, combined with the solid waste, causes a decomposition of the solid waste. When the land upon which the landfill is situate cannot hold the leachate, it is discharged from the landfill.

3. The generation of leachate from the Coward landfill has been a continuous problem since the landfill was first operated.

4. On February 20, 1971, Coward Contracting Company applied to the Bureau of Water Quality Management of DER for a permit to construct facilities to treat industrial wastes, including leachate, which were generated from said landfill and to discharge industrial wastes, to be treated in said facilities, to the waters of the Commonwealth, to-wit, an unnamed tributary to Chartiers Run.

5. After several amendments to this application, DER issued a water quality management permit to Coward Contracting Company on June 21, 1972, under the terms of which Coward Contracting Company was permitted to construct said treatment facilities.

6. On a date prior to July 25, 1972, Coward and/or Coward Contracting Company applied to the Division of Solid Waste Management of DER for a permit, pursuant to the Pennsylvania Solid Waste Management Act, *supra*, to operate said landfill.

7. On July 25, 1972, DER, by its Chief of the Division of Solid Waste Management, informed Coward in writing that his design plans and operational plans for said landfill were in order, that he could continue to operate said landfill consistent with those plans and that no solid waste management permit would be issued to him until the industrial waste treatment facilities (to which reference has been made previously) were constructed and in satisfactory operating status.

8. Thereafter, said industrial waste treatment facilities were constructed and placed in operation.

9. On June 3, 1973, Thomas Proch, an experienced and qualified aquatic biologist employed by DER, conducted a chemical and biological survey of the unnamed tributary to Chartiers Run into which the treated industrial waste from the Coward landfill was being discharged, of Chartiers Run at a

point upstream from said unnamed tributary and of Chartiers Run at several points downstream from the confluence of Chartiers Run and said unnamed tributary. His purpose for conducting this survey was to assess the effect of the discharge from said landfill upon said unnamed tributary and upon Chartiers Run.

10. On June 3, 1973, the quality of the water upstream of said unnamed tributary was excellent and a great many invertebrate organisms were present therein. On June 3, 1973, said unnamed tributary was grossly polluted. It was devoid of most aquatic life except for a veritable million blood worms, which are an indication of the presence of high organic loading in said water. On June 3, 1973, Chartiers Run, to a point approximately two miles downstream from the confluence of Chartiers Run and said unnamed tributary, was polluted, contained only blood worms and the rocks contained therein were coated with a bacterial slime growth, which was an indication of the presence of organic materials therein.

11. On January 15, 1974, Mr. Proch again conducted a chemical and biological survey of said waters using the same techniques and sampling stations as he used on June 3, 1973. The findings as the result of this survey were identical to the findings obtained in said earlier survey.

12. Inspections at the Coward landfill performed on January 15, 1974, February 14, 1974, and March 20, 1974, by James J. Brahosky, an environmental protection specialist employed by DER, disclosed discharges of leachate from the treatment facility at the landfill to said unnamed tributary.

13. On April 16, 1974, DER, by an assistant attorney general employed by DER, sent a writing to Coward in which it was provided that Coward was not adequately treating the leachate generated from said landfill, that the approval for operation of said landfill was revoked and that said landfill should be closed.

14. Between April 24, 1974, and October 22, 1975, Mr. Brahosky inspected the Coward landfill on eleven occasions. On the occasion of each such inspection, leachate was being discharged from the landfill without being treated in the treatment facility. Between November 1974, and October 1975, the treatment facility was not totally operative. On many of the inspection dates, violations of the Pennsylvania Solid Waste Management Act, *supra*, and of the rules and regulations adopted pursuant thereto, in addition to those which related to leachate pollution, were apparent.

15. By reason of the concern of DER with regard to the discharges of leachate from the Coward landfill to the waters of the Commonwealth, there were meetings between the parties. On February 4, 1976, DER and Coward entered into a consent order and agreement. In this consent order and agreement, the parties agreed to certain facts, described in pertinent part, as follows:

A. Coward was discharging or permitting the discharge of inadequately treated industrial wastes into the waters of the Commonwealth in violation of various sections of The Clean Streams Law , the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et. seq.* These discharges constituted "pollution" as that term is defined in The Clean Streams Law , *supra*, and a public nuisance.

B. The industrial wastes (leachate) treatment facility at the Coward landfill had not been totally operative, and was not being operated in compliance with The Clean Streams Law , *supra*.

C. DER was authorized, pursuant to Section 605 of The Clean Streams Law , *supra*, 35 P.S. §691.605 to request this board to assess civil penalties against Coward for his violations of said statute.

D. DER was authorized to revoke the water quality management permit, previously issued to Coward, by reason of these repeated violations.

E. Coward was willing to take all necessary steps to solve said pollution problems at his landfill so as to permit the continued operation thereof.

In this consent order and agreement, the parties agreed, in pertinent part, as follows:

A. Coward was to immediately retain a mutually acceptable engineering firm to perform a thorough study as to the leachate problem at said landfill.

B. The engineering firm so retained was to submit the results of its study and its recommendations to the Bureau of Water Quality Management of DER, in Pittsburgh, by June 1, 1976.

C. DER, by its said Bureau, was to review said study and recommendations and report to Coward and/or his engineering firm as to the acceptability of said recommendations, as to the acceptability of a required time schedule for implementation of the recommendations and as to whether it would be necessary for Coward to submit to DER an application for a new water quality management permit or for an amendment to the existing permit.

D. Coward was to immediately take all steps necessary to cause the existing treatment facility to operate at its maximum efficiency. Coward was to also immediately submit weekly operational reports to DER with regard to said treatment facility.

E. Coward was to disclose to DER which persons and entities, including municipalities, who or which utilized said landfill, information as to the aerator at said treatment facility and information as to landfill employees.

F. DER was to refrain from revoking said water quality management permit for said existing treatment facility so long as Coward was in compliance with all responsibilities contained in said consent order and agreement.

G. During the life of said consent order and agreement (February 4, 1976, to June 30, 1976) DER was to forego the institution of any legal action whatsoever against Coward, assuming that Coward was properly performing his obligations under said consent order and agreement.

H. If Coward failed to comply with any paragraph of said consent order and agreement, DER was free to pursue any available legal action, and, Coward would be obliged to pay a civil penalty in the sum of $100.00 per day for each day of such failure to comply.

I. Coward waived its right to appeal from said consent order and agreement.

16. During inspections at the Coward landfill on April 5, 1976, May 20, 1976, and May 28, 1976, by Mr. Brahosky, the following conditions and/or problems were observed:

A. April 5, 1976

(1) Insufficient cover on solid waste was causing the breeding of flies.

(2) The design plan for the landfill as it particularly related to cell construction drains and diversion of surface water from the landfill were not being followed.

(3) Some leachate was bypassing the treatment facilities and being discharged directly to the waters of the Commonwealth.

(4) Large accumulations of litter were present.

(5) There was insufficient amounts of soil placed over the solid waste as daily cover.

(6) Final cover was unsatisfactory.

(7) Bulky waste was improperly deposited.

(8) Revegetation procedures were not being followed.

B. May 20, 1976

(1) There was exposure of solid waste on the slope above a treatment pond, which slope was not uniform in grade.

(2) There was insufficient cover over bulky waste.

(3) Litter was present.

(4) There was inadequate diversion of surface water.[1]

C. May 28, 1976

(1) to (4) all conditions as present and noted in the inspection of May 20, 1976, were still present and were not corrected or abated.

17. Alvin Brown, an experienced environmental health technican employed by the Bureau of Water Quality Management of DER, conducted approximately ten inspections of the Coward landfill. On May 5, 1976, he collected a sample of the effluent from two four-inch plastic pipes through which the discharge from the final settling pond of the treatment facility flowed on its way to the waters of the Commonwealth. On that same date he collected a sample of the influent to the treatment facility and he collected a sample of the pond influent. These samples were delivered by Mr. Brown to the DER laboratory in Pittsburgh for analyses.

18. These samples were analyzed at the DER laboratory in Pittsburgh on June 8, 1976. The analyses of these samples confirmed the finding as contained in the consent order and agreement between DER and Coward that Coward was discharging or permitting the discharge of inadequately treated industrial wastes into the waters of the Commonwealth.

19. By reason of the continued violations of the Pennsylvania Solid Waste Management Act and The Clean Streams Law which were observed at the Coward landfill in April and May 1976, and, *inter alia* by reason of the fact that the engineering firm had not submitted the results of its study and recommendations to DER by June 1, 1976, as required under the consent order and agreement of February 4, 1976, there was a colloquy and an exchange of letters between counsel for DER and counsel for Coward in June, 1976.

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[1]Mr. Brahosky indicated in the written report of his inspection of May 20, 1976, that if the conditions which he found to be present on said date were not remedied by May 28, 1976, he would institute summary criminal charges against Coward.

20. On June 28, 1976, counsel for DER wrote to counsel for Coward and stated that DER would not institute enforcement action aganist Coward for violations of the Pennsylvania Solid Waste Management Act if Coward would act quickly to correct the violations observed. In this letter, counsel for DER advised counsel for Coward that the landfill would be inspected after June 30, 1976, to determine if, in fact, Coward had covered, graded and revegetated the outslope area. Counsel also suggested that there be a meeting between the parties on July 16, 1976.

21. The engineering firm retained by Coward pursuant to his obligation under the consent order and agreement of February 4, 1976, was NIRA Consulting Engineers (NIRA). In April, 1976, representatives of NIRA visited the Coward landfill and studied the existing industrial wastes (leachate) treatment facility. These representatives also studied the plans for said facility which had been submitted to DER together with Coward's original application for said water quality management permit.

22. NIRA concluded that the existing industrial wastes (leachate) treatment facility was incapable of causing the leachate generated in the Coward landfill to be effectively treated. It was the further conclusion of this firm that the mechanism by which the leachate was collected so as to cause it to flow to the treatment facility was inadequate.

23. NIRA considered several alternatives to abate the leachate discharge problem at the Coward landfill. It was the recommendation of this firm that the most feasible solution to this problem was the improvement and modification of the existing treatment facility by, *inter alia*, installing devices where there would be continuous mixing of the lime which had to be introduced into the leachate effluent in order to increase the pH of the effluent so as to precipitate the heavy metals out of the effluent and installing six hundred to seven hundred feet of underdrain tile to collect the leachate and to convey it to the treatment facility.

24. The report and study of NIRA Consulting Engineers in which said recommendations were contained was sent to counsel for DER on June 29, 1976.

25. On July 9, 1976, Mr. Brahosky conducted an inspection at the Coward landfill and determined that "the outslope was not completely covered, graded and reseeded as agreed upon". As the result of this determination, he filed seventeen summary criminal charges against Coward shortly after July 9, 1976.

26. On or about July 16, 1976, various representatives of DER met with Coward, his counsel and his engineer.

27. Although Coward indicated to his engineers and to the various representatives of DER that he was willing to cause the recommendation of his engineers to be implemented, he emphatically stated at said meeting that he would not begin such implementation unless DER agreed to withdraw the seventeen summary criminal charges which were then pending against him. DER declined to withdraw said criminal charges.

28. On August 16, 1976, DER, by its chief of the Division of Solid Waste Management, reissued an order to Coward and Coward Contracting Company, Inc. In this order, DER made findings, *inter alia* , as follows:

A. Coward and his wife owned the land upon which the Coward landfill is situate, and Coward Contracting Company, Inc., operated said landfill.

B. Although Coward and his corporation received DER approval in 1972 to operate said landfill, notwithstanding the fact that no permit was ever issued for the operation thereof pursuant to the Pennsylvania Solid Waste Management Act, such approval was revoked in April 1974.

C. DER had the authority to order Coward to cease operation of said landfill by reason of the fact that no solid waste permit was in existence.

D. Numerous violations of the Pennsylvania Solid Waste Management Act and of the rules and regulations adopted pursuant thereto were found at said landfill by DER personnel between April 16, 1974, and July 8, 1976.

E. DER issued a water quality management permit to Coward Contracting Company on June 21, 1972, under the terms of which said Company was authorized to discharge treated industrial wastes into an unnamed tributary of Chartiers Run.

F. Leachate, an industrial waste, is generated from said landfill and flows from said landfill to said unnamed tributary.

G. Coward was discharging or permitting the discharge of inadequately treated industrial wastes into the waters of the Commonwealth in excess of the effluent limitations in its said water quality management permit, and in violation of various sections of The Clean Streams Law . These discharges constituted "pollution" as that term is defined in The Clean Streams Law ; they created a public health hazard; they constituted a public nuisance.

H. The industrial wastes (leachate) treatment facility at said landfill was not totally operative at various times from and after November 1974.

Under the terms of this order, Coward was directed to submit to the Division of Solid Waste Management of DER within forty-five days, an updated and revised solid waste application and design plan. Furthermore Coward was directed to submit to the Bureau of Water Quality Management of DER within forty-five days, an application for such revisions or modifications to said water quality management permit as were necessary to cause the discharge from said treatment facility to be in full compliance with The Clean Streams Law, the rules and regulations adopted pursuant thereto and the terms of said water quality management permit. Finally, Coward was directed to deposit a cash bond in the total amount of $6,346.45 in an escrow savings account within thirty days.[2]

29. Neither Coward nor Coward Contracting Company, Inc., filed an appeal from the order of August 16, 1976.

30. Mr. Brahosky conducted inspections at the Coward landfill on October 4, 1976, and on February 9, 1977. During the course of the inspection of October 4, 1976, he reported a discharge of inadequately treated leachate to the waters of the Commonwealth, a need for additional soil cover, a need for reseeding of the outslope area and a need for improved erosion control devices. During the course of the inspection of February 9, 1977, he reported a discharge of inadequately treated leachate to the waters of the Commonwealth and exposed refuse at the working face, although weather conditions affected covering.

31. On February 9, 1977, Mr. Brown conducted an inspection at the Coward landfill. During the course of this inspection, he saw that the aerator and the lime mixing tank, components of said treatment facility were not in operation. On that same date, he collected a sample of the effluent from two four-inch plastic pipes through which the discharge from the final settling pond of the treatment facility flowed on its way to the waters of the Commonwealth and he collected a sample of the pond influent. These samples were delivered by Mr. Brown to the DER laboratory in Pittsburgh for analyses.

32. These samples were analyzed at the DER laboratory in Pittsburgh on February 10, 1977. The analyses of these samples confirmed all earlier findings

[2]The bond requirement was imposed upon Coward starting with 1973 to insure the maintenance and operation of said treatment facility.

that the industrial wastes passing through the treatment facility were not being adequately treated in that facility and that Coward was discharging or permitting the discharge of inadequately treated industrial wastes to the waters of the Commonwealth.

33. Neither Coward nor Coward Contracting Company, Inc., complied with the provisions contained in the order to them dated August 16, 1976, to and including March 24, 1977. Furthermore on March 24, 1977, neither Coward nor Coward Contracting Company had applied to DER for a permit to operate the Coward landfill pursuant to the Pennsylvania Solid Waste Management Act .

34. On March 24, 1977, DER, by its chief of the Division of Solid Waste Management and by its Pittsburgh Regional Engineer of the Bureau of Water Quality Management, issued the order to Coward which is the subject matter of this appeal by Coward.

35. In this order of March 24, 1977, findings of fact were made in which the entire history of the course of dealings between Coward and DER were recited. Under the terms of this order, Coward and said corporation were directed to cease operating the Coward landfill, to refrain from depositing or permitting the depositing of solid wastes at said landfill, to notify their customers with regard to the closing of said landfill and to close said landfill in accordance with the requirements of Chapter 75 of the rules and regulations of the DER.

36. Coward timely perfected the instant appeal to this board.

37. On June 1, 1977, Mr. Brahosky conducted an inspection at the Coward landfill. On said date the landfill was in operation, the treatment facility was not operating and untreated leachate was present on the site.

38. On June 1, 1977 Mr. Brown conducted an inspection at the Coward landfill. On said date the landfill was in operation and solid waste was being deposited therein. On that same date he collected samples from the same two four-inch plastic pipes from which he had earlier sampled and of the pond influent. These samples were delivered by Mr. Brown to the DER laboratory in Pittsburgh for analyses.

39. These samples were analyzed at the DER laboratory in Pittsburgh on June 2, 1977. The analyses of these samples confirmed all earlier findings that the industrial wastes passing through the treatment facility were not being adequately treated in that facility and that Coward was discharging or permitting the discharge of inadequately treated industrial wastes to the waters of the Commonwealth.

40. On June 6, 1977, Mr. Proch again conducted a chemical and biological survey of the waters of the Commonwealth at points in the same general area as were his previous survey points. This survey revealed that Chartiers Run immediately above its confluence with the unnamed tributary into which industrial waste from the Coward landfill flowed had excellent water quality, that said unnamed tributary was grossly polluted and that Chartiers Run was polluted to a point approximately two miles downstream from its confluence with said unnamed tributary.

41. During the course of the hearing in this matter, Coward made the following admissions:

A. The industrial waste treatment facility at the Coward landfill, as it was originally designed and constructed, does not satisfactorily treat leachate originating in said landfill.

B. He is responsible for the operation of said industrial waste treatment facility.

C. He is not utilizing said industrial waste treatment facility because it would not effect proper treatment of leachate.

D. He has not modified said facility in an attempt to make it useful.

42. When the Pennsylvania Solid Waste Management Act became effective, there were seven hundred to eight hundred landfills in operation in Pennsylvania. There have been approximately three hundred landfills closed as the result of legal action instituted by DER.

43. There were eleven landfills existing in Westmoreland county at the time when the hearing in this matter was held. Six of these landfills were being operated without permits issued pursuant to the Pennsylvania Solid Waste Management Act and five of these landfills were being operated with such permits.

44. Although the Coward landfill is not the only landfill in Westmoreland county which is operating with violations of either the Pennsylvania Solid Waste Management Act or The Clean Streams Law present, the Coward landfill has the most serious leachate discharge problem of all such landfills.

45. DER, in issuing the order of March 24, 1977, which is the subject matter of this appeal, was motivated by the lack of effort on the part of Coward

to abate the leachate discharge problem from his landfill.

46. DER made many efforts to avoid the issuance of an order to Coward to close his landfill. It was only after those efforts did not produce a solution to the leachate discharge problem at the Coward landfill that the order of March 24, 1977, was issued.

DISCUSSION

As a basic proposition, it is clear that DER has the valid, legal right to order the operator of a landfill who does not have a permit to operate said landfill as required by Section 7(a) of the Pennsylvania Solid Waste Management Act , *supra*, 35 P.S. § 6007(a), to cease operation of that landfill and to follow prescribed procedures for termination of such landfill operation. *Commonwealth of Pennsylvania, Department of Environmental Resources v. Delenick*, 24 Pa. Cmwlth. 577, 357 A.2d. 736 (1976); *Daniel K. and Doris J. Jahnke, d/b/a Tri-County Disposal v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 77-035-W, issued September 16, 1977, *and Ronald Brown, d/b/a Ron Brown Landfill v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 73-370-C, issued December 30, 1974.

As a basic proposition, furthermore, it is clear that DER may validly order the operator of a landfill from which leachate is being discharged to the waters of the Commonwealth to abate or remove the leachate, which is a nuisance and a health hazard. *John T. Ryan v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 30 Pa. Cmwlth. 180, 373 A.2d 475 (1977).

Coward did not seriously challenge the basic factual and legal basis which formed the foundation for the order from DER to him to cease operation of his landfill and to close it in a proper manner.

His challenge to this order is upon constitutional grounds. He claims that DER engaged in a selective and, therefore, arbitrary and discriminatory enforcement proceeding against him in violation of his right to equal protection of the laws, as granted by the Fourteenth Amendment to the United States Constitution. U.S.C.A., Const. Amend. 14.

It is well settled that the Equal Protection Clause in the United States Constitution not only proscribes the enactment of discriminatory laws, but also the discriminatory enforcement of laws which are fair on their face. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1896); *Commonwealth v. James Henry Lewis*, 443 Pa. 305, 279 A.2d 26 (1971);

Frantz v. Baldwin Whitehall School District, 8 Pa. Cmwlth. 639 (1973), aff'd. 460 Pa. 192, 331 A.2d 484 (1975).

However, one who seeks to overturn the action of an enforcement agency on the basis that such action was selective and discriminatory has the burden of proof; that burden is a heavy one. *United States v. Malinowski*, 347 F. Supp. 347 (E.D. Pa. 1972), aff'd 472 F.2d. 850 (3rd Cir. 1972), cert. den. 93 S. Ct. 2164, 411 U.S. 970, 36 L. Ed. 2d 693 (1973); *Frantz v. Baldwin-Whitehall School District, supra.*

It is not all selective enforcement that is forbidden, but that which is based upon some unjustifiable standard such as race, religion or other arbitrary classification. *Oyler v. Boyles*, 368 U.S. 448, 456, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962); *United States v. Malinowski, supra; Commonwealth v. Walters*, __Pa. Superior Ct.___, 378 A.2d. 1232, 1234 (1977).

In his attempt to sustain this heavy burden, Coward testified that DER or its predecessor in duties, the Pennsylvania Department of Health had been prosecuting him for eight years for various things, while failing to prosecute other landfill operators. He pointed to the fact that he would have implemented plans to abate the leachate problem at his landfill as of July 1976, if DER had agreed to withdraw seventeen criminal charges which were then pending against him. He argued that he had spent a great deal of money with regard to the operation of this landfill, including the expenditure of a substantial sum on industrial wastes (leachate) treatment facilities, all of which was ignored by DER in its attempt to drive him from business.

During the cross examination of several of the witnesses called by DER, Coward was able to establish that there were five other landfills in Westmoreland County, the operators of which did not have a permit as required under the Pennsylvania Solid Waste Management Act . He was also able to establish that there were other landfills in Westmoreland County, permitted or unpermitted, which were being operated in violation of the Pennsylvania Solid Waste Management Act and The Clean Streams Law .

We hold that Coward has failed to sustain his burden of proof in this matter. There are numerous reasons for this holding. In the first place, Coward did not establish that DER had never instituted proceedings to close any other landfill in Westmoreland County and he provided no proper proof that DER had failed to institute other types of enforcement activities against

other landfill operators in Westmoreland County.

In the second place, even if Coward had proved that DER had failed to institute enforcement activities against other landfill operations which were in violation of the Pennsylvania Solid Waste Management Act and The Clean Streams Law or even if Coward had proved that DER was lax in its enforcement activities against such other operations, it is well settled that proof that enforcement of the law is lax or that other offenders may go free is not sufficient to establish an impermissible exercise of discrimination in the enforcement of the law. *Oyler v. Boyles, supra; United States v. Malinowski, supra; The Kroger Co. v. O'Hara Township,* 243 Pa. Superior Ct. 479, 366 A.2d. 254, 256 (1976); *Philadelphia Chewing Gum Corporation, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources,* ___Pa. Cmwlth. _____, ____ A.2d_____, Issued May 24, 1978.

Thirdly, Coward utterly failed to prove that a ~~conscience~~ policy of enforcement was not justified in this case. From as early as June 1973, Coward was discharging or permitting the discharge of leachate from his landfill to the waters of the Commonwealth, causing these waters to be grossly polluted. As such, Coward was in clear violation of The Clean Streams Law. Furthermore beginning not later than January 1974, Coward was in consistent violation of various provisions of the Pennsylvania Solid Waste Management Act in the operation of his landfill. These violations were clearly proved by DER.

Although DER advised Coward in April 1974, that the approval which DER had earlier granted for his operation of the landfill was revoked and that the landfill should be closed, it does not appear that DER actually made any serious attempt to close the landfill by any type of enforcement action at that time.

DER clearly proved that the serious violations of The Clean Streams Law , caused by this leachate discharge continued without abatement by Coward through 1974 and 1975. It would appear that the only action which DER undertook against Coward during this period was a summary criminal prosecution.

On February 4, 1976, DER and Coward entered into a consent order and agreement under the terms of which, *inter alia*, Coward was charged with the responsibility to achieve a satisfactory leachate treatment program. Under

this consent order and agreement, DER agreed to refrain from entering into any enforcement action whatsoever with Coward so long as Coward was in compliance with the terms thereof. It was only after Coward breached that consent order and agreement, five months later, that DER next took enforcement action against him. Such action consisted of the institution of summary criminal proceedings against him (only after Mr. Brahosky gave him advance warning that this was going to happen and the opportunity to avoid such action) and not an order to close his landfill.

Even after Coward flatly refused to implement a plan devised by his own engineering firm to modify existing leachate facilities, such refusal coming during the course of a July 1976, meeting with DER, DER still did not institute action designed to close this landfill. Instead DER issued a perfectly reasonable order to Coward under the terms of which Coward was directed to revise his solid waste operational and design plans and to submit plans with regard to improving his industrial waste treatment facilities. This order was issued in August 1976, and Coward did not appeal from it.

It was only after Coward took no action to comply with this order of August 16, 1976, that DER issued the closure order, the appeal from which is presently before this board.

Throughout the entire period between June 1973, and June 6, 1977, Coward was operating his landfill in such a manner as to cause him to be in violation of laws designed to protect the health and welfare of the citizens of this Commonwealth.

We are at a loss to determine how DER could have been more patient with Coward. DER gave Coward many opportunities to save his landfill operation from a closure order. Coward utterly failed to take advantage of these opportunities. DER was perfectly justified in issuing the order of March 24, 1977, to Coward. Given the inaction by Coward to which we have addressed ourselves in this discussion, DER could not have done anything less than to order this landfill closed.

DER did not arbitrarily enforce the environmental laws of Pennsylvania against Coward. DER took valid action which it was required to take by virtue of the serious environmental problems which Coward had created and was,

regrettably, perpetuating by his failure to engage in abatement activities. His appeal must be dismissed.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the subject matter of this appeal and over the parties before it.

2. Delmar Coward and Coward Contracting Company, Inc., illegally operate a landfill in the City of Lower Burrell and the Township of Upper Burrell, Westmoreland County, Pennsylvania, in violation of the Pennsylvania Solid Waste Management Act , the Act of July 31, 1968, P.L. 788, No. 241, *as amended*, 35 P.S. § 6001 *et seq.* and The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended* 35 P.S. § 691.1 *et seq.*

3. The order of March 24, 1977, issued to Delmar Coward and Coward Contracting Company, Inc., by the Commonwealth of Pennsylvania, Department of Environmental Resources under the terms of which said parties were directed to cease the operation of said landfill and to close said landfill pursuant to the applicable rules and regulations of the Commonwealth of Pennsylvania, Department of Environmental Resources, was a valid exercise of the statutory authority of the Commonwealth of Pennsylvania, Department of Environmental Resources.

4. In issuing said order to Delmar Coward, the Commonwealth of Pennsylvania, Department of Environmental Resources did not engage in arbitrary, selective and discriminatory enforcement against him in violation of his rights under the Equal Protection Clause of the United States Constitution.

O R D E R

AND NOW, this 10th day of July, 1978, the order of the Department of Environmental Resources issued to Delmar Coward and Coward Contracting Company, Inc., on March 24, 1977, is hereby affirmed and the appeal of Delmar Coward is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

Member Burke did not participate in the decision in this matter.

Dated: July 10, 1978

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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112 Market Street
Harrisburg, Pennsylvania 17101
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COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

v.

JEFFERSON TOWNSHIP

Docket No. 74-161-CP-C

Complaint for Civil Penalty

ADJUDICATION

By Thomas M. Burke, August 17, 1978

This is a civil penalties action brought by the Department of Environmental Resources (DER) requesting that this board assess a civil penalty under Section 605 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.* against respondent, Jefferson Township for noncompliance with two provisions of a DER order issued on April 11, 1974, relating to the treatment of sewage from the Jefferson Estates subdivision in Jefferson Township, Fayette County, Pennsylvania.

The complaint was originally filed against Jefferson Township and Herman Uchelvich (Uchelvich), the developer of the Jefferson Estates subdivision. Hearings on the complaint were held on March 18, 1975, February 24, 1977, and February 25, 1977, before the Honorable Joseph L. Cohen. Subsequent to the hearing on March 18, 1975, and prior to the February 24, 1977, hearing, an agreement was reached between the DER and Uchelvich resulting in the discontinuance of this action as to Uchelvich. The agreement was approved by this board on September 24, 1975. Thus only the liability of Jefferson Township for a civil penalty remains to be determined.

The attorney for Jefferson Township withdrew his appearance in this matter after the March 18, 1975, hearing and since that time the respondent township has been represented *pro se*. The township's defense was presented by Donald Redman, chairman of the Jefferson Township supervisors, who is not an attorney. The DER on July 8, 1977, filed proposed findings of fact, conclusions of law and a post hearing brief. Jefferson Township on July 6, 1977, filed a three-page document titled "Reply".

FINDINGS OF FACT

1. Plaintiff is the Commonwealth of Pennsylvania, Department of Environmental Resources.

2. Respondent Jefferson Township is a second-class township with a 1970 population of 2,095 located in Fayette County.

3. The Jefferson Estates subdivision, a development of single family and multi-family dwellings is located in Fayette County. The Jefferson Estates subdivision was developed by Herman Uchelvich.

4. Herman Uchelvich constructed and operates a sewage treatment plant to serve the Jefferson Estates subdivision. The Jefferson Estates sewage treatment plant was constructed in 1972 without a permit from the DER.

5. On April 11, 1974, the DER issued an order to Jefferson Township and Herman Uchelvich. Paragraph no. 1 of the order provided:

> "1. Jefferson Township and Uchelvich shall, within forty-five (45) days, run or cause to have performed a dye test of all homes in the Jefferson Estates subdivision to determine all of the discharge points receiving the sewage discharges from the various single family and multi-family dwellings in this subdivision. Within fifteen (15) days of the completion of this study, a copy of the results thereof shall be sent to the Bureau of Water Quality Mangement of the Department at 6th Floor Kossman Building, Forbes Avenue at Stanwix Street, Pittsburgh, Pennsylvania, 15222, and to the Bureau of Community Environmental Control, 229 McClellantown Road, Uniontown, Pennsylvania, 15401."

Paragraph No. 4 of the order provided:

> "4. Jefferson Township and Uchelvich shall within sixty (60) days of receipt of this Order, cause Uchelvich's consulting engineer to submit for Uchelvich an application for a permit under The Clean Streams Law to cover all sewer lines tributary to the sewage treatment plant and the sewage treatment plant itself in accordance with requirements of the Department."

6. The April 11, 1974, order was not appealed by either Jefferson Township or Herman Uchelvich.

7. Herman Uchelvich submitted an application to the DER for a permit for the Jefferson Estates sewage treatment plant on March 14, 1972. The application was returned by the DER on March 21, 1972, because of a DER requirement that an applicant be a municipality, a municipal authority, or licensed by the PUC

8. Jefferson Township submitted an application to the DER for a sewage permit on April 10, 1972. Jefferson Township withdrew the application in November 1973.

9. Herman Uchelvich applied to the Pennsylvania Public Utility Commission (PUC) on February 19, 1974, for a certificate of public convenience to operate the Jefferson Estates sewage treatment plant. A certificate of public convenience was issued to Herman Uchelvich on June 25, 1974.

10. On July 30, 1974, Herman Uchelvich reapplied to the DER for a permit to operate the Jefferson Estates sewage treatment plant.

11. On November 25, 1974, the DER issued sewage permit no. 2674404 to Herman Uchelvich for the Jefferson Estates sewage treatment plant.

12. At a March 15, 1974, meeting among representatives of Jefferson Township, Herman Uchelvich and the DER, Donald Redman, chairman of the Jefferson Township supervisors told DER that some of the homes in Jefferson Estates might not be connected to the sewerage system tributary to the Jefferson Estates sewage treatment plant.

13. The April 11, 1974, DER order alleged in its findings of fact that the DER had determined that sewage from some homes in the Jefferson Estates subdivision discharges to on-lot disposal systems, some of which are malfunctioning and some of which discharge to deep mines.

14. The dye testing required by paragraph no. 1 of the April 11, 1974, order had not been done as of February 25, 1977.

15. Inspections conducted of the Jefferson Estates sewage treatment plant by a DER inspector on April 2, 1974, and April 8, 1974, showed the plant to be operating satisfactorily.

DISCUSSION

Sometime during 1972 Uchelvich constructed a sewage treatment plant to dispose of sewage from Jefferson Estates, a subdivision of single family and multi-family dwellings developed by Uchelvich in Jefferson Township, Fayette County, Pennsylvania. For two years the sewage treatment plant apparently operated in various stages of noncompliance with The Clean Streams Law, *supra*. Also, the sewage from some of the residences in the subdivision discharges to on-lot sewage systems, some of which the DER believes to be either malfunctioning or discharging directly to deep mines.

As a response to these sewage problems, the DER, on April 11, 1974, issued an order to Uchelvich and Jefferson Township requiring them to upgrade the treatment capability of the sewage treatment plant, to apply to the DER for a permit for the plant and to connect to the treatment plant homes in the subdivision found to be discharging sewage to malfunctioning septic systems or deep mines. As neither Jefferson Township or Uchelvich appealed the

April 11, 1974, order, its requirements are final and Jefferson Township's obligation to comply therewith cannot be contested in this proceeding. See *DER v. Wheeling-Pittsburgh Steel Corp.* ___Pa.___, 375 A.2d 320 (1977)

The order was issued to Uchelvich because he owns and operates the sewage treatment plant and it was issued to Jefferson Township because the plant is located in Jefferson Township. Section 203 of The Clean Streams Law, *supra*, provides that the DER may order a municipality to abate sewage discharges originating from sources within the municipality.

The DER in this proceeding requests that we assess a civil penalty against Jefferson Township for noncompliance with paragraphs no. 1 and no. 4 of the April 11, 1974, order. Paragraph no. 1 required Jefferson Township and Uchelvich to dye test the sewage systems of homes in the Jefferson Estates subdivision by May 27, 1974, and paragraph no. 4 required Jefferson Township and Uchelvich to submit an application for a Clean Streams Law permit for the Jefferson Estates sewage treatment plant by June 10, 1974.

This board is authorized to assess a civil penalty against a municipality for the violation of a DER order by Section 605 of The Clean Streams Law, *supra*, which states in part:

> "In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued pursuant to this act, the department, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was wilful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000) per day for each violation. In determining the amount of the civil penalty the department 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... "

Application for Permit

Paragraph no. 4 of the April 11, 1974, order required Jefferson Township and Uchelvich to "cause Uchelvich's consulting engineer to submit for Uchelvich an application for a permit under The Clean Streams Law to cover all sewer lines tributary to the sewage treatment plant and the sewage treatment plant itself in accordance with requirements of the Department". The application was required to be submitted within 60 days of receipt of the order, approximately June 15, 1974.

The application for the permit was submitted by Uchelvich on July 30, 1974.[1] The DER asks that a civil penalty be assessed against Jefferson Township because the

1. The DER issued permit no. 2674404 for the Jefferson Estates sewage treatment plant on November 25, 1974, in response to the Uchelvich application.

application was submitted six (6) weeks after the date required by the order and because Jefferson Township did not assist Uchelvich in submitting the permit application.

We hold that it would not be appropriate to assess a civil penalty against Jefferson Township for the alleged violation of paragraph no. 4 of the order. We are unaware of what actions Jefferson Township could have taken after the issuance of the order to cause the application to be submitted six (6) weeks sooner. On February 19, 1974, almost two (2) months prior to the date the order was issued, Uchelvich applied to the Pennsylvania Public Utility Commission for a certificate of public convenience to operate the sewage treatment plant. Until Uchelvich procured a certificate of public convenience, he was not qualified in the eyes of the DER to apply for a sewage treatment plant permit.[2] The certificate was not issued to Uchelvich by the PUC until June 25, 1974, 10 days after the permit application was required to be submitted by the April 11, 1974, order. On July 30, 1974, Uchelvich submitted the permit application to the DER.

There is nothing in the record to suggest what actions Jefferson Township could have taken either to expedite the issuance of the certificate by the PUC or to cause Uchelvich's engineer to submit the application in less than 35 days from receipt of the PUC certificate of public convenience.

It might be argued that Jefferson Township could have expedited the submittal of the application by submitting it in its own name. However, both the DER and Jefferson Township knew prior to the issuance of the order that Uchelvich had applied to the PUC for the certificate of public convenience and thus intended to submit the application in his own name. Further, Jefferson Township had previously submitted an application in its own name and with the approval of the DER withdrew the application in November of 1973.[3]

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2. The DER considers only municipalities, municipal authorities and persons possessing a certificate of public convenience from the PUC qualified to receive a permit for the construction and operation of a sewage treatment plant. The purpose of the policy is to insure the existence of a responsible party to operate the plant.

3."Q. And after fully considering that, is it not a fact that your Department advised the township that they would be permitted to withdraw their application upon making another request to so do?

"A. Yes. I think I wrote a letter requesting whether or not, you know — since enough time had elapsed, whether or not that withdraw request was still valid, whether or not that was still their position.

"Q. So you advised them that if that was still their position, your Department wished to be so advised, and they would be permitted to withdraw their application?

"A. Yes." Notes of Testimony - March 18, 1975, p. 125 lines 1-12.

The DER concurred in the withdrawal apparently because it knew the application would be resubmitted by Uchelvich.

The late submittal of the application did not affect the treatment of sewage. Inspections conducted by a DER inspector of the treatment plant on April 2 and April 8, 1974, dates proximate to the date of the issuance of the order, showed the plant to be operating satisfactorily.

For these reasons, and because Uchelvich has paid a civil penalty as part of the settlement with the DER for the same violation, we decline to assess a civil penalty against Jefferson Township for noncompliance with paragraph no. 4 of the April 11, 1974, order.

As a caveat, we point out that the complaint for civil penalty does not involve any responsibility that Jefferson Township might have had for the apparent inadequate treatment afforded by the sewage treatment plant prior to the issuance of the April 11, 1974, order, but rather involves the responsibility of Jefferson Township for the submittal of an application by a third party for a permit six (6) weeks later than required by a DER order where the third party has previously, as part of a settlement with the DER, paid a civil penalty for the infraction.

Failure to Dye Test

The DER's complaint for civil penalty also requests that we assess a civil penalty against Jefferson Township for failure to comply with paragraph no. 1 of the April 11, 1974, order. Paragraph no. 1 of the order states that:

> "1. Jefferson Township and Uchelvich shall, within forty-five (45) days, run or cause to have performed a dye test of all homes in the Jefferson Estates subdivision to determine all of the discharge points receiving the sewage discharges from the various single family and multi-family dwellings in this subdivision. Within fifteen (15) days of the completion of this study, a copy of the results thereof shall be sent to the Bureau of Water Quality Management of the Department at 6th Floor Kossman Building, Forbes Avenue at Stanwix Street, Pittsburgh, Pennsylvania, 15222, and to the Bureau of Community Environmental Control, 229 McClellantown Road, Uniontown, Pennsylvania, 15401."

The dye test was not performed by either Jefferson Township or Uchelvich.[4] Nevertheless Jefferson Township argues that a civil penalty should not be assessed against it for four (4) reasons:

(1) The April 11, 1974, order was never received by the township.

4. The settlement agreement between the DER and Uchelvich relieved Uchelvich of the responsibility for performing a dye test of the homes in Jefferson Estates.

(2) While Jefferson Township was defending this complaint for civil penalties, which was filed 90 days after the order was issued, it was not required to perform the dye-test.

(3) Jefferson Township had no funds available for performing the dye test.

(4) Jefferson Township had no funds available for installing sewers to connect those residents found to have malfunctioning on-lot systems to the sewage treatment plant; therefore performing the dye test would constitute a useless act.

In answer to Jefferson Township's first argument, the board on February 24, 1977, issued an order granting DER's motion to admit facts not denied pursuant to Pa.R.C.P. 4014.[5] The receipt and genuineness of the April 11, 1974, order was deemed to be admitted by the board's order.

Jefferson Township's second argument is without merit as the filing of the civil penalty complaint did not supercede the requirements of the DER's April 11, 1974, order. Jefferson Township continues to be required to comply with the order.

Although Jefferson Township contends that it had no funds available to perform the dye test, it presented no evidence to substantiate its contention. In fact, no testimony was presented on the cost of performing the dye tests. Further, we disagree with respondent's contention that dye testing to determine the extent of the problem of malfunctioning on-lot sewage systems constitutes a useless act. The proper disposal of sewage is required by law because it is necessary for the protection of the public's health. We have no sympathy with the financial arguments of a municipality which is reluctant to take the steps necessary to determine the magnitude of a nuisance existing within its borders. There are various federal and state grants and loans available to assist municipalities install sewage treatment facilities. In order to become eligible for such programs, Jefferson Township must at a minimum determine the magnitude of the problem. Thus we conclude that Jefferson Township has violated an order of the DER and as a consequence is liable for the assessment of a civil penalty under Section 605 of The Clean Streams Law, *supra*.

In determining the amount of a civil penalty which should be assessed, we have held in prior cases that factors relevant to our consideration are damage or injury to the waters of the Commonwealth, the cost of restoration, including costs to the Commonwealth in the investigation and surveillance of violations, the wilfulness of the violation and the general deterrence of violations by the respondent and others similarly situated. *DER v. Koppers Co. Inc.*, EHB Docket No. 74-270-CP-C (issued March 2, 1977).

5. The DER's motion to admit facts not denied was granted because respondent did not answer the DER's request for admissions within the time required by Pa.R.C.P. 4014. See Opinion and Order dated February 24, 1977, by Member Joseph L. Cohen.

No evidence was presented on harm to Commonwealth waters from malfunctioning on-lot sewage systems or even the magnitude of the problem. The Commonwealth expended no costs on restoration, investigation or surveillance. Thus we do not predicate a civil penalty on those factors.

This board in prior adjudications has analogized the factor of wilfulness to the concept of intent in tort law. See *DER v. Rushton Mining Company*, EHB Docket No. 72-361 (issued March 12, 1976), *DER v. Froehlke*, EHB Docket No. 72-341 (issued July 31, 1973) and *DER v. Trevorton Anthracite Company*, EHB Docket No. 76-116 (issued January 24, 1978). In these cases we have stated that there are different degrees of wilfulness each resulting in a different degree of liability depending on the desire of the party to cause the consequences of its act or its knowledge of the certainty of the act's consequences. In this case, although Jefferson Township unquestionably breached a duty owed to the Commonwealth, we do not believe its inaction was intentional or deliberate in the sense that it intended to cause or continue a public nuisance or that it countenanced the continuance of a public nuisance.

From the record it appears that Jefferson Township's failure to comply with the order resulted from an ignorance of who was responsible for abating the problem rather than an intent to shirk its responsibility. The DER became aware of the problem of malfunctioning on-lot systems because Jefferson Township brought it to their attention at a meeting with the DER on March 15, 1974, presumably because it believed the DER was the agency with the ability to alleviate the problem. Jefferson Township also felt that the responsibility for connecting the homes to the treatment plant was Uchelvich's since he had built and developed Jefferson Estates and the sewage facilities in existence there. The order required both Uchelvich and Jefferson Township to perform the dye test.

What must be appreciated when judging the attitude of Jefferson Township is that this is not an affluent municipality. It is a small community with rather limited resources. It does not have in its employment, as does the DER, county health departments or larger municipalities, persons qualified to perform the dye tests, thus Jefferson Township must contract with an engineering firm to

have this service performed, an expense that Jefferson Township was reluctant to encounter while believing that the dye tests were another's responsibility. The financial status of Jefferson Township was vividly demonstrated when it lost the services of its solicitor for the final two days of hearings in this matter because of its inability to compensate him for appearing. None of the above is, of course, a defense to the requirements of the DER's unappealed order; however, it does mitigate against the assessment of a substantial civil penalty based on the wilfulness of Jefferson Township's inaction.

We believe that the appropriate civil penalty should be one that would assure the performance of the dye tests. We therefore assess a civil penalty of $500.00 payable in sixty (60) days, except that if Jefferson Township performs the dye test in conformance with paragraph no. 1 of the DER's April 11, 1974, order within sixty (60) days, the $500.00 civil penalty will be deemed null and void.

We wish to caution respondent and others similarly situated that the board does not condone the failure by a municipality to comply with valid orders of the DER. We merely hold that, based on the facts of this particular case, we believe the aforesaid to be an appropriate civil penalty.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the persons and subject matter of this case.

2. Section 605 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.* provides that a civil penalty may be imposed upon a municipality for the violation of an order of the DER issued under the authority of The Clean Streams Law.

3. The imposition of a civil penalty for the untimely submittal of a permit application in violation of a DER order is inappropriate where no harm was caused to Commonwealth waters, the application was submitted by a third person, and the municipality was powerless to cause the application to be submitted sooner.

4. Respondent's failure to dye test the sewage facilities in homes in the Jefferson Estates subdivision constitutes a violation of the DER's April 11, 1974, order. A penalty of Five Hundred Dollars ($500.00) payable in sixty (60) days unless the dye test is conducted by that date is imposed for the violation.

O R D E R

AND NOW, this 17th day of August, 1978, in accordance with Section 605 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.605, a civil penalty of Five Hundred Dollars ($500.00) is assessed against respondent, Jefferson Township payable in sixty (60) days except that if Jefferson Township performs the dye tests in conformance with paragraph 1 of the DER's April 11, 1974, order within sixty (60) days of the date of this adjudication, the Five Hundred Dollar ($500.00) civil penalty will be deemed null and void.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

BY: THOMAS M. BURKE
Member

cc: Bureau of Litigation
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DATED: August 17, 1978

pmg

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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LLOYD J. PARSONS and
WAYNE R. & DEBRA A. DUBBS

Docket No. 77-188-D
and
77-189-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and M & H COAL SALES, INC., Permittee

ADJUDICATION

By Joanne R. Denworth, Member, August 17, 1978

Lloyd J. Parsons and Wayne R. & Debra A. Dubbs, who live near the property of M & H Coal Sales, Inc., Permittee, have appealed the Department of Environmental Resources' (DER"s) granting of air quality operating permit no. 48-305-008 for two portable coal crushers owned by the M & H Coal Sales, Inc. The appellants complain of coal dust, which they claim emanates from M & H's operation, particularly from the roadway traffic in and out of the site, and contend that the permit was improperly issued under the department's own rules and regulations. These appeals were consolidated for hearing held April 27, 1978. Appellants appeared *pro se* at the hearing and did a creditable job of presenting their case. However, they did not establish that this permit was improperly granted. On the contrary, it was clear from the evidence that DER had done a thorough and commendable job of responding to appellant's complaints, and had properly exercised its discretion in granting the permit to M & H.

FINDINGS OF FACT

1. On June 21, 1977, M & H Coal Sales, Inc. submitted an application to DER for an air quality permit for the operation of a portable coal crusher.

2. In reviewing this application, the department relied upon the evaluations and observations of several trained investigators.

3. Donald K. Kahler, a department sampling technician, visited the site of the M & H operation approximately 20 times. During these visits, Mr. Kahler

never observed any fugitive emissions from the crusher itself, and never detected dust or fugitive emissions resulting from the crushing operation crossing the boundaries of the property of M & H Coal.

4. Mr. Thomas A. DiLazaro, the District Supervisor of the department's Bethlehem office conducted several on-site inspections of the crushing operation. On none of these inspections did Mr. DiLazaro observe any visible fugitive emissions. He did note, however, some minor emissions from the roadways in the area of M & H Coal.

5. The permit application was reviewed by Gregory J. Matzuk, an air pollution control engineer, who concluded that it comported satisfactorily with 25 Pa. Code §127.22, which describes the information to be presented in air quality permit applications.

6. Because the department had received complaints about M & H from the appellants, it also instituted what Mr. Kahler called the "most extensive" sampling procedure for ambient air quality standards that the department had conducted in this region of the state. The testing consisted of the placing of 10 dustfall collectors and 20 hi-volume samplers.

7. Not one of the 20 hi-volume samples exceeded the secondary standard of 150 micrograms per cubic meter for suspended particulate, and seven of eight of the dustfall jar samples were below the state standard of 42.8 tons per square mile for settleable particulate.

8. Two additional dustfall samples exceeded the state standard. However, Mr. DiLazaro testified that these results were, in his opinion, invalid because microanalysis showed the contents of the jars to have been contaminated by large amounts of non-coal particulate.

9. The sampling was conducted from May 23, 1977, until September 16, 1977, and for this time period, Mr. DiLazaro additionally obtained information regarding the exact number of trucks of raw coal going in varied from 10 per day to 84 per day, on at least forty days during the sampling period, the number of truck loads exceeded 45.

10. Based on these investigations and data, the department reissued the M & H Coal permit for the operation of two coal crushers. The permit contained conditions requiring the covering of all entering and departing trucks with tarpaulins, the use of a street sweeper to clean areas not watered and, most importantly, the limitation of 45 trucks bringing coal into the operation per day.

11. In Mr. DiLazaro's opinion, these special conditions insured that M & H would not create violations of the ambient air quality standards.

DISCUSSION

It was abundantly clear from the evidence presented in this matter that M & H's coal crushers were not causing any violation of particulate standards and that the permit for this operation was properly issued.[1] It is also clear that the dust to which appellants specifically objected was not from the crushing operation itself, but from the trucks coming in and carrying out nonpulverized and pulverized coal. DER did conduct extensive tests near both appellants' houses in order to determine whether the roadway dust to which M & H's trucks were contributing was above allowable levels. None of the high-vol samples exceeded the secondary standard for suspended particulate. The dustfall jar samples demonstrated that dustfall was below the state standards for settleable particulate except for three tests, two of which were contaminated with soluble particulate (coal dust is insoluble) and were therefore invalid. DER conditioned the grant of the permit on requirement that trucks be tarpaulined at all times and limited the number of trucks entering the site to 45 per day.[2] Admittedly these conditions would be useless if there was no threat of enforcement. Since the grant of the permit, there were two observed violations of the tarpaulin requirement by DER personnel and those were acted upon with a letter to M & H. Mr. DiLazaro testified that if the permit conditions were not complied with he would recommend a criminal complaint. We are satisfied that DER's employes intend vigorously to enforce the requirements of the permit and we urge them to do so.

Appellants' contentions as to the inadequacy of DER's testing are simply not well taken. Appellants allege that the testing done at the operation was done during a period of low volume. The test results do not bear this out. The testing was done over a period of time that included high as well as low truck load days, some in excess of the 45 limit set in the permit. Appellants also complain that DER violated the requirement of §139.11(1) which states: "all performance tests shall be conducted while the source is operating at maximum routine operating condition." As the department points out, this provision relates to testing for "performance" of

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1. M & H was applying for renewal of a permit; hence DER was able to observe the coal crushers in operation. M & H's earlier permit was for one coal crusher; however, it has since acquired a second coal crusher and both were permitted under the renewal. The second crusher cannot increase the volume of the operation since it is limited to 45 entering loads of coal.

2. This limitation means 45 truck loads of coal to be crushed; thus, there is a total possibility of 180 trucks entering and leaving a day counting trucks leaving empty, trucks entering empty, and trucks leaving with pulverized coal.

a course to determine the actual level of emission; whereas the department was testing to see whether the operation contributed to unacceptable ambient air quality levels. Again, appellants' arguments that the test did not take into account weather conditions do not stand up. Obviously, sampling would be affected by and reflect weather conditions, but since the tests spanned a variety of weather conditions, we cannot draw any conclusions that the test results were skewed by the weather.

Appellants were somewhat outraged by the notion that they had the burden of proving that the permit was improperly granted. 25 Pa. Code §21.42. We do not regard this at all as inappropriate where the department's experts have carefully reviewed a permit application and come to the conclusion that it should be granted.[3] Appellants cross-examined DER's witnesses, but offered no evidence of their own in support of the contention that DER's conclusions were incorrect. While there might be cases where defects in DER's procedures or exercise of discretion would be revealed in this way, this was not such a case. Appellants had the burden of proof and did not sustain it.

We should comment on the procedural issue raised by M & H. M & H was not served with notice of the appeal in the requisite time as required by the board's rule 21.21(3). Although we have held that the failure to serve the permittee may be grounds for dismissal of the appeal, see *Sharon Steel Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-150-C, issued March 12, 1976, it is not clear that the result is required under Pennsylvania law, see *Safway Steel v. Standard Machine, et al*, Fayette Co. Legal Journal (C.P. 218, June 24, 1977), and we were reluctant to apply that rule here where it appeared that appellants had received from the department old appeal forms that did not show the necessity of serving the permittee as a jurisdictional requirement of taking an appeal. Consequently, we proceeded to adjudicate the matter on the merits.

CONCLUSIONS OF LAW

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

2. The Department of Environmental Resources acted reasonably and properly in carrying out its testing program and granting an air quality operating permit for

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3. In this case it seems particularly appropriate when DER responded to appellants' complaint with an elaborate testing program that did not support appellants' contentions, and the thanks that DER received was the unworthy suggestion that the grant of the permit was the product of undue influence from M & H.

for two coal crushers to M & H Sales Company, Inc., conditioned upon M & H's compliance with certain conditions.

ORDER

AND NOW, this 17th day of August, 1978, the appeals of Lloyd J. Parsons and Wayne R. & Debra A. Dubbs are hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

DATED: August 17, 1978

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
Blackstone Building
First Floor Annex
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COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES v. MEDUSA CORPORATION	Complaint for Civil Penalties EHB DOCKET NO. 76-085-CP-W
MEDUSA CORPORATION v. COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	Air Pollution Control Act EHB DOCKET NO. 77-097-W

ADJUDICATION

BY Paul E. Waters, Chairman, August 23, 1978

This matter comes before the board as a complaint for civil penalties and an appeal from an order issued to Medusa Corporation, a cement manufacturing company, in York County, PA, by the DER ordering the plant to comply with a previous variance order or cease operation.

The Medusa plant operation includes three gray kilns and one white kiln. The kilns are used to heat a mixture which is finally processed into cement and it is one of six plants owned in the United States.

The civil penalties complaint was filed July 7, 1976, and alleged violations by Medusa which were later amended to include violations of ambient air quality standards, fugitive emissions, violations of §123.13 and §123.41, as well as violation of the 1973 variance order. The DER had also charged Medusa with certain particulate emission violations during normal operations, but this charge was dropped just prior to the hearing. Medusa raised a large number of affirmative defenses in its answer but has not pursued all of these.

On August 15, 1977, the DER issued an order which contained many of the same allegations that were in its civil penalties complaint. The two matters were consolidated for hearing and disposition with the consent of both parties.

The basic raw materials used to make portland cement are combinations of limestone, shale, clay and sand. According to the official topographic and

geological survey of Pennsylvania, the mineral content of soils indigenous to the greater York area is composed principally of limestone and shale, the same material aggregates used in the manufacture of portland cement. The limestone and clay or shale are dug out of the ground and transported to the plant where crushers break large chunks of rock, which may be as big as compact automobiles, into pieces about the size of marbles. After crushing, the raw materials are combined in the right proportions and ground in large mills to further reduce the size of the materials to a very fine powder which is known as raw feed.

The kiln operation involves the chemical process known as calcining limestone; carbon dioxide is driven from the limestone, converting calcium carbonate into calcium oxide. The calcium oxide later combines with the other ingredients in complex chemical changes to form "clinker", rocklike balls about the size of marbles which are the basic component of cement. The calcination process produces gases and particulate matter as by-products. The particulate matter is suspended in the hot exhaust gas and various types of emission control devices are employed to remove this matter from the gas before it is emitted into the atmosphere through a stack.

The subject of this action concerns Medusa Corporation's cement company division manufacturing facility in York, Pennsylvania, where Medusa operates four cement kilns with auxiliary equipment known as the gray plant (kiln numbers 3, 4 and 5) and the white plant. Two of the kilns are 10 feet in inside diameter and 375 feet long, while two are 12 feet in inside diameter and 375 and 450 feet long, respectively. Both the gray plant and the white plant are operated to produce portland cement clinker by the "wet process". In the wet process, water is added to raw materials during grinding until a thin mud called "slurry" forms. This wet process eliminates dust during raw grinding.

Following enactment in March 1972, of new and more stringent emission regulations, Medusa applied under date of September 18, 1972, for a temporary variance from certain of the amended standards set forth in Sections 123.1, 123.2 and 123.13 of the rules and regulations of the Department of Environmental Resources. The temporary variance was granted on February 14, 1973, by the DER following a public hearing; it covered (1) gray plant kiln start-ups; (2) the gray plant clinker coolers; (3) the white plant steam exhaust; and (4) additional control of potential sources of fugitive dust.

Kiln numbers 3, 4 and 5 are coal-fired rotary kilns equipped with electrostatic precipitators to collect those particulates which otherwise would enter the atmosphere. The characteristics of the wet process dictate that electrostatic precipitators are the appropriate choice for air pollution control in Medusa's opinion. When a coal-fired kiln is started, however, the precipitator cannot be energized immediately because of the possibility of fire or explosion created by unburned fuel which can be ignited by arcing within the precipitator. This start-up procedure is recognized thrpughout the cement industry as a standard and safe operating practice. At the York plant the period of start-up accounts for no more than 0.5% of total operating time in a given production year.

Under the terms of the variance, Medusa designed and had fabricated and installed, a new high capacity portable oil burner for use during kiln start-up. This auxiliary heat source eliminates condensation in the precipitators and reduces drastically the period of time during start-up that the precipitator must be de-energized due to the presence of combustibles.

As a large industrial complex, Medusa's York facility represents a considerable economic factor in the York community. Medusa employs approximately 210 salaried and hourly personnel in the York area, representing an annual payroll of nearly $4,000,000. Moreover, Medusa's total dollar impact on the community exceeds $11,000,000. annually. In addition, operation of the plant requires the services of approximately 50 business organizations in York and surrounding areas. Studies indicate that a shutdown of the York facility could create unemployment affecting 1,100 residents who rely on Medusa-generated jobs.

In addition, Medusa pays over $333,000 annually in real estate, franchise, sales and other state and local taxes. Moreover Medusa's purchases just in Pennsylvania exceed $11,000,000 annually. The replacement cost of the York plant—exclusive of supporting facilities and equipment—would amount to over $73,000,000.

The three types of equipment principally used in removing particulate matter from the exhaust gas are mechanical or cyclone-type collectors, electrostatic precipitators and glass fabric bags impregnated with graphite and located in a "baghouse". When the mechanical collector is used, the exhaust gas flows in a spiral, whirlpool path to the bottom of the cyclone. During the downward spiral the particulate matter is forced by centrifugal action to the walls of the cyclone, and thereafter drops into a hopper at the bottom of the collector. When the precipitator is used, dust particles are charged and pass through an electrical field of the opposite charge, thus causing the dust to be precipitated out of the

exhaust gas and thereafter collected by the device. When glass fabric bags are used, the exhaust gas is cooled, sometimes by a water spray, so that the bags will operate without damage from excessive heat. The bag filters out the particulate dust, though sometimes the coolant combines with the dust to form a gummy substance as residue in the bags, which must be continuously cleaned out in order to avoid impairing the permeability of the bag.

As the clinker emerges from the kiln, it passes into a cooler where air is forced over and around the hot clinker to remove the heat. The clinker then is mixed with a small amount of gypsum and ground into a powder finer than flour. This is cement.

FINDINGS OF FACT

1. The defendant and appellant in this consolidated civil penalties action and appeal is the Medusa Coporation, an Ohio corporation with offices located at Lee and Monticello Streets, Cleveland Heights, Ohio 44101, and is qualified to do business in Pennsylvania with a registered address at 123 South Broad Street, Philadelphia, Pennsylvania.

2. Medusa owns and operates a cement manufacturing facility known as the Medusa Cement Company, Division of Medusa Corporation, hereinafter sometimes referred to as "facility", which is located at Hokes Mill and Lemon Streets in West Manchester Township, York County, Pennsylvania.

3. The Medusa facility is a fifty-year old plant, modified in 1928; it is costly and has a high break-even point comparing it with other, better plants that Medusa has.

4. The Medusa Company in York anticipated $25,000,000 worth of sales for the year 1977.

5. The number 3, 4 and 5 kilns at the York facility are fired with pulverized coal. The high capacity oil torch that Medusa purchased as a result of the variance order enabled the company to preheat the kiln with oil on a start-up situation. At the point they introduce the coal, Medusa shuts down the precipitator, puts on the coal and, when it knows it has stable burning or oxygen in the back end of the kiln, it re-energizes the precipitator.

6. There is a danger of explosion or fire if the precipitator is operated while combustibles are present in the effluent gas.

7. The emissions that come from the facility's kiln when the control device is not operated consist of a combination of kiln feed, raw material, plus coal, smoke or soot.

8. A hot start-up occurs when one of the facility's kilns has been down for a relatively short period of time. When restarting in the hot start mode the precipitator is shut down, the coal fire is put on without any torch, the feed and induced draft fan are on.

9. The portable oil torch is not used during a hot start-up. In a cold start, the kiln is gradually heated with the oil torch, until such time as it reaches or approaches operating temperature; at that point in time the precipitator is shut off, and the coal fire is introduced along with the feed. The precipitator is off during this period of time, from five to twenty minutes.

10. Uncontradicted testimony establishes that it is impossible to conduct a stack test or a source emission test on the kilns during period of start-up or upset.

11. A stack test can only be performed when the emissions and operation of the kiln are at a relatively stable condition, and the exact air flow, tonage, production rate and other factors are known and stable. The regulations require a minimum sampling time of one hour.

12. Testing of the emissions entering the inlet side of the precipitators for the number 3, 4 and 5 kilns was conducted by Medusa and the results were entered into the record. The results, showing a potential emissions before entering the precipitator and then exiting the stack were as follows: Kiln No. 5 - 13,198 lbs/hour to 15,412 lbs/hour; Kiln No. 3 - 12,416 lbs/hour; and Kiln No. 4 - 5,250 lbs/hour to 6,708 lbs/hour.

13. Mr. Abernathy Graham, plant manager, stated that emissions during a start-up look like "a cement kiln without a precipitator".

14. Though the company had optical density monitors to monitor smoke going up the stack, the company representatives had never made an attempt to determine whether or not the reader was accurately reading opacity of the emissions, nor did they make any effort to use the information which was printed out on the charts that were connected to the evidence.

15. The evidence indicated there were 34 separate opacity violations observed by qualified department observers during the post-variance period, which violations were connected with either a start-up or a precipitator malfunction.

16. DER failed to give sufficient notice to Medusa after 15 observations of violations of the opacity limitations of regulation §123.41.

17. The DER employs a recognized standard method for determining settled particulate (dust fall) throughout the Commonwealth, including the York air basin.

18. The state standard for settled particulate matter as an annual average is .8 milligrams per square centimeter (25 Pa. Code §131.3); this is equivalent to 23 tons per square mile per month as an annual average.

19. The state standard for settled particulate as a 30-day maximum is 1.5 milligrams per square centimeter (25 Pa. Code §131.3); this is equivalent to 43 tons per square mile.

20. The national ambient air quality standards for suspended particulate matter, as promulgated by the Environmental Protection Agency (EPA) and adopted by the state of Pennsylvania (25 Pa. Code §131.2) are as follows:

a. Primary Standard - 75 micrograms per cubic meter, annual geometric mean; 260 micrograms per cubic meter, maximum 24-hour concentration not to be exceeded more than once per year. (40 C.F.R. §50.6)

b. Secondary Standard - 60 micrograms per cubic meter—annual geometric mean, as a guide to be used in assessing implementation plans to achieve the 24-hour standard; 150 micrograms per cubic meter—maximum 24-hour concentration not to be exceeded more than once per year. (40 C.F.R. §50.7)

21. The attainment date for compliance with the National Primary and Secondary Ambient Air Quality Standards for the area in question was July, 1975. (40 C.F.R. §52.2034)

22. The DER uses the standard reference method for the determination of suspended particulate matter, as published in the Federal Register.

23. The national primary and secondary standards for suspended particulate matter are based on the sampling technique employed by the DER as set forth in Commonwealth Exhibit 2.

24. The DER method of determining suspended particulate matter concentrations employed both in the surveillance sampling and the wind-actuated sampling conducted in the York air basin constitutes an accurate and valid technique for measuring air quality.

25. The York air basin consists of the following political subdivisions in York County: Manchester Township, North York Borough, Spring Garden Township, Springettsbury Township, West Manchester Township, West York Borough and City of York. (25 Pa. Code §121.1)

26. The DER, at all times material hereto, has maintained seven surveillance stations in the York air basin. These surveillance stations measure both settled particulate and suspended particulate.

27. The surveillance sampling station located closest to the Medusa facility is that located on the roof of the McFall's construction company building. This sampling site is located approximately 300 feet from the Medusa property.

28. The McFall's sampling site, station no. 5, is on the roof of an approximately two-story building (15 feet high) which roof is approximately parallel with the ground (having only a six degree slope).

29. The location of the sampler at the McFall's site meets the criteria of the DER and the EPA and yields accurate results.

30. During 1974 the average concentration of settled particulate at the McFall's site was 44 tons per square mile per month. This is almost twice the allowable limit, and it exceeds the maximum 30-day concentration. During this year there were only two other sites in the basin where the yearly average standard was exceeded; West York Borough building site (the site next closest to Medusa) and the Center City site (site 2).

31. In 1975, the only sampling station in the York air basin where the settled particulate standard was exceeded was the McFall's station, which showed a dust-fall average for the year of 33 tons per square mile per month. Three times during 1975, the maximum 30-day value was exceeded; all three events occurred at the McFall's site.

32. During 1975, the lowest readings at the McFall's site, the months of January and December, coincided with months during which the three gray kilns at the Medusa facility were out of operation.

33. In 1976, the McFall's site was the only site wherein the values exceeded the ambient standard for settled particulate; this site measured the value of 37 tons per square mile per month. This included two violations of the maximum monthly standard of 43 tons per square mile, even though there were five voided samples during this year.

34. During 1977, five of the seven months measured at the McFall's site at the time of the hearings on this case, showed the maximum monthly value of 43 tons per square mile to be exceeded. Values as high as 82 and 65 tons per square mile per month were measured during this period at McFall's.

35. Testimony of one of the citizen witnesses, Jay Clifton Emig, a citizen of West York, verifies the correlation between start-up and dust fall.

Mr. Emig testified concerning his observations of a heavy dusting condition on his property which incident coincided exactly with a reported start-up of the no. 5 kiln on October 15, 1976.

36. Concerning suspended particulate matter, the McFall's site gives the highest readings in the air basin. It is also the sixth worst site in terms of high readings in the entire state.

37. The geometric mean (N.A.A.Q. standard) measured at the McFall's site for the period at issue in this proceeding were as follows: 1974-122 micrograms per cubic meter; 1975-106 micrograms per cubic meter; 1976-102 micrograms per cubic meter; and in the first and second quarters of 1977, the values were 114 and 173 micrograms per cubic meter respectively.

38. In addition, the "not to be exceeded" primary standard of 260 micrograms per cubic meter as a maximum 24-hour concentration was exceeded in the York air basin 17 times since 1974; all 17 such incidents occurred at the McFall's site.

39. The results of the DER wind-actuated sampling program show a direct relationship between high values at the McFall's site and the level of activity at the Medusa site.

40. During the 1974 sampling period, (74 kiln hours per day) the in-sector reading at McFall's was 264 micrograms per cubic meter. When the plant was operated at 40% of its capacity during the second sampling period (30 kiln hours per day), the in-sector reading at McFall's dropped proportionally to 121 micrograms per cubic meter. When the level of activity increased to 80% of its capacity, as during the final sampling period, the readings at McFall's in-sector were proportionately higher, raising to 209 micrograms per cubic meter.

41. The wind-actuated sampling results confirm the conclusions drawn by the expert testimony of DER experts and the citizens who testified in West York that Medusa is causing a serious condition of air pollution to exist in the surrounding community.

42. The suspended particulate from the Medusa facility has a heavy impact on the community and does, in fact, reduce chances for achievement of the ambient standard at the McFall's site.

43. The plan for fugitive emission controls was incorporated into and made a part of the variance order that was issued to Medusa on February 14, 1973, (Variance Order No. 73-612-V).

44. This plan was not satisfactorily implemented by Medusa as illustrated by the fact that the DER documented 55 separate violations on 20 different days during the period at issue in these proceedings.

45. On all but one of the fugitive emission violations referred to herein, the company was advised of the violations.

46. Company officials often failed to, or were slow in, correcting fugitive emission violations even after they had been pointed out to the company by the DER.

47. There are both potential gains and losses associated with the methodology of collection analysis of suspended particulate from a high volume sampler.

48. When the ambient air quality standards for particulate matter were adopted by the Environmental Protection Agency, those standards were based in part on distinct high volume sampling, which sampling in general used the same method used by the DER in its ambient sampling network.

49. The EPA criteria for suspended particulate was in part determined by data showing the health effects when concentrations reached certain limits as measured by the same measuring technique employed by the DER in use throughout these proceedings.

50. Even if there are some potential inaccuracies in the high volume method as employed by the DER, those same inaccuracies existed at the time the criteria document was formulated, and therefore, the DER's high volume sampler method continues to, and is, the only valid method for determining whether or not the ambient air meets the national ambient air quality standards.

51. Citizens complaining of adverse air pollution effects of the Medusa operation, stated that the dust settles on them on an average of once per day. This is consistent with the actual number of start-ups at Medusa's kilns.

DISCUSSION

We must at the outset, deal with Medusa's allegation that this matter is only here before us because of some malice or ill will which the DER harbors against it. Medusa alleges in effect, that it is being singled out and picked[1] on because of some sinister, but unstated, motive of the Department of Environmental Resources regarding its future operation. We approach this lengthy and important matter fully cognizant of Medusa's belief that it is fighting for its very existence. It is Medusa's contention that this state of unfairness amounts

1. There are, of course, a number of other industries in the York area which must contribute significantly to the air contamination which has aroused the hostility of the residents which is now focused on Medusa. In addition, there are other cement plants in Pennsylvania which have not been brought before this board for the imposition of civil penalties.

to an unconstitutional deprivation of due process and a denial of equal protection.[2] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Commonwealth of Pennsylvania v. James Henry Lewis*, 443 Pa. 305, 279 A.2d 26. The charge of discrimination is one easily made. No one can dispute that this is a major enforcement effort on the part of the DER and it has indicated that such an action is viewed as was the action in *Commonwealth v. Barnes & Tucker Co.*, 319 A.2d 871 (1974). The court there said in response to a similar charge by a mine operator:

> "We summarily dismiss Barnes & Tucker's claim that the prosecution of this action constitutes a denial of the equal protection of the laws. There has been no showing that the Commonwealth's action was an intentional discrimination in the enforcement of the law. Indeed, since to a large extent this is a case of first impression, and recognizing the substantial costs of litigation here involved, it is only reasonable that the Commonwealth await the ultimate outcome of this case before bringing similar actions." (Footnote 14)

Somewhat more serious is the allegation supported by the evidence, that the DER carried out a surveillance program without the knowledge of Medusa over a long period of time.[3] More specifically, there were occasions when emissions deemed to be air pollution violations were observed by the DER witnesses who made no mention of their charge until this matter was filed seeking a civil penalty assessment. Medusa claims, and we believe with some justification, that the only possible way it could defend itself against such an allegation is by having the opportunity to observe the alleged violation or at least to preserve the records indicating what it was doing at the time, which might mitigate or in some way relate to the incident.[4] An additional problem is created when a number of potentially useful employees working at the time of an alleged violation leave their employment, as happened in this case, before it is known that the plant must defend itself against a violation of law.[5] In *Armstrong v. Manzo*, 380 U.S. 545, the court said: "Due process to be effective, must be accorded at a meaningful time and in a meaningful manner. The passage of time can erode memories and make it difficult to produce witnesses, evidence and otherwise to construct a defense." *Royal Typewriter Co. v. N.L.R.B.*, 533 F. 2d 1030 (8th Cir.).

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2. *U. S. Constitution Amended, XIV.* These are major items included in the 15 affirmative defenses which Medusa raised.

3. Beginning in 1974, at various times four employees viewed the plant, sometimes three times per week.

4. Medusa argues that inasmuch as the violation in many instances is based on a subjective opacity reading, it is doubly important that a meaningful notice and opportunity to observe the alleged violation be given.

5. Five such persons no longer employed there are: Mr. Smith, Mr. Hermet, Mr. Coulson, Mr. Bateson and Mr. Schena.

Defendant appellant relies heavily upon the case of *Western Alfalfa Corp. v. Air Pollution Variance Board*, 534 P. 2d 796 (1975)[6] and appeals to us on the fairness requirement inherent in the due process clause. *Fuentez v. Shevin*, 407 U.S. 67 (1971).

It is no answer to the claim, to say, as the DER does, that Medusa should have been aware of its own violations or that everyone could see the problem except Medusa. This in our opinion misses the point. No man (or corporation) in this America should ever be hailed into court and there be told that he was not previously advised of a violation of law—because, since he is the one that did it—he should have known it and therefore no notice was necessary!! This requirement, of some reasonable notice, does not extend to a situation where the DER is engaged in surveillance of a general area to determine whether there is a need for some enforcement action. It does, however, cover a situation where, as here, a specific incident is observed and recorded with the intention of making it the subject of a specific civil penalty assessment. Under these circumstances we believe the DER must, at a minimum, advise the alleged violator of the incident at the earliest opportunity.[7] Specifically we find that improper notice was given of 15 such alleged incidents[8] more fully discussed hereinafter.

I. Variance Order

In September 1972, Medusa first applied for a temporary variance. The

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6. The Colorado Court of Appeals, which was later affirmed, said:

> "Inasmuch as the only evidence supporting the charge was the visual observation of the opacity of smoke during a few seconds or minutes of time by an agent of the agency preferring the charges, a comprehensive cross-examination of that agent was particularly crucial here. However, no effective cross-examination of the investigator was possible to offset the prejudice to Western caused by the Division's failure to notify Western of the inspection until months after it took place. See United States v. Whitaker, 343 F. Supp. 358 (E.D.Pa.). Thus, since the defense had no reference upon which to base its questions nor independent knowledge as to what occurred, its opportunity to cross-examine was merely a hollow gesture.
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> "As a practical matter, the making of the allegation alone, based upon a secret inspection, was tantamount to an automatic determination of violation. Accordingly we rule that where all the real evidence of a violation does by its nature exist only temporarily and where that evidence can be preserved only through the subjective observations of an employee of the agency, the fundamental fairness requirement of due process dictates that the alleged violator, whether individual or corporate, must, in an administrative proceeding, be given notice of the fact that evidence is being gathered and be afforded a reasonable opportunity to be present or otherwise be provided with an adequate opportunity to gather similar probative evidence."

7. We need not here pursue the issue to determine what in every conceivable situation is the earliest opportunity. Suffice it to say that the notice given years later of the incidents with which we are concerned was much, much too late.

8. DER contends that on March 2, 1977, a Medusa employee waived notice. We do not agree.

purpose was for dust control equipment on its gray plant clinker coolers and white plant steam exhaust and for control of fugitive dust. Subsequently, on December 21, 1972, Medusa filed an amended petition for variance and proposed a 100 million B.T.U. oil torch to be used to eliminate excessive emissions of coal ash and unburned carbon during start-ups. On February 14, 1973, after a public hearing,[9] the DER issued Variance Order No. 73-612-V which is the subject of one appeal. The order provided among other things that Medusa should:

> "(f) on and after September 1, 1973, activate its electrostatic precipitators not later than two minutes after combustible gases have been purged from the kiln exhaust system following ignition of the oil-fired kiln start-up burners;"

Both parties have gone to great lengths to support their differing interpretations of the order regarding the precipitators and their operation during start-ups. The DER contends that it never contemplated the precipitator would be turned off during start-up, as this allows excessive emissions and is deemed to be one of the major factors leading to complaints in the area. For its part, Medusa argues that a reading of the variance order itself indicates that at least for some period the DER knew and agreed that the precipitator would be turned off.[10] Further, the period involved is only a matter of six minutes or so[11] and in any event, this period is the shortest that any company has ever achieved and there is no technology which is presently available that can totally eliminate the precipitator outage during start-up[12] with safety. Before resolving this issue, the board, in considering both arguments, could not help but wonder why Medusa would insist on turning off the precipitator when the DER feels so strongly about the matter and there is really no economic benefit to Medusa in so doing. It is clear from our analysis that it is the safety factor at the plant which governs Medusa's decision as it has alleged—and there is no other reason.

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9. Twenty-nine persons testified at the hearing held in West York on January 25, 1973.

10. There is testimony of the interpretation given the order by witnesses which tends to support both parties to some extent, but we deem the construction of the order to be a legal rather than a factual matter.

11. The period for start-up is now averaging 6-8 minutes. At one time, a longer period was required, before Medusa purchased the present oil torch equipment.

12. The danger is real. A number of explosions have occurred causing a loss of life and property.

Turning then to the language of the variance order of February 14, 1973, there is no doubt that the DER must prevail in its interpretation. Read as a whole, the order clearly, emphatically and finally puts the burden upon Medusa to achieve compliance in such a way that all rules and regulations of the DER are also complied with at the same time.[13] This means even if Medusa should find, as it now argues, that it is impossible to safely turn on the precipitators during a start-up period, this will not in and of itself, constitute a basis for non-compliance with the emission and other air standards of the DER. To argue that it did not know whether or not this would be possible is to admit agreeing to do something which it [Medusa], did not know it could do. In any event dissatisfaction with the temporary variance order had to be raised within 30 days after its issuance. *Commonwealth of PA, DER v. Wheeling-Pittsburgh Steel Corp.*, 22 Pa. Commonwealth Ct. 280, 348 A.2d 765; *Commonwealth of PA, DER v. Bethlehem Steel Corporation*, EHB Docket Nos. 75-017-W and 75-134-W, issued February 2, 1977; and *Commonwealth of PA, DER v. St. Joe's Mineral Company*, 14 Pa. Commonwealth Ct. 624. Medusa, having failed to do so even if based on a mistake of fact or law, we can offer no remedy at this time, *Joseph Rostosky, d/b/a Joseph Rostosky Coal Company v. Commonwealth of PA, DER*, 364 A.2d 761 (1976), which would change the language of the order in any way. The question of performance impossibility is considered at page 25.

II. Regulation Violations

It is the failure to comply with Sections 123.13 and 123.41 of the rules and regulations, dealing with weight and opacity of allowable emissions which forms the basis of the DER's complaint as to the kiln start-ups. The variance order provided:

> "2. The emissions from the sources are likely to comply with Sections 123.1, 123.2 and 123.13 inasmuch as, at the expiration of the variance period, said emissions are not likely to exceed the following levels:
> "(a) No. 3 kiln clinker cooler - 2 lbs/hr.
> "(b) No. 4 kiln clinker cooler - 2 lbs/hr.
> "(c) No. 5 kiln clinker cooler - 2 lbs/hr.
> "(d) White plant steam exhaust - 0.04 gr./dry SCF
> "(e) Kiln start-ups - Secion 123.41 opacity standards or
> "No. 3 kiln - 25 lbs./hr.
> "No. 4 kiln - 25 lbs/hr.
> "No. 5 kiln - 32 lbs./hr.
> "White cement kiln - 27 lbs./hr."

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13. The order specifically provides:

> "Compliance with the foregoing order shall be obtained in a manner that will not violate the Environmental Protection Statutes and Rules and Regulations promulgated thereunder.
>
> "Nothing contained in this order shall be construed to imply or guarantee that future process changes and/or control measures may not be required upon the expiration of this order granting a temporary variance to attain the Department's ambient air quality standards or to comply with other regulations of the Department."

The order further provided:

> "NOW, THEREFORE, this 14th day of February, 1973, the Department hereby grants a variance, as requested in the petition (a copy of said petition is attached hereto and marked Exhibit "A"), and further orders that the Medusa Cement Company, its successors and assigns shall:
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> * * *
>
> "(b) on and after December 18, 1973, operate all sources included in the aforementioned petition for variance, in such a manner as to maintain the emissions of particulate to within the limits specified in Sections 123.1, 123.2, 123.13 and 123.41 of the Rules and Regulations of the Department of Environmental Resources;"

Medusa contends that even though its own prior testing[14] disclosed evidence which leads by inference to the conclusion that the weight rate limitations are being exceeded, there is no basis for finding a violation. The test on kiln No. 3 indicated potential emissions of 12,416 lbs per hour when the allowable is 25 lbs. per hour. On No. 4 kiln, the test indicated emissions of about 6,000 lbs. per hour against an allowable of 25 lbs. per hour. In like manner, No. 5 kiln tests on the inlet side of the precipitator indicated loads of approximately 14,000 lbs. per hour when the allowed was 27.

Medusa urges us to ignore this evidence and testimony because the tests were not conducted during start-ups, which are now at issue, but rather during normal operation and for a different purpose. We agree that this evidence alone is not sufficient, but we cannot ignore it. In fact, the stack testing that is ordinarily required to prove a violation of the regulations here in question has not been conducted by the DER or anyone else. The reason is that we are dealing with a start-up period which lasts less than 10 minutes with the precipitator not in operation. It is only this brief period with which we are now concerned and the regulations [25 Pa. Code §139.12(4)] require that the minimum sampling time shall be one hour.[15] DER, of course, under the ruling in *Bortz Coal Co. v. DER*, 2 Pa. Commonwealth Ct. 441, 279 A.2d 388 (1971) submits that the weight of all of the evidence is sufficient to prove a violation when there is no scientific test available. Although Medusa seems to believe that there is a way to conduct a one-hour stack test under the regulation, it neglects to say what it is. Nevertheless, we are unwilling to find a violation of §123.13 by inference alone and for the purpose of imposing a civil penalty.

Turning to the opacity standards of §123.41, we again review the evidence[16]

14. It is true the testing was done for the purpose of determining the efficiency of the new electrostatic precipitator and was therefore conducted at normal operation with the precipitator on.

15. An additional reason why the standard test could not be utilized is that because of the variable nature of a start-up a representative sample would not be possible.

16. Continued to page 15

The regulation provides:

> "No person shall cause, suffer, or permit the emission into the outdoor atmosphere of visible air contaminants in such a manner that the opacity of the emission is:
> "(1) equal to or greater than 20% for a period or periods aggregating more than 3 minutes in any one hour; or
> "(2) equal to or greater than 60% at any time."

For reasons unknown to me, the DER has presented the alleged opacity violations which occurred due to start-ups along with, and sometimes without, distinguishing them from emissions caused by malfunctions or upset. Although the DER would have us impose a civil penalty for each and every start-up from the variance expiration date until the time of hearing (1,371), witnesses for the DER did not observe either weight or opacity violations for each and every one of these incidents. It is the DER's position that inasmuch as all of the start-ups it did observe caused a violation, and Medusa acknowledged at various times that there was an emission problem during the period the precipitator was off, ergo, there was a violation of either or both the weight and opacity limits as set out in the regulations on every occasion when it was not observed. With this logic we are unable to agree, absent conclusive evidence that a start-up, hot or cold, can never occur without a violation of the weight/opacity standards. Clearly there is evidence that raises a great deal of doubt that this can be done, but we are not satisfied that there is substantial evidence to find this as a fact.[17] There is a further problem with regard to the opacity standard of Regulation §123.41. Many of the violations are based simply on a report by Medusa that it had a start-up at a particular time. DER would have us find a violation of the opacity standards, having to do with the density observed in a plume, when no one can testify as to the density of the emission in question, because no one saw that particular plume. Further, based on this unobserved emission we are to then impose a fair civil penalty. The only penalty that would be fair under such circumstances is no penalty. Earlier we expressed misgivings about the fact that the DER failed on some occasions to give notice to Medusa that a violation had occurred for which a penalty is now being sought. We are now saying that the DER is entitled to have a civil penalty imposed for only those violations

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16. Continued from page 14
"§123.43. Measuring techniques.

> "Visible emissions may be measured using:
> "(1) any device approved by the Department and maintained to provide accuracte opacity measurements; or
> "(2) observers, trained and qualified to measure plume opacity with the naked eye or with the aid of any devices approved by the Department."

17. Medusa argues that even when the precipitator is off, there are not "uncontrolled" emissions because the ducting and de-energized precipitator serve as efficient settling chambers, removing a significant percentage of any particulate present in the kiln.

concerning which notice[18] was given to Medusa within a reasonable time after the alleged incident occurred.[19]

The evidence shows 13 times where start-ups were observed and 21 where malfunctions were observed which testimony indicated Medusa violated the opacity standards. In only 19 of these cases did the DER show that it gave prompt notice of the alleged violation. We have previously indicated that evidence regarding the probable or potential emission or potential emission rate during start-up is alone not sufficient to convince us that Medusa has violated §123.13 on the occasion of each and every start-up since 1974. With regard to the opacity violations alleged under §123.41, however, our opinion is different. The DER presented qualified smoke readers who actually saw the violations. We accept their testimony as truthful and competent[20] as to the 19 violations. We believe a penalty of $500 for each violation is appropriate.

III. Fugitive Emissions

In count II of the complaint for civil penalties, the DER alleges that in 55 separate incidents on 20 days, Medusa violated Regulation §123.1, which provides that except for nine enumerated exclusions:

> "(a) No person shall cause, suffer, or permit the emission into the outdoor atmosphere of any fugitive air contaminant from any . . ." [source]

A "fugitive air contaminant" is defined in the regulations as: "any air contaminant emitted into the outdoor atmosphere in any manner other than through a flue".

Medusa does not contend that the dust from its operation is other than a fugitive emission, but argues that if there is any violation, it would have to be proved by the DER, under §123.2, which deals with fugitive particulate matter.[21] Inasmuch as the evidence indicated that the dust was visible outside of the property

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18. We here made no distinction between written or oral notice but observe that the best procedure would be to give oral notice at the plant at the time of the incident, and follow this by a later written notice of violation, indicating therein that the DER might seek the imposition of a civil penalty or other legal remedy.

19. It is not sufficient to point to a report filed by the department for some other purpose unless the report admits a violating law or regulation or is alone sufficient.

20. The opacity reading procedure was improper in some cases.

21. §123.2 provides:

> "No person shall cause, suffer, or permit fugitive particulate matter to be emitted into the outdoor atmosphere from any source or sources specified in items (1) through (9) of § 123.1 (a) of this Title (relating to prohibition of certain emissions) if such emissions are:
>
> "(1) either visible, at any time, at the point such emissions pass outside the person's property, irrespective of the concentration of particulate matter in such emissions; or
>
> "(2) not visible at the point such emissions pass outside the person's property and the average concentration, above background, of three samples, of such emissions at any point outside the person's property, exceeds 150 particles per cubic centimeter."

line on only one of the twenty days involved, Medusa believes that any penalty imposed should be so limited. In effect, Medusa would have us disregard the general requirements of §123.1 with which it has failed to comply, and concern ourselves only with §123.2 for which the DER has not alleged or proved violations. We cannot ignore the plain meaning of a regulation simply because of its impact upon Medusa. There is no doubt that any cement plant would find it very difficult to operate without ever having any fugitive dust emissions. Here, however, there is evidence that control measures that could have been employed were not.[22]

Medusa relies heavily on *Commonwealth of Pennsylvania, DER v. Locust Point Quarries, Inc.*, 27 Pa. Commonwealth Ct. 270, to support its view that scientific tests must be used to prove fugitive emission violations, and that testimony of a simple visual observation would not suffice under §123.1. In fact, the court was concerned with the violation of §123.13 in the *Locust Point* case. There is a specific limitation in that section and the court held that scientific tests were available and therefore necessary to show a criminal violation under those circumstances. The case is no help to Medusa. We believe it would be appropriate to impose a penalty of $300 for each of the 20 days on which there were fugitive emission violations.[23]

IV. Air Pollution

The York area does have a constant air pollution problem and the DER has offered evidence in support of its claim that Medusa is a major factor in that problem. The basic truth that runs throughout the proof in this case is the fact that there are many other industries in the same area as Medusa who have clearly contributed and continue to contribute to the problem. If there is a criticism to be found in the conduct of this case, it is Medusa's failure to recognize that it is helping to create an air pollution problem and the DER's refusal to acknowledge that Medusa is not doing it alone. The problem faced by Medusa is more critical because the law does not require that a particular polluter be the sole cause of pollution before a civil penalty can be imposed.

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22. In addition, §123.1(9) specifically provides a procedure to be used to exclude a source which is of minor significance and Medusa did not avail itself to this provision.

23. DER has asked that the penalty be $300 for each incident, but inasmuch as we do not believe that it can properly be said that this kind of violation at a cement plant is willfull as opposed to negligent, we are satisfied to impose a daily penalty of $300.

The Pa. Air Pollution Control Act, 35 P.S. §4008, makes it unlawful to cause air pollution.[24] "Air pollution" is defined in the Pennsylvania Air Pollution Control Act (35 P. S. §4003(5) as follows:

> ". . . The presence in the outdoor atmosphere of any form of contaminant including but not limited to the discharging from stacks, chimneys, openings, buildings, structures, open fires, vehicles, processes, or any other source of any smoke, soot, fly ash, dust, cinders, dirt, noxious or obnoxious acids, fumes, oxides, gases, vapors, odors, toxic or radioactive substances, waste, or any other matter in such place, manner, or concentration inimical or which may be inimical to the public health, safety, or welfare or which is, or may be injurious to human, plant or animal life, or to property, or which unreasonably interferes with the comfortable enjoyment of life or property."

The regulations of the DER provide further that: "No person shall cause, suffer, or permit air pollution as that term is defined in the act." 25 Pa. Code §121.7.

There can no longer be doubt that at least in Pennsylvania, causing air pollution itself is a separate offense from the violation of any other specific environmental law or regulation. The question then becomes—did Medusa cause such pollution as alleged by the DER? The evidence on this point by DER is voluminous and though challenged, it is convincing.

The citizens living and working near the Medusa cement plant have offered testimony which we believe shows conclusively that the Medusa operation does cause air pollution.[25] Even if we discount some of the more dramatic evidence we are left with clear, uncontradicted incidents of the adverse affect upon the health and welfare of York county residents. One Mr. Emig, described a particular occasion when he recorded the exact time of an episode which corresponded with a start-up of a gray kiln. The witness recounted what happened on October 15, 1976, at 4:45 p.m., when he followed the emission directly from a stack at Medusa, into the air and then saw the dust particles settle on his house and coat a black umbrella in his back yard.[26] One witness after another told in detail of their

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24. 35 P. S. §4008 provides:

> "It shall be unlawful to fail to comply with any rule or regulation of the board or to fail to comply with any order of the department, to violate or to assist in the violation of any of the provisions of this act or rules and regulations adopted hereunder, to cause air pollution, or to in any manner hinder, obstruct, delay, resist, prevent or in any way interfere or attempt to interfere with the department or its personnel in the performance of any duty hereunder."

25. We are asked to view a shingle from a nearby house which is hard and discolored and to conclude that Medusa did it.

26. The incident was described in detail at N.T. Page 761 and 762.

experiences living near the Medusa plant, all indicating some adverse affect upon their lives, property or the enjoyment thereof. We refuse to discount these true to life human experiences. These citizens were straight forward, honest and candid. We do not believe they took the time to travel to a hearing miles from their homes in order to mislead this board, or because they have any improper motive in wanting Medusa to answer for its conduct in their community.[27] Medusa sees no problem in all of this. The cars that are damaged, the roofs needing replaced with increasing frequency, the breathing difficulties and unsightliness, we are asked to discount because the emission is not toxic.[28] Medusa has offered a sample of their finished product, a fine powder, to show that the gritty and scratchy nature of the particulate matter frequently complained about was not from their plant. It is unlikely in our view, that this finished portland cement would be escaping from the plant during the manufacturing process.[29]

Medusa believes that only scientific tests are proper for our determination of the air pollution issue here presented,[30] and cites the *Bortz Coal Company*, case, *infra*, which indeed does contain some language to that effect. Medusa has not gone far enough. In *Rushton Mining Company v. Comm. of PA, DER*, 16 Pa. Commwlth. Ct. 135, Judge Bowman, speaking for the majority[31] faced this very issue and said:

> ". . .In *Bortz Coal Co. v. Commonwealth*, 2 Pa. Commonwealth Ct. 441, 458, 279 A. 2d 388, 398 (1971), this Court cited the inadequacy of visual tests and observations 'where recognized scientific tests are available.' However, in the same case, the Court foresaw prosecutions under the Act where such tests would not be available: 'In the event it should occur in a case that there is no scientific measurement instrument, or no method for determining a violation, then as in all adjudicated matters in this Commonwealth, violations will have to be determined upon the weight of the evidence produced.' 2 Pa. Commonwealth Ct. at 458, 279 A. 2d at 398. This Court has no knowledge as to the availability of a

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27. We note that Medusa was located in the community before many protestors without problems. This could be due to nothing more than our heightened awareness of our environment.

28. Portland cement is categorized as non-specific particulate matter in the DER Regulation Section 121.1.

29. While witnesses testified to the clogging of their drain spouts with a hard cement-like dust, Medusa insists that it was only leaves and sediment.

30. Medusa cites *Prosser Restatement of Torts* for the proposition that we should require that any invasion by Medusa be "substantial and unreasonable" although this is not the test we would reach the same conclusion if it were.

31. We note that Judge Mencer agreeing with Medusa, said:

> "I cannot accept the premise that the Legislature, in defining 'air pollution' in Section 3(5) of the Act, 35 P. S. §4003(5) intended that definition to set the standard for unlawful conduct."

This, however, was the dissenting opinion.

> scientific measurement instrument which could gauge whether an atmospheric contaminant 'interferes with the comfortable enjoyment of life or property,' 35 P.S. §4003(5), or of a method for determining whether such interference is 'unreasonable,' 35 P.S. §4003(5). These are purely subjective standards, incapable of reduction to scientific precision. While scientific evidence may be helpful in this type of case, it is not necessarily the most persuasive nor the exclusive means of proof. Our review of the record persuades us that there was sufficient evidence to permit the lower court to properly conclude that DER had proved the elements of the offense charged.
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> "Appellant also contends that the scientific evidence introduced by the Commonwealth in the lower courts was irrelevant to prove a violation of the highly technical provisions of Chapter 123 of DER's Rules and Regulations. If this evidence was, in fact, irrelevant, appellant's argument is even more so. The criminal complaint which initiated this action neither expressly nor impliedly referred to the provisions of Chapter 123. Appellant was charged with 'causing air pollution' in violation of Regulation 121.7 and Section 8 of the Act, proof of which does not require any scientific evidence, much less a particular kind."

Medusa further argues that they have not alone caused all of the many ills complained of in the area by the citizen witnesses and the DER. It is pointed out that the soil is largely limestone and this could explain some of the problems experienced. No doubt Medusa is correct. No doubt there are many industries and causes which along with Medusa have contributed to the air pollution problems in the township. Medusa has not been so bold as to suggest that it plays or played no part in the York air degradation drama. It would merely observe that it was not a solo and have the DER prove exactly what percentage of the problem it [Medusa] caused. Again, as stated at the outset, the law does not speak in terms of minimum or maximum amounts of pollution but requires that—"No person shall cause ... pollution." We have previously concluded that the DER has not improperly or unconstitutionally singled out Medusa for its noncompliance. We now conclude that Medusa is not innocent of wrongdoing and simply because it is the only one before us, we must impose a civil penalty upon it alone.[32] It should not be necessary to go further and state that there indeed may be others who will find themselves similarly situated in the future.

In addition to the convincing testimony from the citizens, the DER did in fact present a great deal of scientific evidence. We think it appropriate to further quote *Rushton Mining, supra*: "Since Regulation 121.7 represents sufficient grounds to support appellant's conviction, no discussion as to the Department of Health order of June 11, 1970, is necessary." We believe to the contrary that although sufficient grounds for the air pollution violation have been shown, nevertheless some comment on the scientific evidence presented on both sides is appropriate.

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32. Medusa by affirmative defense raised the Equal Protection Clause of the 14th Amendment and also alleged the other sources to be intervening causes.

DER engaged in extensive air sampling in the York air basin through a surveillance network. This was done by obtaining information from various points which would give a picture of the air quality between various points.

The Federal Clean Air Act (42 U.S.C. §1857) authorized the administrator to establish national ambient air quality standards for pollutants. The primary ambient air standard is one which, allowing an adequate margin of safety will. . . "protect the public health."[33] The administrator has established a level of 75 micrograms per cubic meter as the standard for suspended particulate matter with the value of 260 micrograms per cubic meter as a maximum 24-hour concentration not to be exceeded more than once per year (40 CFR §50.6).

The secondary standard, which is that necessary..."to protect the public welfare from any known or anticipated adverse affects associated with presence of such air pollution in the ambient air",[34] is set at 60 micrograms per cubic meter, with a 24 hour not to be exceeded standard of 150 micrograms per cubic meter (40 CFR §50.7). The attainment date for compliance in the south-central air quality region here in question, was July, 1975. The state in further implementing the law through its plan and regulations sets standards in 25 Pa. Code §131. The York area and specifically the sampling site closest to Medusa (McFall's), consistently[35] has extremely high particulate values.

With regard to dust fall or settled particulate, the Pennsylvania standard is 23 tons per square mile per month as an annual average,[36] with a 30-day maximum of 43 tons per square mile. The McFall's[37] sampling site had an average concentration of 44 tons per square mile per month in 1974.[38] The standard was exceeded at McFall's in 1975, 1976 and the trend continued for the period for which information was available in 1977.[39] In upholding a civil penalty levied

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33. F.C.A.A. §109(b) (1)

34. F.C.A.A. §109(b) (2)

35. The values drop significantly during periods when Medusa is not operating.

36. DER Regulations 25 Pa. Code §131.3.

37. The station is located atop a building owned by Henry McFall, Inc. about 300 feet from the Medusa plant.

38. One of only two other cities exceeding the limit in the basin was the one next closest to Medusa located at the West York Borough building site.

39. DER was also able to show graphically that there is a distinct relationship between the number of start-upsat Medusa, and the dust fall experienced at McFall's.

against Pennsylvania Power Co., the Commonwealth Court recently said, commenting on similar evidence upon which certain findings of fact were based: "They indicate that DER established six ambient[40] air quality sampling stations in and around the vicinity of PPC and that PPC's boilers emitted such amounts of particulate matter as to produce significantly higher average readings of particulates in the air at the sampling stations located downwind of PPC. We conclude from this evidence that findings numbered 35 and 36 are supported by substantial evidence." *Commonwealth of Pennsylvania, DER v. Pa. Power Co.*, ___Pa. Commonwealth Ct. ___, 382 A.2d 273 at 283 (1987). With regard to suspended particulate wind sampling, again the testing station at McFall's shows the highest concentrations in the air basin and one of the worst readings in the state[41] when the wind is coming from Medusa.

Medusa has made much of the fact that other industry in the general area could, in fact, be creating the problem for which they are getting the blame. To refute this suggestion, the DER has presented convincing evidence regarding the actual pollution control efforts and low emission contributions of these nearby potential culprits.[42] Because of the distance of P.H. Glatfelter Company, which is seven miles from the McFall's sampling station, and the sampling data most closely associated with the other alleged polluters, does not support Medusa's exculpation theory, we reject it.[43]

Medusa has conducted testing of its own. Its data has led to a conclusion which is diametrically opposed to the DER's.[44]

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40. DER in this case had seven.

41. A sampling program conducted by using wind activated high volume samplers placed in such a way that when wind was blowing from the direction of Medusa, the particulate would be collected and measured (in-sector) and when blowing from a direction other than from Medusa, it would shut off but particulate matter then was collected by another device structured for this purpose. The sampling done in 1974, 1975, 1976 and 1977, indicated that the primary standard (75 micrograms per cubic meter) and the secondary standard (60 micrograms per cubic meter) were routinely exceeded, the measurements at McFall's during that period, ranging as high as 264 micrograms per cubic meter. The in-sector readings were much higher than the out-sector. A separate site is used for background.

42. J.F. Baker Co. (JEBCO), P.H. Glatfelter, National Gypsum Company, White Pigment Corp., York Corrogated Co. and Pfaltzgraff Co.

43. Medusa would charge Pa. Power Company, which has a high emission rate, located on Bruner Island far from the McFall's site, with causing ambient air problems in West Manchester Township. We do not agree. The DER has investigated the other potential problem industries through two programs. One is the Pa. Air Quality & Noise Emission Inventory (PAQNEI) and the other is Pa. Emission Data System (PEDS) Information. The efforts and control measures already taken by the others does appear to leave Medusa out of step.

44. Although the DER relies to some extent upon a mathematical modeling technique, which it alleges supports its findings regarding Medusa's contribution to the ambient air by excluding other contributors, we are not fully convinced of the reliability of this evidence.

It is interesting but perhaps not surprising to note Medusa's testing of the air at a V.F.W. site 100 feet from DER's station at the McFall's site when correlated with plant operations, leads Medusa to conclude that—"There was no significant dependance of total suspended particulate on any Medusa operational variables." DER, as previously indicated, found a "striking correlation between the number of kiln start-ups and the Medusa facility and the dust fall values measured at McFall's", and a similar correlation between kiln operation hours and suspended particulate values. Medusa has, in addition to a number of detailed ambient air studies using regression analysis,[46] relied upon X-ray diffraction analysis[47] to prove that potassium sulfate (K_2SO_4) and potassium chloride (KCL) which were found in its emissions, but not in any VFW air particulate samples, were not causing air pollution. Other tests run by Medusa on dust fall samples, shingles and air conditioner filters, all led it to the same conclusion. Medusa is innocent.[48]

After all of the testing has been done, all of the graphs viewed and impressive experts heard, we must come back to the question already answered—Does Medusa cause air pollution in the West Manchester area, in violation of law? We have reviewed all of the evidence, arguments and counter-arguments, and we believe substantial evidence indicated that it does.

The order issued to Medusa on August 15, 1977, which is the subject of appeal to EHB Docket No. 77-097-W, made certain allegations regarding the findings as to air pollution in the West York area to which Medusa contributed by its cement operation. Medusa was required to develop a plan to control emissions so that there would be no further violations of the DER air regulations

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45. Medusa would have us disregard the DER's extensive sampling testimony and exhibits on the basis of a few inconsistencies for which no explanation was given. For example the sample hours of a particular 4-day sample total 94.75 rather than 96 hours. In the same vain, Medusa finds the data worthless because there is a significant particulate concentration on some occasions (January 13, February 17, 1975, and December 20-30, 1976), when it was not in operation.

46. A statistical procedure used to identify the casual relationship, if any, between sets of data.

47. In X-ray diffraction, a sample is presented to an X-ray beam on a precise geometric arrangement. The crystalline compounds present will reflect a characteristic pattern which can be identified by its appearance. Each compound has a distinct pattern like a "fingerprint".

48. We were impressed by the credentials of Medusa's experts but we have no doubt that because of that expertise, if they had been hired by the DER on the terms under which they appeared for Medusa, they could have run different tests and arrived at different opinions.

or the Air Pollution Control Act, *supra*.[49] In the event no proper plan was submitted,[50] then Medusa was ordered to "cease operation of the cement kilns upon expiration of this three-month period". Medusa was also charged with a failure to install auxiliary heating systems to be used during start-ups to limit the necessity for precipitator outage. Medusa has failed to comply with this request.[51]

The question as to whether Medusa may properly be called upon to "shape up or ship out" as the DER has ordered, is extremely difficult to resolve on this record.[52] We have already concluded that Medusa does indeed help cause air pollution problems in the West York and West Manchester areas. Medusa has properly urged us to consider the benefits that flow from its operation—employment, taxa-

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49. The order provided, *inter alia*,:

> "A. Medusa shall develop a comprehensive plan which shall provide for elimination of the air pollution and other violations and deficiencies referred to herein, including an estimate of equipment and process changes that will be necessary to bring the facility into compliance with the Air Pollution Control Act and all rules and regulations of the Department within a period of twenty-four (24) months from approval of the plan by the Department. Such plan shall include plan approval application(s) for the control equipment included in the plan, as provided in 25 Pa. Code §127.11.
> "B. Medusa shall submit the said comprehensive plan and plan approval application(s) to the Department's Harrisburg Regional Office within three (3) months from the date of this Order. In event no such plan or applications are submitted, Medusa shall cease operation of the cement kilns upon expiration of this three (3) month period.
> "C. If the said application(s) are approved by the Department, Medusa shall cause such plan to be implemented and completed as soon as practicable but not later than twenty-four (24) months from receipt of the Department's approval, unless an extension is granted by the Department."

50. During normal operations the electrostatic precipitators installed on each gray kiln were tested to be 99.96 to 99.98% efficient, and in compliance with all DER standards. DER subsequently dropped its complaint as to violations during normal operations.

51. Medusa argued that it was "unnecessary" to provide auxiliary heat because the new coal oil torch was "sufficient". Since the precipitator outage periods during start-up cause violations of the regulations, we do not agree.

52. Referring to a related problem where a public utility was involved, our Commonwealth Court said in *Commonwealth of PA, DER v. Penn. Power Co.*, 384 A.2d 273 (275):

> "It should be noted that this appeal also serves as a foreboding warning of the approach of what will in all likelihood become one of the most complex issues of contemporary environmental law. This centers on the treatment to be afforded energy-producing public utilities for the technologically unavoidable pollution of our environment. Most recently captioned 'Energy versus the Environment', this conflict results from present-day technology's inability to permit compliance with current 'technology forcing' pollution standards being legislatively advocated on both federal and state levels. This 'technology forcing' policy results from the 1970 amendments to the Clean Air Act (CAA), 42 U.S.C. § 1857 et seq., and the state legislation pursuant to these amendments.
> Continued to Page 25

tion and the production of a useful and needed product in the same place for over 40 years, not to mention millions of dollars invested in the land, plant and equipment. Medusa argues that there is no way it can continue its present "wet process"[53] and install a baghouse operation to eliminate precipitator outage problems. Conceding that there may be some few instances where this has been done, it has not been done in Pennsylvania. There will still be some uncontrolled emissions for a brief period[54] if it works, and there is some doubt whether it will work at all. For its part, the DER believes the baghouse should be tried because it is satisfied that if it is tried and fails, then it (DER) can always issue another "cease operations" order—so what's the problem? The problem is that the conversion and experiment will cost millions of dollars.[55] Medusa, having installed the present systems at considerable expense, convinced that it would solve the emission problems and satisfy the DER, is now understandably a little gun shy. The question with which we are then faced is—whether there is technologic or economic compliance impossability or both and if so, what are the consequences thereof. In *Commonwealth of PA, DER v. Penn. Power Co., infra*, the court raised, but did not decide, similar questions.

The court said in footnote 20 at page 286:

> "We only decide here the question of the imposition of civil penalties where it is technologically impossible to comply with an emission standard. Once technology is sufficiently developed to effectively reduce SO_2 emission a different question presents itself. Similarly, we do not intend to suggest that a similar result would necessarily follow upon a showing of economic impossibility."

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52. Continued from page 24:

> "The CAA, in an effort to coordinate federal and state air pollution control action, required the Administrator of the E.P.A. to promulgate national primary and secondary ambient air quality standards. These in effect defined the maximum concentration of pollutants adversely affecting public health and welfare allowable in any given area. The CAA then required each state to adopt and submit to the Administrator for approval, an implementation plan designed to achieve these minimal standards. Once approved, these plans became enforceable by both federal and state authorities, with primary enforcement responsibility resting with the states. That a 'technology forcing' policy decision was, in fact, legislated, is interpolated by that language in the CAA, which requires that state implementation plans afford complaince with the primary ambient air quality standard 'in no case later than three years from the date of approval of such plan.' 42 U.S.C. §1857c-5(a)(2)(A)(i)" (Emphasis supplied)

53. The baghouse control is best suited for a "dry process".

54. Medusa produced aerial photographs showing such emissions from other cement plants which have baghouses as a control.

55. Estimates range above $20,000,000 for conversion to dry process and above $2,000,000 for baghouse conversion.

In another footnote the court intimated that a distinction should also be drawn between a civil penalty action and an appeal from a cease operations order. Both issues are involved in the instant matters. It said, at page 286, footnote 18:

> ". . .It is apparent that Regulation 123.22 can reasonably relate to the attainment of the public interest involved, if DER used the regulation as a means to close down violators of the standard. It is noted that DER is not attempting to shut down PPC on regulation of SO_2 emissions in the Commonwealth. No doubt such actions are an effective means of controlling SO_2 emissions so as to meet 123.22. It appears furthermore that the 'technology forcing' aspects of both the CAA and the APCA would allow such action."

The court had previously observed that it was yet unclear as to the actual length a polluter must extend to fulfill the "technology forcing" standards of the Clean Air Act, 42 U.S.C. §1857, *et seq.*, and the Air Pollution Control Act, 35 P. S. §4001. The real nub of the controversy is—who should bear the risk of failure—if, as Medusa contends, it cannot technologically solve the emission problem with its present process.

Although we believe it is <u>technologically possible</u> to convert to a dry process and a baghouse operation,[56] because the evidence indicates this to be <u>economically</u> unfeasible, we believe a cease operations order contingent on failure to do so without additional evidence, is unwarranted at this time. However, we believe an order to Medusa requiring it to come up with a plan to meet emission standards or cease operation can be valid under Pennsylvania law. If Medusa cannot satisfy air pollution standards at this plant, whether for technological or economic reasons, it may have to cease operation of the plant. *Rochez Bros., Inc. v. DER*, 18 Pa. Commonwealth Ct. 137, 334 A.2d 790 (1975). We will now require Medusa to submit a plan for compliance to DER within 90 days of the board's order.

The order of August 15, 1977, and the variance order upon which it is based require auxiliary heating systems[57] to be installed in order to limit the precipitator off time to "two minutes after combustible gases have been purged from the kiln exhaust system following ignition of the oil-fired kiln start-up burners". It is clear that the parties believed that this would solve the air pollution problems. Medusa installed new oil-fired kiln start-up burners and this substantially reduced, but did not eliminate the problem. There was a point at which Medusa believed that the DER was satisfied. It later became apparent, however, that the DER felt that more needed to be done to further reduce

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56. Assuming that the baghouse control technique cannot be made to operate properly with the present wet process.

57. The variance order specifically requires:
Continued to page 27

or eliminate the precipitator outage time during start-ups. Medusa asserts, and we believe, that it cannot safely further reduce the outage time by its present operations.

We do not know whether consideration was given to regulating the time and/or number of start-ups, as a possible alternative to the order issued, or what other measures were considered. It is not clear, moreover, whether in fact, additional auxiliary heating equipment, which the DER urges would solve the problem. This matter also was never fully resolved. Rather than sustain the DER's cease operation order in 77-097-W on this record, we will require Medusa to comply with the preliminary portion of the order and submit a plan for compliance within ninety days.

Finally we are asked to impose appropriate civil penalties for the four categories of alleged violations.[58] Medusa argues that it is technologically impossible for it to comply with the variance order and the DER order of August 15, 1977, from which an appeal was taken. This order, as previously indicated, required compliance by Medusa with emission limitations and other regulations through a plan to be submitted or termination of cement plant operations. Inasmuch as the whole question of violation of the variance order must now be reconsidered, we do not believe it appropriate to levy separate penalties as to that count in the civil penalties complaint at this time.

We have discussed the violation of Regulation §123.13 and §123.41, and we believe a penalty of $500 for each proven opacity violation (§123.41) of which due notice was given is appropriate.[59] Although the evidence by inference of weight rate violations (§123.13) does not leave much room for doubt, it is not the kind of evidence called for by the regulations. It is important not only that DER be able to determine whether there is a violation of §123.14, but also that a defendant know exactly what standards and tests he must meet—before he is charged with a violation. It is not clear that Medusa received this benefit before this civil penalties action was instituted. *Commonwealth of PA, DER v. Locust Point, supra.*

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57. Continued from page 26:

> "d. on or before September 1, 1973, install auxiliary heating systems of sufficient capacity to prevent condensation within all electrostatic precipitators that are utilized to control dust emissions from cement kilns operated at its plant located at West Manchester Township, York County, Pennsylvania;" —

58. DER seeks penalties totaling $5,216,500 based roughly on a formula of $300 for each fugitive emission violation and $1,000 for kiln start-ups on each day since the variance expired, plus the same amount for each day of violation of Regulations §123.13 and §123.41, plus $1,000 for each day of the air pollution for the same period.

59. There were 19 such violations.

We considered the fugitive emissions penalty and discussed the same at page 16, *infra*. We here note only that the DER requested a penalty of $300 for each incident. Medusa contends that the Air Pollution Control Act, 35 P. S. §4009.1, in allowing a penalty up to $2,500. . . "for each day of continued violation"[60] intended to permit only one penalty for each full day, even though more than one violation occurred, and also requires that the violations not be separated by a day or more on which there are no violations, in order to be "continued". The argument is thoughtful. We do not believe, however, that the legislature intended that there be a penalty imposed as though there were only one violation of our many environmental laws and regulations for any given day, no matter how many kinds of violations actually occurred. Inasmuch as the law speaks only of a single violation or continuous violations, and not various kinds of violations, we believe that the limits apply when the same violation occurs more than once on a given day, but not where there are various kinds of violations on a given day. We have therefore limited our $300 penalty to the twenty separate days on which fugitive dust emissions were shown by the DER.

We have found that Medusa did cause, and its continued operation if not altered, is likely to continue to cause air pollution. Calculating on the basis of 250 operating days for each year,[61] DER recommends a penalty of $1,000 per day for each day since the expiration of the variance order (December 18, 1973). The figure suggested, $1,080,000, although perhaps not too high if we were considering every day normal operation for penalty purposes, does loom large when considering only the brief periods daily when start-ups occur. This is especially true when we have already levied penalties for start-up violations and for fugitive emissions. We do feel, however, that the matter is serious, and a substantial penalty is required. Giving full consideration to the fact that there clearly are other significant contributors to the problems in the York air basin, we believe a penalty of $200 per day is appropriate for the time period indicated.[62]

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60. Section 4009.1 provides:

> "In addition to proceeding under any other remedy available at law, or in equity, for a violation of a provision of this act, or a rule or regulation of the board, or an order of the department, the hearing board, after hearing, may assess a civil penalty upon a person for such violation. Such a penalty may be assessed whether or not the violation was wilful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000.00), plus up to two thousand five hundred dollars ($2,500.00) for each day of continued violation. In determining the amount of the civil penalty, the hearing board shall consider the wilfulness of the violation, damage or injury to the outdoor atmosphere of the Commonwealth or its uses, and other relevant factors."

61. A total of four years or 1,000 days up to the approximate date hearings were concluded. We believe 250 days is more than reasonable considering downtime.

62. While it is not possible to comment on every argument, innuendo or suggestion made by the parties throughout this proceeding, we have weighed all of them in reaching our conclusions.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the parties and subject matter of this appeal filed to EHB Docket No. 77-097-W.

2. The board has jurisdiction over the complaint for civil penalties filed to EHB Docket No. 76-085-CP-W.

3. Evidence which indicates only the possible or potential emission from a source is not alone sufficient to prove a violation of Regulation §123.13, which provides specific maximum weight rate emission limitations, for the purpose of assessing a specific civil penalty pursuant to the Air Pollution Control Act, *infra*.

4. Where DER issues an order requiring an air pollution control plan to conform to a prior unsatisfied variance order, and orders a large business concern to cease operations unless compliance is reached within a given time, such order is valid, but where there are serious questions of technological and economic impossibility of performance unresolved, the board will give the company time to explore all possible alternatives and to submit a plan for compliance before upholding any order to cease operations.

5. The board should not assess civil penalties for alleged violations of a variance order where that issue must be reconsidered because of unresolved questions involving technological and economical impossibility of performance.

6. Where DER has proven that Medusa violated Regulation §123.1 by allowing fugitive emissions to go uncontrolled on 19 separate days, a penalty of three hundred dollars ($300) for each day of violation is fair and reasonable.

7. Causing air pollution is a serious offense for which civil penalties may properly be levied pursuant to the Air Pollution Control Act, *supra*, and *Rushton Mining Co. v. Commonwealth of PA, DER*, 16 Pa. Commonwealth Ct. 135, 338 A.2d 185 (1974).

8. DER has proven that the national primary and secondary ambient air quality standards for suspended particulate matter are being violated in the York air basin.

9. DER has proven that the state standard for settled particulate matter (25 Pa. Code §131.3) is being violated in the York air basin.

10. DER has proven, by means of a wind actuated sampling program, that the Medusa cement plant is a significant cause of air pollution in the York air basin, thereby reducing the chances of compliance with state and national air standards.

11. The citizens living in the area of the Medusa plant offered sufficient credible evidence to prove that Medusa, through its plant emissions, has unreasonably interfered with the comfortable enjoyment of their living and, therefore, violated the Air Pollution Control Act, *supra*.

12. Medusa has caused air pollution in violation of the Air Pollution Control Act, *supra*, and a civil penalty, therefore, may properly be imposed for the full period over which this occurred beginning from December 19, 1973, up to and including December 18, 1977.

13. The board may properly refuse to assess a civil penalty for those occassions on which the DER failed to give notice to Medusa of its alleged violation of Regulation §123.41 (opacity) within a reasonable amount of time.

14. Medusa has violated the opacity standards by its emissions during kiln start-up. There were 19 violations which DER observed and gave proper notice to Medusa.

V. Summary

In accordance with this adjudication we will access civil penalties as follows:[63]

Violation of Variance Order	$
Violation of Regulation §123.13(weight)	$
Violation of Regulation §123.41(opacity) 19 violations at $500 per day	$ 9,500.00
Violation of Regulation §123.1(fugitive emissions) 20 days at $300 per day	$ 6,000.00
Violation - Air Pollution 4 years at 250 full operating days per year 1,000 days at $200 per day	$200,000.00
	$215,500.00

63. The board commends counsel for both parties for the thorough, competent and highly professional manner in which they presented this matter for adjudication.

O R D E R

AND NOW, this 23rd day of August, 1978, in accordance with Section 4009.1 of the Air Pollution Control Act, 35 P. S. §4009.1, civil penalties are assessed against defendant, Medusa Corporation, in the amount of Two Hundred, Fifteen Thousand, Five Hundred Dollars ($215,500.00).

This amount is due and payable into the Clean Air Fund immediately. The Prothonotary of York County is hereby ordered to enter these penalties as liens against any private property of the aforesaid defendant, Medusa Corporation, 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.

Within ninety (90) days of the entry of this order, Medusa Corporation shall comply with the terms of DER's order appealed from in Docket No. 77-097-W insofar as it requires the submission of a plan or compliance with the terms of that order and the rules and regulations of the Department of Environmental Resources.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

Did not participate
THOMAS M. BURKE
Member

DATED: August 23, 1978

CONCURRING AND DISSENTING OPINION

By Joanne R. Denworth, Member

I concur in much of Chairman Waters' well-considered opinion. However, I have two major disagreements.

First, I do not agree that no civil penalties may be levied for continued violation of the weight rate standard of regulation 123.13 without observation of each such violation by DER personnel. If there were any doubt that such violations were occurring with every start-up, I would agree that civil penalties could not be imposed except for specifically recorded violations. In this case it appears a virtual certainty that the weight rate is violated with every start-up from the testing DER did to determine potential emissions. For example, potential

emissions without the precipitator on kiln no. 3 are 12,416 lbs/hr. Assuming a start-up time of 10 minutes (see Finding of Fact No. 9), emissions during that period would be 1,214 lbs. compared to an allowable hourly rate of 25 lbs. Even assuming some benefit from the settling chamber as Medusa claims, we are bound to conclude that violation of the weight rate occurred with every start-up. When the evidence is so clear, I do not believe that an enforcement agency is required to prove each such violation by sampling or test data. Certainly, we should not lightly impose civil penalties on any source; neither should we make the burden on an overburdened enforcement agency any more onerous than necessary by requiring it to prove what is obvious with elaborate and expensive testing. I believe there was substantial evidence of continued weight rate violation to support civil penalties in this case. Although it is likely that continued opacity violations also occurred, the relationship between weight rate and opacity violation has not been definitely established. *Alan Wood Steel Company v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 73-368-B, issued May 26, 1977, and I would agree that an opacity test by its very nature requires a visual observation.

Second, I believe that the penalties in this case are quite inadequate considering the clear violation and the substantial amount of penalty that could be imposed ($10,000 for an initial offense and $2,500 for each day of continued violation). I would impose the $1,000 per day that DER requests for kiln starts on each day since the expiration of the variance for a total of $1,080,000. Since the other counts of violation are essentially for the same offense, which is simultaneously a violation of the Air Pollution Control Act, the rules and regulations of the department and the variance order of the department, see 35 P. S. §4009.1, I would levy only one penalty for all counts.

I agree with Chairman Waters' preference for requiring the company to spend money to achieve a solution to the problem rather than pay penalties; and I would make at least half of the penalty amount conditional upon achieving a plan for compliance. Although Medusa's violations were not willful in any malicious sense, Medusa has knowingly caused significant air pollution in violation in York County of the laws of Pennsylvania since 1973. It should not benefit from failing to solve the problem by paying significantly less in penalties than a solution would have cost.

Although I would impose a larger penalty, I concur in the assessment of penalties totalling $215,500.00, in order to achieve a majority adjudication of the board.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CARROLL TOWNSHIP : Docket No. 77-037-W

: Pennsylvania Sewage Facilities Act

v. : The Clean Streams Law

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and THE BOROUGH OF DILLSBURG, et al, Intervenors

ADJUDICATION

BY: Paul E. Waters, Chairman, September 5, 1978

This matter comes before the board as an appeal from an order issued to Carroll Township by the DER which required the township to implement its official plan which provided for additional sewer lines to be constructed to the sewage plant for the Borough of Dillsburg. The borough plant is to be expanded substantially. Appellant now contends that it has no present or future need for additional sewer lines even though there have been numerous problems with on-lot sewage systems in Carroll Township, and Dillsburg has made substantial progress toward obtaining financing for the proposed plant in reliance, in part, upon appellant.

FINDINGS OF FACT

1. Appellant, Carroll Township, is a second-class township in York County, Pennsylvania, with a population of about 2,800.

2. On October 1, 1974, appellant, pursuant to the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.1, *et seq.*, adopted a sewage plan which required it to construct sewer lines in certain portions of Carroll Township to the existing Dillsburg sewage treatment system.

3. The Borough of Dillsburg, as a part of the overall plan, was to upgrade its facilities and allow additional capacity for Carroll Township as well as Franklin Township and Franklintown Borough.

4. On March 11, 1977, the DER issued an order to appellant and others requiring them to implement the official sewage plan because the DER was not satisfied with the progress that was being made.

5. Carroll Township alone appealed the order and the Borough of Dillsburg and the Dillsburg Borough Authority, the owner of the sewage treatment plant, intervened in support of the DER.

6. The Dillsburg plant is in need of upgrading and design of the new plant allocates a major portion to Carroll Township's alleged needs. On this basis, initial steps have been taken for federal funding, although the project is now far behind schedule.

7. Carroll Township has had second thoughts about its need for going with the other municipalities to provide sewage service, inasmuch as on-lot systems are presently in use.

8. If Carroll Township withdraws from the project, there is a serious question as to whether federal funding can be obtained and the Dillsburg plant upgrading completed.

9. More than one third of the soils in the proposed service area is unsuitable for on-lot sewage systems.

10. Although there have been a number of malfunctions of septic systems in the township, many of these appear to have been corrected.

11. According to the plan, much of the soil in the area is considered to be "severe", which indicates unsuitability for conventional on-lot disposal.

12. Carroll Township is one of the fastest growing municipalities in the county.

13. None of the municipalities who signed the joint resolution, a copy of which is Commonwealth Exhibit 2, apart from Carroll Township, have indicated that they are not willing to go forward with the project. The grant application for the expansion of the system of the Borough of Dillsburg serving the other areas, including Carroll Township, is currently in the step 2 phase. The grant application is for an expansion of existing Dillsburg sewage treatment facilities from a 3,000 gallon per day treatment plant. This expansion would serve populations in Franklin Township, Franklintown Borough, and there is also capacity included for Carroll Township. The step 2 work was scheduled to be completed sometime in the summer of 1978.

14. If Carroll Township were not included in the step 3 application made by Dillsburg, the design of the plant would have to be redone to subtract out the capacity that is now being designed into the facilities for Carroll Township.

Carroll Township's portion of the proposed expansion of the facilities is 52%, so that if Carroll Township withdrew, 52% of the expansion would have to be deleted.

15. The department's record showed that 17 of the 52 samples that routinely came into the DER during the period of 1972 to 1975, being samples of well water for analysis, came from Carroll Township, and 5 of the 17 were shown to be contaminated.

16. The future growth to be accommodated by the expanded sewage system for the proposed Carroll Township service area is approximately 1,183 people. That is, the gallonage allocated to Carroll Township in the expanded facility is 250,000 gallons per day, and 131,700 gallons of that is needed for current population. The remaining 118,300 gallons per day capacity, using the standard conversion of 100 gallons per day per person, allows capacity for an additional 1,183 persons (338 homes, at the standard conversion rate of three and one-half persons per dwelling unit).

17. A joint steering committee was formed in 1974 with representatives from each of the municipalities involved. The goal of this steering committee was to formulate a regional sewerage plan in accordance with the wishes of the DER. Capitol Engineering Corporation was selected to prepare this study for submittal to the steering committee and, subsequently, to the DER. That report was prepared and submitted into evidence as Commonwealth Exhibit 3, constituting part of the official sewage plan of Carroll Township. The conclusion of the Capitol Engineering study, Commonwealth Exhibit 3, was that portions of Franklintown Borough, Franklin Township, Carroll Township and Dillsburg Borough should have sewage collection facilities which would convey sewage to be treated at the site of the existing Dillsburg treatment plant.

18. In the course of the study conducted by Capitol Engineering in connection with the feasibility plan, it was determined that based on a review of the soil characteristics throughout the service area that approximately 75% of the soils contained within the service area are not suitable for on-lot disposal systems for various reasons, such as the type of soil, high groundwater level, or bedrock conditions.

19. In the areas where the plaintiff proposes to provide municipal sewerage service, the concentration of population is such that, eventually, if not at the present time, the continual discharges of sewage through on-lot systems will permeate the groundwater system and contaminate it. In view of these evaluations,

and considering the economic considerations involved in providing the municipal system, it appeared to Capitol Engineers that the municipal system would be the most cost-effective method of treatment. By adopting the plan as its official plan, Carroll Township agreed with this conclusion.

20. The trend in Carroll Township has been about a 5% increase in population per year. That would likely increase to 6% or 7% a year if sewage facilities were available such as those proposed in the township's official plan.

21. In February of 1976, Carroll Township, by motion in a public meeting, indicated that the township wished to be included in the application for a sewage treatment plant capacity, but that they would build their own lines when funds became available. This motion was communicated to the Dillsburg Borough Authority.

22. On the basis of the letter entered into the record as Intervenor's Exhibit 3, the Dillsburg Borough Authority asked its engineer to proceed with the submitted step 2 grant application to EPA.

23. As of July 27, 1976, all of the municipalities, including Carroll Township, had agreed to participate in the sewage project as set forth in the Capitol Engineering Study.

24. At a meeting in August of 1976, Carroll Township asked the Borough of Dillsburg to include Carroll Township in this step 2 grant application for the collection system at the stated lump sum that was indicated in the agreement then being negotiated.

25. On October 28, 1976, the proposed agreement for jointly proceeding could not be agreed upon between Carroll Township and the Dillsburg Authority, and thereafter negotiations deteriorated and no further progress was made.

26. Mr. Barr, expert witness for Carroll Township in this proceeding, testified that the 1970 census showed a population for Carroll Township of 2,386. He further testified that the 1980 projection as estimated by the Northern York Regional Plan was 4,500 population.

27. Mr. John D. Schrum has been a sewage enforcement officer for Carrdl Township for four years. He is certified under the Pennsylvania Sewage Facilities Act, and has been a sewage enforcement officer since 1968.

28. As part of his duties and responsibilities, Mr. Schrum has been responsible for the issuance or denial of permits for subsurface sewage systems throughout the township.

29. Mr. Schrum testified that if he was asked by the township supervisors to make a recommendation as to whether or not public sewers should go

into the area as proposed, that his recommendation would be that unless they are going to prohibit building, they are going to need public sewers.

30. On October 1, 1974, Carroll Township adopted as its official plan for sewage services, according to Act No. 537, a plan entitled "Preliminary Report--Dillsburg Area (York - Cumberland County) Joint Sewerage Study", which was approved by DER.

31. The plan envisioned cooperation among Dillsburg and Franklintown Boroughs, Franklin and Carroll Townships, and the Dillsburg Borough Authority.

32. Dillsburg Borough, Franklin Township and Franklintown Borough took appropriate steps in conjunction with the authority to implement the aforesaid plan so that the authority made application for and received an EPA grant, step 2, for the design of the treatment plant envisioned in the plan as well as the design of the collection systems in Franklin Township and Franklintown Borough.

33. The authority, after receiving notice of the EPA grant, contracted with Capitol Engineering Corporation to design the plant and the collection systems in Franklin Township and Franklintown Borough in accordance with the plan, which design was approximately 90% complete as of March 1, 1978, the date testimony was first taken in this matter.

34. Without Carroll Township's cooperation, there is a potentially great difficulty in procuring a step 3 grant which would provide for construction of the sewage treatment plant in accordance with the plan, and the collection systems in Franklin Township and Franklintown Borough; although such a grant may be forthcoming after redesign of the treatment plant at a reduced capacity.

35. Although by communication dated February 11, 1976, Carroll Township notified the authority that they wished to be included in the application for sewage treatment plant capacity, but that they would build their own collection system, Carroll Township later, in October, 1976, determined they should have an evaluation analysis.

36. Dillsburg Borough requires additional treatment plant capacity.

37. A study prepared for Carroll Township by Dennis H. Bar of Glace and Glace Engineering, recommended providing sewage service to essentially the same areas as is included in the areas ordered to be sewered by the DER and further indicated that community growth may be hindered and property values decreased if such facilities were not available at the appropriate times.

38. Testimony of John D. Schrum indicated during his period of tenure as a sewage enforcement officer (four years) he has had to refuse permits for

potential developement areas comprising one hundred seventy-seven (177) acres plus an additional one hundred seventy-one (171) lots. Furthermore, his testimony indicated various malfunctions as noted on Commonwealth Exhibit No. 7.

DISCUSSION

The first question presented by this appeal is—under what circumstances, if any, may a municipality refuse to comply with its Act 537 sewage plan?

The Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.5 provides:

> "(a) Each municipality shall submit to the department an officially adopted plan for sewage services for areas within its jurisdiction within such reasonable period as the department may prescribe, and shall from time to time submit revisions of such plan as may be required by rules and regulations adopted hereunder or by order of the department:"

On October 1, 1974, appellant Carroll Township,[1] adopted an official sewage facilities plan by resolution which was admitted as DER's Exhibit 2 and 3. Appellant does not deny that the DER now seeks by its order, only to have the township do that which it has agreed to do, i.e. construct sewers for conveyance to and use of an expanded Dillsburg plant. It would seem that any change in circumstances as they relate to appellant, which it believes is justification for a change of direction, would require that appellant seek a revision in its Act 537 plan. Indeed the statute specifically mentions periodic "revisions" to said plan. It is clear that appellant has not used the recognized procedure for implementing what amounts to an official change of mind.

We then must decide whether the plan revision procedure is the only way in which a municipality can seek to avoid the consequences of what it now deems to be a bad Act 537 decision. In the case of *Township of Monroe v. Comm. of PA, DER*, 16 Pa. Commonwealth Ct. 579, 328 A.2d 209 (1974), a township refused to enter a joint sewer agreement because it believed there was no present need, and that there would not be sufficient future need for public sewers, preferring instead to continue reliance on septic tanks. The court, finding no substantial evidence of future need, reversed our decision which had upheld the DER order. We believe here DER should carry a much lighter burden than in the

1. The same plan was agreed to by three other municipalities as well, making it a joint venture with Franklintown Borough, Dillsburg Borough and Franklin Township. Monaghan, Upper Allen and Monroe Townships who were also partners to the resolution have fallen by the wayside for explained reasons.

Monroe Township case, but that still appellant should not be foreclosed, in an appeal from an implementation order, from showing that changed circumstances now indicate there are no present or future needs which require public sewers.[2] We reiterate that a plan revision is the better procedure for a municipality to use, where it has decided that its adopted Act 537 plan is no longer feasible.[3]

. Does the evidence indicate that Carroll Township has a present or future need for public sewerage?

In the *Monroe Township* case, on remand, No. 75-095-W, the board upheld the DER order on a finding that 25% of the undeveloped land was unsuitable for on-lot sewage systems. Here we are dealing with a township with a much higher percentage of unsuitable land. Appellant, in addition through its own investigation has found that 33 1/3% of the wells tested, showed coliform contamination above drinking-water standards.[4] Although we are unable to accept the estimate made by the township enforcement officer that 75% of the land in the service area is unsuitable, it is clear that a substantial part, certainly at least one third, is properly so categorized.[5] This, coupled with the fact that the township is growing,[6] and the fact that appellant is only being asked to do that which it previously agreed to do, leads us to conclude that the order issued by the DER is proper and reasonable.

Appellant properly points out that many of the specific malfunctions which DER alleged, have been corrected,[7] and that wash water found in the street need not be related to an inadequate on-lot system. The board, however, cannot disregard the testimony of the sewage enforcement officer of Carroll Township, who was in the best position to know the sewage needs of the township. Mr. Schrum testified that if his opinion were sought by the township, he would recommend in favor

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2. In the *Monroe Township* case, the court in construing The Clean Streams Law, Section 203, indicated that DER orders issued requiring sewer construction could be sustained by either present or future need. The statute provides:

> "(b) . . .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."

3. If the revision request is not approved by the DER, this would of course be a reviewable decision.

4. Carroll Township conducted tests of 15 wells and found 5 to be contaminated. (N.T. Page 374)

5. The testimony of Mr. Schrum, the township sewage enforcement officer, was taken by a deposition at which objections were interposed to his estimates. Although we find that he is duly certified and properly qualified by experience and training to render an admissible opinion on the question, the fact that he has not had the opportunity to examine every lot does affect the weight we accorded his testimony.

6. The estimated 1980 population is 4,500.

7. There were numerous repairs made to septic systems which apparently were

of the badly needed sewerage project.[8] He further testified:

"A On Siddonsburg Road by Carroll Manor, including some lots on Chestnut Grove Road, there were 23 lots examined which 20 were not usable and three were usable for sand mounds.

"Q On these, approximately what period of time did you examine these lots?

"A Approximately September of 1977.

"Q And what did you look at in terms of making that examination.

"A Probes on every lot.

"Q A probe being a pit to reveal the soil?

"A Yes, sir.

"Q And what was the problem with the lots?

"A Clay."

* * *

"Q Now, both the Shiding development and Carroll Manor are in the proposed service area, is that correct?

"A They are both along Siddonsburg Road.

"Q As far as Carroll Manor is concerned, aside from those five lots, are there any other problems or malfunctions in that development that you are aware of?

"A Yes, sir.

"Q Would you describe those, please?

"A Sewage coming on top of the ground, malfunctions.

"Q How many instances of that have you observed?

"A On one occasion, we observed eight lots in one day.

"Q Any others that you are aware of?

"MR. HIMES: Do you know when that was?

"THE WITNESS: During this past summer.

"BY MR. DICE:

"Q How were you able to determine the malfunction?

"A By seeing the sewage on top of the ground.

"Q All right. Any others?

"A Other what, sir?

"Q As far as, continuing with your list of —

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8. Notes of Testimony, Page 442, Lines 6 through 10 and 15 through 19:

"Q Let me ask you this. If you were asked by the Township Supervisors to make a recommendation as to whether or not public sewers should go into the area as proposed, what would your recommendation be?

* * *

"THE WITNESS: Unless they are going to prohibit building, they are going to need something.

"MR. DICE: When you say something, you mean public sewers?

"THE WITNESS: Public sewage, sewers."

Road and we had 35 lots that were unsuitable for standard sewage systems.

"Q And on what basis were they unsuitable, do you recall?

"A Through probe tests.

"Q What was the limitation on those as revealed on those probe tests?

"A Well, from water three and a half to four feet to rock at 18 inches, bedrock.

"Q Is that also in the general area of the service area on Commonwealth's Exhibit No. 7?

"A Yes, sir. It is Logan Road and Ore Bank Road where they join and they join Siddonsburg Road."

Appellant seems to base further legal objections on the economic impact the project will have on its citizens and its belief that Dillsburg is not really concerned about anything more than its own needs. We believe *Ramey Borough v. Comm. of PA, DER*, 466 Pa. 45, 351 A.2d 613, has resolved the former issue and we can offer no legal remedy for the latter.[9]

CONCLUSIONS OF LAW

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

2. Although the perferred procedure where a municipality does not want to implement its official plan under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.1, *et seq.* Act 537, is for it to seek a plan revision, this board will nevertheless review an order issued by the DER under The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1, *et seq.*, which in effect requires the municipality to implement a joint sewer plan it has neglected.

3. Appellant has both a present and future need for public sewers, which is demonstrated by the present malfunctions of many on-lot systems, the growing population and the fact that more than one third of the undeveloped land is unsuitable for standard on-lot systems.

4. The DER has carried the burden of proof necessary to sustain its implementation order by a showing that appellant, by its official plan agreed to carry out a joint sewer venture with other municipalities who have moved ahead in reliance thereon, and despite frequent malfunctions of on-lot systems, polluted water, wells and more than one third of its land being unsuitable for standard on-lot systems, it has failed and refused to implement its agreement.

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9. No doubt each municipality in adoption of an Act 537 sewage plan, had its own separate motivation, and we could expect that self interest would be a prominent part thereof.

O R D E R

AND NOW, this 5th day of September, 1978, the appeal of Carroll Township to EHB Docket No. 77-037-W is hereby dismissed and the order of the DER is hereby sustained with compliance dates to run from the date hereof.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

DATED: September 5, 1978
llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

PRIMROSE MINING, INC. : Docket No. 77-184-B and 77-185-B

v. : Mine Drainage Permit

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Thomas M. Burke, October 4, 1978.

This matter comes before the board on the Department of Environmental Resources's (DER) motion to dismiss appeals.

Appellant, Primrose Mining, Inc., purchased two bituminous coal mines in Somerset County. Consequently, it applied to the DER to have the mine drainage permits which were issued to the original owners reissued in its name. It now appeals from the special conditions included in the two mine drainage permits issued by the DER in response to its request. The special conditions impose effluent limitations on the discharge of total suspended solids, total iron, manganese and aluminum from the bituminous coal mines.

The DER on January 12, 1978, filed a motion to dismiss appeals asserting that appellant is, at this time, precluded from challenging the special conditions of the permits. Appellant, on February 2, 1978, filed an answer opposing the DER's motion to dismiss. Both parties have filed briefs in support of their respective positions and oral argument was held before the board on July 11, 1978.

The board has the authority to grant a motion to dismiss where, on an appeal challenging the validity of a DER action, there is a showing by the DER that there is no genuine issue as to any material fact and that DER is entitled to judgment as a matter of law. *Summerhill Borough v. Comm. of Pa., DER*, ___Pa. Commonwealth Ct.___, 383 A.2d 1320 (1978).

The DER's motion to dismiss is granted for the reasons stated herein.

FINDINGS OF FACT

1. Appellant is Primrose Mining, Inc., a business corporation with offices at 200 Union Carbide Building, Pittsburgh, Pennsylvania 15220.

2. Stewart Coal Company (Stewart) on June 2, 1975, submitted to the DER application no. 5675302 for a mine drainage permit for the operation of a bituminous deep mine in Conemaugh Township, Somerset County.

3. Stewart's application no. 5675302 represented that the mine drainage discharge from the proposed Conemaugh Township mine would be limited to the following effluent parameters:

Total suspended solids	30 mg/l (average)
Total iron	4.0 mg/l (average)
Manganese	3.0 mg/l (average)

4. The DER on July 23, 1975, issued mine drainage permit no. 5675302 to Stewart. The permit, at Section F.1, stated:

> "F. You are hereby authorized to construct, operate or discharge, as indicated above, provided that you comply with the following:
>
> "1. All representations regarding operations, construction, maintenance and closing procedures as well as all other matters set forth in your application and its supporting documents (Application No. 5675302 dated 6/2/75), and amendments dated 6/27/75, & 7/8, 7/16/75. Such application, its supporting documents and amendments are hereby made a part of this permit."

5. On July 23, 1975, mine drainage permit no. 5675302 was issued to Stewart subject to special conditions "A", "B" and "C" which provided:

> "A. The concentration of total suspended solids in the discharge shall not exceed 30 mg/l as a daily average nor 60 mg/l as a daily maximum.
>
> "B. The concentration of total iron in the discharge shall not exceed 4 mg/l as a daily average nor 7 mg/l as a daily maximum.
>
> "C. The concentration of manganese in the discharge shall not exceed 3 mg/l as a daily maximum."

6. No appeal was taken by Stewart from the issuance of mine drainage permit no. 5675302.

7. Stewart by letter dated August 9, 1977, gave "full and unqualified authority" to appellant and/or the DER to cause mine drainage permit no. 5675302 to be transferred to appellant.

8. Grove Resources Company (Grove) on January 12, 1976, submitted to the DER application no. 5676301 for a mine drainage permit for the operation of a bituminous deep mine in Garrett Borough, Somerset County.

9. Grove's application no. 5676301 represented that the mine drainage discharge from the proposed Garrett Borough mine would be limited to the following parameters:

Total suspended solids	30 mg/l (average)
	60 mg/l (maximum)
Total iron	1.5 mg/l (average)
	4.0 mg/l (maximum)
Aluminum	0.2 mg/l (average)
	0.4 mg/l (maximum)

10. The DER on April 30, 1976, issued mine drainage permit no. 5676301 to Grove. The permit, at section F.1 stated:

> "F. You are hereby authorized to construct, operate or discharge, as indicated above, provided that you comply with the following:
>
> "1. All representations regarding operations, construction, maintenance and closing procedures as well as all other matters set forth in your application and its supporting documents (Application No. 5676301 dated January 12, 1976), and amendments dated Feb. 24, 1976 & Mar. 16, 1976. Such application, it's supporting documents and amendments are hereby made a part of this permit."

11. Mine drainage permit no. 5676301 was issued to Grove on April 30, 1976, subject to special conditions "A", "B" and "C" which provided:

> "A. The concentration of total suspended solids in the effluent shall not exceed 30 mg/l as a daily average, nor 60 mg/l as a daily maximum.
>
> "B. The concentration of total iron in the effluent shall not exceed 1.5 mg/l as a daily average, nor 4.0 mg/l as a daily maximum.
>
> "C. The concentration of aluminum in the effluent shall not exceed 0.2 mg/l as a daily average, nor 0.4 mg/l as a daily maximum."

12. No appeal was taken by Grove from the issuance of mine drainage permit no. 5676301.

13. By letter dated August 9, 1977, Grove gave "full and unqualified authority" to appellant and/or DER to cause mine drainage permit no. 5676301 to be transferred to appellant.

14. The DER, on September 22, 1977, received applications from appellant requesting that the permits issued to Stewart and Grove be reissued to appellant. The applications were submitted to DER under cover of the following letter:

> "Gentlemen:
>
> Primrose Mining, Inc., is filing application for renewal of two Water Quality Management permits as follows:

Previously Granted to	Permit #	Location
Grove Resource Company	5676301	Garrett Borough Somerset County
Stewart Coal Company	5675302	Conemaugh Twsp. Somerset County

Since the two mines have not been openned for operation, the filing previously submitted by the companies would not change.

We are submitting with the filings, letters from Grove Resource Company and Stewart Coal Company, giving Unqualified Authority to Primrose Mining, Inc. or the Department of Environmental Resources for renewal of the permits.

Primrose Mining, Inc., states that they are the present owner of the two mines and will abide by the terms and conditions of the original permits.

The officers of Primrose Mining, Inc., are as follows:

President	A. C. Muse
Vice President	Gordon M. Reid
Treasurer	C. H. Muse, Jr.

Enclosed is Primrose Mining, Inc., check in the amount of $50.00 to cover cost of filing the two permits.

Very truly yours,

A. C. Muse
President"

15. The DER on October 18, 1977, effected the requested transfer of mine drainage permit no. 5676301 from Grove to appellant by issuing to appellant mine drainage permit no. 5677307 which contained the identical terms, provisions and conditions that were included in the permit issued to Grove.

16. The DER on October 18, 1977, effected the requested transfer of mine drainage permit no. 5675302 from Stewart to appellant by issuing to appellant mine drainage permit no. 5677306 which contained the identical terms, provisions, and conditions that were included in the permit issued to Stewart.

DISCUSSION

Appellant, some time prior to September 1977, purchased two bituminous deep coal mines in Somerset County; one, located in Conemaugh Township, was purchased from Stewart Coal Company (Stewart) and the other, located in Garrett Borough, was purchased from Grove Resources Company (Grove). Although neither coal mine has been opened, the prior owners had applied for and received mine drainage permits to operate the mines from the DER.[1] Appellant on September 22, 1977,

1. Section 315 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.*, requires that a person apply for and receive a mine drainage permit from the DER prior to the construction or operation of a bituminous deep mine.

applied to the DER to have the permits transferred from Stewart and Grove to it. To effectuate the transfer, appellant merely resubmitted to the DER the applications and supporting documents submitted by the prior owners. The applications were submitted under cover of a letter which stated in part:

> "Since the two mines have not been openned for operation, the filing previously submitted by the companies would not change...
>
> "Primrose Mining, Inc., states that they are the present owner of the two mines and will abide by the terms and conditions of the original permits."

The DER on October 18, 1977, issued the requested mine drainage permits to appellant. Mine drainage permit no. 5677306 was issued for the Conemaugh Township mine and mine drainage permit no. 5677307 was issued for the Garrett Borough mine. The permits were identical to the permits issued to Stewart and Grove; only the identifying permit numbers were changed.

Appellant on November 21, 1977, filed these appeals from the DER action of issuing the permits, alleging that the DER's imposition of the special conditions pertaining to the discharge of total suspended solids, total iron, manganese, and aluminum was "arbitrary, unreasonable and unlawful".

The challenged special conditions were included in the permits when issued to Grove and Stewart.

The DER's motion to dismiss cites *Comm. of Pa., DER v. Derry Township*, 466 Pa. 31, 351 A.2d 606 (1976) and *Comm. of Pa., DER v. Wheeling-Pittsburgh Steel Corp.*, 464 Pa. 223, 375 A.2d 320 (1977) for the proposition that the requirements of the two permits became final and thus not subject to challenge in this proceeding when the original permittees, Grove and Stewart, failed to appeal the DER's action in issuing the permit to them. The DER argues that appellant is bound by the requirements of the permits and thus cannot challenge them in this proceeding because as a successor in interest to the bituminous deep mines, it can have no greater rights *vis a vis* the DER than the original permit holders and is thus bound by the finality of the DER's determination when it issued the permits to Grove and Stewart. See Section 83, Restatement of Judgements, *Central Pa. Lumber v. Carter*348 Pa. 429, 35 A.2d 282 (1944) and *Thompson v. Karastan Rug Mills*, 228 Pa. Superior Ct. 260, 323 A.2d 341 (1974).

The *Wheeling-Pittsburgh* and *Derry* decisions applied the doctrine of exhaustion of administrative remedies which requires that where an administrative remedy is provided by statute, a party seeking relief must exhaust this remedy before a court will act, *Boro. of Baldwin v. DER*,16 Pa. Commonwealth Ct. 545,

330 A.2d 589 (1974) and the doctrine of collateral estoppel which defines the effect of a judgment on the parties in a subsequent different cause of action. *Township of McCandless v. McCarthy*, 7 Pa. Commonwealth Ct. 611, 300 A.2d 815 (1973). In *Wheeling-Pittsburgh* and *Derry*, the DER sought judicial enforcement of unappealed orders which had not been complied with. By way of a defense, the respondents sought to attack the validity of the orders. The Commonwealth Court held, (and the Supreme Court affirmed), in both cases, that an order from which no appeal has been taken, cannot be collaterally attacked in an enforcement proceeding.

The Commonwealth Court in the recent case of *Bethlehem Steel Corp. v. DER*, ___Pa. Commonwealth Ct.___, ___ A.2d ___, (Nos. 773 and 774 C.D. 1977, Opinion and Order filed September 6, 1978) held that the *Wheeling-Pittsburgh* decision is not controlling where a party in a new proceeding before the DER seeks a modification of obligations imposed upon it by a prior DER action because of a subsequent change in facts or circumstances. Rather, the court applied the doctrine of *res judicata* to determine if the party was barred from seeking a modification of a prior unappealed DER decision in the new proceeding before the DER. Given the court's analysis in *Bethlehem, supra,* we believe that this matter, which involves a new proceeding before the DER initiated by appellants to seek a modification of the obligations imposed by a prior unappealed DER action, is governed by the doctrine of *res judicata*.

For *res judicata* to prevail, there must be concurrence of four conditions: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons or parties, and; (4) identity of the quality or capacity of the parties for or against whom the claim is made. *Bethlehem Steel Corp. v. DER, supra; Township of McCandless v. McCarthy, supra; Stevenson v. Silverman*, 417 Pa. 187, 208 A.2d 786 (1965); *Robachinski v. Workmen's Compensation Appeal Board*, 33 Pa. Commonwealth Ct. 89, 380 A.2d 952 (1977).

Conditions "1" and "2" exist in this case. The "thing sued for" and the "cause of action" in the instant proceeding are identical to the original DER action. Appellant in this proceeding is challenging permit requirements imposed by the earlier DER action and appellant has not based its challenge on the occurrence of a change of circumstances sufficient to cause the "thing sued for" to differ from that involved in the original proceeding. In fact, appellant has merely resubmitted the documentation on which the DER made its decision in the original action.

In *Township of McCandless v. McCarthy, supra,* the Commonwealth Court stated:

> "...for purposes of res judicata, *there is identity of causes of action when in both the old and new proceedings the subject matter and the ultimate issues are the same.* Beyond this, determination of the question must rest in the sound discretion of the courts as applied to the circumstances of each case, having proper regard both to the public policy of res judicata and to the rights of the parties to have every bona fide issue passed upon."
> (Emphasis in original) Id. 300 A.2d 815 at 820

Here, the subject matter, the applications for permits, and the ultimate issues, the requirements of the permits, are identical to the earlier unappealed DER action.[2] Factually, the matter differs from *Robachinski, supra,* and *Bethlehem, supra,* where the courts held that there was no identity of "causes of action" and "thing sued for" because the appellant averred to the administrative agency that circumstances had changed since the initial decision. Here, no change in circumstances exists. Appellant merely resubmitted the identical applications and documents previously submitted to the DER by Grove and Stewart.

The only condition which does not exist in the instant appeal is "3", i.e., the successor in interest to the original parties, Grove and Stewart, appears in the instant appeal. However, *res judicata* still controls; it applies to and is binding, not only on actual parties but also to those who are in privity to them. *Stevenson v. Silverman, supra; Goldstein v. Ahrens,* 379 Pa. 330, 108 A.2d 693 (1954); *Burke v. Pittsburgh Limestone Corporation,* 375 Pa. 390, 100 A.2d 595 (1953), and *Central Pa. Lumber Co. v. Carter,* 348 Pa. 429, 35 A.2d 282 (1944).

We note Commonwealth Court's caution that *res judicata* should be applied sparingly "where the conduct involved is subject to continuing regulation and flexibility...as it should be in this field of developing technology". *Bethlehem Steel Corporation v. DER, supra.* Nevertheless, if any case calls for its application, this is it. Not only have the requirements of these permits previously been determined, the basis of the determination, the application and supporting documents submitted by appellant, were identical to the submissions by Grove and Stewart. Moreover, appellant proposed to the

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2. The doctrine of *res judicata* applies to not only those issues actually litigated in a prior proceeding, but also to those which might have been raised and adjudicated if the prior proceeding was on the same or substantially the same cause of action. *Township of McCandless v. McCarthy, supra; Burke v. Pittsburgh Limestone Corporation, infra.*

DER that it would achieve the effluent requirements that it subsequently appealed. If the appellant had submitted applications proposing different waste water treatment facilities or proposing different effluent limitations, the "thing sued for" might be different, rendering *res judicata* inapplicable.

We also are of the view that this appeal should be dismissed because the appellant was not aggrieved in a legally cognizable manner by the DER action when it issued the permits. The DER issued the exact permits that appellant requested. The applications for the permits proposed the effluent limitations that the DER imposed and appellant now challenges. Further, appellant in the letter to the DER requesting the permits stated that "it would abide by the terms and conditions of the original permits", and as previously stated, the DER merely reissued to appellant without changes the original permits.

We have in prior cases stated that since our hearings are conducted *de novo*, we have the discretion to consider facts not raised before the DER. See *Warren Sand & Gravel Inc. v. DER*, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975). However, there must be some semblance of order to the administrative appeal process. In this case, appellant not only did not raise facts before the DER, it did not raise the controversy; not only did appellant acquiesce in the permit requirements imposed by the DER, it proposed those permit requirements. If we granted appellant's request and toppled the DER's action, it would have to be based on facts completely different from those presented to the DER. The DER would for all intents and purposes be by-passed and the EHB would become the permitting agency.

For these reasons, we grant the DER's motion to dismiss and sustain the action of the DER in its issuance of mine drainage permits no. 5677306 and no. 5677307.

CONCLUSIONS OF LAW

1. Appellant is barred by the doctrine of *res judicata* from challenging the requirements of mine drainage permit nos. 5677306 and 5677307 as the requirements were imposed by an earlier unappealed DER action and the challenge is not based on the occurrence of a change of circumstance sufficient to render *res judicata* inapplicable.

2. *Res judicata* applies to and is binding on actual parties to an earlier proceeding and their privies.

3. Appellant was not "aggrieved" as that term is used by Section 1921-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §51 *et seq.*, by the DER's action of including the special conditions limiting the discharge of total suspended solids, total iron, manganese and aluminum in mine drainage permit nos. 5677306 and 5677307 as appellant proposed those discharge limitations, asserted to the DER that it would abide by those discharge limitations and did not in any way raise this controversy before the DER.

ORDER

AND NOW, this 4th day of October, 1978, it is hereby ordered that the DER's motion to dismiss appeals at Environmental Hearing Board Docket Nos. 77-184-B and 77-185-B is granted.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

cc: Bureau of Litigation

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DATED: October 4, 1978

pmg

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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BETTY WALSNOVICH, *et al*

Docket No. 77-190-W

Pennsylvania Solid Waste Management Act

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and COMMUNITY REFUSE SERVICE, INC., Permittee

ADJUDICATION

BY PAUL E. WATERS, Chairman, October 6, 1978

This matter comes before the board as an appeal from the DER's issuance of a permit to Community Refuse Service, Inc., pursuant to the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001, *et seq.*, authorizing the permittee to construct and operate a disposal facility on a large tract in Franklin County, Pennsylvania. Appellants, nearby residents who have had a previous unpleasant experience with a landfill, are opposed to the facility because of potential harm to the well-water supply and the anticipated unsightliness due to poor management.

FINDINGS OF FACT

1. Appellants, Betty Walsnovich, *et al*, are residents of Montgomery Township in Franklin County and occupy homes in the general area of the proposed landfill.

2. Community Refuse Service, Inc. was issued a Solid Waste Mangement Permit No. 10110 for the construction and operation of a sanitary landfill facility in Montgomery Tonwship, Franklin County, Pennsylvania, by the Pennsylvania Department of Environmental Resources, hereinafter DER.

3. Community Refuse's permit application set forth a number of critical design features deemed necessary for the proposed sanitary landfill to comply with the pertinent rules and regulations of the DER to provide adequate protection of the environment.

4. The most significant design feature is Community Refuse's commit-

ment to place a subbase of reworked soil underneath all refuse that is to be deposited at the site by crushing rocks into a fine grain material.

5. The subbase of reworked soil will be a minimum of eight feet thick; and where the overlying refuse is greater than eight feet thick, the subbase will be at least as thick as the overlying refuse.

6. The subbase of reworked soil will be prepared in one foot thick layers, each of which will be certified by a consultant to insure that it has been compacted to a proper density.

7. Only highly weathered bedrock, which is brown in color, is to be reworked and used as part of the subbase.

8. The second critical design feature of Community Refuse's permit application is the inclusion of an underdrain system, which is to insure that the water table never comes above the level of the base of the reworked soil subbase.

9. The third critical design feature in Community Refuse's permit application is the plan for diversion of surface water, which is to insure that only a minimum amount of surface water comes into contact with the refuse.

10. As part of its review, officials from the DER: (a) evaluated all written submissions of Community Refuse; (b) conducted detailed field studies of the site, including numerous visits thereto ; and (c) held an informal fact-finding hearing to hear the objections that citizens had to the proposed facility.

11. The review of Community Refuse's permit application was done primarily by two technically qualified DER officials, both of whom testified that the proposed landfill complies with the DER's rules and regulations, and that it does not pose any significant risk of environmental harm.

12. The area near the landfill is a sparsely populated area with no more than six homes within one-quarter mile of the entrance to the landfill.

13. There are no major employers in the area near the proposed landfill, nor are there any public sewers or public water supplies in the surrounding area.

14. The soil in the area in question contains a high slate content.

15. Some efforts to obtain on-lot sewage disposal permits in the area have failed because the soil was unable to meet the DER regulations.

16. Evidence of standing water in some test holes indicates that the area is not suitable for a natural renovation landfill.

17. An old solid waste disposal area about a mile from the presently proposed site has created unsightly conditions and bad feelings on the part of appellants toward any future solid waste disposal in their vicinity.

18. There is a stream within 100 feet of the proposed landfill boundary

DISCUSSION

Appellants do not want to risk the unpleasant aftermath of a landfill which they are afraid will bring environmental damage to their vicinity. Although they are not to be blamed for their concern, this board cannot reverse a decision of the DER based only upon that fear—no matter how honest and deep seated it may be.

The law provides that: "The department is hereby authorized to approve or disapprove plans for solid waste management systems submitted in accordance with this act." 35 P. S. §6005 (2)(f). It is our duty to reverse that decision only if we find an abuse of discretion. *Gannon v. Penna. Public Utility Comm.*, 1948, 56 A.2d 366; *Evays v. Reading Parking Authority*, 1956, 124 A.2d 92; *Travis v. Dept. of Public Welfare*, 1971, 277 A.2d 171. Appellants' major concern is the soil in the area which they contend contains large amounts of slate which will not properly filter the effluent from the landfill and this, they believe, will ultimately lead to contamination of their private water wells and a nearby stream. Although we are satisfied that appellants' evidence regarding the geology and hydrology of the area was not of the caliber upon which final conclusions could be based[1], our decision is more concerned with the measures to be employed by the permittee to overcome the site limitations. Although the permittee seems reluctant to concede that the site is less than ideal, it indeed must recognize the limitations which have caused appellants' concern, because the application and the testimony both indicate extensive efforts to comply with the law and regulations through three design features.

Appellants have made only passing mention to this aspect of the case,[2] expressing more concern about the kinds of problems which arose from an old dump which was apparently mismanaged. Obviously, the permittee here cannot be called upon to defend the misfeasance of others as a prerequisite to obtaining or retaining its own solid waste management permit.

It is sometimes difficult for laymen to understand that when an appeal is brought before this board, it must stand or fall on its own merits. Appellants will, no doubt, be incensed by this, because they have indeed, already had a bad experience with a disposal area,[3] which could not be called a sanitary landfill

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1. The key "scientific" witness for appellants was a retired biology teacher, now a dairy farmer, who has lived in the area for many years and has had experience with his own well on land adjoining the landfill.

2. The board believes that parties should be free to present their cases as they deem best, but it was clear at the hearing that the issues were not joined and the parties were at cross purposes.

3. This illegal disposal area was ordered closed by the DER on January 8, 1975, because of its many violations.

by any stretch of the imagination. They would here have us consider this experience and, on that basis, find that it will now be repeated unless we intervene. We cannot so find.

Permittee has designed a landfill which will use the crushed slate material to form a base eight feet thick upon which refuse will then be deposited. We are satisfied that the technical witnesses who were on the site properly evaluated the geology of the area and soil characteristics. The subbase with the proposed underdrain system is expected to prevent any contact between the water table and the refuse.[4] This is in conjunction with surface water diversion devices and should be adequate environmental protection. It must be remembered that there are only a few homes in this sparsely populated area and the plan calls for monitoring of the nearby stream so that any change in water quality can be met with appropriate remedial action.

The only other issue raised by the parties concerns the access road to the landfill and that matter has apparently been resolved subsequent to the hearing.[5]

CONCLUSIONS OF LAW

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

2. Under the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001, *et seq.*, this board cannot reverse a decision of the DER to issue a permit, otherwise proper, because appellants have had a previous bad experience with a landfill in the general area, or because nearby homeowners are generally opposed to any landfill within one-half mile of their homes.

3. Where the permittee has proposed extra measures in order to have a proposed landfill site meet the requirements of the statute and regulations, the board must look beyond the alleged site limitations to see if the proposal is sufficient to overcome the limitations.

4. The special design features which include the use of a subbase underdrain system, and surface water diversion, in a sparsely populate area are sufficient to justify the issuance of a solid waste management permit by the DER.

5. In this case, the proper implementation of the proposal and a good operation will be crucial factors, and therefore, appellants should be allowed to examine all certification data and stream monitoring reports.

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4. The depth to water table varies throughout the site from just below the surface to more than 15 feet. The proposal calls for the underdrains to be placed above the water table wherever it may be encountered throughout the site.

5. By letter dated July 18, 1978, the board was advised by counsel for permittee that it: "...has recently acquired the right to expand its existing access road in

ORDER

AND NOW, this 6th day of October, 1978, the appeal of Betty Walsnovich, et al, is hereby dismissed and the permit issued to the Community Refuse Service, Inc. is sustained. Permittee, shall send copies of all sub-base certifications and all reports from its stream monitoring program to appellants through their counsel.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

DATED: October 6, 1978
llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

		Docket No. 75-150-C
SHARON STEEL CORPORATION		
		EPA National Pollutant Discharge Elimination System Permit
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES		State Certification

ADJUDICATION

The proposed adjudication prepared by Hearing Examiner Louis R. Salamon has been adopted by the board without modification, October 11, 1978.

Sharon Steel Corporation (Sharon), which operates a basic steel producing plant in Farrell, Pennsylvania, was required to obtain, from the United States Environmental Protection Agency (EPA), a National Pollutant Discharge Elimination System permit (NPDES permit) in connection with the discharge of industrial wastes from various facilities at said plant to the Shenango River.

Pursuant to the provisions contained in Section 401(a) (1), of the Federal Water Pollution Control Act, 33 U.S.C. §1341(a) (1), and as a part of its application for a NPDES permit, Sharon was required to furnish to EPA a certificate from the Commonwealth of Pennsylvania that such discharge would be in compliance with applicable federal and state effluent standards.

The Commonwealth of Pennsylvania, Department of Environmental Resources (DER) issued such a certification with regard to Sharon to EPA in a writing dated October 29, 1974, and on or about October 31, 1974, Sharon received a copy thereof. In that certification, DER set forth certain standards and conditions with which Sharon was required to comply.

On or about December 6, 1974, EPA issued a NPDES permit to Sharon with regard to said discharge. On December 12, 1974, Sharon filed a written request to EPA for an adjudicatory hearing with regard to certain issues raised by matters contained in the NPDES permit. On or about May 14, 1975, Sharon received from EPA

a public notice of adjudicatory hearing. In that public notice, Sharon was advised that certain issues raised by Sharon in its request for such hearing could not be addressed by reason of the fact that they were related to the state certification. Sharon was further advised that it might raise these issues with appropriate state officials.

On June 16, 1975, this board received from Sharon an appeal from the terms and conditions contained in the state certification. Thereafter, DER moved to quash this appeal on the ground that this appeal was not timely filed. Sharon responded to this motion to quash by contending, *inter alia*, that if it was required to perfect an appeal to this board from the state certification within thirty days from October 31, 1974, the date when Sharon first received such certification, Sharon should be permitted an appeal *nunc pro tunc*.

DER also later petitioned this board to quash this appeal on the ground that Sharon was estopped to challenge certain waste parameters, contained in the state certification, for the reason that these were the same parameters which were established in earlier permits which DER issued to Sharon and in an earlier agreement between DER and Sharon, which were never timely challenged by Sharon.

We heard arguments on this motion to quash and on this petition to quash and on March 12, 1976, we issued an adjudication thereupon. In that adjudication, we concluded that an evidentiary hearing was necessary in order for there to be a determination as to whether an appeal *nunc pro tunc* should be allowed, that Sharon was estopped to challenge waste parameters contained in this state certification which were contained in earlier DER permits issued to Sharon, from which Sharon never filed appeals, and that Sharon was not necessarily estopped to challenge waste parameters contained in this state certification which were contained in said earlier agreement between DER and Sharon. In the adjudication, we held that the petition to quash with regard to certain waste parameters was granted in part and denied in part, based upon the conclusions above set forth. Sharon filed an appeal from our adjudication to the Commonwealth Court of Pennsylvania. In an opinion and order in *Sharon Steel Corp. v. Com. of Pa., DER*, 28 Pa. Commonwealth Ct. 607, 369 A.2d 906 (1977), the court reversed our order and remanded this matter to this board for an evidentiary hearing on the issue of timeliness of the appeal of Sharon.

On May 11, 1977, we held this hearing on the question of timeliness and also on the question of whether Sharon should be allowed to appeal *nunc pro tunc*.

FINDINGS OF FACT

1. Sharon is a corporation which operates a basic steel producing plant in Farrell, Mercer County, Pennsylvania.

2. DER is the agency of the Commonwealth of Pennsylvania which has the duty to issue certifications to EPA that discharges of industrial wastes from discharge facilities in the Commonwealth of Pennsylvania will be in compliance with applicable federal and state standards. These certifications were required to be issued in connection with applications for NPDES permits filed by entities which discharge industrial wastes. NPDES permits are required under the Federal Water Pollution Control Act, 33 U.S.C. §1251, *et seq.*

3. On October 29, 1974, DER issued such a certification to EPA in connection with the application of Sharon, no. PA0002429, for a NPDES permit covering its discharges of industrial wastes from various facilities at its said steel producing plant.

4. This certification was signed by Craig E. Yendell, an engineer, who, at the time, was chief of planning in the Meadville regional office of the Bureau of Water Quality Management of DER.

5. A true and correct copy of this certification was sent to James K. McCauley, vice president for environmental control of Sharon. Mr. McCauley received this copy of the certification on October 31, 1974.

6. There was no notice on this certification that such certification was an action which could be the subject of an appeal by Sharon.

7. As of October 31, 1974, it was not customary for DER to include in such certifications notice that such certifications could be appealed.

8. Mr. McCauley, who is not a lawyer and who had never seen a state certification prior to October 31, 1974, telephoned Mr. Yendell shortly after he received this document to inquire with regard thereto.

9. During the course of this telephone conversation:

A. Mr. Yendell explained the reason why it was necessary for DER to issue this certification.

B. Mr. McCauley indicated that Sharon objected to certain conditions contained in this certification.

C. Mr. McCauley asked Mr. Yendell to tell him how Sharon should appeal from the objectionable conditions contained in said certification.

D. Mr. Yendell told Mr. McCauley that Sharon should appeal from this certification within thirty days from the date when the NPDES permit was issued.

10. At no time relevant to this matter did Mr. Yendell specify the adjudicatory body to which any such appeal should be taken.

11. Between August, 1972, and February, 1976, it was Mr. Yendell's responsibility to issue state certifications to EPA with regard to discharges of industrial wastes from facilities in the Meadville region of DER.

12. Mr. McCauley, when he received the copy of this certification, was not familiar with the Federal Water Pollution Control Act, *supra*, as it related to the issuance of state certifications in connection with NPDES permits.

13. Although Mr. McCauley had available to him the services of counsel employed by Sharon Steel and the services of outside counsel during the period between October 31, 1974, and November 30, 1974, he chose to rely solely on the statement of Mr. Yendell with regard to the time for appeal from said certification. Mr. McCauley did not send a copy of this certification to counsel and he did not discuss the effect of this certification with counsel at that time.

14. Sharon did not file an appeal from this certification with this board within thirty days of the date when Sharon, by Mr. McCauley, received the copy thereof.

15. Mr. McCauley received NPDES permit no. PA0002429 from EPA or or about December 6, 1974. The conditions contained in said state certification were incorporated in this permit.

16. Mr. McCauley turned this permit over to the legal department of Sharon on December 9, 1974.

17. On December 12, 1974, Sharon sent to EPA a document entitled Request for Adjudicatory Hearing.

18. Mr. McCauley signed this document and he participated in the drafting thereof.

19. Mr. McCauley believed that this Request for Adjudicatory Hearing was a proper and timely challenge to all conditions imposed under said NPDES permit and, as such, from the conditions contained in said state certification.

20. Sharon did not file an appeal from this state certification with this board within thirty days of the date when Sharon, by Mr. McCauley, received said NPDES permit.

21. On May 14, 1975, Mr. McCauley received from EPA a written notice of adjudicatory hearing with regard to NPDES permit no. PA0002429.

22. In said written notice, Mr. McCauley was informed that neither the hearing officer nor the EPA regional administrator had jurisdiction to adjudicate issues which were based on said state certification and that those issues were cognizable before state officials.

23. On June 16, 1975, this board received from Sharon an appeal from the terms and conditions contained in said state certification.

24. On July 8, 1975, this board received from DER a motion to quash this appeal on the ground that said appeal was not timely filed.

25. On July 23, 1975, this board received from Sharon a response to motion to quash this appeal in which, *inter alia*, relief in the form of an allowance of an appeal *nunc pro tunc* was requested.

DISCUSSION

In section 21.21 (a) of the Rules of Practice and Procedure before the Environmental Hearing Board, 25 Pa. Code §21.21 (a), it is provided as follows:

> "(a) An appeal to the board from an action of the department shall be commenced by the filing of a written notice of appeal with the board within 30 days from the date of the receipt of written notice of an action of the department, unless a different time is provided by statute."

We have found that Sharon received a copy of the state certification which related to its application for a NPDES permit for industrial waste discharge facilities at its Farrell, Pennsylvania, steel producing plant on October 31, 1974.

We have also found that Sharon did not file an appeal to this board from said certification until June 16, 1975.

Since more than thirty days elapsed between the date when Sharon received this certification and the date when Sharon appealed from this certification, we would, without more, be required to quash this appeal because it was not timely filed. See *Borough of Grove City v. Comm. of Pa., DER*, EHB docket no. 74-267-C issued April 10, 1975; *Real-Act, Inc. v. Comm. of Pa., DER*, EHB docket no.74-131-C issued August 13, 1974.

Sharon has, however, filed a written request that we grant leave for the filing of an appeal *nunc pro tunc*. Under and by virtue of the provisions contained in Section 21.21 (e) of the Rules of Practice and Procedure before the Environmental Hearing Board, 25 Pa. Code §21.21 (e), we have the authority to grant the relief requested. In that section, it is provided, as follows:

> "(e) 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 constitutes 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."

In the leading case of *Nixon v. Nixon*, 329 Pa. 256, 198 A. 154 (1938), the Supreme Court of Pennsylvania, speaking through Chief Justice Kephart, provided insight into what events would and would not amount to good cause for the allowance of an appeal *nunc pro tunc*. It was stated, pp. 259-260, as follows:

> "But, as this Court has indicated, the legislative purpose is not to foreclose a party who satisfactorily explains his delay. However, the occasion must be extraordinary and must involve fraud or some breakdown in the court's operation through a default of its officers, whereby the party has been injured. There can be no extension of time as a matter of indulgence: *Schrenkeisen v. Kishbaugh*, 162 Pa. 45, 48. Such excuses as a client's illness (*Marcus v. Cohen, supra*), or neglect of an attorney (*Ward v. Letzkis*, 152 Pa. 318; *Wise v. Cambridge Springs Borough, supra*, at p. 144) are insufficient. Fraud, on the other hand (*Zeigler's Petition*, 207 Pa. 131; *York County v. Thompson*, 212 Pa. 561) or its equivalent, 'the wrongful or negligent act of a court official' (*Singer v. Del., L. & W. R. R. Co.*, 254 Pa. 502, 505) may be a proper reason for holding that, as to the injured person, the statutory period does not run and the wrong may be corrected by means of a petition filed nunc pro tunc within a reasonable time. As was stated in *Horn v. Lehigh Valley R. R. Co.*, 274 Pa. 42, 44, in reference to a statute limiting claims for workmen's compensation: 'While the governing sections are mandatory, ...we have held, where a party has been prevented from doing an act through fraud or circumstances that amount to fraud, the court might extend the time within which to do the act: ...' And, in *Schwartz Bros. v. Adams Express Co.*, 75 Pa. Super. Ct. 402, 403, it was said: Where a party has been prevented from appealing by fraud or by the ignorant or negligent act of a court official, it has been held that the court has power to extend the time for taking an appeal.' "

The principle contained in *Schwartz Bros. v. Adams Express Co., supra*, which is recited in the above quote from *Nixon v. Nixon, supra*, was applied in *Flynn v. Unemployment Compensation Board of Review*, 192 Pa. Superior Ct. 251, 159 A.2d 579 (1960). In *Flynn, supra*, a claimant for unemployment compensation whose claim had been rejected by the Bureau of Unemployment Compensation and who had been given written notice of her right to appeal, claimed that she did not timely perfect that appeal because the representative from said bureau, with whom she had been dealing, told her that she could not make the appeal and that she did not have "a leg to stand on". The court held that there should be an evidentiary

hearing to determine whether claimant's allegations were true and applied the principle that where a claimant is unintentionally misled by an official who is authorized to act in the premises, the time for appeal could be extended to relieve an innocent party of injury consequent on such misleading act.

With these principles as our guide, we turn to the allegations of Sharon in support of its request that it be permitted an appeal *nunc pro tunc* in this matter. Sharon contends that it was negligent for DER to fail to include in the certification which Sharon, by Mr. McCauley, received a notice that such certification was an action which was appealable, especially when it was the usual practice of DER, in other DER actions, so to do. Sharon also contends that Mr. Yendell affirmatively misled Mr. McCauley into failing to appeal from said state certification in a timely fashion when he told Mr. McCauley that Sharon should appeal therefrom within thirty days from the date when the NPDES permit was issued.

Although we have found that DER did, in fact, fail to include in said certification a notice that such certification was an appealable action, such fact, standing alone, does not aid Sharon in this matter. In *Commonwealth of Pennsylvania v. Derry Township, Westmoreland County*, 10 Pa. Commonwealth Ct. 619, 314 A.2d 868 (1973), the court articulated the following principle, p. 872 of the A.2d volume:

> "We note, however, that so long as an administrative agency or the Legislature has provided a duly published procedure for a hearing or appeal after such an order, it is not a requirement that it must also extend additional notice of such rights."

As we have noted previously, the procedure for an appeal after such action of DER as a state certification was duly provided and published in Section 21.21 of the Rules of Practice and Procedure before the Environmental Hearing Board; this procedure was in existence long prior to October 31, 1974.

We have found that Mr. Yendell did, in fact, advise Mr. McCauley that Sharon should appeal from this state certification within thirty days from the date when the NPDES permit was issued. We have also found that Mr. McCauley relied on this advice at the time.

Although this is the type of unwarranted, misleading and incorrect advice by an official who had a key role in the state certification process with regard to Sharon which might otherwise cause us to be disposed to accord to Sharon the relief which it requests, we seriously question whether Sharon had the right to rely on it. Mr. Yendell was not a lawyer. Mr. McCauley had available to him the input of legal counsel for Sharon. It is surprising that he did not seek

such input on such a potentially important question as when to file an appeal from state action with which he was clearly dissatisfied.

We need not, however, decide whether to grant this relief to Sharon on the basis of the misleading statement made by Mr. Yendell because later developments for which Sharon was solely responsible are operative to bar it from such relief.

At no time did Mr. Yendell specify the adjudicatory body to which any such appeal should be taken. Although Mr. McCauley, on behalf of Sharon, may have been misled by Mr. Yendell as to the time to challenge said certification, he could not have been misled as to the proper forum for the making of such challenge. Furthermore, when Mr. McCauley received NPDES permit no. PA0002924 from EPA, he sent this permit to the legal department of Sharon. This can be seen from a notation to that effect on the face of the copy of said permit which was an exhibit in this proceeding. We have every reason to believe that legal counsel for Sharon took an active role in this entire matter at this point in December 1974, and that legal counsel participated in the drafting of the Request for Adjudicatory Hearing which Mr. McCauley signed and sent to EPA. We cannot quarrel with the proposition that both Mr. McCauley and legal counsel for Sharon believed that they were filing a proper challenge to, *inter alia*, the state certification, when the Request for Adjudicatory Hearing was sent to EPA.

It appears, however, that this judgment by Mr. McCauley and by legal counsel for Sharon was incorrect. We cannot attribute this mistake in procedural judgment to the earlier advice of Mr. Yendell. We believe that it was incumbent upon Sharon to study the Federal Water Pollution Control Act, *supra*, especially after Sharon received said NPDES permit from EPA. If a careful study of said act had been made, Sharon would have found that the intent of that legislation was for the states to play a paramount role in the certification process. A reading of that act itself would have made it reasonably apparent to Sharon that there was a strong legislative preference that the certification process be reviewable before a state agency. Even if Sharon, by Mr. McCauley and its legal counsel, would have been unable to determine conclusively whether an appeal to this board was the proper method to challenge the state certification at the time when said NPDES permit had just been issued, Sharon should have attempted to protect itself procedurally by filing such an appeal to this board within thirty days from the date when Mr. McCauley received said NPDES permit at the same time as it filed for an adjudicatory hearing to EPA.

We are left with the fact that Mr. McCauley and legal counsel for Sharon simply failed to file this appeal in the proper forum at a time when they should have known that this board was the proper forum for such a filing.

Although we are in sympathy with the plight of Sharon, created by this mistake in procedural judgment, we must adhere to the principle that neither neglect of a party or his counsel to timely and properly perfect an appeal nor the hardship which such mistake may cause are sufficient grounds to permit the allowance of an appeal *nunc pro tunc*. See *Rostosky v. Comm. of Pa., DER*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976); *In Re Township of Franklin*, 2 Pa. Commonwealth Ct. 496, 276 A.2d 549 (1971); See also *Wheeling-Pittsburgh Steel Corp. v. Comm. of Pa., DER*, 27 Pa. Commonwealth Ct. 356, 366 A.2d 613 (1976).

CONCLUSIONS OF LAW

1. The Environmental Hearing Board does not have jurisdiction to hear an appeal from a state certification issued in connection with an application for a National Pollutant Discharge Elimination System permit to be issued by the United States Environmental Protection Agency when the corporation to which such certification was issued took an appeal to this board more than thirty days after the issuance of the certification unless good cause exists for the allowance of an appeal *nunc pro tunc*.

2. In the instant matter Sharon Steel Corporation failed to show good cause, as a matter of law, for the allowance of an appeal *nunc pro tunc*.

O R D E R

AND NOW, this 11th day of October, 1978, the motion to quash filed by the Commonwealth of Pennsylvania, Department of Environmental Resources is granted and the appeal filed by Sharon Steel Corporation is hereby quashed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

Thomas M. Burke, Member, did not participate in this decision.

(Carbon copies on next page)

cc: Bureau of Litigation

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DATED: October 11, 1978

pmg

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD
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WOLFE DYE AND BLEACH WORKS, INC. : Docket No. 77-019-D

v. : Industrial Waste Permit

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

BY JOANNE R. DENWORTH, Member, October 19, 1978

Wolfe Dye and Bleach Works, Inc. (Wolfe) has appealed from the Department of Environmental Resources' (DER's) denial of its application for a permit to discharge treated waste to Pigeon Creek, a tributary of the Schuylkill River in Berks County, Pennsylvania. At issue are two effluent criteria—for copper and suspended solids—that Wolfe contends are unauthorized by DER's regulations and illegal in that they impose a financially unreasonable burden upon Wolfe.[1] Appellant argues that the DER's overly stringent standards as to copper and suspended solids would require appellant to install chemical treatment in addition to its proposed extended aeration system at an added cost that the company's accountant projects will cause Wolfe's business to be unprofitable.

FINDINGS OF FACT

1. Appellant, Wolfe Dye & Bleach Works, Inc. (Wolfe) is in the fabric bleaching and dyeing business with a plant in Shoemakersville, Berks County, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (department), the agency entrusted with the duty of administering The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1, *et seq.*, and the rules and regulations promulgated thereunder.

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1. At the hearing, Wolfe stated that it was contesting only three of the effluent criteria that DER applied in its permit review—namely, 90% removal of total BOD or a maximum of 260 lbs/day of total BOD, whichever is less, copper at .1 mg/l, and suspended solids at 20 mg/l. Since the hearing, the BOD removal requirement is no longer at issue since DER has accepted appellant's argument regarding BOD based on the revised waste load characteristics brought out in the testimony of appellant's expert witness.

3. Wolfe's plant is located along Pigeon Creek about one mile from confluence with the Schuylkill River.

4. Wolfe presently disposes of the wastewaters from its bleaching and dyeing operations through a system of lagoons and spray fields.

5. Wolfe has no industrial waste permits authorizing use of either the lagoons or the spray fields for wastewater disposal.

6. Wolfe at one time possessed a permit authorizing use of the lagoons, but that permit was revoked by the department because of non-compliance with the impoundment regulations.

7. The department has taken enforcement action against Wolfe for its unauthorized discharge of wastewaters, and Wolfe is currently submitting penalty payments to the department under a consent agreement.

8. In 1973 the department and Wolfe entered into an agreement concerning control of Wolfe's industrial waste discharges that required Wolfe to submit an industrial waste permit application by September 1, 1973.

9. The department prescribed effluent limitations for Wolfe's discharge in a letter dated March 2, 1973. That letter specified, *inter alia*, the following effluent limitations for discharge into Pigeon Creek:

BOD_T	90% removal
suspended solids	20 mg/l
copper	.1 mg/l

10. Gilbert Associates, a consulting engineering firm, was hired by Wolfe in 1973, to design a treatment system to conform to DER's requirements. Gilbert Associates was in contact with DER over a period of years and finally submitted an application for an industrial waste permit dated April 30, 1976.

11. In its application, Wolfe proposed a biological treatment system employing extended aeration by the activated sludge process, followed by a clarifier.

12. The proposed system is designed to meet a criterion for BOD of 85% removal of 5-day BOD, a standard for suspended solids of 50 p.p.m. and a standard for copper of 1 p.p.m.

13. The estimated cost of installation and construction of the system proposed by Wolfe in its application is $500,000. The estimated cost of operating the proposed system is $40,000 per year, exclusive of depreciation.

14. In order to meet all of the criteria set forth by the DER in the letter of March 2, 1973, the addition of a physical chemical treatment system for chemical precipitation of remaining solids would be necessary at an additional cost of $410,000 or a total cost of $910,000.

15. Wolfe's accountant, taking management's figures, projected that the system costing $910,000 would cost the following sums for operation and would result in the following losses in operating income to Wolfe:

Year	Additional Cost	Projection of Wolfe Before Tax Income
1977	$ 6,800	$451,450
1978	218,600	177,950
1979	379,600	(52,650)
1980	391,000	(145,050)
1981	403,300	(249,850)

16. Wolfe's permit application was denied by the department in a letter dated January 21, 1977, because the treatment system proposed by Wolfe did not meet the effluent limitations for copper and suspended solids and BOD removal.

17. Regulation 95.2 of the DER's regulations requires the removal of "practically all" suspended solids. The department's policy in interpreting this section has been to require removal of 90% of suspended solids present in raw waste.

18. Deposition of suspended solids on a stream bottom interferes with aquatic life by blocking the penetration of light to the stream bottom.

19. Application of DER's policy of requiring 90% removal of suspended solids to the raw waste characteristics submitted by Wolfe in 1973 resulted in the DER's establishing a criteria for suspended solids of 20 mg/l.

20. The limitations for suspended solids proposed by Wolfe would remove 80% of the suspended solids present in Wolfe's raw waste.

21. Although the DER did not set forth any average and maximum values in its letter of March 19, 1973, the department's general practice (which it claims is well known by consulting engineers) is to calculate a maximum concentration by multiplying the average concentration by two. Thus, the standard applicable to Wolfe would be 20 mg/l average and 40 mg/l maximum. Similarly, the standard applicable to copper would be .1 mg/l average and .2 mg/l maximum.

22. Effluent limitations are calculated based upon the most critical flow in a stream, which is the seven-day, ten-year low flow. The seven-day, ten-year low flow for Pigeon Creek is .7 cfs, which is based upon the formula of .1 cfs/per square mile of watershed, since there are no gauging records for Pigeon Creek.

23. The department applied the stream standard of .1 mg/l copper to Wolfe's discharge rather than applying a different effluent criteria because the flow from Wolfe's proposed treatment plant will have a volume almost identical to the low flow volume of Pigeon Creek.

24. The department's copper criteria applied to Wolfe is a general stream criteria applicable to many streams in the Commonwealth and to the Schuylkill River and its tributaries.

25. Concentrations of copper are toxic to aquatic life. Although concentra-

tions over .5 mg/l are likely to be toxic to aquatic life, the toxicity of concentrations below that varies from stream to stream depending upon such factors as total dissolved solids, temperature and hardness.

26. The best way to determine a copper criteria for a specific stream is to conduct bioassay testing. Since the department does not have the financial or manpower resources to conduct such tests, general stream standards have been set for most streams.

27. In calculating the effluent limitations for copper in a particular stream, the department uses a mass balance formula invdving the stream flow and stream concentration of copper above the discharge point and the flow and copper concentration in the discharge. In this case, the department applied the mass balance formula using zero copper in the upstream water which resulted in a required effluent criterion of .2 mg/l copper. However, since copper may be toxic over .1 mg/l, the department used the .2 as a maximum figure and .1 as the average criteria required.

28. Robert Frey, an aquatic biologist with the department, conducted a chemical sampling survey of Pigeon Creek on October 23, 1975, and found a copper concentration of .03 mg/l upstream at the Wolfe plant and .01 mg/l downstream from Wolfe in the Borough of Shoemakersville.

29. Mr. Frey also conducted an aquatic biology survey of Pigeon Creek on June 23, 1977, and found that the aquatic community downstream of Wolfe's was depressed compared to the upstream community. Runoff from Wolfe's spray field and lagoons was the only attributable cause of this depression.

30. Effluent limitations comparable to those imposed upon Wolfe, given waste water effluent, stream flow, have been imposed by the DER on other bleaching and dyeing establishments.

DISCUSSION

Appellant makes two arguments in this case:

1. Regulation 95.2(b)(2) is constitutionally invalid because its requirement for the removal of "practically all of the suspended solids", is too vague, indefinite and uncertain to be applied.

2. The DER exceeded its own regulations and authority by imposing a stream standard rather than a discharge standard for copper upon Wolfe.

I. The Standard Applicable to Suspended Solids

Appellant's arguments with regard to Section 95.2(b)(2) is that the term "practically all" is vague and indefinite, is not a term of art and has no meaning as applied to any particular discharge. Appellant's expert witness, Charles Kertell, believed that "practically all" could mean all that is practicable, and in his opinion,

50 mg/l is all that it is practicable to remove from Wolfe's discharge. He asserts that the system proposed by Wolfe has been recognized by EPA as the best practicable control technology currently available.[2]

Since the hearing it has become apparent to us that provisions of §95.2 applicable to wastewater treatment requirements have changed since the department established criteria for Wolfe.[3] In 1973, regulation §95.2 provided:

> "§95.2. Treatment for bio-degradable wastes.
> (a) All bio-degradable wastes shall be given a minimum of secondary treatment or its equivalent for industrial wastes except as otherwise specified in this Chapter.
> (b) Secondary treatment is that treatment which shall accomplish the following:
> (1) Reduce the organic waste load as measured by the biochemical oxygen demand test by at least 85% during the period May 1 to October 31 and by at least 75% during the remainder of the year based on a five consecutive day average of values.
> (2) Remove practically all of the suspended solids.
> (3) Provide effective disinfection to control disease producing organisms.
> (4) Provide satisfactory disposal of sludge.
> (5) Reduce the quantities of oils, greases, acids, alkalis, toxic, taste and odor producing substances, color and other substances inimical to the public interest to levels which shall not pollute the receiving stream."

Regulation 95.2, *as amended*, June 28, 1977, effective July 25, 1977, provides:

> "§95.2. Waste treatment requirements.
> (a) All wastes shall be given a minimum of secondary treatment.
> (b) Secondary treatment for sewage, except discharges from the bodies of animals, is that treatment which shall accomplish the following:
> (1) Reduce the organic waste load as measured by the biochemical oxygen demand test by at least 85% during the period May 1 to October 31 and by at least 75% during the remainder of the year based on a five consecutive day average of values.
> (2) Remove practically all of the suspended solids.
> (3) Provide effective disinfection to control disease producing organisms.
> (4) Provide satisfactory disposal of sludge.
> (5) Reduce the quantities of oils, greases, acids, alkalis, toxic, taste and odor producing substances, color and other substances inimical to the public interest to levels which shall not pollute the receiving stream.
> (c) Secondary treatment for other wastes is that treatment which achieves either of the following:
> (1) The effluent limitations resulting from the application of the 'best practicable control technology currently available' as defined by the Administrator of the United States Environmental Protection Agency pursuant to Sections 301, 304 and 402 of the Federal Water Pollution Control Act (33 U.S.C. §§1311, 1314, and 1342); or
> (2) For those discharges for which 'best practicable control technology currently available' has not been defined by the Administrator under the Federal Water Pollution Control Act (33 U.S.C. §§1251 *et seq.*), effluent limitations resulting from the Department of Environmental Resources' determination of the equivalent of 'best practicable control technology currently available'."

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2. Although no specific reference to federal regulations was given by appellant's expert, we assume from a perusal of 40 C.F.R. §400 *et seq.*, that guidelines applicable to appellant's operation are those governing the textile industry, specifically the knit fabric finishing subcategory governed by 40 C.F.R. §410.50 and §410.53, but we cannot be certain of this.

3. We are at a loss to understand why this amendment was not brought to the attention of the board by either of the parties.

It appears from the amendment of §95.2 that the provisions requiring the removal of "practically all of the suspended solids" is now applicable only to sewage waste and that the regulation has been clarified to provide, with regard to industrial wastes such as Wolfe's, that effluent limitations resulting from the application of best practicable control technology currently available shall be applied. Thus it appears that the standard for suspended solids proposed by appellant has now been adopted by the Environmental Quality Board.[4] Although normally, review of the department's denial of Wolfe's permit application would be based on the regulations in effect at the time the department acted, we believe it is appropriate in this case to remand the permit application to the department for reconsideration in light of this amended regulation.[5] From the facts on this record, we are unable to determine whether or not the new regulation would result in the application of a standard of 50 mg/l suspended solids as appellant contends.

We are moved to remand this matter for reconsideration of the suspended solid effluent limitation in part because of questions concerning the interpretation of the standard of "practically all of the suspended solids". When the suspended solids effluent limitation was established for Wolfe in 1973, the department was relying on raw waste characteristics that had been submitted by Wolfe that gave the raw waste suspended solids as 209 mg/l. The department has generally interpreted Section 95.2(b) to require removal of 90% of the suspended solids contained in the raw wastes. Applying that policy to the figure submitted by Wolfe in 1973, the department arrived at an effluent limitation of 20 mg/l. (The department now says that that standard was intended as a 20 mg/l average with a maximum allowable of 40 mg/l.) In its application finally submitted in April of 1976, Wolfe sets forth raw waste characteristics containing 250 mg/l (N.T. 54-55) suspended solids. Applying the department's figure of 90% to this amount would result in an effluent limitation of 25 mg/l average, 50 mg/l maximum. Our difficulty with the department's interpretation of the standard of "practically all" suspended solids, is that it would appear to shift in relation to the

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4. It is true, as the department contends that the Federal Water Pollution Control Act, 33 U.S.C. § 1370 permits the states to adopt more stringent standards than those established by the federal government. However, here it would appear that the state has not adopted more stringent standards but has specifically adopted the federal guidelines.

5. It would appear from Regulation §95.6(a) that the amended regulation has effected a change in "treatment requirements" that could automatically be applicable to Wolfe. That section provides:

> "Whenever there is a change in the provisions of Chapter 93 (relating to water quality criteria) or this Chapter or whenever the department adopts a plan or makes a determination that would change existing or impose additional water quality criteria or treatment requirements, it shall be the duty of the permittee of facilities affected thereby, upon notice from the department, to promptly take such steps as shall be necessary to plan, obtain a permit or other approval, and construct such facilities as may be required to comply with the new water quality criteria or treatment requirements."

amount of suspended solids being discharged and available technology rather than in relation to the needs of the stream that is being protected. (Thus it would seem to be in a discharger's interest to inflate the amount of suspended solids being discharged in order to receive a larger allotment for suspended solids.) The department argues that it has some flexibility in interpreting the provision so that it may require more or less than 90% removal depending on the needs of the stream; and in this case the department believed that a stringent standard should be applied because of the size of Pigeon Creek. Although the department's policy makes some rough environmental sense, we question how it can be determined whether the standard has been properly applied in any given case. Since we have doubt about the application of the standard as interpreted to apply to Wolfe, in that it does not appear to be related to a specific object with regard to the protection of Pigeon Creek, and Section 95.2 has been amended to make clear that a technology-based standard is applicable to industrial wastes, we believe that this matter should be remanded for consideration of an applicable suspended solids criteria under the amended regulation.[6]

II. The Copper Criterion

Appellant's argument with regard to the copper criteria is that the department violated its own regulations or exceeded its authority in imposing a stream standard rather than a discharge standard upon Wolfe for its copper discharge. It is true that the department used as an effluent criterion, the stream standard of .1 mg/l which is set forth in Chapter 93 of the Department's Rules and Regulations, 25 Pa. Code §93.5(c) and is applicable by virtue of §93.6(b)(1) 01.110.10 to the Upper Schuylkill River Basin and all its tributaries. The department explained the use of the stream standard on the grounds that the ratio of Wolfe's proposed flow to the stream flow is one to one, and that the need to protect against the toxicity of copper is pronounced in a small stream of the size of Pigeon Creek. Charles Kuder of the department thought that the treatment system proposed by Wolfe would be adequate if the waste water discharge were to a fairly large stream and there were no problems with chemicals

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6. Appellant's contention that the regulation is constitutionally infirm because it is vague and indefinite seems to us to miss the possible infirmity. Although it has been held that a regulation promulgated by an agency must be definite and certain and is not enforceable if it cannot be understood by a careful reading, see *Commonwealth Trust v. First National Bank*, 84 D. & C. 421 (1953); FILE, Administrative Law and Procedures, §33, the rule is usually applied where some type of enforcement action is brought or threatened against a person under a statute or regulation which could not, by the application of common sense, be understood to mean prohibited the activity involved. See 16 AM. JUR.2d, Constitutional Law §[illegible]. In this case the department has a general policy of interpreting the term "practically all of the suspended solids" to mean 90% removal of suspended solids and appellant was informed of that interpretation and requirement in the department's letter of March 1973. Thus, appellant was not uninformed as to the meaning of the regulation as interpreted by the department. See *Disciplinary Counsel v. Campbell*, 463 Pa. 472, 345 A.2d 616 (1975).

in the discharge, but he did not believe that the system would be adequate to protect a very small stream such as Pigeon Creek.

We can find nothing in the regulations or in The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1, *et seq.*, or in the requirements of due process that would prevent the DER from imposing a stream standard as an effluent criteria where there are circumstances that justify that imposition. Appellant's argument that it should be permitted to discharge copper in an amount equivalent to the drinking water standard is not persuasive since the drinking water standard pertains to what is toxic to human life not aquatic life.

While it is clear that DER could not accept Wolfe's proffered effluent limitations of 1 mg/l copper, we question whether it was necessary to impose a standard quite as stringent as that outlined for Wolfe's discharge. It would appear from the DER's own formula that the application of the mass balance formula would result in a copper standard of .2 mg/l average and .4 mg/l maximum for Wolfe. It appears that the DER lowered this criteria, not on the basis of any exact information as to the needs of this particular stream, but on the ground that Pigeon Creek being a very small stream would require a more stringent standard than the criteria arrived at by the application of general policy. A department witness testified that standards of .2 mg/l copper and 50 mg/l suspended solids have been considered or approved by the department where the discharge is to a larger stream or the volume of discharge is smaller relative to the volume of the stream. However, in view of the considerable economic impact or of Wolfe satisfying DER's criteria, we believe Wolfe should only be required to meet DER's standards if they are clearly necessary to protect the stream. We do not believe that DER can be required to perform bioassay testing for each stream in the Commonwealth in order to establish effluent criteria. On the other hand, where there is a question of over stringency that may make some real economic difference, the applicant should have the opportunity to establish acceptable effluent limitations according to specific testing that would be satisfactory to DER. We are not certain whether it would make any difference to Wolfe in terms of the necessity of building additional treatment facilities. (It may be necessary to build additional facilities even if the standard is .2 mg/l copper.) However, prior to review of any further permit application or amendment to its permit application that Wolfe submits, Wolfe should be given an appropriately short time to perform testing as approved by DER to determine what effluent limitation for copper is necessary for the protection of Pigeon Creek.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the parties to this appeal and over the subject matter.

2. Where the board has doubt about the validity of a standard requiring removal of "practically all of the suspended solids" as applied in a particular case, and the regulation has been amended since the submission of appellant's application to make a different standard based on federal effluent guidelines applicable to industrial wastes, the matter will be remanded to the department for reconsideration of the permit application in light of the amended regulation.

3. Nothing in the law prohibits the department from using a stream standard as an effluent limitation where factors such as the size of the stream relative to the discharge warrant the use of a stream standard.

4.. While it is clear that the department was correct in rejecting appellant's permit application insofar as it proposed to meet an effluent limitation for copper of 1 p.p.m., the department's own evidence raises a question whether the effluent limitation established for appellant (of .1 mg/l) is slightly more stringent than necessary to protect Pigeon Creek.

5. In view of the significant economic impact on appellant of further chemical treatment, in future permit review, appellant should be given the opportunity to conduct tests as approved by the department to determine what effluent limitation for copper is necessary for the protection of Pigeon Creek.

O R D E R

AND NOW, this 19th day of October, 1978, the appeal of Wolfe Dye & Bleach Works, Inc. is sustained in part and this matter is remanded to the department for reconsideration in accordance with this opinion.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

DATED: October 19, 1978

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

THE KRAWITZ COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 77-118-W

Sewer Extension Permit

ADJUDICATION

By Joanne R. Denworth, Member, October 30, 1978

Appellant, The Krawitz Company, has appealed from the Department of Environmental Resources' (DER's) denial of a permit for a sewer extension to serve a development that appellant had begun to construct in Macungie Township, Berks County, Pennsylvania.

FINDINGS OF FACT

1. Appellant is The Krawitz Company (Krawitz), a partnership formed in 1975 by Harold Krawitz and his father, Saul Krawitz. Krawitz's office is located at 921 North Glenwood Street, Allentown, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, the agency entrusted with the administration of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1, *et seq.*

3. Appellant is an active developer in the Allentown area, having completed a number of subdivisions, including Kraft Village, Lone Pond Estates, Cameo Woods, Section I, all of which are located in Upper Macungie Township; an 18 lot development in Hanover Township; and a 40 lot development in Bushkill Township. Krawitz has recently begun a 100 lot development in Hanover Township.

4. The appeal in this matter relates to the proposed development of Cameo Woods, Section II, which is a subdivision adjacent to Cameo Woods, Section I, and as planned consists of 125 lots.

5. Krawitz obtained subdivision approval for Cameo Woods II from the Upper Macungie Board of Supervisors in December of 1976.

6. On May 4, 1977, Krawitz entered into a sewer extension agreement with Upper Macungie Township Municipal Authority, which provided for the extension of sewer lines into the Cameo II development at the developer's expense. Paragraph 1(3) of the agreement provides that the Authority will submit an application for extension to the Department of Environmental Resources and "upon receipt of said approval . . . the Authority will notify the developer that work may be started on the project."

7. Pursuant to a separate development agreement between Upper Macungie Township and Krawitz, Krawitz received 27 building permits in April and June of 1977, for houses in Cameo Woods II.

8. In June of 1977 Krawitz began construction of sewer lines into Cameo Woods, Section II, although no approval for the extension had yet been obtained from the DER.

9. Beginning in April, 1977, Krawitz built four houses designed to be sample houses in the Cameo Woods II development, and laid foundations for 15 additional houses in another area of Cameo Woods II.

10. The sample houses are completed except for sewer hookups, but are located in a portion of the proposed development remote from the installed sewers; consequently, these houses could not economically be connected to the sewers that have been installed unless other houses are built.

11. In May, 1977, the Authority submitted an application to the DER for a permit to extend sewer lines to Cameo Woods II.

12. By letter of September, 1977, the permit application was denied by the DER for the following reasons:

> "1. The Allentown Authority sewage treatment plant is not meeting its permit discharge requirements in the areas of total suspended solids and five (5) day biochemical oxygen demands.
> "2. Portions of the Little Lehigh interceptor are experiencing average daily flows that are nearing the carrying capacity of the interceptor, as designed for maximum peak flows.
> "3. Peak flow conditions result in surcharging of portions of the Little Lehigh interceptor."

13. Because of halted construction on the Cameo Woods II site and conditions in other adjacent developments, erosion and runoff have created some flooding conditions on properties downhill from Cameo Woods II. These problems

would be alleviated by a detention basin to be constructed by Krawitz in the completion of the Cameo Woods II development.

14. Krawitz is in an extended position financially in the Cameo Woods II development in that it has expended funds for the improvements made to date, is servicing debt on a financing arrangement with the bank ($800,000 of which has been received in the form of a letter of credit), and is incurring annual expenses such as the $1,600 it pays quarterly to the township sewer authority to keep its allotted sewer capacity.

15. The flows from Cameo Woods, Section II, would first pass through the interceptor lines owned and maintained by the Lehigh County Authority (LCA). The LCA interceptor extends alongside the Little Lehigh Creek, in a westerly direction, from the Allentown city line at Keck's Bridge.

16. The LCA interceptor is surcharged, which means that it sometimes excedes its carrying capacity, and it overflows during wet periods causing sewage wastes to infiltrate the nearby ground and surface waters. A Step II federal grant application has been submitted by the LCA for the construction of a relief line to alleviate the periodic overflows into the Little Lehigh Creek.

17. The surcharging of the LCA interceptor line and the sewage overflows from the manholes are particularly acute in the vicinity of Keck's Bridge where the sewage backs up as it flows from a 36 inch line into a 24 inch line.

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18. From the terminus of the LCA line at Keck's Bridge, the interceptor line extends alongside the Little Lehigh Creek into the City of Allentown to Schreiber's Bridge. This stretch of the interceptor is sometimes referred to as the Allentown-Emmaus Interceptor. From Schreiber's Bridge the interceptor continues alongside the Little Lehigh Creek, past the waterworks plant for the City of Allentown, and to the Kline Island Wastewater Treatment Plant (Plant) at the confluence of the Lehigh Creek with the Little Lehigh Creek.

19. The interceptor in Allentown is subject to surcharging and raw sewage overflows from manholes into Little Lehigh Creek during wet-weather periods.

20. The overflow of raw sewage from manholes into the Little Lehigh Creek occurred at least 12 times in 1977. With an inch of rainfall, 60 percent of the manholes are under water. With two inches of rain, 90 percent of the manholes are under water.

21. The Schreiber's Bridge area is a bottleneck due to the fact that the 36 inch line from Keck's Bridge and the 27 inch line from the Cedar Creek interceptor meet at Schreiber's Bridge where the flows converge into the 30 inch line at Schreiber's Bridge.

22. The bottleneck at Schreiber's Bridge results in a surcharging of the City of Allentown interceptor, as well as a surcharging of the Cedar Creek interceptor and an overflowing at the Mosser Street manhole.

23. The surcharging of the Cedar Creek interceptor results in a backup of sewage into the basements of residents in the vicinity of Hamilton Street and Park Boulevard. The backup of sewage sometimes forces the evacuation of homes in the area.

24. The Allentown waterworks is located on the Little Lehigh Creek between Schreiber's Bridge and Allentown's Kline Island Wastewater Treatment Plant. Half of the water supply for the City of Allentown is taken from the Little Lehigh Creek.

25. Manhole no. 6 and the Mosser Street manhole are approximately 2,500 to 3,000 feet above the waterworks. These manholes overflow during wet-weather periods.

26. Although water from Lehigh Creek is filtered before it enters the waterworks so that raw sewage in the stream would not cause problems under normal conditions, the waterworks filtration and chlorination systems could be stressed in any excess stream flow situation and any malfunction could result in raw sewage contaminating the drinking water. Consequently, the overflow of manholes creates a potential public health hazard for the users of Allentown's water supply.

27. On one occasion there was a positive fecal coliform count in the finished water leaving the waterworks. This occurred after a wet-weather period when the manholes had overflowed.

28. The Lehigh County Authority has made an application for a Step II grant for the design of a permanent relief line to be constructed from the vicinity of Keck's Bridge to the Kline Island Wastewater Treatment Plant. The line is scheduled to be completed and in operation in 1981.

29. During most of 1977, the plant failed to meet the suspended solids and five day biochemical oxygen demand treatment requirements imposed by permit no. 3974411 issued by the DER on March 29, 1974, but improvements were made to the plant and it has been meeting its permit criteria since October of 1977.

30. On at least six or seven occasions in 1977, the plant by-passed raw sewage during wet-weather conditions.

31. An expansion to the plant is scheduled to be in full operation by July 1, 1979.

32. Although the department has not imposed a sewer ban on connections to existing lines in the Allentown system, it has adopted a policy of refusing to permit extensions to the LCA interceptor and the other lines along Little Lehigh Creek until the problems with those lines are corrected.

DISCUSSION

Considerable controversy has been generated by the department's refusal to permit extensions to a sewerage treatment collection system where the system is hydraulically or organically overloaded or where other conditions exist, which the department finds to be environmentally hazardous. A number of appeals from the department's refusal to permit extensions are now pending before the board. Recently, in *City of Lancaster v. Commonwealth of Pennsylvania, DER*, EHB Docket Nos. 77-193-W and 77-197-W (issued April 10, 1978) on a motion for summary judgment by the appellant the board ruled that under the department's new regulations governing municipal wasteload management, 25 Pa. Code §94.1 *et seq.*, the regulation prohibiting new connections to a sewerage system "except as approved by the department" was invalid insofar as it would enable the department to impose a sewer ban without the procedural safeguards that were elaborately provided for in subsequent portions of the regulations specifically governing sewer bans and their imposition and removal. Appellant in this case makes the argument that the department has in effect imposed a "sewer ban" by refusing to permit extensions to the interceptor system, and argues that where building permits have been obtained by a developer, the department must grant a permit for an extension in the same way that a municipality must allow connections for building permits obtained prior to the time a sewer ban goes into effect.

The problems with appellant's argument is that it fails to distinguish in law and in fact between an extension of a sewer system, for which a permit must be obtained from DER under §207 of The Clean Streams Law, and a lateral connection to existing sewer lines, which are permitted by a municipality as a matter of course unless a "sewer ban" on all such connections has been imposed by affirmative order of DER under §203 of The Clean Streams Law. The regulations recently adopted by the Environmental Quality Board make clear the distinction between extensions and connections on which a "ban" may be imposed by the department. However the distinction existed in the law prior to the adoption of Chapter 94. Since confusion in this area seems to be widespread, we deem it appropriate to review the law in some detail.

Section 202 of The Clean Streams Law is the general section prohibiting the discharge of sewage into the waters of the Commonwealth without a permit. It provides in relevant part:

> "Sewage discharges
>
> "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. . . . For the purposes of this section, a discharge of sewage into the waters of the Commonwealth shall include a discharge of sewage by a person or municipality into a sewer system or other facility owned, operated or maintained by another person or municipality and which then flows into the waters of the Commonwealth."

Section 203 of the Law authorizes the department to prohibit by order new extensions or connections to sewage treatment systems when the department finds hydraulic or organic overload or other conditions warranting such action. That section provides in part:

> ". . . 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 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."

Taken together these provisions were interpreted in §91.33 of the DER's regulations, which preceded the new regulations contained in Chapter 94, to mean that permits would not be required for connections to an existing sewer system that was permitted by the department, unless the department had issued an order banning further connections to the system.[1] However, that rule did not apply to extensions because permits for extensions are required under §207 of The Clean Streams Law regardless of the condition or capacity of the system to which any extension would be added. Section 207 provides:

> "Approval of plans, designs, and relevant data by the sanitary water board [now the Department of Environmental Resources]
>
> "All plans, designs, and relevant data for the construction of any new sewer system, or for the extension of any existing

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1. Section 91.33 provided:

> "(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 of industrial wastes, or is not operated or maintained in accordance with the permit or applicable orders, rules and regulations."

The amended §91.33 continues the rule that no permits are required for connections to an existing permitted system.

> sewer system, by a municipality, or for the erection, construction, and location of any treatment works or intercepting sewers by a person or municipality, shall be submitted to the board for its approval before the same are constructed or erected or acquired. Any such construction or erection which has not been approved by the board by written permit, or any treatment works not operated or maintained in accordance with the rules and regulations of the board, is hereby also declared to be a nuisance and abatable as herein provided." 35 P. S. §621.207

Permit Review

Applying the usual standards of review to the question of whether the DER properly denied a permit for an extension in this case, see e.g. *Harman Coal Company v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 75-034-C (issued January 3, 1977), aff'd Pa. Commonwealth Ct. (1977), we find it impossible to conclude that the department abused its discretion or acted arbitrarily and capriciously. It seems almost axiomatic that the department should not approve the extension of a sewer line that is surcharging and overflowing, causing pollution of the Little Lehigh Creek and directly contributing to a backup of sewers in other parts of the system's collection areas because of bottlenecks in the interceptors to which the extension would be added. In reviewing a permit application the department is required to consider whether the permit application satisfies the rules and regulations of the department and whether its granting would be consistent with the provisions of The Clean Streams Law and any other applicable standards. See, e.g., *Anthony J. Agosta v. Commonwealth of Pennsylvania, DER*, EHB 75-208-W (issued March 25, 1977); *Metzger & PCG v. Montoursville Borough and Commonwealth of Pennsylvania, DER*, 22 Pa. Commonwealth Ct. 70, 347 A.2d 743 (1975). There is no question but that the interceptor to which the requested sewer main extension would connect is causing pollution of the waters of the Commonwealth in that raw sewerage has been discharged on a number of occasions to the Little Lehigh Creek. Further, the present condition of the interceptor is creating a potential health hazard for the Allentown waterworks and is contributing to an actual health hazard in the sewage backups caused by bottlenecks in the system. We cannot see how the department could consistently with the provisions of The Clean Streams Law, particularly the goals announced in §§4 and 5 of that law, 35 P. S. §§691.4 and 691.5, grant a permit for a sewer extension under these conditions.

Appellant argues that the plant has been meeting its NPDES permit requirements since October of 1977. It is true that the plant's improved performance since early 1977 has led to a lifting of the "moratorium" on main extensions to the Allentown treatment system except in the area of the interceptors along the Little Lehigh Creek. If the only problem with the Allentown treatment plant were that it was hydraulically overloaded, the board would take into consideration the degree of overload in relation to economic hardship in considering whether or

not the permit should have been granted. See *East Pennsboro Township Authority v. Commonwealth of Pennsylvania, DER,* 3 EHB 33 (1974); *Borough of Carlisle v. Commonwealth of Pennsylvania, DER* , 2 EHB 217 (1973). Here, however, there are specific problems with the lines to which the sewer main extension would be appended that make it obvious that the department should not permit extension of that line.

Building Permits

Appellant's primary contention is that because it has obtained 27 building permits from Upper Macungie Township, its permit should be granted as an "exception" to the "ban". As we have attempted to point out, under the law and regulations, both old and new, a "ban" is applicable to lateral connections, not new extensions and the exceptions to a ban have been developed for connections, not extensions.

Prior to the adoption of the new regulations, the board had developed a body of law relating to sewer connection bans in cases where the department had issued an order to a municipality forbidding any further connections to existing sewer lines where overload conditions or other conditions creating any environmental or health hazard existed. In a number of cases the board established the principle that where the department imposed a ban on sewer connections, due process requires some equitable exception to the ban to protect individual property owners who may have purchased property with access to a sewer line and proceeded to build before they received notice of the imposition of a sewer ban. As a rule of convenience for determining when the equities lay in favor of a property owner, the board adopted, *inter alia,* the rule (previously recognized by the Sanitary Water Board) that any landowner who had obtained a building permit prior to the issuance of a sewer connection ban was entitled to a sewer connection after the ban went into effect. See *F & T Construction Company v. Commonwealth of Pennsylvania, DER,* 6 Pa. Commonwealth Ct. 59, 293 A.2d 138 (1972); In the Matter of *Moon Nurseries, Inc.,* 2 EHB 271 (1973); *Commonwealth of Pennsylvania, DER v. East Pennsboro Township Authority and East Pennsboro Township,* 2 EHB 240 (1973); In the Matter of *Edgewood Manor,* 2 EHB 60 (1973); *Grange Construction Company, Inc. v. Commonwealth of Pennsylvania, DER,* 3 EHB 451 (1974); *Hoffman v. Commonwealth of Pennsylvania, DER,* 3 EHB 113 (1974); *Gettysburg Construction Company, Inc. v. Commonwealth of Pennsylvania, DER,* 3 EHB 235 (1974); *Bintner v. Commonwealth of Pennsylvania, DER,* 2 EHB 252 (1973); *Steak and Ale Restaurants of America v. Commonwealth of Pennsylvania, DER,* 3 EHB 376 (1974); *Annie M. Warner Hospital v. Commonwealth of Pennsylvania, DER,* EHB Docket No. 74-184-W (issued March 7, 1975); *Orange Cleaners v. Commonwealth of Pennsylvania, DER,* EHB Docket No. 74-158-W (issued April 29, 1975); *Vincnet P. and*

Judith C. Belmont, EHB Docket No. 77-056-W (issued October 20, 1977).[2] In most of the cases cited the board found that the appellant had not satisfied any of the grounds for an exception to the ban. The board has also recognized that there may be economic circumstances that require modification of a sewer connection ban, and has on the appeal of several municipalities modified a sewer connection ban order on the demonstration of decreased pollution hazard and continuing progress toward achievement of water quality goals. *East Pennsboro Township Authority v. Commonwealth of Pennsylvania, DER*, 3 EHB 33, 283 (1974); *Borough of Carlisle v. Commonwealth of Pennsylvania, DER*, 2 EHB 217 (1973).

In the new municipal waste load management regulations in Chapter 94 of 25 Pa. Code, the Environmental Quality Board has adopted procedural requirements relating to a sewer connection ban that essentially restate and improve upon the principles of law enunciated in the board's opinions requiring notice of a ban and establishing criteria for modification and removal of a ban and exceptions to a ban. With regard to exceptions to a ban, the regulations specifically provide in §94.54:

> "Sewer line extension
> "Exceptions to a ban are limited to those exceptions which do not require the extension of existing sewer lines, except as needed for the elimination of public health hazards or pollution or for facilities of public need."

The new regulations elsewhere provide in regulation 94.11 entitled "Sewer extension":

> "A sewer extension shall not be constructed if the additional flow is contributed to the sewerage facilities from the extension will cause the plant, pump stations, or other portions or the sewer system to become overloaded."

Thus the amended regulations, which do provide that a building permit is grounds for an exception to a connection ban, do not recognize any such exception as grounds for issuing an extension permit.

Appellant complains that the department has not imposed a sewer ban on connections to the lines in question, and argues that it should be permitted an extension as long as lateral connections are being allowed. Again, appellant fails to distinguish between an extension and a connection, which are treated differently in the law and seem clearly distinguishable in fact. Any person buying into an area where there are existing sewers would reasonably expect to be able to connect to those sewers; whereas a person buying unsewered land for development must reasonably expect to obtain some sort of permit to sewer the land or to

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2. Other grounds for exception to a sewer connection ban recognized by the department and/or the board were: 1) where the connection will serve existing occupied dwellings built prior to the date of the receipt of the ban; 2) where the connection will result in no increase in sewerage flows to the overloaded facilities; 3) where the situation is equitably indistinguishable from one of the other exceptions—for instance, where there was delay in issuing a building permit that was the fault of the municipality, not the landowner.

provide for sewerage treatment by on-lot septic systems. Those differing expectations are supported by the reality that connections to existing lines up to a planned capacity have been contemplated in the design and permitting of the existing treatment plant and collection system. Where problems with the system develop it is logical, and to us entirely proper, to begin by refusing to permit extensions of the system and as a last resort to prohibit any connections to existing lines. The policy that is embodied in the law, and the old and new regulations adopted by the Environmental Quality Board to ban lateral connections to existing lines as a last resort where environmental conditions warrant such an imposition seems to us a reasonable one. We cannot accept appellant's argument that an extension should be allowed if lateral connections are being allowed.

Additionally, it appears from Exhibit A-1 that for some time the City of Allentown has been urging the department to deny any permits for sewer extensions on the LCA line because of the problems at the treatment plant and with the interceptor. The superintendent of the treatment plant testified on behalf of appellants that the plant had met its effluent criteria for the later months of 1977. This employee, who also superintends the waterworks, also testified that he did not believe the raw sewage in the Lehigh Creek presented any threat to the City's waterworks. Despite his testimony it appears that the municipality itself is anxious to limit further extensions of the LCA line until problems with the interceptors along the Little Lehigh Creek have been alleviated. It would be improper to allow Upper Macungie Township to control the extension of sewer lines by the device of issuing building permits when the municipality that owns and operates the treatment system into which the extension will feed objects to extensions to its system.

In sum, where an applicant is requesting a sewer extension permit from the department, we cannot regard the fact that he has obtained building permits for houses that would be connected to the extension as a controlling fact determining whether or not the department should grant a permit. In the case of a sewer extension the issuance of building permits should be one factor to be taken account of by DER in its permit review. In this case the Reading office recommended the granting of the permit but was overruled by the Harrisburg office with what appears to us to have been good reason. We certainly do not think that DER's review of a request for a sewer extension can be foreclosed by Upper Macungie Township's issuing building permits that would require extension of a collection and treatment system that is not operated by the township.

Estoppel

Appellant also argues that DER is estopped from denying a permit for an extension because appellant did not know that the DER had established a moratorium on extensions to the LCA interceptor. While the board has recognized that the doctrine of estoppel may be applied to the actions of DER, see *William E. Nash and Julia Nash v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 74-040-C, issued January 27, 1975; In the Matter of *Moon Nurseries, Inc., supra*, we are clear that it cannot be applied here where it was the action of Upper Macungie Township, not the DER that led appellant to proceed with construction of its project. The DER cannot be estopped from making its own evaluation of the permit request because the township issued building permits before it got a permit for a sewer extension. That appellant was aware of the need for a permit for an extension is clear from the development agreement between Upper Macungie Township Authority and Krawitz, which provided that the Authority would secure a permit for a sewer extension from DER. Krawitz obviously expected to be able to obtain such a permit since it proceeded to lay sewer lines prior to the receipt of any permit. Essentially, appellant's complaint is that the DER stopped granting extension permits routinely and that this is like a "ban" because appellant had no notice that its permit would not be granted until July of 1977, when it met with DER officials and others to discuss the extension.

We have trouble believing that appellant had no knowledge before July, 1977, that there would be any trouble with the permit since it appears from Exhibit A-1 that the City of Allentown opposed the granting of an extension permit for appellant's Cameo Woods I development. However, even assuming appellant did not expect the permit to be denied, we do not believe appellant's expectation of routine approval is a legally protected right. See *John G. Bintner v. Commonwealth of Pennsylvania, DER, supra*, concurring opinion of Robert Broughton.

We recognize that DER's decision results in an economic hardship for appellant that might have been avoided if appellant had known before it began construction of Cameo Woods II that a sewer extension would not be approved. We would urge DER to make such a policy known to all applicants as soon as it has been determined. However, we cannot regard the fact that DER did not give notice that it would not issue a permit as grounds for approving a permit that was properly denied on environmental grounds.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the parties to this appeal and over the subject matter.

2. Under The Clean Streams Law and the old and new regulations adopted thereunder, an extension of a sewer system is different from a lateral connection to a sewer system in that an extension must be permitted under §207 of The Clean Streams Law; whereas a lateral connection will be allowed without a permit unless the department imposes a "sewer connection ban" by affirmative order under §203 of The Clean Streams Law.

3. DER did not abuse its discretion or act arbitrarily or capriciously in denying a permit for an extension to the Lehigh County Authority interceptor leading to the City of Allentown's sewerage treatment plant where it was shown that the interceptors to which the extension would be added were surcharging and overflowing, resulting in the discharge of raw sewage to the Little Lehigh Creek in periods of wet weather and creating a potential hazard to the City's waterworks, and where blockages in these interceptors caused by surcharged lines flowing into smaller lines are resulting in sewage backups in certain of the collection areas of the system.

4. The fact that Upper Macungie Township issued building permits to appellant is not determinative of whether or not DER should grant a permit for an extension, although such permits would be grounds for an exception to a sewer connection ban to allow for lateral connections.

5. DER is not required by any principle of estoppel to issue a permit for this extension to appellant since it was the township and not DER that issued building permits to appellant prior to obtaining any approval for a sewer extension from DER even though the need for such a permit was recognized by the township and appellant.

O R D E R

AND NOW, this 30th day of October, 1978, the appeal of the Krawitz Company from the Department of Environmental Resources' denial of an application for a sewer extension to serve its development is hereby dismissed and the action of the department is sustained.

ENVIRONMENTAL HEARING BOARD

Joanne R. Denworth

BY: JOANNE R. DENWORTH
Member

Thomas M. Burke

THOMAS M. BURKE
Member

DISSENTING OPINION

It is such common knowledge as to need no proof, that in most if not all urban areas served by older sewer systems, there will be backed up water in some low lying basements and streets after a heavy rainfall. To seize upon this as a basis for refusing a sewer extension required to complete construction of 27 homes for which building permits have already been issued is clearly inappropriate under the facts in this case. The problem which DER uses as a basis to deny the requested extension permit has existed many years before the present application was made, and indeed will continue to exist whether or not the extension is allowed. It is not my view that sewer extensions should always be allowed when the treatment plant has adequate capacity to treat it, as in this case, regardless of any water surcharge problems along the sewer lines. However, when, as here, a builder in reliance on building permits, has begun construction of a small number of homes, is prepared to solve other water runoff problems in the area and the additional sewage to be generated can truly be said to be *de minimis*, I believe it is an abuse of discretion to deny the permit. At the very least, this board should hold that DER has a responsibility to review each permit application independently and on its own facts, and not issue a blanket denial letter as it did for the entire Lehigh interceptor without regard to the particular hardships this might impose in any given case. The inequity of this decision becomes clear when one considers that DER has taken no steps to prevent hundreds of sewer connections. If DER believes that a sewer ban is justified under the circumstances, the regulations provide the procedure by which it can be imposed. I agree that we are here not dealing with a sewer ban, but with a "sewer extension ban", which can be even more far reaching.

I believe that under all of the facts in this case it was an abuse of discretion for DER to deny the requested extension permit to the extent necessary for appellant to utilize its 27 building permits.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

DATED: October 30, 1978

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

SCOTT PAPER COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 78-107-D

Appeal from Promulgation of Regulation

ADJUDICATION

By Joanne R. Denworth, Member, December 1, 1978

Scott Paper Company (Scott) has filed an appeal with this board from the action taken by the Environmental Quality Board (EQB) on August 5, 1978, when the EQB adopted regulations amending 25 Pa. Code Chapters 121 and 123 to make certain sulfur emission standards applicable to suburban portions of the Metropolitan Philadelphia Interstate Air Quality Control Region (MPIAQCR).[1] The EQB order adopting these regulations provided that they would become effective October 1, 1978. 8 Pa. Bulletin 2163, 2164. Scott filed its appeal with the Environmental Hearing Board on September 5, 1978. On September 19, 1978, Scott filed a Petition for Supersedeas under the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §510-21(d) and the board's rule 21.16, 25 Pa. Code §21.16. In its extensive Notice of Appeal and Petition for Supersedeas, Scott alleges that it is adversely affected by the EQB's regulations—which, in essence, lower the sulfur-in-fuel requirements for industrial boilers in portions of the suburban counties—in that it will be required to spend at least an additional $250,000 per year for fuel. In studies and affidavits filed with its pleadings, Scott alleges that the total cost of the regulations to suburban industry will be between 7 and 10 million dollars per year.

On September 28, 1978, the Department of Environmental Resources (DER) filed a motion to quash Scott's appeal on the ground that the board has no jurisdiction to

1. The MPIAQCR is a federally established air quality control region under the federal Clean Air Act in which the state has responsibility for establishing point source emission standards to satisfy federal ambient air quality standards.

review the promulgation of regulations by the Environmental Quality Board. Prior to taking any action on the Petition for Supersedeas, the board ordered the parties to file briefs on the question of jurisdiction. Original briefs were filed with the board on October 17, 1978, and reply briefs were received October 30, 1978. Although Scott requested oral argument, the board denied its request, believing that the briefs adequately addressed the issue to be determined by the board and that resolution of the issue was sufficiently clear as to need no further illumination.

Whatever may be the desirability of providing for review of regulations adopted by the Environmental Quality Board, the law of Pennsylvania does not provide for such review until a regulation is applied in a particular case. *United States Steel Corporation v. Commonwealth of Pennsylvania,* EHB Docket No. 75-170-C (issued April 27, 1977); *West Penn Power Company v. Commonwealth of Pennsylvania, DER,* EHB Docket No. 73-330-D opinion and order issued February 25, 1977; *St. Joe's Mineral Corporation v. Goddard,* 14 Pa. Commonwealth Ct. 624, 324 A.2d 800 (1974). In this, the law in Pennsylvania differs from the federal administrative law, which provides for judicial review of administrative action, including rule-making by a federal agency, by appeal from that action (generally within 30 days). Administrative Procedure Act, 5 U.S.C. §§701-706 and see definitions §§551 and 553. The Pennsylvania Administrative Agency Law, Act of June 4, 1945, P. L. 1388, *as amended,* 71 P.S. §1710.1 *et seq.* provides only for review of "adjudications" or administrative agencies and does not similarly provide for the review of regulations adopted by administrative agencies; and the case law in Pennsylvania has held that such regulations are not reviewable on their adoption, but only on their enforcement in a particular proceeding. *Insurance Company of North America v. Commonwealth Insurance Department,* 15 Pa. Commonwealth Ct. 462, 327 A.2d 411 (1974); *Pennsylvania R.R. Co. v. Pennsylvania Public Utility Commission,* 396 Pa. 34, 152 A.2d 422 (1959); *Redmond v. Commonwealth, Milk Marketing Board,* Pa. Commonwealth Ct. , 363 A.2d 840 (1976); *Pittsburgh v. Blue Cross of Western Pa,* 4 Pa. Commonwealth Ct. 262, 286 A.2d 475 (1971) rev'd on other grounds *sub nom.*

In keeping with that general principle of administrative law in Pennsylvania, it appears clear from the legislation establishing the Environmental Hearing Board that its jurisdiction extends only to review of adjudicatory actions taken by DER and not to review of legislative action taken by the Environmental Quality Board. Legislation adopted in 1970 established the administrative structure for administration of the environmental laws of Pennsylvania and placed the legislative, judicial and administrative functions in three separate administrative bodies—the Environmental Quality Board, the Environmental Hearing Board and the Department of Environmental Resources.

Act of December 3, 1970 ("Act 275"), P. L. 834, §§20, 28, 29, 30-35, 71 P. S. §510-1 *et seq.*, amending the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, §1901-A *et seq.* Creation and appointment of the Environmental Quality Board is authorized by §471 of the Administrative Code, 71 P. S. §180-1, and its powers and duties are provided for in §1920-A of the Administrative Code, 71 P. S. §510-20. These include the following:

> "§510-20. (Adm. Code §1920-A). Environmental Quality Board
> (a) The Environmental Quality Board shall have the responsibility for developing a master environmental plan for the Commonwealth.
> (b) The Environmental Quality Board shall have the power and its duties shall be to formulate, adopt and promulgate such rules and regulations as may be determined by the board for the proper performance of the work of the department, and such rules and regulations, when made by the board, shall become the rules and regulations of the department.
> (c) The board shall continue to exercise any power to formulate, adopt and promulgate rules and regulations, heretofore vested in the several persons, departments, boards and commissions set forth in section 1901(a) of this act, and any such rules and regulations promulgated prior to the effective date of this act shall be the rules and regulations of the Department of Environmental Resources until such time as they are modified or repealed by the Environmental Quality Board.
> (d) 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 other order as the circumstances require.
> (e) The board shall receive and review reports from the Department of Environmental Resources and shall advise the Department and the Secretary of Environmental Resources on matters of policy."

* * *

Under §201 and §§1901-A through 1919-A and 1924-A of the Administrative Code, and §510-26, 510-101, 510-106, or Act 275, DER was created and given responsibility for a wide range of activities that were newly created or were previously performed by the Department of Health and other separate boards and departments. DER's administrative responsibilities include permit review, enforcement actions and land management.

Creation and appointment of the Environmenatl Hearing Board is authorized by §472 of the Administrative Code, 71 P. S. §180-2. The jurisdiction of the Environmental Hearing Board is specifically set forth in §1921-A, which provides:

> "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." (Emphasis supplied)

The same division of responsibility that is provided generally in the Administrative Code is specifically set forth in the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, *as amended*, 35 P. S. §4001 *et seq.*. There the EQB is given powers and duties that include the following:

> "§4005. Environmental quality board
> The board shall have the power and its duty shall be to—
> (1) Adopt rules and regulations, for the prevention, control, reduction and abatement of air pollution, applicable throughout the Commonwealth or to such parts or regions or subregions thereof specific-

ally designated in such regulation which shall be applicable to all air contamination sources regardless of whether such source is required to be under permit by this act. Such rules and regulations may establish maximum allowable emission rates of air contaminants from such sources, prohibit or regulate the combustion of certain fuels, prohibit or regulate open burning, prohibit or regulate any process or source or class of processes or sources, require the installation of specified control devices or equipment, or designate the control efficiency of air pollution control devices or equipment required in specific processes or sources or classes of processes or sources. Such rules and regulations shall be adopted pursuant to the provisions of the act of July 31, 1968 (Act No. 240), known as the 'Commonwealth Documents Law,' upon such notice and after such public hearings as the board deems appropriate. In exercising its authority to adopt rules and regulations, the board may, and to the extent deemed desirable by it shall, consult with a council of technical advisers, properly qualified by education or experience in air pollution matters, appointed by the board and to serve at the pleasure of the board, to consist of such number of advisers as the board may appoint, but such technical advisers shall receive no compensation, other than their actual and necessary expenses, for their services to the board.

"(2) Establish and publish maximum quantities of air contaminants that may be permitted under various conditions at the point of use from any air contaminant source in various areas of the Commonwealth so as to control air pollution.

"(3) By the rule or regulation, classify air contaminant sources, according to levels and types of emissions and other characteristics which relate to air pollution. Classifications made pursuant to this subsection shall apply to the entire Commonwealth or any part thereof. Any person who owns or operates an air contaminant source of any class to which the rules and regulations of the board under this subsection apply, shall make reports containing information as may be required by the board concerning location, size and height of air contaminant outlets, processes employed, fuels used and the nature and time periods or duration of emissions, and such other information as is relevant to air pollution and available or reasonably capable of being assembled."

35 P. S. §4005 * * *

Under the Air Pollution Control Act the DER is given a number of specific administrative responsibilities, 35 P. S. §4004. Section 5 of that act provides:

"§4006. Environmental hearing board

The hearing board shall have the power and its duty shall be to hear and determine all appeals from orders issued by the department in accordance with the provisions of this act. Any and all action taken by the hearing board with reference to any such appeal shall be in the form of an adjudication, and all such action shall be subject to the provisions of the act of June 4, 1945 (P. L. 1388), known as the "Administrative Agency Law."

35 P. S. §4006

Under both the Administrative Code and the Air Pollution Control Act, the jurisdiction of the EHB is specifically limited to review of actions or orders of the Department of Environmental Resources. No mention is made of actions of the Environmental Quality Board. Scott argues that the EQB is part of DER and that its "order" adopting the regulations appealed from is therefore reviewable by the EHB under this section. Although apparently undiscovered by Scott, there is some support for this argument in §202 of the Administrative Code, 71 P. S. §62, which makes both the EQB

and the EHB "departmental adminstrative boards" within the DER.[2] We believe, however, that the significance of this section is to make the EQB and the EHB a part of DER for purposes of administration and budgetary appropriations by the General Assembly. It cannot be construed to mean the EHB has jurisdiction to review the promulgation of regulations by the EQB when that would be inconsistent with the substantive administrative law of Pennsylvania.

The Environmental Quality Board is a body composed of representatives of many different interests, including the secretaries of some of the state's executive departments, members of the Citizens Advisory Council and members of the General Assembly. 71 P. S. §180-1. Though DER may propose rules and regulations for adoption by the EQB, the action of the EQB in adopting such regulations is the action of a separate administrative body within DER. Once those rules and regulations are adopted they become the rules under which the DER must operate, and they are reviewable by the EHB in the context of any action by the Department taken pursuant to those rules and regulations. The Commonwealth Court has ruled that the EHB may consider the validity of a regulation adopted by the EQB, *St. Joe's Minerals Corporation v. Goddard,* 14 Pa. Commonwealth Ct. 624, 324 A.2d 800 (1974); however, that review is in the context of an action taken by the DER pursuant to the regulations adopted by the EQB. (In *St. Joe's* the DER action was denial of a variance petition). If the EHB were to review actions of the EQB in promulgating regulations it would have to, in effect, perform the rule-making functions of the EQB over again without the benefit of the public hearing procedures and technical advice that are essential to the legislative rule-making process. We cannot believe that there was any intent in the adoption of Act 275 to have the EHB, which is a separate but equal branch "within" the DER, review the legislative actions of the EQB.[3]

Section 41 of the Administrative Agency Law, 71 P. S. §1710.41 provides for an appeal from an "adjudication" within 30 days to the Court of Common Pleas of Dauphin County (now to the Commonwealth Court) by "any person aggrieved thereby who

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2. That specific provision provides:
"§62 (Adm. Code §202). Departmental administrative goards, commissions and offices.
"The following boards, commissions, and offices are hereby placed and made departmental administrative boards, commissions, or offices, as the case may be, in the respective administrative departments mentioned in the preceding section, as follows:
* * *
"In the Department of Environmental Resources,
Environmental Qulaity Board,
Environmental Hearing Board,"
* * *

3. If there were provisions for review of the promulgation of regulations, the review would likely follow the federal Administrative Procedure Act in providing for judicial review of regulations. We know of no precedent for review by one adjudicatory administrative agency of regulations promulgated by another legislative administrative agency.

has a direct interest in such adjudication".[4] An adjudication is defined in the Administrative Agency Law as:

> "(a) '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, . . ." 71 P. S. §1710.2

While we recognize that Scott has been adversely affected by the promulgation of these regulations in that it is now required to spend an additional amount yearly for fuel, there is no question but that the courts of Pennsylvania do not regard the promulgation of a rule of general effect as an "adjudication" for purposes of obtaining judicial review. Perhaps the most detailed statement of the distinction between an adjudication and a regulation appears in *Insurance Company of North America v. Commonwealth Insurance Department, supra*, as follows:

> "INA [Insurance Company of North America] contends that the promulgation of the instant regulations is a 'determination' or 'ruling' by the Insurance Department which affects its property rights and obligations, and is therefore an appealable 'adjudication'. It is clear, however, that the 'determination' or 'ruling' referred to in Section 2(a) speaks of administrative action which is quasi-judicial in nature, and which determines only the personal or property rights or obligations of the parties before an agency in a particular proceeding. Contrasted with this is the quasi-legislative function an administrative agency performs in promulgating rules or regulations of *general application* to persons throughout the Commonwealth, and the exercise of which, in the absence of a specific statute vesting jurisdiction in a particular court, is not appealable. *Man O'War Racing Association, Inc. v. State Horse Racing Commission*, 433 Pa. 432, 250 A.2d 172 (1969); *Pittsburgh v. Insurance Commissioner*, 4 Pa. Commonwealth Ct. 262, 286 A.2d 475 (1971), rev'd on other grounds, 448 Pa. 466, 294 A.2d 892 (1972).
>
> "This functional dichotomy is recognized by the definition of 'regulation' contained in Section 2(e) of the Administrative Agency Law, §1710.2(e) which provides that:
>
> > "'Regulation' means any rule, regulation or order in the nature of a rule or regulation, of general application and future effect, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency."
>
> "No right of appeal is provided under the Administrative Agency Law from the mere promulgation of a regulation. Given the admitted general applicability and future effect of the instant regulations, it is clear that both fall within the definition of 'regulation' under Section 2(e), and accordingly no right of appeal to this Court lies under Section 41 of the Administrative Agency Law at this time. Nor does the failure of the Administrative Agency Law to either grant or negate a right of appeal from the promulgation of an administrative regulation give this Court jurisdiction of an appeal by way of broad certiorari. '[T]he precondition to review by certiorari is that the order or action of the agency, board, or commission must be judicial in nature and final'. *Manheim Township School District v. State Board of Education*, 1 Pa. Commonwealth

4. This section is still in effect but has been suspended in part by the rules of appellate procedures insofar as the procedural requirements for appeal are concerned and repealed in part insofar as it provided for appeal to the Court of Common Pleas of Dauphin County rather than the Commonwealth Court.

> Ct. 627, 632, 276 A.2d 561, 564 (1971). See also, *LaCamera v. Board of Probation and Parole*, 13 Pa. Commonwealth Ct. 85, 317 A.2d 925 (1974). As our prior discussion has indicated, the promulgation of the instant regulations and the administrative dismissal of INA's objections thereto are not acts of a judicial character, and therefore no appeal lies therefrom." 15 Pa. Commonwealth at 465-467, 327 A.2d at 413-414 (emphasis in original) (footnotes omitted).

In determining the limits of its jurisdiction the EHB has consistently tried to determine whether the departmental action appealed from constitutes an "adjudication" within the meaning of the Administrative Agency Law, *Eremic v. Commonwealth of Pennsylvania, DER;* EHB Docket No. 75-283-C (issued December 2, 1976); *Upper Moreland Township et al v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 77-198-D (issued June 20, 1978), and that standard has been approved and applied by the Commonwealth Court in reviewing EHB decisions. *Standard Lime and Refractories Co. v. Department of Environmental Resources*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971), *Sunbeam Coal Corporation v. Department of Environmental Resources*, 8 Pa. Commonwealth Ct. 622, 304 A.2d 169 (1973); *Commonwealth, DER v. New Enterprise Stone & Lime Co., Inc.*, 25 Pa. Commonwealth Ct. 389, 359 A.2d 845 (1976). The board's own rules define an "action" of DER from which an appeal may be taken as follows:

> "*Action* - Any order, decree, decision, determination or ruling by the department or local agency affecting personal or property rights, privileges, immunities, duties, 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." 25 Pa. Code §21.2, 21.21(a)

Although the enumeration in this section is not exclusive, it could hardly be expanded to include the promulgation of regulations by the EQB. In sum, it is clear that the action of the EQB from which Scott is appealing is a rule-making action rather than an adjudicatory act of the DER, which would be within the EHB's jurisdiction to review. See *Man O'War Racing Association, Inc. v. State Horse Racing Commission*, 433 Pa. 432, 250 A.2d 172 (1969).

Scott argues that DER (or more correctly, the EQB) violated Scott's due process rights in the promulgation of these regulations by failing to include it in early consideration of the proposed regulations and failing to give its views an adequate hearing. If there is any merit to these contentions we believe they must be addressed in another forum—perhaps directly in the Commonwealth Court—since the EHB, having no jurisdiction to review the promulgation of regulations, cannot have any jurisdiction to consider the manner in which they were adopted. It may be that some relief is afforded Scott by the Uniform Declaratory Judgments Act, 12 P. S. §831 *et seq.*,

although we are not at all certain of that. See *Temple University of Comm. System of Higher Education v. Pa. Dept. of Public Welfare*, 30 Pa. Commonwealth Ct. 595, 374 A.2d 99 (1977).[5] We have some question whether the law should place a party in the position of having to comply with a regulation or risk substantial penalties for non-compliance ($10,000 per day under the Air Pollution Control Act) before it can get a determination as to whether or not a regulation is valid as applied to it. Whatever the wisdom of the law, it is clear to us that the Environmental Hearing Board does not have jurisdiction to review the action of the Environmental Quality Board in adopting these regulations.

ORDER

AND NOW, this 1st day of December, 1978, the appeal of Scott Paper Company from the alleged action of the Department of Environmental Resources in adopting and promulgating regulations relating to sulfur emissions is hereby dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

DATED: December 1, 1978

5. We are aware that the Commonwealth Court recently issued a preliminary injunction in *Hospital Association of Pennsylvania v. Bachman, Secretary of Health, et al*, C. D. Docket No. 716 1978 to restrain the Department of Health from enforcing regulations promulgated by it. Although no opinion has been issued in that matter, it appears from the motion for preliminary injunction and petition for review filed in that matter that the petitioner's contention is that the regulations are unauthorized under the Public Welfare Code. Here there is no question but that the Environmental Quality Board is authorized by §510-20 of the Administrative Code and the Air Pollution Control Act to adopt regulations to achieve federal ambient air quality standards in the air quality regions. What is at issue here is the substantive content of the regulations on subjects within the express jurisdiction of the EQB.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

GREENE TOWNSHIP AND
HARBORCREEK TOWNSHIP, Intervening Appellant : Docket No. 76-123-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and GREENE LANDFILL, INC., Permittee

OPINION AND ORDER

Harborcreek Township, intervening appellant, moves the board to revoke Solid Waste Management Permit No. 101046 and Water Quality Management Permit No. 2576203 issued by DER to Greene Landfill, Inc., to operate a sanitary landfill in Greene Township, Erie County. The basis of the motion is an order by Commonwealth Court upholding an order of the Court of Common Pleas of Erie County at No. 127, Equity, 1976, enjoining the operation of the landfill at the site for which the DER permits were issued, because Greene Landfill, Inc., has not complied with the zoning ordinance of Greene Township.

Greene Landfill, Inc., and DER oppose the motion. They argue that Greene Landfill, Inc., is attempting to secure the necessary approval from the Greene Township Zoning Hearing Board.

We do agree with Harborcreek that the propriety of DER's action in issuing the permits is presently a moot issue, since no matter what the decision of this board, Greene Landfill, Inc., will not be able to operate the landfill so long as the injunction is in effect. However, we do believe that Greene Landfill, Inc., should have the opportunity to seek the necessary approval from the Greene Township Zoning Hearing Board. Therefore, appellant's motion is denied; however, the matter shall be continued generally pending Greene Landfill, Inc.'s attempt to procure the necessary approval from Greene Township to operate the landfill at the site permitted by DER.

O R D E R

AND NOW, this 19th day of January, 1978, the following is hereby ordered:

1. The motion to revoke the Solid Waste Management permit and Water Quality Management permit issued to Greene Landfill, Inc., by the Department of Environmental Resources, is denied.

2. This matter is continued generally pending Greene Landfill,Inc.'s attempt to secure approval from Greene Township to operate the landfill at the site permitted by the Department of Environmental Resources.

3. The parties shall file bi-monthly status reports to the board.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

cc: Bureau of Litigation Enforcement
512 Executive House Apartments
101 South Second Street
Harrisburg, PA 17120

For the Commonwealth of Pennsylvania
Department of Environmental Resources
Paul F. Burroughs, Esquire
606 West Second Street
Erie, PA 16507

For Intervening Appellant
Harborcreek Township:
Eugene J. Brew, Jr., Esquire
601 Masonic Building
Erie, PA 16501

For the Appellant Greene Township
William T. Jorden, Esquire
501 Marine Bank Building
Erie, PA 16501

For the Permittee:
Greene Landfill, Inc.
William H. Eckert, Esquire
Siln, Eckert, Burke ,Siegle & Roseman
255 West Tenth Street
Erie, PA 16501

DATED: January 19, 1978
pmg

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CITY OF LANCASTER, et al and HOME BUILDERS ASSOCIATION OF LANCASTER COUNTY, Intervenor : Docket No. 77-193-W and 77-197-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

On November 23, 1977, the DER issued an order which prohibited the appellant, City of Lancaster, hereinafter City, from allowing further connections to the municipal sewage treatment plant which the DER had determined to be hydraulically overloaded. Appellant moved for summary judgment on two grounds: first, that under the doctrine of federal preemption the DER and this board are bound by the determination of plant capacity contained in appellant's NPDES permit; second, that regulation 94.21(3) prohibiting sewer connection "except as approved by the department" is unreasonable and invalid in light of regulations governing the imposition of sewer bans. The second issue raised by appellant has also been raised in a number of recent appeals from "prohibitions" issued by the department.[1] Oral argument on appellant's motion was held March 6, 1978.

We do not agree with appellant's first contention, but as we do agree with appellant's second contention, we deem it unnecessary to discuss the first except to say that the dispute as to plant capacity, to the extent that it remains an issue, will have to be resolved after hearing at which the capacity set forth in the NPDES permit may be offered as evidence.[2] Although disputed, we will assume for the purpose of disposing of the motion before us, that the DER's figures are accurate and that the permit limitation is 9.49 million gallons per day (mgd). Indeed, appellant does not deny that this figure has consistently been exceeded.

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1. *Williamsport Area Sanitary Authority et al v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 78-011-W.
2. The sewage plant permit is alleged to provide for a capacity of 9.49 million gallons per day, while the plant, which is connected to the storm sewer system, actually has been receiving as much as 11.8 mgd. There is a serious factual dispute as to whether the permit does have such a limitation, inasmuch as the NPDES certification for the plant is for 11.8 mgd under permit no. PA 0026719.

The aforesaid prohibition order was issued pursuant to a regulation promulgated by the Environmental Quality Board and adopted on November 5, 1977. The regulation in question, 25 Pa. Code §94.21, provides among other things that if the department determines that either the hydraulic or organic load on the sewerage facilities is exceeding the capacity provided in the permit, then the permittee shall:[3]

> ". . . (3) Prohibit new extensions of or connections to the sewer system tributary to the overloaded sewerage facilities except as approved by the Department."

It is clear that the DER can employ the above regulation to stop further sewer connections without the necessity of imposing a sewer ban which is provided for under Regulation 25 Pa. Code §94.33. In order to impose a sewer ban, the law provides that:

> ". . . (b) The Department will publish the order imposing the ban in one newspaper of general circulation in the area affected by the ban beginning no later than 48 hours after the imposition of the ban or as soon thereafter as publication schedules allow for a period of two consecutive weeks. The Department will publish the order imposing the ban, following imposition of the ban, once in the Pennsylvania Bulletin, provided, however, that failure or delay in so publishing by the Department shall not in any way affect the date of imposition or validity of the ban.
>
> "(c) The Department, at the time of imposition of the ban, will give notice of the ban to any governmental entity which issues building permits in the area of the ban. No building permit which may result in a connection to the sewer system or increase the waste load to that system shall be issued by such governmental entity after the ban is effective; provided, however, that failure or delay in such notification shall not, in any way, affect the date of imposition or validity of the ban."

---

3. 25 Pa. Code, §94.21 provides:

> "If the annual report establishes or if the Department determines that either the hydraulic or organic load on the sewerage facilities is exceeding the capacity approved by the permit, the permittee shall comply with the following:
>
> "(1) Immediately begin work for the planning, design, financing, construction, and operation of such sewerage facilities as may be necessary to provide required capacities to meet anticipated demands for a reasonable time in the future and resulting in a project that is consistent with the applicable official plans approved pursuant to the Pennsylvania Sewage Facilities Act (35 P.S. §§750.1-750.20) and the rules and regulations promulgated thereunder at Chapter 71 of this Title (relating to administration of the sewage facilities program) and consistent with the requirements of the Department and the Federal Government regarding area-wide planning and joint or combined sewerage facilities.
>
> "(2) Submit to the Regional Office, for the review and approval of the Department, a written plan, to be submitted with the annual report or within 90 days of notification of the Department's determination of overload, setting forth the actions to be taken to reduce the overload and to provide the needed additional capacity, including, but not limited to, a schedule showing the dates each step toward compliance with the preceding paragraph (1) of this section shall be completed.
>
> "(3) Prohibit new extensions of or connections to the sewer system tributary to the overloaded sewerage facilities except as approved by the Department."

We wonder why the DER would ever bother to impose a sewer ban when the same ends could be reached by simply imposing a prohibition? No satisfactory answer has been forthcoming.

Intervenor, Home Builders Association of Lancaster County, has raised a question about the constitutionality of the DER's action under the due process clause. It is true that Section 1921-A of the Administrative Code of 1929, 71 P. S. §510-21 does require that no DER action shall be final as to a person ". . . until such person has had the opportunity to appeal such action to the Environmental Hearing Board". (Emphasis added) Clearly, the due process requirements are met when intervenor came before the board to contest the DER's action. This opportunity was immediately available. *Department of Environmental Resources v. Borough of Carlisle*, 16 Pa. Commonwealth Ct. 341, 330 A.2d 293 (1974) and *Commonwealth v. Derry Township*, 10 Pa. Commonwealth Ct. 619, 134 A.2d 868 (1973).

The real problem that we find with §94.21(3) is the fact that it, in effect, delegates unlimited discretion to the department to do what it must do according to articulated standards under §94.31 and other regulations contained in Chapter 94. Regulation 94.21(3) therefore appears to us to be unreasonable and invalid on its face. If the department determines that an organic or hydraulic overload exists, it may impose the sewer ban under §94.31 or, it appears, it may prohibit connections except as approved by it under §94.21(3). In order to impose a ban under §94.31 the department must find that one or more of three conditions exist.[4] Under §94.21(3), there are no guidelines for the imposition of a prohibition other than the existence of the same hydraulic overload that is an occasion for the imposition of a ban under §94.31. Thus, there is no discernable basis for an affected party to seek redress for an arbitrary decision. If the DER decides to lift or not to lift a prohibition, to grant or not to grant an exception, a party is in the position of not knowing what, if anything, can be done to insure some relief. No doubt the board could simply read the regulations together and construe §94.21 as incorporating the provisions of §94.31, §94.55 and

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4. 25 Pa. Code, §94.31 provides:

> "A ban on connections will be imposed by the Department whenever the Department determines that an organic or hydraulic overload exists at the plant or any portion of the sanitary sewer system or that the discharge from the plant causes actual or potential pollution of the waters of the Commonwealth and, in addition, that one or more of the following conditions prevail:
>
> "(1) The Department determines that a ban is necessary to prevent or alleviate endangerment of public health.
>
> "(2) The permittee has failed to submit a satisfactory plan or has failed to implement the program as required by §94.21 of this Title (relating to existing overload).
>
> "(3) The failure of the permittee to provide facilities to prevent an organic or hydraulic overload was not caused solely by the unavailability of Federal construction grants under section 201 of the Federal Water Pollution Control Act (33 U.S.C. §1251 *et seq.*) for which the permittee has applied and remains eligible."

§94.56. This, however, was clearly not the intention of the Environmental Quality Board, and we will not construe a regulation in a manner we know was not intended. Secondly, we could write in limitations as we were forced to do in developing case law around the sewer ban orders issued prior to the promulgation of these regulations, incorporating what we deemed to be the minimal requirements to pass the test of reasonableness. *Commonwealth v. Borough of Carlisle*, 16 Pa. Commonwealth Ct. 341 (1974), *Commonwealth v. East Pennsboro Township*, EHB Docket No. 73-287, aff'd. 18 Pa. Commonwealth Ct. 58 (1975), *Commonwealth v. Bitner*, EHB Docket No. 73-154-W, issued December 12, 1973. We are not so disposed.

The DER argues that a "prohibition" as opposed to a "ban" gives it more flexibility to approve connections under certain conditions such as an agreed upon reduction of flow. However, in response to questions at oral argument as to how the DER would exercise its discretion in considering requests for exceptions to a "prohibition", the considerations stated seemed to be the same as those set forth for modification and removal of a ban under regulations 94.41 and 94.42. After the imposition of a sewer ban, there are specific provisions for modifications or removal thereof.[5] One such provision permits the DER to lift the ban if steps have been taken which have resulted in "the reduction of the actual loading to less than the capacity provided in the permit . . ." We note that there is no similar provision for lifting a "prohibition".

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5. 25 Pa. Code, §94.41 provides:

> "A ban may be modified or removed by the Department, in the exercise of its discretion, in accordance with the following conditions:
>
> "(1) If the permittee has demonstrated that steps have been taken which have resulted in the reduction of the actual loading to less than the capacity provided in the permit, the ban may be modified or removed to allow connections up to the permitted capacity.
>
> "(2) If it is affirmatively demonstrated, through the submission by the permittee and approval by the Department of an application for an amendment to the permit, that the actual capacity of the plant or the sanitary sewer system or any part thereof, or both, is in excess of the capacity provided in the permit and is sufficient to prevent an overload until additional capacity is made available, the ban may be modified or removed to allow connections up to the new capacity.
>
> "(3) If the permittee has demonstrated that steps have been taken which have resulted in the reduction of the overload and that public health will not be endangered and that downstream uses will not be adversely affected, the ban may be modified to allow for limited approval of connections for the elimination of public health hazards, the elimination of pollution, or the connection of facilities of public need, provided that the program for the reduction of the overload continues in a manner which will result in the overall reduction of overload."

Further, we note that a sewer ban may be modified if it appears that the actual capacity of the plant is greater than indicated on the permit and steps are being taken for an amendment to the permit. Again, there is no such provision extended to cover a party foreclosed by a prohibition under §94.21 from connecting to a sewer system. Finally, a ban may be modified where there is no danger to the public health and there is a "public need" for the proposed new connections coupled with a program for reduction of the overload. No related provision applies to a sewer connection prohibition. There is even a priority system for allowing such modifications of sewer bans.[6] The most glaring shortcoming in §94.21 is the fact that it provides for no exception—not even the standard ones where a building permit has previously been obtained or where the new source is on the same property replacing an old one.[7]

It is now beyond dispute that in order for a rule or regulation promulgated by an administrative agency, to be valid and enforceable, it must be reasonable. *Erie Lighting Co. v. Pa. Public Utility Commission*, 131 Pa. Super 190 (1938). In *Jenkins v. Unemployment Comp. Bd. of Review*, 162 Pa. Super 49 (1948) the Superior Court, in a *per curiam* opinion said: "The exercise by an administrative agency of its rule making function is however subject to various limitations arising out of the fact that the authority is a delegated legislative power, and one indispensable requirement is that the regulation shall be reasonable." 42 Am. Jur. "Public Administrative Law" §100. The authority to review regulations to determine their reasonableness arises not from any specific constitutional or statutory provision, but rather from the inherent review power of courts. *Penn Anthracite Min. Co. v. Delaware & H. R. Corp.*, 16 F. Supp. 732, aff'd. 91 F. 2d 634, cert denied 58 S. Ct. 283. This is well stated in 1 P.L.E. §84. Adm. Law & Procedure.

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6. 25 Pa. Code, §94.42 provides:

> "The Department will not modify or remove a ban if the projected number of new connections may exceed the available capacity if the ban is modified or removed unless the person or municipality upon whom the ban is imposed presents a program, acceptable to the Department, for limited approval of connections in a manner which will prevent further overload. This program shall give priority to connections in the following order:
> "(1) the elimination of public health hazards;
> "(2) the elimination of pollution; and
> "(3) the connection of facilities of public need."

7. Both of these exceptions are now specifically provided for in the case of sewer bans under the regulations at §94.55 and §94.56.

> "Generally, the determination of an administrative officer or body is subject to review to ascertain whether the action taken is arbitrary, unreasonable, capricious or unlawful, since the Courts exercise a supervisory capacity to protect parties from an arbitrary and capricious exercise of authority."[8]

In order to be valid, a rule or regulation should be uniform in operation. *Comth. Trust Co. v. First Nat. Bank of New Kensington*, 84 D & C 421 (1953). It should be reasonable *Pa. R. Co. v. Driscoll*, 336 Pa. 310 (1940), *City of Phila. v. Pa. P.U.C.*, 164 Pa. Super. 86, and not arbitrary or violative of a statute. *Robeson v. Phila. Tax Review Bd.*, 13 Pa. Comwlth. 513 (1973), or violative of any constitutional provision. *Bortz Coal Co. v. DER*, 7 Cmwlth. 362 (1971). We are unable to say that 25 Pa. Code §94.21(3) is reasonable when read in the light of §94.31 and the other sewer ban provisions.

We believe the regulation in question can stand if it is construed as a method of giving notice to a municipality or sewer authority that the DER believes it to have a hydraulic overload. If the party notified agrees with this determination it could then take immediate steps to reduce the load and concurring in the findings of the DER, it could properly prohibit further sewer connections. If, however, as in this case, there is a dispute about the applicability of a prohibition, it can refuse to prohibit further connections unless or until the DER issues a sewer ban pursuant to its regulations or takes other legal means[9] to accomplish that end.

As the DER's letter of November 23, 1977, contained a direction to appellant to comply with all of the requirements of §94.21, including the filing of a plan to reduce hydraulic overload, the granting of appellant's motion for summary judgment on the question of the validity of §94.21(3), does not entirely dispose of this appeal. To the extent that a dispute remains as to appellant's obligations under §§94.21(1) and (2), the appeal is continued and will be scheduled for hearing.

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8. The discussion on Pa. Administrative Law goes on to state:

> ". . . The Courts usually will consider only the questions of illegal or arbitrary action, and they will not interfere with the administrative determination unless the administrative officer or body has acted arbitrarily, capriciously unreasonably or unlawfully."

9. Nothing we say here could prevent the DER from seeking an injunction to prohibit sewer connections.

O R D E R

AND NOW, this 10th day of April, 1978, after argument and due consideration of a motion for summary judgment filed on behalf of appellants in the above captioned matters, the same is hereby granted.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

Member Thomas M. Burke dissents, and in support thereof enters the following opinion:

DISSENTING OPINION

The City of Lancaster and the Lancaster City Sewer Authority, referred to jointly herein as appellants, in early December 1977 filed a timely appeal from a letter of the Department of Environmental Resources dated November 23, 1977, notifying appellants that the North Sewage Treatment Plant was determined by the DER to be hydraulically overloaded and as a result appellants were required to comply with the requirements of Section 94.21 of the DER's rules and regulations (25 Pa. Code 94.21). On December 30, 1977, the Home Builders Association (intervenor) was granted permission to intervene.

A motion for summary judgment was filed by appellants on January 10, 1978, wherein they requested this board to declare the November 23, 1977, action of the DER to be null and void for the following two reasons:

1. The hydraulic load on the sewage treatment plant is within the limits permitted by the plant's National Pollution Discharge Elimination System (NPDES) permit and thus the plant is not overloaded; and

2. Section 94.21 is unlawful and unreasonable.[10]

Intervenor joined in the motion for summary judgment and alleged as a further basis for granting the motion that the action was violative of the Due Process Clauses of the United States and Pa. Constitutions because the action was taken by the DER without prior notice and hearing.

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10. An *amicus curiae* brief has been filed in support of appellants' motion for summary judgment by the Williamsport Sanitary Authority.

Section 94.21 states as follows:

> "If the Annual Report establishes or if the Department determines that either the hydraulic or organic load on the sewerage facilities is exceeding the capacity approved by the permit, the permittee shall comply with the following:
>
> (1) Immediately begin work for the planning, design, financing, construction, and operation of such sewerage facilities as may be necessary to provide required capacities to meet anticipated demands for a reasonable time in the future and resulting in a project that is consistent with the applicable official plans approved pursuant to the Pennsylvania Sewage Facilities Act (35 P.S. §§ 750.1-750.20) and the rules and regulations promulgated thereunder at Chapter 71 of this Title (relating to administration of the sewage facilities program) and consistent with the requirements of the Department and the Federal Government regarding area-wide planning and joint or combined sewerage facilities.
>
> (2) Submit to the Regional Office, for the review and approval of the Department, a written plan, to be submitted with the Annual Report or within 90 days of notification of the Department's determination of overload, setting forth the actions to be taken to reduce the overload and to provide the needed additional capacity, including, but not limited to, a schedule showing the dates each step toward compliance with the preceding paragraph (1) of this section shall be completed.
>
> (3) Prohibit new extensions of or connections to the sewer system tributary to the overloaded sewerage facilities except as approved by the Department."

For the purpose of deciding the motion for summary judgment, the factual basis of the DER November 23, 1977, letter and all reasonable inferences to be drawn therefrom must be accepted as true. C.f. *Schaster v. Albert*, 212 Pa. Super. 58, 239 A.2d 841 (1968). Thus, the DER's contention that the North Sewage Treatment Plant is hydraulically overloaded is accepted as true. A hydraulic overload is defined by Section 94.1 (25 Pa. Code 94.1) as follows:

> "*Hydraulic Overload* - The condition that occurs when the hydraulic portion of the load, as measured by the average daily flow entering a sewage treatment plant, exceeds the average daily flow upon which the permit and the plant design are based or when the flow in any portion of the system exceeds its hydraulic carrying capacity during a recent 3-month period."

Initially, appellants' contention that the NPDES permit allows the existing flow should be summarily dismissed as a basis for summary judgment. It is apparent from a review of the documents filed with the board and from oral argument on the motion that there are material issues of fact in dispute on, *inter alia*, the requirements of the NPDES permit and the requirements of the permit required by Section 202 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691, *et seq.*

If genuine issues as to material facts exist, then a case must go to trial. *Rose v. Food Fair Stores Inc.*, 437 Pa. 117, 262 A.2d 851 (1970).

In challenging the validity of Section 94.1 appellants are faced with the same burden as challenging the validity of a statute. The Commonwealth Court in *Commonwealth of Pa., DER, v. Metzger*, 22 Pa. Commonwealth Ct. 70, 347 A.2d 743 (1975) expressed the pertinent principles:

> "The regulations challenged here, of course, are legislative in character, for they were issued pursuant to a grant of legislative power contained in Section 9 of the Sewage Facilities Act, 35 P.S. §750.9. Thus, they are subject to the same test with reference to their validity as in an act of the Legislature. *Uniontown Area School District v. Pennsylvania Human Relations Commission*, 455 Pa. 52, 313 A.2d 156 (1973), and a heavy burden, therefore, rests upon the person asserting their unconstitutionality, *Bilbar Construction Company v. Easttown Township Board of Adjustment*, 393 Pa. 62, 141 A.2d 851 (1958). As our Supreme Court has said:
>
> "A court, in reviewing such a regulation, 'is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers . . . . Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be so entirely at odds with fundamental principles . . . as to be the expression of a whim rather than an exercise of judgment.' *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232, 236-37, 57 S. Ct. 170, 172, 81 L. Ed. 142 (1936). *Uniontown Area School. District, supra*, 455 Pa. at 77, 313 A.2d at 169". Id. 347 A.2d 743 at 746.

The Pa. Supreme Court in *Water and Power Resources Board v. Green Springs Co.*, 394 Pa. 1, 145 A.2d 178 (1958) stated the test to which the validity of a statute is subjected:

> "Nothing but a clear violation of the Constitution will justify the judiciary in nullifying a legislative enactment. Every presumption must be indulged in its favor and one who claims the Act is unconstitutional has a very heavy burden of proof . . . if the language of a statute be of doubtful import the statute in its entirety and all its provisions must be considered." Id. 145 A.2d at 181.

See also *Commonwealth v. Delenick*, 24 Pa. Commonwealth Ct. 577, 357 A.2d 736 (1976).

Appellants focus their objections on the third paragraph of the requirements imposed by Section 94.21, which prohibits new extensions of, or connections to, the sewer system tributary to the overloaded treatment plant except as approved by the DER.

The regulation does not affect the appellants' right to construct an extension to the sewer system. Whether or not a hydraulic overload exists at the treatment plant, the construction of an extension of the sewage system

is prohibited by Section 207 of The Clean Streams Law[11], *supra*, without the approval of the DER. Thus, even prior to the November 23, 1977, action of the DER, appellants were prohibited from the construction of an extension of the sewage system without the DER approval.

The issue before this board therefore is the validity of a regulation requiring a person to seek the DER approval prior to connecting to a sewer system.

The legislature has given the DER the authority to prohibit connections to sewerage systems without the DER's prior approval. Section 202 of The Clean Streams Law, *supra*, states 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. . .For the purposes of this section, *a discharge of sewage into the waters of the Commonwealth shall include a discharge of sewage by a person or municipality into a sewer system* or other facility owned, operated or maintained by another person or municipality and which then flows into the waters of the Commonwealth. A discharge of sewage without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the board is hereby declared to be a nuisance. [emphasis supplied]

Under Section 202, therefore, the DER has the authority to prohibit all connections without the DER approval. In *F & T Construction Co. v. DER*, 6 Pa. Commonwealth Ct. 59, 293 A.2d 138 (1972) the Commonwealth Court stated: "The Department has clearly been given the power to prevent the discharge of sewage into a sewer system by The Clean Streams Law..." Section 94.21, which only requires the DER approval if an overload exists, is therefore, less restrictive than permitted by Section 202 of The Clean Streams Law.

As appellants have chosen to attack the regulation by means of a motion for summary judgment, there is no evidence of record that this requirement is unduly oppressive or burdensome nor is there any evidence of record that the requirement constitutes an unreasonable exercise of the police power as applied to appellants. Notwithstanding the want of such critical evidence to support the heavy burden of proof required of one who challenges the validity of a regulation issued pursuant to a grant of legislative power, appellants would have us declare Section 94.21 invalid because it constitutes "the delegation

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11. Section 207 of The Clean Streams Law states:

> "All plans, designs, and relevant data for the construction of any new sewer system, or for the extension of any existing sewer system, by a municipality, or for the erection, construction, and location of any treatment works or intercepting sewers by a person or municipality, shall be submitted to the board for its approval before the same are constructed or erected or acquired. Any such construction or erection which has not been approved by the board by written permit, or any treatment works not operated or maintained in accordance with the rules and regulations of the board, is hereby also declared to be a nuisance and abatable as herein provided."

of unlimited discretion to an administrative agency". Appellants contend that Section 94.21 allows the DER unbridled discretion to ban all connections to their sewer system as long as the hydraulic overload exists. DER could, appellants argue, use Section 94.21 to circumvent the requirements of ections 94.31[12], 94.32[13], and 94.33[14] of the DER's regulations (25 Pa. Code 94.31, 94.32 and 94.33) which set forth the conditions which must exist before the DER can impose a ban on connections to a sewage system and which require the DER to publish notice of the imposition of a ban.

The DER does not have unlimited discretion to prohibit connections to a sewer system under Section 94.21. The existence of a hydraulic overload, as defined by Section 94.1 requires property owners to seek the DER approval prior to installing a connection to the sewage system. However, the DER's approval or

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12. §94.31 states:

"A ban on connections will be imposed by the Department whenever the Department determines that an organic or hydraulic overload exists at the plant or any portion of the sanitary sewer system or the discharge from the plant causes actual or potential pollution of the waters of the Commonwealth, and, in addition, that one or more of the following conditions prevail:

"(1) The Department determines that a ban is necessary to prevent or alleviate endangerment of public health.

"(2) The permittee has failed to submit a satisfactory plan or has failed to implement the program as required by §94.21 of this Title (relating to existing overload).

"(3) The failure of the permittee to provide facilities to prevent an organic or hydraulic overload was not caused solely by the unavailability of Federal construction grants under section 201 of the Federal Water Pollution Control Act (33 U.S.C. §1251 *et seq.*) for which the permittee has applied and remains eligible."

13. §94.32 states:

"A ban may be imposed by the Department whenever the Department finds that such a ban is needed in order to prevent or eliminate public health hazards or pollution resulting from violations of the Clean Streams Law not otherwise covered by the provisions of this Chapter."

14. §94.33 states:

"(a) A ban imposed by order of the Department will be addressed to the person or municipality who authorizes connection to the sanitary sewer system and who operates the sanitary sewer system and plant. The ban shall be effective immediately upon receipt of the order imposing the ban.

"(b) The Department will publish the order imposing the ban in one newspaper of general circulation in the area affected by the ban beginning no later than 48 hours after the imposition of the ban or as soon thereafter as publication schedules allow for a period of two consecutive weeks. The Department will publish the order imposing the ban, following imposition of the ban, once in the Pennsylvania Bulletin, provided, however, that failure or delay in so publishing by the Department shall not in any way affect the date of imposition or validity of the ban.

"(c) The Department, at the time of imposition of the ban, will give notice of the ban to any governmental entity which issues building permits in the are of the ban. No building permit which may result in a connection to the sewer system or increase the waste load to that system shall be issued by such governmental entity after the ban is effective; provided, however, that failure or delay in such notification shall not, in any way, affect the date of imposition or validity of the ban."

denial of connections to the sewer system under 94.21(3) does involve the DER's discretion. See *East Pennsboro Twp. Authority v. DER*, 18 Pa. Commonwealth Ct. 58, 334 A.2d 798 (1975). Where the DER has discretion to act, its discretion is limited by the policies and requirements of The Clean Streams Law, including the limitations imposed on the DER by Section 4, "Declaration of Policy" and Section 5 "Powers and Duties", of The Clean Streams Law, *supra*. DER's "exercise of discretion" when it approves or denies a connection to a sewer system is reviewable by this board on appeal by an aggrieved party.

There is nothing in this record which would allow us to conclude that the DER will use Section 94.21 to circumvent the requirements imposed on the DER prior to imposing a ban under Sections 94.31, 94.32, and 94.33[15].

A regulation cannot be declared invalid because of the mere possibility of abuse by the DER. The Commonwealth Court in *Bortz Coal Co. v. Air Pollution Commission*, 2 Pa. Commonwealth Ct. 441, 279 A.2d 388 (1971) stated in answer to the contention that the Pa. Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001 *et seq.*, constituted an unlawful delegation of legislative authority to the Air Pollution Commission stated that:

> "One of the discretionary determinations to be made by the Commission is the scientific or technical rules and regulations which determine that amount of air pollution which should be prohibited in carrying out the legislative intent. If the regulatory agency sets forth unreasonable standards or fails to establish any standards of air pollution, the citizens are protected through the appeal provisions of the Act. Certainly the *possibility* of such an unreasonable determination should not be the basis for a holding that there has been an unlawful delegation of power. As stated before, we hold that there is not an unlawful delegation of powers in the Air Pollution Control Act." Id. 279 A.2d at 394.

In summary, Section 94.21(3) does not, by itself, prohibit connections to a hydraulically overloaded sewage system, rather it requires prior DER approval of the connection. It is, of course, true that the power to approve is the power to deny. However, I don't believe we should assume that the DER will act unreasonably in reviewing requests for approval to connect. Certainly, an unreasonable action by the DER is reviewable by this board and reversible as an abuse of discretion.

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15. In fact, counsel for DER asserts in his brief on this matter that the DER has not yet prohibited any person from connecting to the system, since no property owner has petitioned for approval to connect to the system. See Appellee's Supplemental Brief In Opposition to Appellants' Motion for Summary Judgment, p.6.

Therefore since: (1) DER has the authority to require a party to seek its approval before connecting to a sewage system; (2) There are no facts of record on which to base a finding that DER will employ Section 94.21 in an unreasonable manner; (3) Appellants have not met the heavy burden required by *DER v. Metzger, supra,* to declare a regulation invalid; and (4) This board cannot declare a regulation invalid on the mere possibility it will be abused by the DER, I would dismiss appellants' motion for summary judgment.

ENVIRONMENTAL HEARING BOARD

Thomas M. Burke

THOMAS M. BURKE
Member

DATED: April 10, 1978

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
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SVONAVEC COAL COMPANY and
SVONAVEC, INC.

Docket No. 78-019-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ORDER AND OPINION
SUR
COMMONWEALTH'S MOTION TO DISMISS

On or about February 20, 1978, appellants filed an appeal from the action of the DER in issuing a requested amendment to Mine Drainage Permit #4072SM18 (amended). The sole basis for said appeals as articulated in appellants' "Notice of Appeal", involved the propriety of the DER's inclusion of Special Condition #3 as a part of said amended permit.

By letter dated March 9, 1978 from D. R. Thompson, Chief, Division of Mine Drainage Control and Reclamation, to appellant, Svonavec, Inc., the DER deleted Special Condition #3 from Mine Drainage Permit #4072SM18 (amended). Deletion of Special Condition #3 from Mine Drainage Permit #4072SM18 moots all objections to the issuance of said amended permit.

O R D E R

NOW, therefore this 10th day of April 1978, the appeal of Svonavec Coal Company and Svonavec, Inc. is hereby dismissed on the grounds that it has become moot as a result of subsequent action by the DER, to wit, its letter of March 9, 1978, which deleted from Mine Drainage Permit No. 4072SM18 the sole basis of appellants' objection thereto.

PAUL E. WATERS
Chairman

THOMAS M. BURKE
Member

JOANNE R. DENWORTH
Member

cc: Bureau of Litigation Enforcement

FOR COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES:

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FOR APPELLANT/RESPONDENT/DEFENDANT:

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Barbera and Barbera
146 West Main Street
P. O. Box 390
Somerset, PA 15501

DATED: April 10, 1978
llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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Docket No. 77-087-C

JAMES R. SABLE

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO VACATE ORDER OF DISMISSAL

Appellant, James R. Sable, by counsel, on March 6, 1978, filed a Petition to Vacate an order which dismissed the subject appeal on December 29, 1978.

The original appeal, a one-page hand written letter received in this office on August 9, 1977, did not comply with Section 21.21 of the board's rules in the following respect:

1. It did not set forth the address and telephone number of the appellant.

2. It did not attach a copy of the action from which the appeal was taken.

3. It did not indicate that the officer of the Department issuing the notice of appeal or the Bureau of Administrative Enforcement were notified of the appeal.

4. It did not set forth appellant's objections to the department's action.

Although the board's rules state that the failure to comply with Section 21.21 is a sufficient basis for the dismissal of an appeal, the appeal was not at that time dismissed. Rather, a notice was sent to appellant on August 10, 1977, which acknowledged the appeal and indicated the above deficiencies and cautioned, "unless the following is submitted within 10 days of the receipt of this notice, your appeal may be dismissed". The notice was sent to appellant at the return address on the envelope containing the appeal.

Having received no response from the notice by December 29, 1977, the board dismissed the appeal. The order dismissing the appeal was sent by certified mail to the only address that the board had for the appellant, the aforementioned return address; however, it was returned "unclaimed".

Appellant bases his Petition to Vacate the December 29, 1977 order on an allegation that neither the August 10, 1977, notice nor the December 29, 1977 order were received by appellant. However, under the circumstances, we have no reluctance to deny the Petition to Vacate our earlier dismissal, coming as it does more than 7 months after the first default of appellant. The original failure by appellant to comply with the board's rules is alone a sufficient basis to dismiss the appeal. *Rostosky v. Commonwealth of Pennsylvania, Dept. of Environmental Resources*, 26 Pa. Commonwealth Ct. 478, 364 A2d 761 (1976). *Lebanon County Sewage Council v. Commonwealth of Pennsylvania, Dept. of Environmental Resources*, 76 C.D. 1977. The board has been liberal of its application of rule 21.21; however, liberality will not be carried to the extent of completely ignoring the rule.

Further, the notice and order were served in accordance with Section 33.31 of the general rules of Administrative Practice and Procedure 1 PA Code 33.31 and Rule 233 of the PA Rules of Civil Procedure which permit the service of notices by mail. The rules do not require proof of actual receipt. See *Barsky Inc. v. Walverton*, 18 Bucks Co., L.Rep. 187 (1968).

ORDER

AND NOW, this 11th day of April, 1978, the petition filed on behalf of appellant James R. Sable, to vacate our dismissal order of December 29, 1977, is hereby denied.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

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Brennan, Robins & Daley
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Pittsburgh, PA 15222

DATED: April 11, 1978

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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SHARON STEEL CORPORATION : Docket No. 77-181-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
MOTIONS TO LIMIT CONTENTIONS OF APPELLANT
IN PRE-HEARING MEMORANDUM AND NOTICE OF APPEAL

Sharon Steel Corporation (appellant) filed with this board on November 14, 1977, an appeal from the refusal by the Department of Environmental Resources (DER), Bureau of Water Quality Management, to issue an industrial waste permit in response to appellant's application No. 4377201. The letter notifying Sharon of the refusal stated that the permit was denied because: "...the proposed degree of treatment to be provided was inadequate in certain respects". The letter concluded that: "Refusal of this application is based upon the Department of Environmental Resources' Rules and Regulations, Chapter 91, Sections 91.23 and 91.24 (25 Pa. Code 91.23 and 91.24) which require that all applications be easily understood and utilize acceptable factors and designs".

Appellant, in its notice of appeal listed the following reasons why it believes the action of the DER in denying the permit was improper:

"This action was arbitrary, capricious and not in accordance with law because:

a). the application number 4377201 was easily understood and did utilize acceptable factors of design;

b). there are no published, ascertainable, and/or objective standards for determining what is meant by the term "easily understood".

c). there are no published, ascertainable, and/or objective standards for determining what is meant by the term "acceptable factors of design";

d). the action was based on subjective reactions of the DER inconsistent with and irrelevant to the objectives of the law and regulations it is required to uphold and administer;

e). the action was not necessary for the proper protection of the public interest;

f). there is no requirement in the law or regulations that an Industrial Waste Permit application be "easily understood";

g). there is no requirement in the law or regulations that an Industrial Waste Permit application "utilize acceptable factors", and

h). the action was not environmentally necessary.

The refusal was stated in the notification letter to be based on 25 Pa. Code §§91.23 and 91.24. This action is arbitrary, unreasonable and not in accordance with law because:

a). 25 Pa. Code §§91.23 and 91.24 in fact require the application to be approved;

or, if construed to require refusal,

b). 25 Pa. Code §§91.23 and 91.24 are unconstitutionally vague and overbroad; and

c). 25 Pa. Code §§91.23 and 91.24 are unconstitutionally vague and overbroad as applied."

Appellant, in accordance with the normal procedure of the board, was ordered on November 17, 1977, to file with the board a prehearing memorandum containing *inter alia* the statement of facts it intends to prove and contentions of law relied upon. The order cautioned that a party may be deemed to have abandoned all contentions of law or fact not set forth in its pre-hearing memorandum. On January 16, 1978, appellant submitted its pre-hearing memorandum. In a section titled, "Contentions of Law", appellant stated, *inter alia*, that:

"The refusal to grant the application for a permit must be held invalid because it is arbitrary, capricious, unreasonable, not in accordance with law, environmentally unnecessary and, deprives Sharon of property without due process of law.

The refusal violated the duty of the DER to protect the environment, by contributing to pollution in violation of the law, and fails to reflect a consideration of the factors required of any decision by the DER set forth in §5 of the Clean Streams Law.

The regulations cited in the letter of refusal in fact require the approval of the application. If said regulations were to be construed to require the refusal, they would be unconstitutional as vague and overbroad on their face and as applied.

The refusal was based upon requirements not set forth in the law and regulations and not published as assertainable or objective standards to be achieved by the public."

DER has filed two motions relating to the interaction of the notice of appeal and the pre-hearing memorandum. On February 2, 1978, the DER filed a "Motion to limit legal contentions to those set forth in appellant's notice of appeal". DER, in its motion alleges that appellant has raised legal contentions in its pre-hearing memorandum which were not set forth in its notice of appeal. DER requests that appellant be prohibited from continuing to assert those legal contentions in this proceeding and that appellant's case be strictly limited to the legal issues set forth in its notice of appeal. As support of its motion, DER cites Section 21.21(c)(3) of the board's rules which states that: "The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the department or local agency. Such objection may be factual or legal. Any objection not raised by the appeal shall be deemed waived." DER also cited *Wrightstown Township v. Department of Environmental Resources*, EHB Docket No. 75-307-W (issued December 1, 1977) wherein the Hearing Examiner ruled that testimony on an alleged violation of the Air Pollution Control Act by the permittee was inadmissable under Rule 21.21 in an appeal from the issuance of a surface mining permit because the air pollution issue was not raised until the hearing on the merits. We stated at footnote 13 of the adjudication that: "The board has not construed [Rule 21.21] as mandatory, but very strong directory language."

Initially, we do not believe that the legal contentions stated in the prehearing memorandum raise objections not previously raised in appellant's notice of appeal.

DER refers to three "legal contentions" which it believes raise new issues. The first is appellant's contention that the refusal to grant the application for a permit deprives appellant of property without due process of law. Rather than raising a new objection, we believe the "deprivation of due process" contention expounds on the objection stated in appellant's notice of appeal that the DER's action was arbitrary and capricious because it was based on subjective reactions of the DER inconsistent with law. The second contention objected to is appellant's statement that the refusal violates the duty of the DER by contributing to pollution in violation of the law. This

legal contention was raised in the notice of appeal wherein appellant alleged that the DER's action was inconsistent with and irrelevant to the objectives of the law and regulations, was not environmentally necessary and was not necessary for the proper protection of the public interest. The third contention objected to by the DER is appellant's statement that the DER action fails to reflect a consideration of the factors required by Section 5 of the Clean Streams Law. We reiterate that appellant in its Notice of Appeal did allege that the DER action was inconsistent with and irrelevant to the objectives of the law and regulations and not in accordance with law.

Further, we have never held that a party was foreclosed from arguing a legal contention to the board because it was stated initially in the pre-hearing memorandum. A regulation, statute or constitutional provision can be stated initially in the pre-hearing memorandum so long as it addresses the objections or facts averred in the notice of appeal.

The DER on February 21, 1978, filed with this board a "motion to eliminate from consideration allegations set forth in appellant's notice of appeal, but not addressed in its pre-hearing memorandum." In its motion, the DER requests that we eliminate from consideration three objections set forth in appellant's notice of appeal, but not addressed in appellant's pre-hearing memorandum.

The contentions of appellant objected to by the DER are:

1. the action was based on subjective reactions of the DER inconsistent and irrelevant to the objections of the law and regulations it is required to uphold and administer.

2. the action was not necessary for the proper protection of the public interest.

3. 25 Pa. Code §§91.23 and 91.24 are unconstitutionally vague and overbroad as applied.

As previously stated in this opinion, the first two contentions were addressed by the pre-hearing memorandum. With regard to the third contention, the pre-hearing memorandum repeats it verbatim.

Even if there were objections to the DER action stated in the notice of appeal which were not addressed in the pre-hearing memorandum, we would not eliminate those objections from further consideration. The board

does permit the pre-hearing memorandum to be amended after discovery has been completed so long as the amendment is filed sufficiently in advance of the hearing to not prejudice the opposing party.

AND NOW, this 18th day of April, appellee's motion to limit legal contentions to those set forth in appellant's notice of appeal is denied, and appellee's motion to eliminate from consideration allegations set forth in appellant's notice of appeal but not addressed in appellant's pre-hearing memorandum is denied.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke
THOMAS M. BURKE
Member

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DATED: April 18, 1978

pmg

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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SHARON STEEL CORPORATION

Docket No. 77-181-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR IMPOSITION OF
SANCTIONS FOR FAILURE TO COMPLY WITH PRE-HEARING ORDER #1

AND NOW, this 21st day of April, 1978, the DER's motion for imposition of sanctions on appellant for failure to comply with pre-hearing order #1 is hereby granted in part and denied in part.

DER alleges that certain statements contained in appellant's pre-hearing memorandum are inadequate and therefore, do not comply with the requirements of the board's pre-hearing order #1. Specifically, the DER objects to the adequacy of statements given in answer to Item C, "Description of any scientific tests relied upon by any party and summary of testimony of experts" and Item D, "Order of witnesses".

In answer to Item C, appellant stated: "Sharon expects to introduce the results of the operation of a bench scale model of the proposed treatment system conducted by the Pennsylvania Engineering Corporation . . . Several experts, including those involved in the above-mentioned study, will be called to testify". We concur with the DER that appellant has not summarized the testimony of its expert witnesses as required by Item C of the board's pre-hearing order #1.

In answer to Item D, appellant stated: "At the present time, Sharon knows that Joseph P. Walsh, Director of Environmental Control, and Joseph Lengyel, Product Director, Water and Waste Water Systems, Engineering Construction Division of the Pennsylvania Engineering Corporation, are expected to be called as

witnesses. Sharon will supplement this memorandum when the number and order of witnesses are finally determined."

We do not agree that appellant has not adequately responded to Item D. In answer to the DER's motion, appellant asserts that "Appellant did, in fact, list the names of those whom it expected to call as witnesses. Of course, the list may increase or decrease after pre-hearing conferences and discovery proceedings."

We have no reason to question appellant's assertion that the two persons named are the only two witnesses it intends to call subject to pre-hearing conferences and discovery proceedings. The disclosure of additional facts through discovery or the framing of issues during pre-hearing conferences are legitimate reasons for amending a pre-hearing memorandum to add or delete the names of witnesses, so long as the amendment is filed sufficiently in advance of the hearing to not prejudice the opposing party.

We therefore enter the following:

O R D E R

AND NOW, this 21st day of April, 1978, appellant shall on or before May 8, 1978 , file with the board and serve the DER's counsel with a copy of an amendment to its pre-hearing memorandum summarizing the testimony of its expert witnesses.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

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DATED: April 21, 1978
pmg

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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SHARON STEEL CORPORATION : Docket No. 77-181-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR APPELLANT'S PETITION
FOR DISCOVERY

Appellant filed on February 21, 1978, a petition for discovery requesting this board to issue subpoenas for the taking of depositions of three persons and requesting that this board order the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), to produce certain documents. The DER on March 10, 1978, filed objections to appellant's petition for discovery and a motion for a protective order. On March 30, 1978, appellant filed an answer to the DER's objections and motion for protective order.

The DER's motion for a protective order relates to the location of the deposition of Homer W. Fry, who has since died. As the DER has not objected to the deposition of the other two witnesses, subpoenas are hereby issued for the purpose of taking their depositions at the office of appellant's counsel at 747 Union Trust Building, Pittsburgh, PA, at a time convenient to both parties on or before May 29, 1978.

The DER's first objection to the request for production of documents alleges that since appellant requests "all documents", the request is over-broad and therefore requires an unreasonable investigation by the DER. Appellant requests three categories of documents: (1) documents relating to the preparation of the refusal to issue the permit, (2) documents relating to the promulgation of sections 91.23 and 91.24 of the DER's regulations and (3) reports of the quality of the wastewater discharges from appellant's plant, the quality of the unnamed tributary into which the discharges flow and the

Shenango River, as well as documents relating to the water uses and water quality of the unnamed tributary and the Shenango River.

Requests for "all documents" has in some instances been held to impose an unreasonable burden upon the party required to produce the documents. See 5A ANDERSON PENNSYLVANIA CIVIL PRACTICE §4011.95. However, we believe appellant is entitled to examine all the facts bearing on the permit denial; therefore, the DER's objection as it applies to the first subject of inquiry is overruled. In regard to the second subject of inquiry, we don't believe that it imposes an undue burden upon the DER to produce whatever documents it has in its possession relating to the promulgation of Sections 91.23 and 91.24.

The third area of inquiry does impose an unreasonable burden upon the DER as the scope of its required investigation is not limited by time. See 5A ANDERSON PENNSYLVANIA CIVIL PRACTICE, §4011.98. In its answer to the DER's objections, appellant suggests limiting the scope of the inquiry to inspections, etc., since January 1, 1970. We are unable to determine whether eight years is unreasonably burdensome or, in fact, is necessary to respond to appellant's needs. We therefore order the DER to supply the documents requested by paragraph III(c) for the period commencing January 1, 1970, unless the DER, on or before the date on which it is required to produce the documents, shows that the gathering of eight years of data is unreasonably burdensome and unnecessary to determine the parameters of the plant's discharge, the unnamed tributary and the Shenango River and the water uses of the unnamed tributary and the Shenango River.

The DER also objects to the request for documents on the basis that the documents requested include information prepared in anticipation of litigation. As to the documents which bear on the denial of the permit and the promulgation of the regulations, we believe they were manifestly prepared for a purpose other than preparation for trial, and thus must be produced. See *Commonwealth of Pennsylvania, DER, v. United States Steel Corporation*, EHB Docket No. 75-205-CP-D, (Opinion and Order issued August 13, 1976). (This is not to say that the DER must produce those documents which are obviously the work product of its attorney such as memoranda of counsel regarding preparation for this trial on these issues.)

As to the third area of inquiry, reports of inspections conducted, or documents prepared solely for this litigation, need not be produced.

The DER's third objection states that appellant's request for documents includes documents subject to the attorney-client privilege. This privilege does not apply to all communications between attorney and client. Rather it applies only to confidential communications from the client to the attorney and to those communications from the attorney to the client which reiterate an earlier communication from the client. See *Eiserman v. Hornberger*, 44 D. & C. 2d 128 (Lycoming County, 1976); *Nelson v. Himes*, 62 D. & C. 2d 748 (York County, 1973). The DER need not produce confidential communications directed by the DER to its counsel.

The DER objects to the request for documents because they are not limited by a specific time period. The first two subjects of inquiry, permit denial and the promulgation of regulations, are limited in time by the nature of the inquiry. The time limitation on the third area of inquiry has previously been addressed herein.

The DER also objects to producing the documents for inspection at the office of appellant's counsel in Pittsburgh. The DER asserts that the petition for discovery could require the production of documents located in the DER's offices in Harrisburg, Pittsburgh, Meadville, Norristown, Reading, Williamsport and Wilkes-Barre and that requiring the DER to attempt to review the files in these offices and then to transport the information to the Pittsburgh office of appellant's counsel would place an unreasonable burden upon the DER. We stated in *Allegheny Valley Residents Against Pollution v. Commonwealth of Pennsylvania, DER, et al*, EHB Docket No. 74-232-C (Opinion and Order issued June 9, 1977) that "Pa. R.C.P. 4009 permits only the inspection, examination and copying of documents. It does not authorize the transmittal of evidence to any one or any place for examination".

From a reading of the petition for discovery, we believe that most of the requested documents are located either at the DER's Meadville office or the DER's Harrisburg office. We, therefore, order the DER to produce the documents requested by the petition for discovery at its Meadville office and/or its Harrisburg office. The DER shall make copying facilities available and

may impose upon appellant a reasonable charge for use of its duplicating equipment.

O R D E R

AND NOW, this 4th day of May, 1978, it is hereby ordered that:

1. Subpoenas are hereby issued for the purpose of taking the depositions of David E. Milhous and Jack N. Walter at the offices of Reed, Smith, Shaw and McClay, 747 Union Trust Building, Pittsburgh, PA, 15230, at a time convenient to both parties on or before May 29, 1978.

2. The DER shall, at a time convenient to both parties, on or before May 23, 1978, make available for inspection and copying the documents requested by Paragraph III of appellant's February 20, 1978, petition for discovery at the DER's Meadville Regional Office, 1012 Water Street, Meadville, PA 16335 and/or at the DER's Harrisburg office, 16th Floor, Fulton Building, Third and Locust Streets, Harrisburg, PA 17120, during normal business hours.

The DER need not, in accordance with the terms of the attached opinion, supply any documents that were prepared solely in the preparation of this litigation or that are specifically within the attorney-client privilege.

The documents requested by Paragraph III(c) of appellant's petition for discovery shall be limited to the time period commencing on January 1, 1970, unless the DER on or before May 23, 1978, shows that the gathering of eight years of documents is unreasonably burdensome.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

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For the Appellant/Respondent/Defendant:
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DATED: May 4, 1978

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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Docket No. 77-181-B

SHARON STEEL CORPORATION

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR DER'S FIRST PETITION FOR DISCOVERY

The Commonwealth of Pennsylvania, Department of Environmental Resources (DER), on February 27, 1978, filed with this board a "First Petition for Discovery" requesting this board to require appellant, Sharon Steel Corporation, to answer certain interrogatories and to produce certain documents. By letter dated February 28, 1978, the board notified appellant that it had received the DER's petition for discovery and advised appellant that it must file an answer to the petition for discovery, if it desired to do so, on or before March 15, 1978. On March 15, 1978, appellant filed objections to the form of the petition for discovery and reserved the right to raise objection to the specific interrogatories and the request for production of documents at the time the interrogatories are to be answered and the documents produced. The DER on April 4, 1978, filed a response to appellant's objections.

In its response to appellant's objections, the DER requests the board to require appellant to file all its objections simultaneously, rather than allowing appellant to file objections relating to the form of the petition for discovery in response to the board's February 28, 1978, letter and specific objections at the time discovery is to take place.

The intent of the board's February 28, 1978, letter was to solicit all of appellant's objections to the DER's petition for discovery. Further we agree with the DER that appellant's bifurcated response could cause unnecessary delay. However, in *Jones and Laughlin Steel Corporation v. Commonwealth of Pennsylvania*, [illegible] EHB Docket No. 74-272-C (Opinion and Order [illegible]

September 10, 1976) we held that objections, unless they relate to form and time of filing, may, as a matter of law, be raised at the time the interrogatories are to be answered or the request for documents is to be satisfied. We reasoned that section 21.15(d) of our rules provides that discovery before the board shall be consistent with the Pennsylvania Rules of Civil Procedure (PRCP) and that the PRCP have been interpreted to provide that the failure to file objections to interrogatories and requests for documents waives only the objections to form and late filing. Therefore, we cannot foreclose appellant from raising nonwaivable objections at the time discovery is to take place and the DER's request that we do so is denied.

Appellant initially objects to answering the interrogatories and producing documents insofar as they request data gathered or prepared after October 14, 1977, the date on which the DER denied appellant's application for permit. Appellant argues that such information is prepared in anticipation of litigation. We disagree that merely because information is gathered after the date of permit denial, it is *ipso facto* prepared in anticipation of litigation. See *Bethlehem Steel Corporation v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 75-154-D and 75-155-D (Opinion and Order issued October 29, 1975) wherein we stated that "the date of the start of litigation is only significant as an indication of when material may have begun to be prepared in anticipation of litigation. If relevant material collected or prepared after that date would have been collected or prepared regardless of litigation and is not prepared specifically for litigation, it is still discoverable". Therefore appellant's first objection is overruled.

Appellant also objects to the DER defining "documents" in its petition for discovery as meaning the original and all copies which are different from the original in any way. Appellant contends that copies of documents would be irrelevant to the subject appeal and lists as examples of copies which are irrelevant those that are different from the original by the marking of a receipt stamp or indication of copies sent and received. In response, the DER contends that such information as who received blind copies, blind postscripts and dates of receipt are relevant.

Matters which are clearly irrelevant are not discoverable. *Spodal v. Zarlinski*, 39 Northumberland 175 (1967). However, the scope of discovery is

not limited only to what is admissable, but to what may be relevant to the preparation of the case. See *Pennsbury Village Condominium v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 76-028-C (Opinion and Order dated July 12, 1976). As we are unable to determine what facts will be disclosed by the production of the "copies", we are unwilling to rule that those facts are clearly irrelevant to the DER's case.

Appellant objects to the production of documents at the offices of the DER's counsel in Pittsburgh in that it would subject the documents to risk of loss or destruction. We agree; and we hold that appellant shall produce the documents either at its offices in Sharon, Pennsylvania, and/or at the offices of its counsel in Pittsburgh, Pennsylvania. Appellant shall make copying facilities available and may impose upon the DER a reasonable charge for the use of its duplicating equipment.

Appellant also objects to the identification and production of documents to which appellant has had access but does not presently have access. If appellant is no longer in possession or control of certain documents requested by the DER, it merely needs to say so. However, appellant shall identify those documents formerly in appellant's possession or control and shall state the disposition made of such documents.

Appellant further objects to the DER's definition of the terms "identify" and "identity" insofar as the DER's definition would require appellant to supply the educational background, summary of knowledge, and expertise, experience, and publications of individuals identified. Appellant contends that it is unreasonably burdensome to collect the information requested and that the information should be obtained from the individuals concerned. We overrule appellant's objection as we do not believe it is unreasonably burdensome for appellant to supply the requested identification. Nor do we believe it necessary for the DER to seek the information from the individual who is identified by appellant. If the information is available to appellant, it should supply it to the DER.

Finally, appellant requests that it have the option to either identify the requested documents or to produce such documents without identifying same on the grounds that to identify each document would cause unreasonable annoyance, expense or oppression to appellant. We agree with appellant only insofar as the identity of the documents as that term is defined by the DER's petition

for discovery, is present in the content of the document. Otherwise, appellant must supply the information requested by the definition of the term "identify" or "identity" in the DER's petition for discovery.

O R D E R

AND NOW, this 4th day of May, 1978, it is hereby ordered that:

1. Appellant, Sharon Steel Corporation, shall answer the interrogatories propounded by the DER's first petition for discovery on or before May 23, 1978, in accordance with the terms of this opinion.

2. Appellant, Sharon Steel Corporation, shall on or before May 23, 1978, produce for inspection and copying the documents requested by the DER's first petition for discovery at appellant's offices in Sharon, Pennsylvania, and/or at the offices of appellant's counsel in Pittsburgh, Pennsylvania, in accordance with the terms of this opinion.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

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For the Commonwealth of Pennsylvania,
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DATED: May 4, 1978

COMMONWEALTH OF PENNSYLVANIA

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CONSOLIDATED GAS SUPPLY CORPORATION : Docket No. 78-028-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION & ORDER
SUR APPELLANT'S FIRST DISCOVERY PETITIONS

Appellant, Consolidated Gas Supply Corporation, on March 27, 1978, filed a first petition for discovery, first set of interrogatories, and first request for production, requesting this board to: (1) issue subpoenas for the purpose of taking the deposition of certain individuals; (2) issue a subpoena *duces tecum* to Treasure Lake of Pennsylvania, Inc. (Treasure Lake) ordering Treasure Lake to produce certain documents; (3) order the Department of Environmental Resources (DER) to answer interrogatories; and (4) order the DER to produce certain documents. The DER on April 10, 1978, filed objections thereto and appellant on April 24, 1978, filed an answer to the DER's objections. This opinion and order rules on the DER objections and sets forth agreements reached between the parties on appellant's discovery petitions.

The DER objects to the issuance of subpoenas for the taking of depositions of Charles F. Straub, a retired oil and gas inspector, Division of Oil and Gas, DER, Charles H. Updegraff, Acting Chief of the Division of Oil and Gas and John Verna of Verna Engineering Inc. for reason that they previously testified at a fact-finding hearing conducted by the DER prior to the issuance of the order which is the subject of this appeal. Therefore, the DER argues, appellant has had the opportunity to cross-examine the three individuals and any further pre-hearing examination of them must be viewed as being sought in bad faith and as subjecting the witnesses and the DER to unreasonable annoyance contrary to the Pennsylvania Rules of Civil Procedure (Pa.R.C.P.) 4011 and 4012 and Section 21.15 of the

board's rules. We disagree. The scope of examination permitted during a discovery deposition is much broader than that allowed during cross-examination. Whereas, cross-examination is limited to the subject matter testified to on direct examination, the scope of discovery includes not only what is admissable at the hearing, but also what may be relevant to the preparation of appellant's case. *Grace v. Hile*, 8 Mercer Co. L.J. 326, 46 D & C 2d 89 (1969) and *Szarmack v. Welch*, 456 Pa. 293, 318 A.2d 707, (1974). Further, since the hearing on this appeal is a *de novo* hearing, the DER is not limited to the testimony it presented at the fact finding-hearing in attempting to sustain its order.

The DER also objects to the deposition of Charles F. Straub on the grounds that the purpose for the deposition as stated in appellant's petition for discovery is to obtain "his relevant opinion regarding the issues involved." The DER contends that appellant is prohibited by Pa.R.C.P. 4011(f) from seeking Mr. Straub's expert opinion. However, the nature of the examination may be such that the witness will not be asked to give a prohibited expert opinion. Further, since the privilege is personal to the witness, Pa.R.C.P. 4011(f) does not limit expert opinions unless the expert himself objects. *Fraley v. Pa. Water and Gas Co.*, 54 Luz. Rep. 189 (1964). The DER does not contend that Mr. Straub objects to giving an expert opinion, only that the DER objects. Therefore, we are unwilling to decide the issue in advance of the deposition.

Appellant also requests an undetermined number of subpoenas for the purpose of taking the deposition of persons to be identified by the DER in answer to an attached interrogatory which requests the names of the expert witnesses that the DER intends to call at hearing. The DER objects to the issuance of these subpoenas for reason that appellant's request "shows a clear intent to solicit an opinion of an expert in violation of Pa.R.C.P. 4011(f)." Appellant's request is, at this time, denied. We believe Section 21.15 of the board's rules prevents us from issuing the subpoenas without knowing the number required or the names of the individuals to be deposed. Section 21.15 of the board's rules requires a petitioner to name the individual to be deposed and a statement of the facts or opinions the individual may be able to disclose. Appellant may, after it receives from the DER the names of the witnesses the DER intends to call at hearing, request this board to issue subpoenas for the purpose of deposing the named individual(s). We encourage the parties to agree between themselves on the deposition of each party's witnesses.

The DER also sets forth two separate objections to appellant's request for a subpoena *duces tecum* to Treasure Lake. (1) Pa.R.C.P. 4009, which provides for the production and inspection of documents, is limited in operation only to the parties to an action; and, (2) Treasure Lake, a non-party to the present action was not given notice of the filing of this petition of discovery and thereby an opportunity to respond.

The DER is correct in its contention that an order for inspection and copying of documents in the custody of Treasure Lake cannot be obtained under Pa.R.C.P. 4009. See *Day v. B.J.&H. Sales Inc.*, 56 Luz. L.Reg. 221, 39 D & C 422 (1966). However, the board does have the authority under Pa.R.C.P. 4018 to issue the subpoena *duces tecum*. The Pennsylvania Supreme Count in *Woods v. Dunlap*, 461 Pa. 35, 334 A.2d 619 (1975) stated:

> "While it is true that Rule 4009 pertains only to parties, see 4 Goodrich-Amram, Pennsylvania Procedural Rules Service § 4009-1 (1954); compare Fed.R.Civ.P. 34; 8 C. Wright & A. Miller, Federal Practice and Procedure §2209 (1970), that rule is not the sole source of the court's power to order the production of documents. Rule 4018 provides that upon the request of a party, the court shall issue a subpoena to compel testimony at a deposition. The authority to issue a subpoena ordering a witness to appear for deposition includes the power to insert within the subpoena a duces tecum clause ordering the witness to produce papers, documents, or other evidence. 4 Goodrich-Amram, Pennsylvania Procedural Rules Service §4018-5 (1954)."
> Id. 461 Pa. 35 at 42.

Also, the board's rules do not require appellant to give notice to Treasure Lake of the filing of the petition for discovery with the board. Treasure Lake does have the opportunity to file objections or a motion for a protective order on or before the date of examination. See *Jones and Laughlin Steel Corporation v. DER*, EHB Docket No. 74-272-C (Opinion and Order issued September 10, 1976). The DER's objection to appellant's request for a subpoena *duces tecum* to Treasure Lake is therefore overruled.

In answer to its objection, the DER need not answer those interrogatories or produce those documents which were prepared in anticipation of litigation.

The parties have agreed to the following modifications of appellant's discovery petitions:

1. The DER shall have 20 days from the date of the order of the board to answer appellant's interrogatories.

2. The definition of the term "documents" as it applies to appellant's interrogatories and request for production shall be modified to require the DER to produce different copies of the same document only if there are significant differences between or among the copies in question.

3. The DER need not produce those documents to which the DER has had access, but does not presently have access, and the DER need only engage in a reasonable investigation to identify such documents.

4. The DER shall produce the originals of only those documents located in Pittsburgh. The DER may produce copies of those documents located in offices outside of Pittsburgh.

5. The DER need not produce the documents required by paragraphs 5 and 6 of appellant's first request for production until twenty (20) days after receipt from appellant of a complete listing of all documents in appellant's possession which fit the description of the documents requested by paragraphs 5 and 6 of the request for production.

O R D E R

AND NOW, this 12th day of May, 1978, it is hereby ordered that:

1. Three subpoenas are attached hereto for the purpose of taking oral depositions of Charles F. Straub, Charles H. Updegraff and John Verna.

2. One subpoena *duces tecum* is attached hereto to be served on Treasure Lake of Pennsylvania, Inc.

3. The DER shall answer the appellant's first set of interrogatories in accordance with the terms of this opinion within twenty (20) days of receipt of this order.

4. The DER shall produce the documents requested by appellant's first request for production in accordance with the terms of this opinion within twenty (20) days of receipt of this order; except that the DER need not produce the documents requested by paragraphs 5 and 6 thereof until twenty (20) days after receipt from appellant of a complete listing of all

documents in appellant's possession which fit the description of the documents requested by paragraphs 5 and 6 of appellant's first request for production or until twenty (20) days after receipt of this order, whichever date is later.

ENVIRONMENTAL HEARING BOARD

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THOMAS M. BURKE
Member

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DATED: May 12, 1978

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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TOWNSHIP OF INDIANA : Docket No. 78-055-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ORDER AND OPINION

The motion of the Commonwealth of Pennsylvania, Department of Environmental Resources, to quash the appeal of Indiana Township is hereby granted for the following reasons.

1. Appellant is contesting a denial of a "201 Delineation Request" by Ernest F. Giovannitti, Acting Regional Sanitary Engineer, Bureau of Water Quality Management, Department of Environmental Resources.

2. Appellant received the denial on March 28, 1978.

3. The appeal from the denial was filed with this board on April 28, 1978. This date is beyond the 30-day time limit specified in Section 21.21 of the board's rules for the filing of appeals to this board.

4. The appeal period set forth in Section 21.21(a) of the board's rules is authorized by Section 1921A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-21, and is as binding as an appeal period contained in a statute. *Rostosky v. Comm. of Pa., DER*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976).

5. This board has no jurisdiction over appeals filed beyond the prescribed appeal period. *Rostosky, supra, Lebanon County Sewage Authority v. Comm. of Pa., DER*, ___Pa. Commonwealth Ct.___, ___A.2d___, No. 176 C.D. 1977.

6. Appellant failed to file its notice of appeal within the required thirty (30) day appeal period, therefore this board lacks jurisdiction over it appeal.

ORDER

AND NOW, this 17th day of May, 1978, the appeal of the Township of Indiana from the denial of a "201 Delineation Request" is hereby quashed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

THOMAS M. BURKE
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DATED: May 17, 1978

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COMMONWEALTH OF PENNSYLVANIA

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WEST PENN POWER COMPANY : Docket No. 73-330-D

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Introduction: The Legal Context of the Technological Question

The Department of Environmental Resources (DER) has once again moved to dismiss West Penn Power Company's appeal from Variance Order No. 73-708-V issued to the company on September 19, 1973. The DER's motion comes after the conclusion of West Penn's presentation of direct evidence (some 3,700 pages of testimony) on the first phase of its challenge to the validity of Regulation 123.22(b) and the variance regulations contained in Chapter 141 of 25 Pa. Code. In an opinion issued February 25, 1977, the board set forth the ground rules for the conduct of this case and reaffirmed the rule announced in *Bethlehem Steel Corporation v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 75-107-D (opinion issued August 2, 1976), that a source challenging the validity of emission regulations must establish as a threshold proposition that the emission regulation is more stringent than necessary to meet national ambient air quality standards, which have been established by the federal government for the protection of public health. The board has previously ruled in the case cited above that under the Clean Air Act of 1970 (the act) and the principle of the supremacy of federal law, the states are required to adopt emission regulations that will satisfy the federal standards established under that act. The board also recognized that under the act the states may adopt more stringent standards than might be required for the federal standards and that under *Train v. NRDC*, 421 U.S. 60, 7 ERC 1735 (1975) and *Union Electric v. EPA*, 427 U.S. 246 , 49 L.Ed. 474 (1976), any question of the validity of those standards in terms of economic and technological feasibility as related to public health standards is a question that is left to the consideration of appropriate state forums.

In recognizing the distinction between the federally required measures (those necessary to meet federal ambient air standards) and those not federally required (which must be sustained on state police power grounds), we are confronted at the outset by the fact that the federal ambient air standards are defined in terms of ground level concentrations: all the receptor sites are at or near ground elevation, and the population—whose health Congress sought to protect—for the most part dwells on the ground. In this context we hear the debate that is the essence of this case: tall stacks v. scrubbers.

History of the Case

The variance order appealed from here was issued in response to West Penn's amended petition for variance filed with the department June 7, 1973, in which West Penn essentially asked for a 12-year variance from the department's regulation §123.22(b) governing allowable emissions of sulfur dioxide for Boiler No. 33 at its Mitchell Power Station on the Monongahela River in Washington County, Pennsylvania. West Penn's petition for variance also included requests for extensions of time in which to meet particulate and sulfur dioxide standards at Boiler Nos. 1, 2 and 3 at the Mitchell Power Station and particulate matter emission standards for Boiler No. 33. The department's variance order granted West Penn's requests with respect to all of those emissions, and the emission standards as to those emissions have since been complied with (by switching to low sulfur oil with respect to SO_2 emissions from Boiler 1, 2 and 3). West Penn's appeal relates only to the sulfur dioxide emission limitation applicable to Boiler No. 33, which has a rated capacity of 2546 x 10^6 Btu/hu (compared to 635 x 10^6 Btu/hu for Boiler 1, 2 and 3).

In its amended petition for variance West Penn discussed alternate plans for controlling the sulfur emissions from Boiler No. 33. Alternative I proposed installation of a tall stack to disperse boiler emissions some 700 feet above ground level, in combination with use of the lowest sulfur coal that could be used compatibly with the electrostatic precipitator, installed to control particulate emissions. West Penn also proposed to establish ground level monitoring stations to monitor air quality around the Mitchell plant. As to this alternative West Penn represented:

> ". . . The cost of the tall stack will be approximately $4.3 million, and the stack will be in use 41 months after receipt of final approval for its construction and use. Upon completion of the tall stack, Petitioner will comply with all applicable ground-level concentration standards and regulations but will require a ten-year variance from existing emission standards to amortize the cost of new equipment."

Under Alternative II, appellant stated it would investigate sulfur removal processes, and "if any such processes not presently being tested have, in Petitioner's

(appellant's) estimation, a sufficiently high chance for success, petitioner will, with the consent of the Department, install such test facilities". Appellant stated that it would require approximately 53 months to engineer, construct and install such a system.

With respect to the sulfur-compound variance for Boiler No. 33, the amended petition summarized appellant's request as follows:

> "Therefore, under Alternative I, Petitioner would comply with all applicable ground-level concentration standards by April 1, 1977, but would require a variance from existing emission regulations until June 30, 1985, in order to amortize the cost of the facility. Under Alternative II, Petitioner would require a variance from existing emission standards and ground-level concentration standards at least until April 1, 1978, and possibly for an extended period thereafter, dependent upon the development of technology and future supply conditions."

In the department's order granting a temporary variance the department made the following determinations with regard to the sulfur dioxide emissions from Boiler No. 33:

> "Upon a review of the petition (a copy of said petition is attached hereto and marked Exhibit "A"), and accompanying materials, testimony (if any) received at public hearing, and upon other information available to the Department dealing with the availability of technology to control sulfur dioxide emissions, the Department finds that:
>
> "1. The granting of such a variance may prevent or interfere with attainment or maintenance of ambient air standards within the time prescribed by the Federal Clean Air Act and Rules and Regulations promulgated thereunder.
>
> "2. Alternate I does not provide for compliance with Section 123.22 in a reasonable time period and is therefore not acceptable to the Department.
>
> "3. The granting of the variance, as requested, for implementation of Alternate II is not reasonable inasmuch as the intermediate dates, and the completion date set forth in the petition do not indicate that the company intends to effect the control of the source as quickly as is reasonably practicable."

With respect to Boiler No. 33 the department's order to West Penn provided that West Penn should:

> "(a) on or before June 30, 1976 complete the implementation of Alternate II of the control plan set forth in the aforementioned amended petition for a variance, which plan is hereby incorporated herein and made a part hereof;
>
> * * *
>
> "(e) on and after June 30, 1976 operate its aforementioned Boiler No. 33 in such a manner as to maintain the emissions of sulfur compounds to within the limits specified in Chapter 123 of the Rules and Regulations of the Department of Environmental Resources; . . ."

In the prior opinion and order in this case, the board denied the department's motion to dismiss this appeal. That motion was based on the department's contention that the department had granted West Penn a variance for three years, which is the

maximum time for which a variance may be granted under Regulation 141.4. Although we agreed that West Penn's variance request could not be granted under the existing regulations as a matter of law, we recognized West Penn's right to challenge the validity of those regulations as unnecessary and unreasonable for the purpose for which they were enacted. We ruled however that the threshold question on which West Penn had the burden of proof as to both the variance regulation and the emission regulation was whether or not these regulations are more stringent than necessary to achieve national ambient air quality standards (NAAQS). West Penn maintained in the pre-hearing memoranda filed by it that it could demonstrate that NAAQS could be met and maintained with West Penn's tall stack strategy, and further that even with West Penn's present short stack on Boiler 33, NAAQS are not being violated in the Monongahela Valley air basin.

In considering the DER's motion to dismiss we are bound to consider only the facts presented by West Penn's direct case and the cross-examination of its witnesses. In addition, the parties have stipulated to certain of the Commonwealth's evidence that was presented in the opening days of the hearing—primarily the statement of Gary Triplett who was the principle draftsman of the SO_2 emission regulation that was included in the Pennsylvania SIP, submitted to EPA for approval in January, 1972. West Penn also argues that in considering this aspect of the case the board is obligated to assume that the other allegations West Penn makes as to technical and economic infeasibility are true. We agree that for purposes of a motion to dismiss we must assume that the allegations West Penn makes in this regard could be proven.[1]

---

1. In its several pre-hearing memoranda West Penn alleged that flue gas desulfurization equipment will cost 50 to 90 million dollars; that it is doubtful that West Penn will be able to make that capital investment for the Mitchell Station; that flue gas desulfurization equipment is unreliable and will not achieve ambient standards; and that West Penn does not have available space to install a scrubber or available land to dispose of the waste product it would produce (allegedly enough to cover 90 acres to a depth of one inch per year).

West Penn's Contention as to Regulation 123.22(b)(3)

West Penn's attack upon the regulation is, of course, an attack upon the validity of the regulation as applied to Mitchell. However, the thrust of West Penn's argument is that regulation 123.22(b)(3), which is an emission limitation adopted by the Environmental Quality Board applicable to large combustion sources in the Allegheny County, Beaver Valley, Monongahela Valley and southeastern Pennsylvania air basins, is invalid because it is not source specific and may, therefore, as applied to any individual source, result in emission controls that are more stringent than necessary to meet NAAQS.[2]

---

2. Regulation 123.22 provides in full:

"§123.22. Combustion units.

(a) *Prohibited emissions in general.* This subsection shall apply to all combustion units in all the air basins except those units subject to the provisions of subsection (b) of this section. No person shall cause, suffer, or permit the emission into the outdoor atmosphere of sulfur oxides, expressed as SO_2, from any combusion unit, at any time, in excess of any of the following:

(1) The rate of three pounds per million B.t.u. of heat input when the heat input to the combusion unit in millions of B.t.u.'s per hour is greater than 2.5 but less than 50.

(2) The rate determined by the following formula:

$A = 5.1E^{-0.14}$

where:

A = Allowable emissions in pounds per million B.t.u. of heat input, and

E = Heat input to the combustion unit in millions of B.t.u. per hour, when E is equal to or greater than 50 but less than 2,000.

(3) The rate of 1.8 pounds per million B.t.u. of heat input when the heat input to the combustion unit in millions of B.t.u.'s per hour is equal to or greater than 2,000.

(b) *Specific locations.* This subsection shall apply to all combustion units in the Allegheny County, Beaver Valley, Monongahela Valley and Southeast Pennsylvania air basins. No person shall cause, suffer, or permit the emission into the outdoor atmosphere of sulfur oxides, expressed as SO_2 from any combustion unit, at any time, in excess of the following:

(1) The rate of one pound per million B.t.u. of heat input, when the heat input to the combustion unit in millions of B.t.u.'s per hour is greater than 2.5 but less than 50.

(2) The rate determined by the following forumla:

$A = 1.7E^{-0.14}$

where:

A = Allowable emissions in pounds per million B.t.u. of heat input, and

E = Heat input to the combustion unit in millions of B.t.u.'s per hour,

when E is equal to or greater than 50 but less than 2,000.

(3) The rate of 0.6 pounds per million B.t.u. of heat input when the heat input to the combustion unit in millions of B.t.u.'s per hour is equal to or greater than 2,000.

(c) *Other units.* This subsection shall apply to all combustion units not subject to the provisions of subsections (a) and (b) of this section. No person shall cause, suffer, or permit the emission into the outdoor atmosphere of sulfur oxides, expressed as SO_2, from any combustion unit, at any time, in excess of the rate of four pounds per million B.t.u. of heat input.

(d) *Allowable emissions.* Allowable emissions under this section are graphically indicated in Appendix D of this Chapter.

Regulation 123.22(b) as applied to West Penn would require the installation of flue gas desulfurization to achieve the emissions limitation standards set forth, since t: achieve the limitation by the use of low sulfur coal would require the use of .36% sulfur coal, which is not available. West Penn contends that Mitchell's emissions would nowhere exceed ambient standards and would make only an insignificant contribution to the areas where standards are being exceeded if West Penn were allowed to use a 750 foot stack in conjunction with the lowest sulfur fuel that could be used compatibly with the electrostatic precipitator. In its variance petition, West Penn did not specify what the sulfur content of that coal would be; however, in the diffusion modeling studies done by DeNardo and McFarland for this litigation predictions in the various studies were based upon the use of coal containing 2.2% and 3% sulfur in conjunction with a tall stack. West Penn contends that those predictions demonstrate that emissions from Mitchell using 3% coal would clearly not interfere with attainment and maintenance of NAAQS and with the extra safeguard of using 1.9% coal (which would be bound to vary to some degree), concentrations from Mitchell would be insignificant at every point.

Variance-Revision

West Penn is really here seeking a revision to Pennsylvania's SIP by way of a variance. Such revisions are provided for in §5(a)(3) of the act and in 40 C.F.R. §51.6(c) and §51.32(f), which directs the administrator to approve a revision if it meets certain requirements (including non-interference with NAAQS) and has been adopted by the state after reasonable notice and public hearing. In *Train v. NRDC*, *supra*, the Supreme Court ruled, contrary to the contention of NRDC, that §5(a)(3) of the Clean Air Act authorized the approval of revision to a SIP that might be granted through a state's variance procedure before or after the Clean Air Act attainment date if approval of the revision (variance) would not interfere with attainment and maintenance of NAAQS. Hence it is West Penn's contention that the federal law would permit a revision to Pennsylvania's SIP to allow for West Penn's alternative control strategy if there are economic and technological grounds for a variance and it is demonstrated that the strategy would not interfere with the attainment or achievement or maintenance of ambient air quality standards.

Pennsylvania's variance regulations, however, do not allow a variance of the sort West Penn is requesting. Chapter 141 of 25 Pa. Code contains the regulations adopted by the Environmental Quality Board implementing §13.5 of the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, *as amended*, 35 P. S. §4015.5. The provision allows the department to grant temporary variances pursuant

to rules and regulations adopted by the Environmental Quality Board. This provision is subject to the proviso:

> "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 standards interposed by Federal law within the time prescribed by such law for the attainment of such standard."

The temporary variances to be granted under Chapter 141 clearly are variances from the emission regulations applicable under other provisions of 25 Pa. Code and do not envision any alternate means of attaining ambient air quality standards such as that proposed by West Penn.[3] In reviewing a petition for temporary variance the department must consider:

> "(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."

Under §141.4 variances may be granted for a period of three years at the outside and may be renewed only once for a period not in excess of two years—hence, the total possible variance under the variance regulations is five years, whether or not NAAQS are being met and maintained.

As stated in our earlier opinion in this case, it is difficult to regard the variance regulations, which were adopted prior to §13 of the Air Pollution Control Act and specifically approved under §13(c) [35 P.S. §4013.5(c)], as unreasonable or invalid except perhaps with regard to the time period under §141.4 that is not to be exceeded whether or not a source is contributing to a violation of NAAQS.

It has become clear that West Penn is not really seeking a temporary variance under the variance regulations although that was its original request. What West Penn wants is a permanent variance (see p. 8 of West Penn's brief) for Mitchell's Boiler 33 on the ground that regulation 123.22(b)(3) is invalid as applied to it. Thus, if the board were to agree with West Penn's assertions, DER would presumably be required

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3. Section 141.3 provides that temporary variances may be granted upon reasonable terms and conditions, including but not limited to the following:
(1) The gradual reduction of emissions during the variance period.
(2) The reduction, cutback or alteration of operations giving rise to the emissions for which the variance is sought.
(3) The development of new air pollution control technology. . . .

to prepare and submit a revision to EPA based on the board's findings. As pointed out in our earlier opinion, the department's variance denial in this case was a hybrid order that directed West Penn to comply with its alternative II strategy within three years as opposed to twelve years and consequently was in the nature of an abatement order rather than a variance denial. West Penn has sought to litigate the question of validity ever since the issuance of the variance order appealed from in this case (see description of federal litigation in the earlier West Penn opinion). By its receipt of an abatement order, West Penn has obtained enforcement review where others who have received variance denials have been denied pre-enforcement review. See *Commonwealth of Pennsylvania, Department of Environmental Resources v. United States Steel Corporation*, EHB Docket No. 75-170-C, issued April 27, 1977. Nevertheless we view the issue of the validity of regulation 123.22(b)(3) as legitimately raised, particularly as simultaneous enforcement action by EPA is now proceeding in federal district court, see discussion, *infra*.

Viewing the only question to be whether regulation 123.22(b)(3) is invalid as applied to Mitchell and thus whether Mitchell should be granted an exception to its operation by way of a "variance" or revision, we reject DER's contention that the board may not look at West Penn's alternate control strategy as of the date it was proposed. DER vehemently argues that no variance could possibly be considered for Mitchell because of the present violations occurring around the Mitchell plant. We agree that West Penn's own evidence tends to show that Mitchell alone is causing violations of the 24 hour standard with its current use of 2.8% sulfur fuel for Boiler 33, and that it would also cause violations of the 24 hour standard under worst case conditions burning 2.2% coal. However, West Penn contends that if it had been allowed to switch to low sulfur fuel it would have been meeting ambient standards by 1975 except for 'worst case' conditions, which would have been remedied by the tall stack that would have been installed by this time. We have to agree with West Penn that it cannot be denied a challenge to regulation 123.22(b)(3) on the ground that it is presently violating ambient standards.

The other point DER makes is that West Penn's variance petition did not offer to achieve compliance with ambient standards until April of 1977 under any control strategy and therefore could not have possibly been granted for that reason alone since no variances are permissable where non-interference with NAAQS will be

achieved after the Clean Air Act deadline of July 1, 1975. 35 P. S. §4013, 5(a); 25 Pa. Code §141.2; *Train v. U.S., supra,* 7 ERC at 1741. We certainly agree that West Penn could not have been granted a variance that allowed it to violate ambient air standards beyond the attainment date. However, assuming West Penn's premise that regulation 123.22(b)(3) is invalid because infeasible at Mitchell, West Penn could have been ordered (or allowed) to comply with ambient standards by use of its alternative strategy within the requisite time period rather than to comply with ambient standards by installation of flue gas desulfurization equipment. Further, as West Penn points out that although NAAQS have not been achieved in the southwest AQCR, other sources are on compliance schedules that extend beyond the attainment date. For example, DER has entered into an agreement with the Clairton coke works for achievement of emission limitations well beyond the attainment date in the Clean Air Act. We appreciate West Penn's point that the attainment date was more hopeful than reasonable in most situations; however, we also appreciate that West Penn by contesting the department's regulations has succeeded in avoiding any emission controls for Boiler 33 for five years while other sources in the air quality region have installed scrubbers and may be responsible for any improvement in air quality that has occurred.

Federal Law and Policy on Tall Stacks

Preliminarily, we must address DER's contentions that the use of a tall stack is precluded by federal law. If this were so, we would have no trouble dismissing the matter as DER requests on the same principle of federal supremacy that led us to treat the ambient air question as a threshold question. There is no doubt that the federal courts and Congress and EPA do not favor tall stacks as a means of pollution control; however, we are unable to conclude at this point that tall stacks are completely precluded by federal law.

The federal case law does not approve of tall stacks as a means of attaining the goals of the Clean Air Act. In *NRDC v. EPA,* 489 F.2d 390 (5th Circuit 1974) which was reversed by *Train v. NRDC, supra,* on other grounds as related above, Judge Wisdom ruled that a state's obligation under §5(a) of the Act to adopt emissions limitations and such "other measures" as may be necessary to achieve NAAQS requires the use of constant emission controls rather than dispersion techniques. He interpreted the word "necessary" in that provision to mean that other measures such as tall stacks could be used only where necessary in conjunction with constant emission controls. Judge Wisdom's decision was followed in *Big Rivers Electric Corporation v. EPA,* 523 F.2d 16 (6th Circuit 1975) which upheld the administrator's disapproval of Kentucky's SIP. In that case as in *NRDC v. EPA,* the Kentucky SIP like the Georgia SIP had provided that the Air Pollution Control Commission could grant a variance to a particular source as follows:

". . . where it appears to the satisfaction of the commission that an air contaminant source can apply an alternate control strategy which would provide for achievement in the attainment of applicable air quality standards, the commission may under such terms and conditions as it deem appropriate authorize such a control strategy after public hearing."

EPA disapproved this section of Kentucky SIP on the ground that it "could be construed to permit intermittent control measures under circumstances where constant controls are available". The 5th circuit upheld EPA's disapproval concluding that the administrator did not abuse his discretion in disapproving the SIP "without a showing that measures that would satisfy that definition (of emission limitations as opposed to dispersion techniques) were unavailable". This case supported the conclusion in *NRDC v. EPA* that the goal of the Clean Air Act is to reduce air pollution, not to rely on dispersion techniques that transport pollutants from one area to another. Similarly, in *Kennecott Copper v. Train*, 526 F.2d 1149 (9th Circuit 1975) the Ninth Circuit upheld EPA's rejection of a Nevada SIP provision applicable to its sole source of SO_2 and ruled that EPA acted within its authority in refusing to accept an intermittent control strategy and requiring research to achieve constant emission control "as it becomes available for use of McGill smelter on an economically feasible basis".

West Penn is attempting to come within the exception that is somewhat offhandedly stated in all of these cases. That exception was stated in 5th Circuit's conclusion that dispersion techniques could be employed "only if emission reduction is unavailable or unfeasible—i.e. only after they are 'necessary'". It is West Penn's contention that a scrubber is economically and technologically infeasible at Mitchell and that a tall stack strategy is therefore necessary and appropriate in Mitchell's case.

1977 Clean Air Act Amendments

In August of 1977 Congress adopted amendments to the Clean Air Act including a provision addressing the tall stack question. Somewhat predictably, both DER and West Penn interpret this provision as supporting their respective positions. DER cites the beginning of §123, P. L. 95—95, 91 stat. 685, August 7, 1977, which provides:

"(a) The degree of emission limitation required for control of any air pollutant under an applicable implementation plan under this title shall not be affected in any manner by—
"(1) so much of the stack height of any source as exceeds good engineering practice (as determined under regulations promulgated by the Administrator), or
"(2) any other dispersion technique."

The provision then gives credit for tall stacks in existence before 1970 or for which construction contracts were awarded before February 8, 1974. Controversy over whether new tall stacks are precluded as a means of compliance centers upon §123(c) which provides:

> "(c) Not later than six months after the date of enactment of this section, the Administrator, shall after notice and opportunity for public hearing, promulgate regulations to carry out this section. For purposes of this section, good engineering practice means, with respect to stack heights, the height necessary to insure that emissions from the stack do not result in excessive concentrations of any air pollutant in the immediate vicinity of the source as a result of atmospheric downwash, eddies and wakes which may be created by the source itself, nearby structures or nearby terrain obstacles (as determined by the Administrator). For purposes of this section such height shall not exceed two and a half times the height of such source unless the owner or operator of the source demonstrates, after notice and opportunity for public hearing, to the satisfaction of the Administrator, that a greater height is necessary as provided under the preceding sentence. In no event may the Administrator prohibit any increase in any stack height or restrict in any manner the stack height of any source."

West Penn contends that Mitchell exactly fits the exception described in §123(c) in that its emissions would not interfere with attainment and maintenance of NAAQS if it were burning 2% coal except for the terrain obstacle across the river (a 1,100 foot hill at a distance of .9 kilometers) that will cause the plume to impinge upon the terrain under worst case atmospheric conditions. Thus, West Penn claims that its proposed 750 foot stack rather than a stack 2 1/2 times building height (339 feet for Mitchell) could be credited by the Administrator in place of the present 230 foot stack on Boiler 33.

DER stresses the legislative history of §123, some of which was read into the record during the testimony of Gayle Hoffnagle, a meteorologist consultant for West Penn, in support of its contention that tall stacks are not to be used as a means of emissions control except in conjunction with best available technology. House Report 95-294. West Penn maintains that use of the 1.9% sulfur coal is an emissions limitation and that the use of the tall stack would be simply to avoid exceedences of the national standards that could be caused by terrain induced conditions. DER claims that "nearby terrain obstacles" cannot include a hill .9 kilometers from the source since the House Report refers to nearby obstacles as being within a quarter mile of the source. EPA has not yet promulgated the regulations that it is required to develop under §123, though it is apparently preparing them, see Environmental Reporter, Current Developments, February 10, 1978, pp. 1534-35; so it cannot be known yet whether West Penn's strategy for the Mitchell plant will be permitted or entirely foreclosed by the new regulations.

Among the objections to tall stacks recounted in the legislative history are that some of the SO_2 that is dispersed and transported into the atmosphere is

converted into sulfates and that sulfur remaining in the atmosphere may cause damage to the environment in the form of acid rain.[4] It seems clear from the legislative history of the Clean Air Act Amendments that Congress is generally opposed to dispersion techniques as a means of pollution control; and there is no doubt that the Clean Air Act of 1970 and the 1977 amendments are intended to be technology forcing in the sense of requiring industry to develop techniques for the constant control of pollutants. However, with ambient standards based on ground level concentrations it is always possible that a particular source may be able to demonstrate that ambient standards will not be violated if the dispersion technique of a tall stack is employed. With a tall stack large amounts of sulfur are transported to other areas but in small enough quantities that no ambient SO_2 violations will occur.[5] Although there may very well be a sulfate problem, the federal government has no ambient standards

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4. The House Report stated, *inter alia:*

> "2. Intermittent control systems do not help to reduce the derivative pollutants of sulfur oxides (sulfates, sulfites, sulfuric acid) or oxides of nitrogen (nitrates, nitrites, nitric acid, nitrosamines); in conjunction with tall stacks, ICS may thus increase the health risks associated with SO_2 and NOx emissions.
>
> "The Environmental Protection Agency has found--and the National Academy of Sciences has confirmed--that sulfates, sulfites, and sulfuric acid appear to be 'more toxic than the parent compound [sulfur dioxide] and appear likely to be responsible for a substantial portion of adverse effects on health associated with stationary source combustion of fossil fuels' NAS has also found that the application of tall stacks and/or intermittent control systems will not reduce total emissions of sulfur oxides to any significant degree; thus this strategy does not decrease the total amount of sulfate in the regional atmosphere."
>
> * * *
>
> "4. If SO_2 and NOx emissions are merely dispersed by tall stacks and intermittent controls and are not reduced, these emissions will be converted to acid rain in significant amounts. Acid rain reduces soil productivity, harms vegetation, crops, buildings, and materials, and may jeopardize segments of the whole economy of certain areas, the increasing acidity of rainfall has been noted in many areas--England, Scotland, Norway, Sweden, Brazil, and the States of the Northeastern United States. Cornell, Yale and Dartmouth scientists have documented this trend.
>
> "As the acidity of rainfall increases, the productivity of forest and agricultural lands are threatened. . . . Furthermore, the NAS has predicted that if sulfur oxide emissions are allowed to double between 1970-80, the average acidity of rain in the Northeast is likely to increase as much as 300 percent."

5. To get an idea of the quantities we are discussing, if Boiler 33 is burning 3% sulfur coal, it is emitting 1,512 grams per second of SO_2 (assuming 100% conversion of sulfur to SO_2) which amounts to 11,975 pounds of SO_2 per hour and 143,700 pounds (71.85 tons) per 12-hour day. With a tall stack this would be dispersed so that no one place received any excessive concentration of SO_2. With a 90% efficient scrubber, only 1,197 pounds of SO_2 would be emitted each hour. With Boiler 33 burning 2% sulfur coal, the emission rate is 1,008 gps or roughly 8,208 pounds per hour.

for sulfates. The State of Pennsylvania does, see 25 Pa. Code §131.3 (which DER alleges are exceeded at every point in the Commonwealth where they are monitored), but those standards are not applicable to the questions raised by this phase of the case. The situation appears to be that although sulfates are thought to be dangerous to human health and property and vegetation, it has not yet been determined to what degree this is so. Thus the use of tall stacks cannot yet be precluded on the basis of the formation of sulfates and acid rain, although those consequences have clearly affected the congressional decision to oppose tall stacks as a general means of pollution control. The fact remains that §123 does leave open the possibility that in certain circumstances a stack taller than 2 1/2 times building height may be a "good engineering practice" stack where it is necessary to overcome a terrain obstacle. Evidently this is to be determined on a case-by-case basis by the administrator pursuant to whatever new regulations are promulgated.

EPA Suit

If the board decides that the department's SO_2 regulation is valid as applied to Mitchell, West Penn will be faced with a choice of deciding whether or not to continue the use of Boiler 33 by investing in a scrubber. Recently (in December 1977) EPA brought suit under §113(b) of the Clean Air Act as it is obligated to do, to enforce Mitchell's compliance with Pennsylvania's SIP. Presumably West Penn is arguing in that case that it should not be penalized while it is attacking the state's regulations and seeking a revision from the state to permit its tall stack strategy. West Penn's counsel has brought a recent case to the board's attention in which the federal court for the eastern district of Missouri ruled in precisely this situation and entered a preliminary injunction to restrain EPA from enforcing the Missouri SIP while Union Electric was seeking and had some expectation of getting a variance from the Missouri SIP. *Union Electric Company v. EPA*, docket no. 78-0164C(A) (E.D. Mo. 1978). The ground upon which the District Court Judge relied was the irreparable economic

harm to Union Electric from both the penalties authorized by the Clean Air Act and the capital investment required for fuel gas desulfurization equipment. In that case, EPA had apparently recommended to the Missouri Air Quality Commission that it relax its SO_2 regulations applicable to large power plants in the St. Louis area, but the commission had not done so. In this case, we are aware of no recommendations from EPA that the Pennsylvaia SIP applicable to Mitchell be relaxed and certainly the variance regulations themselves could provide no relief to Mitchell. This leads us to a discussion of the development and application of regulation 123.22(b)(3) and to an assessment of West Penn's evidence thus far presented.

The Federal Standards and Pennsylvania's SIP

Under §109 of the Clean Air Act of 1970, the federal government, through EPA, established national ambient air quality standards for certain pollutants for the protection of human health. These standards promulgated on April 30, 1971, included the following standards for sulfur dioxide, found at 40 C.F.R. §50.4:

"Primary Standards (a) 80 micrograms per cubic meter (0.03 p.p.m.)—annual arithmetic mean—single receptor site.

(b) 365 micrograms per cubic meter (0.14 p.p.m.)—maximum 24-hr. concentration not to be exceeded more than once per year—single receptor site.

"Secondary Standards 1300 micrograms per cubic meter (0.5 p.p.m.)—maximum 3-hr. concentration not to be exceeded more than once per year."

(The secondary standard was promulgated September 14, 1973. 40 C.F.R. §50.5.)

Under §110 of the Clean Air Act the states have the obligation to develop state implementation plans that detail through emission limitations and other programs how the federal ambient air quality standards are to be met and maintained. Pursuant to §110(a)(b) of the act, those implementation plans were to be developed within 9 months of the time the acts were promulgated after review and approval by EPA. Under § 109 of the act, power is reserved in the states to adopt emission limitations more stringent than necessary to achieve the federal standards.

On August 5, 1971, EPA promulgated guidelines for the development of implementation plans to meet NAAQS. 40 C.F.R. 51.12 *et seq*. Under those provisions,

EPA directed that the adequacy of control strategies for the attainment of sulfur oxide NAAQS in air quality regions where NAAQS were exceeded could be determined in one of two ways: diffusion modeling or the use of the proportional or "rollback model" described in 40 C.F.R. §51.13(e). The rollback model is expressed as the equation:

$$\frac{A-C}{A-B} \times 100 = \% \text{ reduction needed}$$

where: A = existing air quality at the location having the highest measured or estimated concentration in the region,

B = background concentration, and

C = national standard.

DER, the agency delegated with responsibility to develop the SIP for Pennsylvania, chose to apply the rollback model to the Allegheny County, Beaver Valley and Monongahela Valley air basins. Gary Triplett, Chief of the Division of Air Resource Management and Research in DER's Bureau of Air Quality and Noise Control, who had primary responsibility for the preparation of Pennsylvania's SIP's, explained that DER chose to use the rollback equation rather than diffusion modeling in the Southwestern Pennsylvania AQCR for several reasons: the state of the art of diffusion modeling at that time; the complex terrain in the region, which makes modeling more difficult than in flat terrain; and the time available to prepare the implementation plan, which did not allow for modeling of all of the sources in these air basins. West Penn argues that if the rollback equation is used, the EPA guidelines direct in §51.13(e)(2)(ii):

> "The above equation does not account for topography, spatial distribution of emissions, or stack height, but the significance of these perameters shall be considered in developing the control strategy."

West Penn contends that the Commonwealth did not adjust the rollback formula to take account of these considerations.

In applying the rollback formula, the Commonwealth used lead candle data collected, converted and tabulated by the Allegheny County Health Department (ACHD)[6] to determine the "A" portion of the rollback formula—i.e. the existing air quality at the location having the highest measured or estimated concentration in the region. Lead candle data is a measure of the sulfation rate, which was converted to ambient

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6. The Allegheny County Health Department has jurisdiction over Allegheny County and enforces county ordinances that must conform to the minimum state requirements 35 P. S. §4012(a) and (b). Consequently, DER has no responsibility for enforcing the air pollution laws or monitoring in Allegheny County and in preparing the SIP relied on information from the Allegheny County Health Department as to existing air quality.

SO_2 data in parts per million by use of a conversion factor.[7] Rather than taking the highest concentration from the Allegheny County data, DER used an average of the six highest concentrations, which upon conversion resulted in an SO_2 concentration of .094 p.p.m. or 243 micrograms per cubic meter for "A".[8] DER then used zero for B in the equation instead of using any measure of background concentration.[9] Thus the rollback equation that was applied by DER to develop the SO_2 emission limitations was as follows:

$$\frac{243 - 80}{243 - 0} = \frac{163}{243} = 67.1\%$$ reduction in SO_2 emissions necessary to attain and maintain NAAQS

The DER then developed SO_2 regulations for combustion units and coke oven gas, which it determined were the two categories of regulatable sources of sulfur dioxide emissions.[10] The department had no regulations for sulfur dioxide prior to this time. According to Mr. Triplett it was not the intent of DER to develop SO_2 regulations that were more stringent than necessary to meet NAAQS, but rather to develop emission regulations that were just stringent enough to meet and maintain NAAQS. (Exhibit C-1: N.T. 180). In support of this assertion, DER cites the fact that it used a lower conversion factor for the lead candle data than that approved by EPA, that it used the average of the six highest concentrations rather than the highest concentration in Allegheny County, and that it used zero for background in the application of the rollback formula.

In developing its package of emission limitations for the regulations of SO_2, DER included in the rollback area Allegheny County and the Beaver Valley and

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7. Although continuous SO_2 monitoring was preferable to lead candle data as a means of determining SO_2 concentrations, EPA did approve the use of lead candle data where monitoring data using acceptable measurement techniques was not available. The conversion factor approved by EPA was greater than that used by DER and thus would have resulted in higher concentrations of SO_2.

8. The six highest SO_2 readings from ACHD's records for 1970 were:

Logan's Ferry No. 2	.130 p.p.m.
Hazlewood	.115 p.p.m.
Belle Bride	.093 p.p.m.
Liberty Borough	.080 p.p.m.
Clairton	.063 p.p.m.
Logan's Ferry	.081 p.p.m.
AVERAGE	,094 p.p.m.

$.094 \text{ p.p.m.} \quad \frac{(2584 \text{ ug/m}^3)}{\text{ppm}} = 243 \text{ ug/m}^3$

9. It is not clear that there was a measure of background concentration at that time. The testimony of West Penn's witnesses as well as the Geomet Study prepared for the state of Pennsylvania in 1976 indicate that SO_2 background in western Pennsylvania is currently around 40-45 ug/m^3.

10. There are numerous small sources of SO_2 background such as residential heating that are uncontrolled except for the floor set in Regulation 123.21. The use of coal for homeheating is banned by ordinance in Allegheny County, but there was some evidence that it is used in more rural areas around Allegheny County.

Monongahela Valley air basins. In some ways it is this inclusion that is the root of the controversy in this case. The southwest Pennsylvania air quality control region (AQCR) is a federally established region, 40 C.F.R. §52.2021, which is assigned a priority classification for each pollutant, depending on the seriousness of the pollution problem in that region for that pollutant. The southwest Pennsylvania AQCR is a priority one (1) region for sulfur dioxide (as well as for other criteria pollutants). The federally established region includes Allegheny, Armstrong, Beaver, Butler, Greene, Fayette, Indiana, Washington, and Westmoreland Counties. Also within that area are the state determined air basins, that were established by state regulations adopted in September 1971, 25 Pa. Code §121.1. DER determined that in order to meet and maintain NAAQS in the southwest AQCR it would be necessary to include the Beaver Valley and Monongahela Valley air basins as well as the Allegheny County air basin from which the concentrations of SO_2 used in the rollback equation were obtained.[11] Mr. Triplett explained the use of the three state air basins within the AQCR on the basis of population density and intensity of industrial density.[12] The inclusion of the Monongahela Valley air basin meant the inclusion of three major sources of SO_2 to which the package of regulations would be applicable: the Elrama power plant, which is considerably larger than Mitchell, located in Washington County just south of the Clairton coke works which are in Allegheny County, the Mitchell power plant of West Penn located approximately 3 1/2 miles up the Monongahela River from Elrama, and the Wheeling-Pittsburgh Steel Corporation, an integrated steel mill including coke ovens, located at Monessen some 8 miles further up the river from Mitchell. (The Monongahela flows north to join the Allegheny and form the Ohio River.)

The department's SO_2 regulations applicable to combustion sources categorized the combustion sources in terms of geographic location and size. The rationale for the distinction in terms of location was, of course, the extra degree of control of SO_2 emissions believed to be required in the specific air basins referred to in the

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11. Apparently there had been lead candle data studies of the Monongahela Valley air basin and the Beaver Valley air basin sometime in the '60's, but no data from those areas was available at the time of the development of the SO_2 regulations. (N.T. 205)

12. Mr. Triplett testified:

> "The basic EPA requirement was that you pick the location with the highest concentration and roll back on that.
>
> "In this particular case, we recognized that not only in this federally designated air quality control region, but in some of the other ones, if we did that , we would be regulating entire, large areas of 14, 15 counties because of a much smaller area with very high emission densities.
>
> "So in this particular case, it became necessary—and we discussed this with the EPA—to choose a smaller area. So we ended up with choosing the Beaver Valley, Allegheny County and the Mon Valley as the area to roll back on, and treated the remaining part of the air quality control region in a different fashion." (N.T. 212)

regulation. The basis for the distinction in terms of size was stated in Mr. Triplett's written testimony as follows:

> "DER's rationale for its classification of combustion unit by size was that by imposing the more stringent emission limitations on larger combustion units, the smaller combustion units would be given less stringent emissions limitations which they could achieve through the use of the less costly fuel oils, and the total combustion unit contribution to air ambient quality would remain the same.
>
> "While helping the smaller units, DER contemplated that this classification would not unduly prejudice the larger combustion units, since the larger units would probably not have attempted to comply with the emissions limitations through fuel switching in any event. Moreover, DER contemplated that the owners of the large units would be more likely to have the resources necessary to obtain, install, and operate pollution control equipment adequate to meet the emissions rate for the larger units.
>
> "Of course, DER realized that the larger sources would have to proceed diligently in order to design, finance, construct and operate adequate pollution control equipment to meet the regulations, but then DER was mindful of the technology forcing character of both the Clean Air Act and the Air Pollution Control Act."

As part of the package of regulations designed to control the sulfur compound emissions, DER also developed regulation 123.21, setting a floor on SO_2 emissions generally (of 55 p.p.m. in any effluent gas) and regulation §123.23 controlling the emission and flaring of by-product coke oven gas.

In order to determine whether Pennsylvania's control strategy for sulfur dioxide in the southwestern air quality control region was adequate, an evaluation of the SIP was done by IBM under contract with EPA. This evaluation was based upon emission data obtained from known sources of air contaminants in questionnaires and compiled by IBM as an emissions inventory that was entered into a computer. IBM then used the computer to apply the proposed emission limitations to each source and by summing all known sources to determine the total percentage reduction in SO_2 emissions that could be expected by application of the SO_2 regulations. (Exhibit C-1). The IBM study concluded that a 71.5% reduction in SO_2 emissions would be obtained by application of the regulations. Again, according to Mr. Triplett's written testimony:

> "Considering growth, the uncertainty of data and model, the fact that western Pennsylvania has a hilly topography which can trap pollutants during inversions e.g., the Donora catastrophe and more recent air pollution alerts, and finally, the fact that even a 71.5% reduction was not sufficient to achieve secondary NAAQS, DER determined that the proposed regulations could not be reduced without imperilling attainment of primary NAAQS."

In support of the necessity and reasonableness of its SO_2 regulations DER further cites two reviews by EPA of Pennsylvania's SO_2 emission standards. The first was under the Energy Supply and Environmental Coordination Act, which required that EPA review all SIP's to see whether emission regulations could be relaxed to allow for the use of higher sulfur coal where possible without interfering with attainment and maintenance of NAAQS. In EPA's report issued February, 1975, EPA concludes that there was no potential for relaxation of the SO_2 emission limitations

in effect in Pennsylvania. (See attachment to Exhibit C-1). In addition DER cites EPA's review of the SO_2 regulations for the southwest interstate AQCR done in 1975 and 1976 in accordance with the requirements for regular review under §110(a)(2)(h) of the Clean Air Act of 1970. As a result of this study, on September 9, 1975, (40 C.F.R. 41952) the administrator of EPA designated the Allegheny County, Beaver Valley and Monongahela Valley air basins as air quality maintenance areas for both particulate matter and SO_2.[13] Further, on July 13, 1976, (41 F.R. 28826) the administrator found that NAAQS for SO_2 would not be achieved in the southwest Pennsylvania air quality control region even with full compliance with existing SO_2 emission regulations (41 F.R. 28828). That study recited that NAAQS for SO_2 had not been exceeded in 1976 in the Monongahela Valley air basin, but noted exceedences in Allegheny County.

West Penn faults the rollback equation as applied by DER for its failure to take account of topography, spatial distribution of emissions or stack height as required by 40 C.F.R. §51.13(e)(2). Mr. Triplett acknowledged that there was no quantitative way in which topography was accounted for. He said that, in fact, DER had asked EPA for guidance as to how this was to be done and EPA could provide none. Mr. Triplett suggests that the way in which DER took account of topography was by including the Beaver Valley and Monongahela Valley air basins as well as Allegheny County to account for the topographic conditions of the river valleys which contribute to the pollution conditions in the southwest Pennsylvania AQCR by causing frequent temperature inversions. DER could also have been said to have taken account of spatial distribution of emissions in a crude way, at least for Allegheny County by the use of an average concentration rather than one high point of concentration. Mr. Triplett conceded that no account was taken of stack height in application of the rollback formula. (N.T. 218). In choosing the air basins to which the most stringent regulations would be applicable DER looked at the emissions inventory indicating density of industrial emissions.

After assessing the Commonwealth's evidence in support of the SO_2 regulation applicable to large combustion sources, it is difficult to agree with West Penn that the regulation represents a form of regulatory overkill. If this is true at all it may only be true with regard to this particular plant, which is a medium-sized combustion unit that falls in the category of the large size combustion units, and is located some distance away from the "hot spots" to which the rollback equation was applied. To be sure the rollback equation as applied by DER was a rather crude instrument; however, we do not believe that the regulation is invalid because it is not source specific. See, *Texas v. EPA*, 599 F.2d 289 (5th Cir. 1974).

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13. An air quality maintenance area is an area that "due to current air quality and/or projected growth rate, may have the potential for exceeding any national standard within the subsequent ten year period." 40 C.F.R. §57.12(e).

West Penn contends that a diffusion model would have taken account of topography spatial distribution, stack height and meteorological conditions to assure that the emission limitations applicable to any one source would not be more stringent than necessary to achieve and maintain NAAQS. We are persuaded that the decision of DER to utilize the rollback model rather than the diffusion modeling in this heavily industrialized region of complex terrain was entirely reasonable given the state of the art of diffusion modeling at that time and that the SO_2 regulations developed in the application of the rollback equation are not as a general matter more stringent than necessary to achieve NAAQS. Further, the inclusion of the Monongahela Valley in the rollback area, while not substantiated by air quality data at that time, appears to us to have been reasonable based on the fact that it is a heavily populated and heavily industrial area that would clearly affect the adjacent Allegheny County area where SO_2 concentrations were at that time excessive at every monitoring location. Also, it is a river valley with steep hills on both sides that will trap pollutants during the frequent temperature inversions experienced in this topography.

West Penn's Evidence

West Penn's approach to the question of whether state regulations are more stringent than necessary to meet the federal standards assumes that if a source can demonstrate that an alternate, less expensive control strategy would enable it to satisfy the federal standards, the source has succeeded in demonstrating that the state's regulations are more stringent than necessary. To make its case, West Penn presented complicated evidence based on diffusion modeling of the Mitchell Power Plant to demonstrate "worst case" SO_2 concentrations that could be expected from Mitchell's emissions under various assumptions and configurations. Since the ambient air obviously cannot be measured at every point, diffusion models are used to predict ground level concentrations of SO_2 at various receptor sites where the maximum concentrations from that source might be expected. Diffusion models are mathematical computer constructs designed to take account of all the variables that affect ground level concentrations such as plume rise, wind speed and direction, air temperature and, debatably, topography. The modeling studies done by West Penn's major consultant, DeNardo & McFarland, concluded that the Mitchell emissions with the present short stack on Boiler 33 burning 2% coal would not cause exceedences of the annual standard at any point, but that with a 750 foot stack and 2% coal, it can safely be concluded that only minimal contributions to annual concentrations will be made at any point and that the 24 hour standards, which might be exceeded by Mitchell's emissions alone under "worst case" conditions with the present configuration, would be reduced to insignificance. These conclusions were supported by predictions made with other models, specifically the CRSTER and the Valley models used by EPA, and by a model

prepared by another consultant, Geomet, which predicted much lower concentrations from Mitchell than those predicted by the D & M model.

A great deal of the testimony in this case was taken up with DER's attack upon the assumptions made by these modelers and the monitoring data gathered by D & M to "calibrate" its model—i.e., compare the models predictions to actual measured SO_2 concentrations at a particular location to develop a calibration factor that is applied to the model results to "calibrate" the model to actual conditions.

DER first attacks the use of diffusion modeling as a technique for predicting concentrations by pointing to the discrepancy in the modeling results obtained by the modelers who modeled the Mitchell plant. DER also argues that in an industrialized area such as Allegheny County and the Monongahela Valley, a multi-source model must be used to determine the effect of all the sources contributing to the ambient air rather than a single source model such as the one developed by DeNardo and McFarland. While this would be true for purposes of setting an emission limitation for all of the sources, a multi-source model is nothing more than a series of single source models and it is appropriate to use a single source model to determine what the contribution from any particular source will be. Although it is true that the state of modeling is in its infancy or early childhood, it is the tool that is used and recognized by EPA in evaluating what the effect of emissions from point sources may be. See 40 C.F.R. §51, Appendix A; EPA Guideline on Air Quality Models, 2nd draft, May 1977 (C 31). Furthermore, under the Clean Air Act Amendments of 1977, diffusion modeling is recognized as a tool for determinations under the prevention of significant deterioration provisions of the act. 42 U.S.C. §7620(a); §7473. Pennsylvania itself has employed Geomet to do diffusion modeling for purposes of evaluating the effect of power plants in nonurban areas and recommending changes in sulfur-in-fuel requirements for those sources. Diffusion modeling was also used in preparation of Pennsylvania SIP for the Philadelphia area where the results were more reliable because of the flat terrain in that area. In sum, we cannot dismiss West Penn's evidence because it is based on diffusion modeling, which is a recognized tool for assessing the impact of SO_2 and other emissions. We must confess, however, a great deal of reservation about the board's ability to evaluate the validity of one air quality model versus another in complex terrain, given EPA's Guideline injunction:

> "Whenever a model is applied, the services of knowledgable, well-trained air pollution engineers, meteorologists and air quality analysts should be engaged. The need for specialists is particularly critical when the more sophisticated models are used or the area being investigated has complicated meteorological or topographic features. ' A model applied improperly or with inappropriately chosen data can lead to serious misjudgments regarding the source impact or the effectiveness of a control strategy."

In this case the controversy centers primarily upon the use by DeNardo & McFarland of the "half-height terrain correction factor" to account for the complex terrain surrounding the Mitchell plant. D & M's half-height terrain factor is an attempt to explain the behavior of a plume as it travels over hilly terrain by assuming that the receptor points are located at one-half of their actual elevation, relative to the source. While this is an imperfect assumption, it does tend to account roughly for the fact that a plume encountering a hill will in part impinge upon it and in part pass over the hill because of topographic lifting. The differences between the model results presented in this case were largely ascribed to use of the half-height terrain correction versus a full terrain correction used by Dr. Cramer and no terrain correction used by Geomet (except in D class stability). While we do not have full confidence in the modeling assumptions used by D & M, they appeared to be reasonable and were well supported by the testimony of West Penn's other witnesses as reasonable assumptions for this particular terrain situation. DER certainly did not show simply by cross examination that D & M's set of assumptions were unreasonable or inappropriate to the case.

We are more taken with DER's attack upon the calibration of the model because of questions about the location of the Pepka monitor, the fact that the Pepka monitor registered higher concentrations of SO_2 when Mitchell was shut down than when it was operating, the use of a single monitor to calibrate the model, the reading of the strip charts (which in a number of cases was demonstrably inaccurate and was made questionable simply by the fact that the unit of the strip chart being interpreted represented more than one-half the national standard and was frequently exceeded by zero drift) and the failure to use one-half of the detectable limit of the instrument in recording hourly values. However, our doubt about the validity of the calibration factor does not change the fact that the monitoring evidence on the record demonstrates that D & M's model does overpredict (actually by a fact of 3 rather than 2 according to D & M) and that there are no monitored exceedences of annual in directions where Mitchell's contribution would presumably be the greatest. Further, we have to agree with West Penn that even if the modeling results for present conditions—i.e. a 230 foot stack on Boiler 33 and a 198 foot stack on Boilers 1, 2 and 3—are questionable, the results of the modeling studies on the question of a tall stack—low sulfur coal configuration versus a 90% efficient scrubber with 2% sulfur coal require us to consider whether the state's package of regulations applicable to the Mitchell plant are excessively stringent.

The evidence thus far presented does indicate that with the 750 foot stack and the use of a lowest sulfur coal (1.9% is proposed as the lower sulfur coal that could be used) the emissions from Mitchell would be sufficiently dispersed so as not

to cause any violation of NAAQS that could be attributable to Mitchell alone. Even the state's and EPA's modeler's model predicts that with a tall stack as proposed by West Penn the emissions from Boiler 33 in the Mitchell plant would not cause exceedences of the 24 hour NAAQS, which was agreed to be the standard most likely to be violated. (Dr. Cramer, was not called as a witness but his modeling results were compared in West Penn's exhibits to the results of the other modelers employed by West Penn.) The question then is how the Mitchell emissions would interact with other SO_2 emissions and whether Mitchell's contribution should be considered "significant". It is West Penn's contention that with a tall stack Mitchell's contributions to the Liberty Borough and Glassport monitors in Allegheny County would be less than 1 ug/m^3 burning 2% sulfur coal (Exhibit A-63 Figure 3). In Exhibit A-88 West Penn demonstrates that when the Mitchell plume interacts with the Elrama plume under different assumptions, maximum 24 hour combined concentrations with the present Mitchell and Elrama configurations are 97.4 at Glassport and 87.5 ug/m^3 at Liberty Borough, and that with a 750 foot stack on Boiler 33 and an 83% efficient scrubber on Elrama the predicted high of 24 hour values drops to 40.8 ug/m^3 at Glassport and 38.4 ug/m^3 at Liberty Borough. Maximum annual combined concentrations show a difference between the present plant configurations of 6.0 ug/m^3 at Glassport, 9.7 ug/m^3 at Liberty Borough and under the tall stack assumption of 1.6 ug/m^3 at Glassport and 2.9 ug/m^3 at Liberty Borough.

The significance of the Liberty Borough, Glassport monitors is that they are monitors that continually show exceedences of SO_2 standards and are affected in some degree by emissions from Mitchell. West Penn contends that that degree is insignificant and points repeatedly to the fact that the Liberty Borough and Glassport monitors are located in Allegheny County across from the Clairton coke works of United States Steel, which is the largest coke works in the world, and that even with the Mitchell plant shut down those monitors would continue to show exceedences of SO_2 NAAQS. West Penn argues that Mitchell should not have to be over-controlled because Clairton is insufficiently controlled. The modelers agree that at present Mitchell's emissions represent an approximate 5 percent contribution to the annual SO_2 concentrations that are recorded at the Liberty Borough and Glassport monitors. As the record stands there are no conceded exceedences of ambient air in the Monongahela Valley. The state presented evidence of an annual exceedence (by .002 p.p.m.) at Charleroi in 1976; but West Penn maintains that it can demonstrate that the 1976 monitoring data for Charleroi is incomplete and invalid. In any event Mitchell has somewhat less effect on Charleroi, which is 6 miles southeast of Mitchell (as the wind blows) than on Glassport and Liberty Borough since south-southwest winds blowing toward Glassport and Liberty Borough are a more frequent occurrence than north-northwest winds blowing toward Charleroi. (A-64 pp. 25-26).

The question of "significance" is also a term of art. Under the rules evolving for the evaluation of new sources to which the prevention of significant deterioration (PSD) are applicable, the term significant was first defined as .5 ug/m^3 for an annual concentration contribution in a Class I area, see EPA Guideline on Air Quality Models, Second draft, May 1977, but that has since been revised to 1.0 ug/m^3 for annual contributions. "Interim Guidelines on Air Quality Models", EPA publication OAQPS no. 1.2080, October 7, 1977. That test, however, is applicable to new sources, not to old sources being retrofitted to achieve emission reduction. West Penn argues that its predicted 1.ug/m^3 contribution to the Glassport, Liberty Borough area with a tall stack is equivalent to the PSD requirement but that in any event it should be judged simply on the common sense meaning of significance and that it is apparent that one microgram per cubic meter is not a "significant" contribution to the annual standard of 80 micrograms per cubic meter. It might be noted that if the D & M calibration factor of .5 is disregarded the model predictions would be increased so that the predicted contribution would be 2 micrograms per cubic meter.

An important consideration in evaluating interference with attainment and maintenance of ambient air quality standards is that monitoring sites are not necessarily the places where ambient air standards may be exceeded. In fact, West Penn's own modelers essentially concede that with the present short stack at Mitchell burning 2.8% sulfur coal (the average sulfur content of coal used in 1976 and 1977) violations of the 24 hour NAAQS will occur under certain atmospheric conditions on the hillside approximately .9 kilometers away from the Mitchell plant across the Monongahela River. The state presented evidence of recorded violations of the 24 hour and 3 hour standards; however, for purposes of this motion to dismiss, we cannot consider that evidence until West Penn has had an opportunity to present rebuttal testimony. DeNardo and McFarland did present persuasive evidence that the present short stack with a 90 percent efficient scrubber could still cause violations of the 24 hour standard across the river from Mitchell for certain atmospheric conditions because of the terrain, even though there would be compliance with the state's emission limitations because a wet cool scrubber plume does not rise like a dry hot plume and could therefore impinge on the .9 kilometer hillside under worst case or inversion conditions. However, it does not appear that the scrubber plume would cause violations of the 24 hour NAAQS unless Boiler 33 were using over 3% sulfur coal and units 1, 2 and 3 (which because of their higher fuel cost are used as peaking facilities) were on line or with a lower sulfur coal, in the case of an inversion. On the other hand, the tall stack-low sulfur fuel configuration would assure that the emissions would be dispersed out of the area under the worst atmospheric conditions that cause various types of downwash, as well as in inversion situations.

West Penn's contentions as to the advantages of the tall stack strategy are summarized in Exhibit A-88 as follows:

"SUMMARY OF CONCLUSIONS

"Sulfur Dioxide emissions from Boiler No. 33 'Burning 3.0% Sulfur Coal' vented through a 750 Foot stack will not interfere with the attainment or maintenance of National Ambient Air Quality Standards for Sulfur Dioxide.

"Advantages of a 750 foot stack are:

1. It will reduce present ambient SO_2 levels within 8 km of the plant by at least 60% to 80%.

2. Within 8 km of the plant, the maximum 24 hour concentration will be 8 times lower than emissions from the present stack and 3 times lower than emissions from the present stack with a scrubber.

3. The maximum 24 hour concentrations beyond 8 km of the plant will always be less than concentrations from the present stack and only slightly more than from the present stack with a scrubber.

4. When the Mitchell plume vented through a 750 foot stack interacts with the plume from the Elrama Power Plant, the resulting maximum 24 hour SO_2 concentration is 96.0 ug/m^3 which is only 26% of the 24 hour Ambient Air Standard of 365 ug/m^3.

5. When the Mitchell 750 foot stack plume interacts with the plume from the 83% scrubber equipped Elrama Power Plant, the maximum annual contribution of Sulfur Dioxide from both sources to the Charleroi, Glassport and Liberty Borough monitors is only 1.4 ug/m^3, 1.6 ug/m^3 and 2.9 ug/m^3 respectively. These values are all less than 4% of the annual Ambient Air Standards of 80 ug/m^3.

6. During periods of prolonged low wind speeds which cause high air pollution episodes in Allegheny County, the plume from a 750 foot stack will rise to a stabilization height of 4,500 to 6,000 Feet MSL. At this height, emissions from Unit 33 will 'punch through' the lid of the temperature inversion, thus preventing the plant from contributing to the build-up of pollutants within Allegheny County."

DER contends that if Mitchell is allowed to use a tall stack at all it should only be in combination with constant emission control as would be required by regulation 123.22(b)(3). West Penn contends that if Boiler No. 33 were burning two percent (2%) sulfur coal and emissions were vented to a 750 foot stack the maximum annual concentrations from Boiler No. 33 would be 3.18 ug/m^3; whereas, if Boiler 33 were equipped with a 750 foot stack and a 90 percent efficient scrubber burning two percent (2%) sulfur coal the maximum annual contribution would be 1.1 ug/m^3. West Penn also compares the 24 hour maximum concentration contributions to be expected from Mitchell under these assumptions:

No. 33 burning 3% sulfur coal with emissions vented through a 750 foot stack	80 ug/m^3
Boiler No. 33 with a 90% efficient scrubber burning 2.2% sulfur coal (an emission well below that required by DER's regulations) through the 230 foot stack	170 ug/m^3

In attacking the sufficiency of West Penn's evidence, DER claims that the board cannot consider West Penn's tall stack strategy because it is not an emission limitation. DER argues that the Environmental Quality Board chose to adopt an emission limitation as a means of complying with the federal standards rather than to allow federal standards to be met by dispersion techniques and that the federal law precludes the use of dispersion techniques to achieve the federal standards. See discussion, *supra*. West Penn counters that their proposal to use low sulfur coal is in fact an emission limitation. Whether or not it is a sufficient emission limitation, the use of low sulfur coal must be considered an emission limitation even by DER since that is the means employed to achieve ambient standards for power plants in other locations in Pennsylvania. See regulation 123.22(a), *supra*, p. 5 (the 1.8 pounds per million Btu input applicable to combustion units over 2,000 would presumably also require the installation of a scrubber in the case of large units). See Exhibits C-39 and A-30. (It would appear that West Penn is asking that Mitchell be treated like a non-air basin SO_2 source in being allowed to satisfy ambient standards by fuel-switching in combination with a tall stack if necessary.) We have some question whether West Penn is serious about its proposal to use low sulfur coal since it repeatedly refers to the use of 3% sulfur coal in conjunction with a tall stack. Its proposal really seems to be to use a tall stack as an emission control device in combination with whatever sulfur coal (down to 1.9%) that would satisfy the government. But it is no answer to say, as DER does, that the EQB adopted emission limitations rather than dispersion techniques as a means of satisfying the federal standards since it is exactly West Penn's contention that it shouldn't have—at least in this situation.

Conclusions

Our difficulty with West Penn's position is that we do not believe the Environmental Quality Board was required to adopt regulations that, as applied to each source, would be just stringent enough to achieve ambient standards. Rather, it appears to us to have been reasonable to attempt to achieve ambient standards by classifying sources in terms of size and location and adopting a package of emission limitations as was proposed by DER. As to the reasonableness and validity of 123.22(b)(3), we deem a major question to be what would be the effect if all power plants in the relevant area (which should probably include power plants considerably south and west of the southwest AQCR) were allowed to use tall stacks as a means of achieving ambient standards. Mr. McFarland, West Penn's primary witness, believes that ambient standards could be achieved in this manner, although West Penn made no attempt to demonstrate that by modeling or any other evidence. It is a fact alluded to in much of the testimony thus far that most other power plants in the air basins have installed scrubbers or are in the process of installing scrubbers. To us, therefore, West Penn must demonstrate why it should

be treated differently from other power plants in this area. West Penn maintains that those scrubbers do not work efficiently and that ambient standards are still being violated around power plants with scrubbers. Although this seems to be true,[14] it is also true that the installation of scrubbers and the desulfurization of by-product coke oven gas have reduced the amount of SO_2 in the atmosphere in the southwest AQCR. Probably most SO_2 sources could argue that the regulation as applied to each alone is invalid because more stringent than necessary to achieve NAAQS. Every source can also make the argument that if other sources were better controlled they would not need to be so tightly controlled. We would agree with the contention that one source should not have to make up for another's failure to comply with emission regulations. We are not sure how this cuts, however, since at the present time both Clairton and Mitchell (and probably Elrama) are in violation of applicable emission limitations, but Clairton and Elrama are on approved compliance schedules. Admittably, Clairton is a much larger source than Mitchell.

The question in our mind comes down to whether there is any basis for treating Mitchell differently from other combustion sources in the relevant air basin and that is a question not of the general validity of the SO_2 regulation itself but whether there are circumstances that require an exception to that regulation and whether the package of regulations is invalid for failure to allow for alternatives in exceptional circumstances. We are not convinced that there are exceptional circumstances here. The circumstances thus far demonstrated by West Penn are that it is a medium-sized power plant located further from the rollback area hot spots than some other major sources in a place where the prevailing winds would tend to disperse the plumes east-northeast over an area outside the nonattainment area. If there are other conditions that distinguish Mitchell from other plants in this area in terms of economics and technology, it may be appropriate to consider whether the legislative choice in favor of constant emission control in this air basin for this plant is justified where an alternative control strategy exists that should achieve the declared purpose of the regulation—meeting federal ambient air standards for SO_2.

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14. See Exhibit C-39, Geomet's "A Study of Ambient SO_2 from Selected Nonurban Pennsylvania Sources", prepared for DER, which draws the following conclusions as to non-air basin power plants:

- Air quality levels will continue to exceed national ambient air quality standards (NAAQS) between now and 1985 in the vicinity of several plants which lie outside of DER designated air basins.
- Air quality levels will exceed NAAQS in the vicinity of plants which are in compliance with DER emission regulations for combustion sources.
- Allowable plant emissions of SO_2 from both combustion and noncombustion sources could be increased beyond present DER limitations at some plants without exceeding NAAQS.
- A new approach to setting SO_2 limitations in individual plants as recommended which will take into account the affects of background levels, plume heights and terrain elevations.

Considering the presumptive validity to be accorded the regulation, *Rochez Bros., Inc. v. Department of Environmental Resources*, 18 Pa. Commonwealth Ct. 137, 334 A.2d 790 (1975), we may very well conclude that the legislative choice in favor of constant emission controls as opposed to dispersion techniques is justified regardless of cost—particularly in view of the other policy objections to tall stacks. However, given West Penn's allegations of impossibility and the possible consequences of shutting down the Mitchell plant, we cannot sustain the application of the regulations without assessing West Penn's evidence as to economics and technology.

Having sat through these hearings, we feel especially entitled and even obligated to comment on the labyrinth that was no doubt intended as creative federalism under the Clean Air Act. EPA set the national standards and essentially told the states what they had to do to implement those standards. It appears clear to us that EPA would not have approved a Pennsylvania SIP for SO_2 that permitted use of tall stacks as a means to achieve ambient in the southwest Pennsylvania AQCR. Even if it had been willing to approve such a strategy, it appears from *NRDC v. EPA, supra,* and *Big Rivers Electric Corporation v. EPA, supra,* that the federal courts would not have approved of that approval. The federal cases do suggest that there may be circumstances where the use of the tall stack is appropriate due to economic and technological considerations; however, the federal courts have refused to consider economic and technological arguments suggesting that those considerations are appropriately relegated to state forums. *Union Electric Company v. EPA, supra,* 427 U. S. 246 at 265-67. What seems amiss is that with the divided responsibility between the federal and state government, neither government is taking ultimate responsibility for the decisions that are made in terms of total justification including economic considerations. It is ironic that the federal law and policy, which is generally opposed to the use of tall stacks, leaves open the possibility of a tall stack under certain circumstances; however, the state law that was passed to satisfy the federal law would not permit anything but the use of a scrubber in this situation. It seems quite likely that if this board says a tall stack should be employed in the case of Mitchell because of economic and other considerations, EPA will still disapprove any revision for a tall stack at Mitchell.[15]

Although the regulation applicable to the Mitchell plant appears to us to have been based upon reasonable premises and classifications, we believe that West Penn has made a sufficient showing on the threshhold question to allow it to present its case as to economics and technology. In ruling we are mindful of the recent

15. Possibly, the sensible course for all power plants would have been an individual evaluation by EPA (or EPA and DER jointly) based on diffusion modeling and economic and technical considerations that might be applicable to each case. Such a more individually tailored approach has been adopted in SIP revisions promulgated by EPA for Ohio.

Commonwealth Court decision in *Commonwealth of Pennsylvania, Department of Environmental Resources v. Pennsylvania Power Company*, C. D. 1976 No. 892, issued April 4, 1978, where the court ruled that civil penalties could not constitutionally be imposed upon Pennsylvania Power Company for violations of the SO_2 emissions limitation because of the decision in *Commonwealth of Pennsylvania, Department of Environmental Resources v. Pennsylvania Power Company*, 12 Pa. Commonwealth Ct. 212, 316 A.2d 96 (1974) aff'd, ___ Pa. ___, 337 A.2d 823 (1975) that it was impossible for Pennsylvania Power Company to comply with the state's emission regulations. Since the only decided case in Pennsylvania dealing with scrubber technology concludes that was impossible (in 1972) to comply with regulation 123.22, we believe that the reviewing courts of Pennsylvania will require that the economic and technologic factor be on the record in evaluating the validity of the regulation as applied to Mitchell. We are also mindful that the federal law assign to this board and similarly situated state courts the function of evaluating economic and technological arguments to the extent they are to be considered at all.

Since the only question is whether the state's regulations should have permitted a tall stack strategy for Mitchell, we do not see any need for DER to present testimony on the ambient air question at this point. Thus, in the further hearings that are to be held West Penn shall proceed to present its case on the economic and technological questions after which the state may present such evidence as it desires to present. Preliminarily, we would ask West Penn to address the question of why, when it contends that ambient standards would not be violated except in worst case conditions by the burning of 2% coal in Boiler 33, it has been burning 2.8% in Boiler 33 for the last several years?[16] While we are willing to evaluate the validity of regulation 123.22(b)(3) in terms of its economic effect, we are unwilling to have the ambient standards exceeded any more than necessary while we do so.

ORDER

AND NOW, this 19th day of June, 1978, the Commonwealth's motion to dismiss is denied in accordance with the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

Joanne R. Denworth

JOANNE R. DENWORTH
Member

DATED: June 19, 1978

16. We agree that West Penn could not have proceeded to build a tall stack without DER's approval, 35 P. S. §4006.1(a), but we can find no explanation on the record for why a lower sulfur coal could not have been used in Boiler 33.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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112 Market Street
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(717) 787-3483

UNITED STATES STEEL CORPORATION : Docket No. 78-033-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Appellant, United States Steel Corporation filed on April 10, 1978, a First Petition for Discovery requesting this board to order the Pennsylvania Department of Environmental Resources (DER) to answer certain interrogatories and to produce certain documents. The DER on May 5, 1978, filed objections as to the form of appellant's discovery petition while reserving the right to raise those substantive objections available under Pa. R.C.P. 4007 and 4011 at the time the interrogatories are to be answered or the documents produced. See *Jones and Laughlin Steel Corp. v. Dept. of Environmental Resources*, EHB Docket No. 74-272-C, (Opinion and Order issued September 10, 1976) where we held that objections unless they relate to form and time of filing, may, as a matter of law, be raised at the time the interrogatories are to be answered or the request for documents is to be satisfied. Appellant on May 23, 1978, filed a reply to the DER's objections to appellant's discovery petition. This opinion and order deals with the DER's objections as to the form of appellant's First Petition for Discovery.

Interrogatories #1-12

Interrogatories no. 1 through 12 ask the DER if it contends that compliance with the regulations controlling pushing emissions is necessary to the attainment or maintenance of air quality standards within specified distances from the Fairless Works. The DER objects on the grounds that the interrogatories cannot be answered "since each interrogatory is based upon an unwarranted assumption that one emission point from one source within a particularly area can be isolated from the total regulatory scheme..."

The DER's objection is overruled as the interrogatories on their face, appear capable of being answered. However, if the DER is unable to answer the interrogatories because of such reasons as the nature of air contaminated emissions or the peculiarities of the regulatory scheme, it should say so and state the reasons therefore.

DER also objects that the reference to §123.13(b) in interrogatories 1 through 12 is unclear, i.e. the interrogatories do not state whether the reference is to all processes listed therein or to the process factor listed for the pushing operation. Appellant, in its reply to the DER's objection, states that the reference to §123.13(b) is intended to relate solely to the pushing operation. Thus the DER, when answering the interrogatories, shall consider the reference to §123.13(b) to relate to the process factor listing for pushing.

Interrogatories #16-20

In interrogatories 16 through 20, appellant seeks information gathered by particulate monitoring stations. DER objects that the interrogatories are not limited in scope to those monitoring stations operated by the DER, therefore DER contends it would be required by the interrogatories to seek out monitoring stations operated by private industry, neighboring states and the EPA and evaluate the data collected. DER's objection is overruled. To the extent the DER has knowledge of the information or data requested by interrogatories no. 16 through 20, it must answer the interrogatories. If it does not have the knowledge necessary to answer the interrogatories, it merely needs to say so.

Interrogatories #1-20, 34c, 34d, 35, 39

The DER alleges that these interrogatories are framed to elicit admissions from the DER rather than relevant information, and suggests that to the extent that appellant desires admissions it should file a request for admissions. We overrule the DER's objection. The objected to interrogatories are intended to solicit information from the DER. Typically, after asking for the DER's contention on a matter, appellant asks the DER to state the basis of the contention. We do not find this procedure to be improper.

Interrogatories #22, 24

Appellant asks the DER in interrogatories no. 22 and 24 if it intends to conduct or sponsor a study of the impact of pushing emissions on ambient air quality. The interrogatories also request information on any such prospective studies. The DER objects on the grounds that the interrogatories are subjective and therefore incapable of being answered. It suggests that they be modified to refer to any "presently ongoing studies" or "written proposals". We overrule the

DER objections as we believe that the DER is able to state whether or not it presently intends to conduct such a study. It can certainly explain its response.

Interrogatory #27

The DER objects to interrogatory no. 27 on the grounds that it is vague and overbroad. The interrogatory asks if the DER has compiled an emission inventory for each particulate matter source in the Pennsylvania portion of the Metropolitan Philadelphia Interstate Air Quality Control Region and the month and year of the compilation. The DER contends that it is unclear whether appellant seeks the date of compilation for each source or the date of a comprehensive emission inventory for the designated area. The DER also contends that since the emission inventories are compiled and updated on an ongoing basis, identification of the year and month of compilation is difficult if not impossible. The DER's objection is overruled. The DER should merely state whether or not it has compiled an emission inventory for each source and the month and year of the latest update.

Interrogatory #30

Interrogatory no. 30 requests that the DER "Identify. . . the person or persons presently in the employ of the Commonwealth or DER who are most familiar with the environmental impact of pushing emissions from the Fairless Works". The DER objects on two separate grounds. (1) That the interrogatory embraces all Commonwealth employees, rather than DER personnel. In its reply appellant agrees to limit the inquiry to DER employees unless the DER intends to call a non-DER Commonwealth employee as a witness. We agree. Interrogatory no. 30 shall be limited to the person or persons employed by the DER except that any non-DER Commonwealth witness shall be identified. (2) The DER objects to the use of the term "most familiar" as literally requiring a "performance evaluation" of its staff before it can answer the interrogatory. However, we believe that the DER can fairly and reasonably identify the person or persons in the employ of the DER most familiar with the impact of pushing emissions from the Fairless Works. The stated purpose of the interrogatory is the avoidance by appellant of the taking of necessary depositions.

Interrogatory #33

Interrogatory no. 33 requests the DER to identify the persons responsible for evaluation of the particulate matter control strategy for the Philadelphia region and to identify the persons in the employ of the Commonwealth or DER who are the

most familiar with the strategy. The DER objects on the grounds that the identification of the persons are not limited to persons presently employed by the DER.

In regard to the persons responsible for evaluation of the strategy, if the DER has knowledge of the identity of those persons, whether or not they are employed by the DER, it must supply same. As to those persons "most familiar" with the strategy, the DER shall answer the interrogatory as if it refers only to employees of the DER, except that any non-DER Commonwealth witnesses shall be identified.

The DER's objection to the use of the term "most familiar" is overruled. See our discussion on interrogatory no. 30, *supra*.

Interrogatory #35

Interrogatory no. 35 requests the DER to state whether it contends that noncompliance with regulations 123.13(b) and 129.15 at the Fairless Works affects ambient air quality in any air basin in any appreciable degree. The DER objects to the terms "in any appreciable degree" and "in any air basin" as being overbroad and lacking in the requisite specificity. We overrule the DER objection; the DER can state to the best of its knowledge whether the ambient air quality in any air basin is affected by pushing emissions from the Fairless Works.

The reference to §123.13(b) shall be interpreted to refer to the process factor listed for "By-product coke production, pushing operation".

Interrogatories #21, 23,
29, 31, 32, 34, 35-39
and Request for Production of Documents #3

The DER objects to these interrogatories and request for production of documents to the extent that they require both the identification and production of the same documents. The DER's objection is sustained; it need not identify those documents it produces for inspection and copying.

Request for Production of
Documents #1, 2, 3 and 4

The DER need only produce those documents in its possession, custody or control.

Request for Production of Documents #2

The DER objects to the request for production of documents no. 2 on the grounds that it requests documents "submitted by the Commonwealth" to

the EPA. The DER contends that the request requires a survey of all Commonwealth agencies. The DER's objection is overruled. The DER shall produce the documents in its custody, possession or control which were submitted by the Commonwealth to the EPA. The request does not require a survey of other agencies.

O R D E R

AND NOW, this 11th day of July 1978, the Department of Environmental Resources is hereby ordered to answer the interrogatories and produce the documents requested in appellant's first petition for discovery on or before August 6, 1978, as follows:

1. The DER shall answer interrogatories no. 1 through 39 as propounded therein except that:

(a) the reference to §123.13(b) in interrogatories no. 1 through 12, 35 and 39, shall be interpreted to refer to the process factor listed for by-product coke production, pushing operation;

(b) in answer to interrogatories no. 30 and 33, the DER need only identify the person or persons employed by the DER except that any non-DER Commonwealth employees that it intends to call as witnesses shall be identified; and

(c) the DER need not identify those documents that it produces for inspection and copying.

2. The DER shall produce the documents for inspection and copying requested by paragraphs 1 through 4 therein at the location where they are normally maintained.

ENVIRONMENTAL HEARING BOARD

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DATED: July 11, 1978
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SHARON STEEL CORPORATION V. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	DOCKET NO. 78-058-B
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES V. SHARON STEEL CORPORATION	DOCKET NO. 78-071-CP-B

OPINION & ORDER
SUR DER'S MOTION FOR CONSOLIDATION

The Department of Environmental Resources (DER) moves that the matters before the board at Sharon Steel Corporation v. DER, Docket No. 78-058-B and DER v. Sharon Steel Corporation, Docket No. 78-071-CP-B be consolidated. Sharon Steel Corporation (Sharon) has filed a reply opposing the consolidation of those proceedings.

Although both matters involve Sharon and the hot metal transfer station at Sharon's Farrell Works, the factual and legal issues are dissimilar and the burden of proof differs in each proceeding.

At docket no. 78-071-CP-B, the DER requests that we assess a civil penalty against Sharon because of the emissions from the hot metal transfer station. Whereas the appeal by Sharon at docket no. 78-058-B involves only the narrow issue of whether the DER acted arbitrarily in returning Sharon's application for a determination of minor significance for the fugitive emissions from the hot metal transfer station instead of allowing Sharon additional time to submit additional information. The significance of the emissions is not pertinent to Sharon's appeal.

Also, the appeal by Sharon, because it involves such a narrow issue, can proceed to hearing shortly. However, civil penalty actions generally involve the resolution of pre-hearing motions and extensive discovery. We do not believe it to be in the interest of either party or of judicial efficiency to hold

Sharon's appeal at 71-058-B in abeyance until the civil penalty action is ready for hearing. The DER's motion to consolidate is therefore denied.

ORDER

AND NOW, this 2nd day of August, 1978, the motion of the Commonwealth of Pennsylvania, Department of Environmental Resources, to consolidate the matters of Sharon Steel Corporation v. DER, EHB Docket No. 78-058-B and DER v. Sharon Steel Corporation, EHB Docket No. 78-071-CP-B is denied.

ENVIRONMENTAL HEARING BOARD

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Docket No. 78-012-D

ABINGTON TOWNSHIP

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

The department has moved to dismiss the appeal of Abington Township from a letter from the Department of Environmental Resources dated January 6, 1978, in which the Regional Sanitary Engineer for DER's Region I refused to certify appellant's Rydal collector as a "treatment works segment" for purposes of federal funding and also refused to consider the collector sewers as an amendment to the outstanding Sandy Run treatment plant grant. This matter was previously before the board in *Samuel Persky et al v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 76-038-D, issued March 7, 1977, where the board upheld the department's order to Abington Township to construct public sewers in the Washington Lane/Rydal areas of Abington Township because of the public health hazard and water pollution caused by malfunctioning on-lot systems. This appeal concerns who will pay for the collectors, the cost of which has escalated over years of litigation to roughly one million dollars ($1,000,000).

Abington Township is attempting to obtain federal funds to finance the major portion of the cost of the collector system. EPA's regional administrator for Region III denied Abington Township's requested advance approval for construction of a collector system in the Washington Lane/Rydal area of the township pursuant to 40 C.F.R. §35.95-18(b) on the ground that the proposed system to be constructed constituted an "entire system" as opposed to construction of a "minor portion of a project". The township has appealed that decision to the administrator in Washington. Meanwhile, the township has sought to have federal funds made available for the collector system through two other routes that require DER's approval or certification to EPA. First, the township

has requested that the department certify the collector system as a "treatment works segment" under 40 C.F.R. §35.905-24 which provides as follows:

> "A treatment works segment may be any portion of an operable treatment works described in an approved facilities plan, pursuant to §35.917, and which can be identified as a discreet contract or subcontract for Step I, II or III work. Completion of construction of a treatment works segment may, but need not, result in an operable treatment works."

The township wishes to have DER certify the collector system as a portion of the Pennypack Watershed Project, which is a proposed regional treatment system that is the subject of considerable dispute. See *Upper Moreland Township, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket Nos. 77-198, 199, 200, 78-050, 78-051, issued June 29, 1978. The controversy centers on whether there will be a regional system for the Pennypack Watershed area and whether that system will be a spray irrigation system or an interceptor system. In a study released by DER in November of 1977, DER concluded that a spray irrigation system would be the most "cost effective" regional system for the watershed.[1] DER's preference for a spray irrigation system for the Pennypack Watershed can only be implemented when and if the three municipalities involved apply for and agree to participate in a regional spray irrigation system (one of the municipalities definately prefers an interceptor system.) DER has attempted to implement its policy choice in favor of spray irrigation by, among other things, listing the regional spray irrigation system as a fundable project (No. 72) on the state priority list compiled by DER for EPA. See 25 Pa. Code Chapter 103. The controversy over the type of treatment system to be employed in the Pennypack Watershed has consumed many years of study and expense. In June of 1976 Abington Township received a letter from Marshall Cashman of DER advising it in response to its inquiries that federal funds would be available to fund the collectors required in Abington in connection with the Pennypack Watershed system. However, it is 1978 and that system, though perhaps closer to reality, has still not been finally determined. Nonetheless, it is Abington's contention that the collectors needed would be required regardless of the final treatment solution—i.e. either spray irrigation or an interceptor system or a mixed interceptor/spray system—and therefore the collector should be fundable in advance as a treatment works segment of the Pennypack system.

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1. That conclusion was appealed by several municipalities in *Upper Moreland Township, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources, supra*, and the board recently held that the publication of study conclusions favoring spray irrigation for the region is not an appealable action of the department for purposes of invoking this board's jurisdiction.

Alternatively, Abington Township contends that DER should certify the collectors as an amendment to the Sandy Run treatment plant project. Under the present official sewage facilities plan of Abington Township, which was approved by DER in 1971, public sewers were to be installed in the areas in question and the sewerage therefrom conveyed to the Sandy Run plant. Federal funds have been allocated for the upgrading of the Sandy Run plant. Apparently the Pennypack Watershed study plans, which has not yet been implemented or finalized in official sewerage facilities plans of the participating municipalities, would convey the sewage from the Washington Lane/Rydal areas to whatever treatment plant is developed for the Pennypack project.

DER's letter of January 6, 1978, gave as the basis for refusing to certify the collector as a "treatment works segment" that the collector is not described in an "approved facilities plan within the meaning of 40 C.F.R. §35.905-24." In refusing to certify the collector sewers as amendment to the Sandy Run treatment grant, the department gave as a reason the statement that ". . .this would involve a change in scope that would be inconsistent with our policy. Furthermore, Pennsylvania has virtually no monies available for change in scope projects."

DER argues that neither of these refusals constitute appealable action of the Department of Environmental Resources within the meaning of 71 P. S. §510-21(a) because these actions do not constitute an adjudication as that concept has been defined by decisions of the board and the courts of Pennsylvania. See *Commonwealth of Pennsylvania, Department of Environmental Resources v. New Enterprise Stone & Lime Company, Inc.*, 25 Pa. Commonwealth Ct. 389, 359 A.2d 845 (1976); *Anthony and Alice Toma v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 73-406-C (August 13, 1974); *George Eremic v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-283-C (June 16, 1976); *Man 'O War Racing Association v. State Horse Racing Commission*, 433 Pa. 432, 250 A.2d 172 (1969). In articulating the characteristics of appealable action, the board has been guided by §2 of the Administrative Agency Law which defines an adjudication as:

> ". . . 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."

Upon careful consideration we cannot agree with the department that the action taken here is not a final determination 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. Abington Township has requested that the department

certify the collector system for federal funds through one of two routes and the department has refused to do so. In our view this constitutes a final determination on a specific request to classify the project in such a way as to enable it to receive federal money. This is a classification of the project that finally determines whether or not Abington will have any right to federal money for the project, and as such it is an act of discretion that is reviewable by this board. The question raised by this appeal is different from that considered by the board in *Latrobe Municipal Authority, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-111-C (October 22, 1975), where the appellant sought to challenge its unfundable position on the priority list. In that case the board ruled that unless there was a *prima facie* showing of an abuse of due process or of flagrant misapplication of DER's own priority rules, the board would refrain from exercising jurisdiction over challenges to the priority list because of its inability to determine the relative rights of applicants when all the parties were not before the board. In this case Abington Township is asking to have the collectors included within one of two projects that are reachable on the priority list. It may be that DER's refusal to certify the collectors as part of either of those projects is substantively valid on the ground that there is no money for the system. However, that does not prevent DER's refusal from being a reviewable action.

Although we have some question about a municipality's entitlement to federal funds, see *Man 'O War Racing Association v. State Horse Racing Commission, supra*, 433 Pa. at 441; *City of Grand Rapids v. Richardson*, 429 Fed. Sup. 1087, 1093 (W.D. Michigan, 1977), where the state is given responsibility for determining rights and obligations within a federal scheme, and review of the state agency's decisions is provided for under state law, review cannot be avoided simply because the exercise of discretion relates to the right to federal funds. DER cannot make arbitrary and capricious decisions in determining whether an applicant is entitled to federal funds any more than it can in deciding any other matter within its discretion. Certainly we do not think that review of the department's determination in a case can be avoided by invoking the technicality that the collector system is not part of an "approved facilities plan" which does yet exist for the Pennypack project when it is a portion of the presently approved sewage facilities plan. We note further that 40 C.F.R. §35.917(d) would seem to permit Step III funding for a treatment works segment in advance of the adoption of an approved facilities plan under conditions that may be met here. There is no question but that Abington Township is under obligation to proceed with construction of the sewers under the DER order upheld by the board whether or not it receives federal funds. However, we do not believe the question of

its right to federal funds can be entirely foreclosed without the review that it seeks of this final determination of DER.

ORDER

AND NOW, this 7th day of August, 1978, the department's motion to dismiss is hereby denied. The department shall file a pre-hearing memorandum on or before September 5, 1978.

ENVIRONMENTAL HEARING BOARD

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DATED: August 7, 1978

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SHARON STEEL CORPORATION : Docket No. 78-058-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR DER'S FIRST PETITION FOR DISCOVERY
AND SUR DER'S MOTION FOR SANCTIONS

The Department of Environmental Resources (DER) on June 5, 1978, filed a First Petition for Discovery requesting that the board issue an order requiring Sharon Steel Corporation (Sharon) to answer certain interrogatories and produce certain documents for inspection and copying. Sharon, on June 16, 1978, filed a response to the DER's Petition for Discovery wherein Sharon answered some of the interrogatories and objected to the rest. The DER on June 26, 1978, filed a Motion for Sanctions requesting that we impose sanctions against Sharon for failing to provide the DER with sufficient answers to its written interrogatories. Sharon on July 10, 1978, filed a reply to the DER's Motion for Sanctions.

This opinion and order responds to the objections of Sharon to certain interrogatories of the DER and to the DER's Motion for Sanctions.

The DER's Motion for Sanctions was inappropriate as to Sharon's objections to interrogatories as Sharon was, by notice of the board, given until June 16, 1978, to file objections to the DER's Petition for Discovery.[1] However, we shall treat the Motion for Sanctions as a reply to Sharon's objections and, where appropriate, as objections to Sharon's answers.

Sharon's appeal involves the narrow issue of whether or not the DER acted arbitrarily when it returned Sharon's application for a determination of

1. The board's procedure when receiving a petition for discovery is to notify the adverse party that a petition has been filed and giving the party a period of time, usually ten days, to object to the petition.

minor significance under 25 Pa. Code §123.1(b) for the fugitive emissions from the hot metal transfer station instead of allowing Sharon additional time to submit supplemental information. Sharon is not arguing that based on the information submitted to the DER it is entitled to the determination, it is merely arguing that DER should have given it more time to submit supplemental information. Interrogatories C, D, E, F, G, H(3), I(3), J(3), K(3), M, N, O, P, Q, R, S, all request information on such topics as length of operation of the hot metal transfer station, monitoring of emissions, existing control equipment, compliance with the Air Pollution Control Act by the emissions from the source, characteristics and quantity of emissions from the source, ambient air quality in the area of the source, conditions at hot metal transfer stations owned by other companies, alternatives to seeking a determination of minor significance, schedule of operation and tonnage transferred by the station. These questions may be relevant to a rejection of the application on its merits or to an action seeking sanctions because of the emissions, but they are manifestly irrelevant to this appeal.

In *Pennsbury Village Condominium v. DER*, EHB Docket No. 76-028-C (Opinion and Order issued July 12, 1976) we stated that:

> "...matters which are clearly irrelevant are not discoverable. *Spadel v. Zarlinski*, 39 Northumberland 175(1967). Moreover, where discovery seeks to establish facts which, even if established, would have no legal significance or affect, discovery will be denied. 5 ANDERSON PENNSYLVANIA CIVIL PRACTICE, §400.94."

Therefore Sharon's objections to Interrogatories C, D, E, F, G, H(3), I(3), J(3), K(3), M, N, O, P, Q, R, S, are sustained on the basis of relevancy. Sharon's objection to Interrogatory L which requests information on Sharon's knowledge of the requirements of 25 Pa. Code §123.1(b) and Sharon's efforts to satisfy its requirements, is overruled. Sharon must answer Interrogatory L.

Interrogatory A

Sharon filed an answer to Interrogatory A in its "Response to the DER's Petition for Discovery" and supplemented its answer in its reply to the DER's Motion for Sanctions. However, the DER in its Motion for Sanctions objects to the adequacy of the answer for the following reasons:

1. The answer does not provide facts which "undermine" Sharon's position.

The DER's objection is overruled as Sharon appears to have adequately answered the interrogatory. Also, the truth of the answer is averred to by an

attached affadavit. Whether or not the facts stated in answer to Interrogatory A support or undermine Sharon's position will be decided by the board after hearing.

2. The answer does not use the definition of "fact or information" or "identify" given in the definition section of DER's Petition for Discovery.

The DER's objection is sustained. Sharon must "identify" individuals in accordance with the DER's definition insofar as it has knowledge of the information requested. Sharon need not "identify" those documents produced for inspection, but must identify those documents which are referred to in its answer but are not in Sharon's possession. See *United States Steel Corporation v. DER*, EHB Docket No. 78-033 (Opinion and Order issued July 11, 1978). Sharon shall use the terms "fact or information" as they are defined insofar as the definition is pertinent to its answer to Interrogatory A.

3. The DER objects that Sharon has not listed all persons having knowledge of the facts stated in answer to Interrogatory A.

Sharon in its reply to the DER's Motion for Sanctions has listed additional individuals with knowledge of the answer. If Sharon has listed the persons with knowledge of said facts, it need not reply further; if Sharon knows of other individuals having knowledge of the facts, it must identify them.

4. The DER objects that Sharon has not listed all documents relating to the answer to Interrogatory A.

Sharon in its reply to the DER's Motion for Sanctions has attached additional documents related to the answer. If Sharon has listed and/or produced the documents relating to Sharon's answer, it need not reply further; if Sharon has knowledge of other documents relating to its answer, it shall identify those documents or produce those documents in its custody or control.

Interrogatory B

The DER's objection in its Motion for Sanctions to the adequacy of Sharon's answer to Interrogatory B is denied. The interrogatory is answered satisfactorily.

Interrogatories H, I & J

Interrogatories H, I and J request information regarding an apparent DER request for information concerning proposed control equipment, character of emissions and quantity of emissions from the hot metal transfer station. Sharon has filed an answer to Interrogatories H, I & J, however the DER objects in its Motion for Sanctions to the adequacy of Sharon's answers for the following reasons:

1. The DER objects that the answers do not address the request for information on proposed control equipment, quantity of emissions or character of emissions.

The DER's objection is sustained as the answers do not address requests for information on these topics. If Sharon was requested by the DER to supply it with such information, it must say so and answer the following related questions. If Sharon was not requested to provide said information, it need merely say so.

2. The answers do not use the definitions of "fact or information" or "identify" given in the definition section of the DER's Petition for Discovery.

DER's objection is sustained. Sharon must identify individuals in accordance with the DER's definition insofar as it has knowledge of the information requested. Sharon need not identify those documents produced. Sharon shall use the terms "fact or information" as they are defined insofar as the definition is pertinent to the answer to the particular interrogatory.

O R D E R

AND NOW, this 7th day of August, 1978, it is hereby ordered that Sharon Steel Corporation shall respond to the DER's First Petition for Discovery on or before Monday, August 28, 1978, as follows:

1. Sharon Steel Corporation need not answer Interrogatories C, D, E, F, G, H(3), I(3), J(3), K(3), M, N, O, P, Q, R, S.

2. Sharon Steel Corporation shall answer Interrogatory L.

3. Sharon Steel Corporation shall supplement its answer to Interrogatory A and produce the documents in its custody or control listed therein in accordance with the opinion attached hereto.

4. Sharon Steel Corporation shall answer Interrogatories H, I and J and produce the documents in its custody or control listed therein.

5. Sharon Steel Corporation shall answer Interrogatories A, H, I, J, and L by using the definitions of "identify" and "fact or information" given in the DER's set of definitions.

ENVIRONMENTAL HEARING BOARD

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SHARON STEEL CORPORATION : Docket No. 77-181-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR APPELLANT'S PETITION
FOR DISCOVERY DATED JULY 7, 1978

Appellant, Sharon Steel Corporation, on July 7, 1978, filed a second petition for discovery in this matter requesting the Department of Environmental Resources (DER) to produce for inspection and copying certain documents. Appellant's initial discovery petition, which was filed on February 21, 1978, resulted in a board order requiring the DER to produce two persons for the purpose of taking their depositions and requiring the production of voluminous documents at DER's Harrisburg and Meadville offices.[1] The instant petition for discovery, which is more extensive than the first , should represent the culmination of appellant's discovery in this appeal. The DER has filed objections to appellant's petition and appellant has filed an answer to the DER's objections. This opinion and order responds to appellant's second petition for discovery and the DER's objections thereto.

General Objection

The DER asserts that the Petition for Discovery should be denied in its entirety as the DER has already provided appellant with thousands of pages of documents for its review and therefore the added burden imposed by the instant petition is oppressive and unnecessary.

The DER's objection is overruled. We are unwilling to say that appellant in this case is entitled to only one opportunity to pursue discovery. However because

1. Appellant on May 12, 1978, also filed a petition for discovery requesting that the board issue a subpoena for the purpose of taking the deposition of Kenneth Young. The petition was granted by the board.

of the extensive nature of the discovery requested in appellant's initial and instant petitions, and because this matter should soon proceed to hearing, we caution that the board will look with disfavor upon the filing of further discovery petitions herein.

Specific Objections

The DER has raised no specific objections to the documents requested in categories 2, 3, 6, 7, 13, 14, 20-26 and 29 of appellant's petition. The DER shall produce for inspection and copying the documents requested therein.

The DER objects to producing those documents sought by categories 5, 8, 9, 10, 11, 15, 17, 18, 19 and 30 "which were prepared by counsel for DER, at his suggestion, or in and of the preparation of the DER's case."

The DER's objection is overly broad. See Pa.R.C.P. 4011(d). Documents prepared by counsel for the DER or at his suggestion are not privileged unless they were prepared in anticipation of litigation. Further, the documents requested by categories 8, 10 and 15 were manifestly prepared for a purpose other than preparation for trial and must be produced. C.f. *Peters v. Sun Ray Drug Co.*, 37 D. & C. 2d 612 (1966). However we reiterate that: "This is not to say that the DER must produce those documents which are obviously the work product of its attorney such as memoranda of counsel regarding preparation for this trial." See our Opinion and Order Sur Appellant's Petition for Discovery issued in this matter on May 4, 1978.

The DER need not produce those documents requested in categories 5, 8, 9, 10, 15, 17, 18, 19 and 30 which are subject to the attorney-client privilege.

Appellant requests in category 1 of its petition, the production of all industrial waste permits and applications therefor issued by the DER since January 1, 1975, for the treatment of metal finishings wastes. The DER objects to being required to produce these permits and applications because, DER argues, they are irrelevant to this appeal, and would cause an unreasonable investigation, entail unreasonable costs and would be unreasonably burdensome and oppressive. The DER asserts that the permits and applications are, depending on the location of the permitted source, located in its regional offices in Meadville, Pittsburgh, Harrisburg, Norristown, Wilkes-Barre, Reading and Williamsport. Appellant contends these permits and applications are relevant as they ". . . are likely to provide important evidence regarding whether DER acted arbitrarily, capriciously or unreasonably in denying Appellant's permit application."

We are, at this time, unwilling to find that documentation showing what actions the DER took on other industrial waste applications is irrelevant to this appeal; therefore we overrule the DER objection based on relevancy. C.f. *Yoffee v. Golin*, 45 D. & C.2d 318, 90 Dauph. 39 (1968).

We are unable to determine, based on the DER's assertion, whether or not production of these permits and applications would be unreasonably burdensome and oppressive in violation of Pa. R.C.P. 4011.

The number of permits and applications involved, the man hours and cost involved in locating the documents, the existence of an indexing system are all unknown at this time. The party asserting that discovery is unreasonably burdensome in violation of Pa. R.C.P. 4011 has the burden of proving same. 5 ANDERSON PENNSYLVANIA CIVIL PRACTICE §4011.73. However we do find that these permits and applications should remain in the regional office where they are located. Permits required by The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1 *et seq.* and the applications submitted therefor are vital to the Bureau of Water Quality Management's regulatory program. To say they are the Bureau's raison d'etre would not be an exaggeration. Thus any loss or damage to them would have a significantly detrimental effect on the DER's operation. In order to minimize the potential for loss or damage to the permits and applications and to minimize the disruption of the day-to-day regulatory activities of the DER, we find that requested permits and applications should be produced for inspection and copying at the regional office where they are kept in the normal course of business.[2] See also *Allegheny Valley Residents Against Pollution v. Commonwealth of Pennsylvania, Department of Environmental Resources, et al*, EHB Docket No. 74-232-C (opinion and order issued June 9, 1977) wherein we stated that "Pa.R.C.P. 4009 permits only the inspection, examination and copying of documents. It does not authorize the transmittal of evidence to anyone or any place for examination." We therefore order the DER to produce for inspection and copying the documents requested by category 1 of the appellant's petition for discovery, unless the DER on or before the date on which it is required to produce the documents, shows that the production for inspection and copying of all industrial waste permits and the applications therefor issued since January 1, 1975, for the treatment of metal finishings wastes at the regional office where they are located is unreasonably burdensome or oppressive in violation of Pa. R.C.P. 4011.

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2. In the Opinion and Order Sur Appellant's Petition for Discovery issued in this matter on May 4, 1978, we required the DER to produce the required documents at either its Harrisburg or Meadville offices. However, in that instance, the documents were either directly related to the basis of the permit denial, the quality of the receiving streams or the promulgation of a regulation. These documents would be likely to be located in either the Harrisburg or Meadville offices and, if not, the removal of the documents from the office where they are maintained would not be likely to be disruptive of DER's regulatory functions.

Appellant, in category 16 of its petition for discovery, requests "All permit applications and Internal Review and Recommendations therefor , reviewed by David E. Milhous , which applications included treatment for the removal of hexavalent chrome." The DER objects to the request, asserting that the production of these documents would be unreasonably burdensome and oppressive while only tangentially relevant and, therefore, in violation of Pa.R.C.P. 4011. Mr. Milhous has been employed by the DER since 1970 as a sanitary engineer reviewing permit applications. Since 1977, he has been chief of the section of DER's Meadville office which issues all water pollution, water obstruction and water supply permits in a fourteen county area. Prior to 1977, he worked in the DER's Philadelphia office. The DER asserts that it would be unreasonably burdensome to require Mr. Milhous to cease performing his current duties to search the DER's Meadville office records for permits on treatment of hexavalent chrome and review them to determine if he participated in their review and to search the DER's Philadelphia office records for the same information for the years 1970 through 1976.

We find that it would be unreasonably burdensome to require the DER to produce the documents reviewed by Mr. Milhous when he worked in the DER's Philadelphia office. The documents required by category 16 of appellant's petition will be limited to the permit applications and internal review and recommendations therefor, reviewed by David Milhous during his employment at the DER's Meadville office.

Category 12 of appellant's petition requests DER to produce "The DER's Comprehensive Planning and Water Quality Requirements". The DER contends that it does not know what appellant means by the term "DER's Comprehensive Planning and Water Quality Requirements" and therefore, it would be unreasonably burdensome and oppressive to compel the DER, at its peril, to guess the meaning appellant assigns the phrase. In its answer to the DER's objection, appellant states that "The DER's Comprehensive Planning and Water Quality Requirements were established by the DER under The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, and the Federal Water Pollution Control Act, 33 U.S.C. §1251, *et seq.*" If appellant's explanation clarifies the term, the DER must supply the requested documents to appellant. If the DER, in good faith, is still ignorant of the meaning of the term, it needs only say so. Discovery will be refused when the questions asked are vague. 5 ANDERSON PENNSYLVANIA CIVIL PRACTICE §4011.94.

The DER's objection to producing those documents sought by category 15, which duplicate documents provided in response to category 8, is sustained. The DER needs only to supply one copy.

The DER objects to producing the documents requestedby categories 4 and 5 of appellant's petition on the basis that the requests are overly broad and, therefore, unreasonably burdensome. Categories 4 and 5 request the DER to produce documents, memoranda, policy statements, etc. which instruct DER personnel on such items as how to conduct inspections, take samples, analyze samples and complete inspection reports. They also ask for documents relating to tests the DER conducted at appellant's Damascus plant. The documents are *prima facie* material to this appeal and should be produced only if they are related to the sampling, testing, etc. of the waste water parameters at issue in this appeal. E.g., if the acidity of the discharge is not at issue in this appeal, the documents detailing the testing procedure for acidity would not be material to this appeal and thus their production would be unreasonably burdensome.

Finally, the DER's objection based on relevancy to providing appellant with the documents sought by categories 27 and 28 of the appellant's petition, i.e. various sections of, and indices to, the Bureau of Water Quality Management's Policy and Procedure Manual is overruled.

ORDER

AND NOW, this 29th day of August, 1978, it is hereby ordered that the DER shall at a time convenient to both parties on or before September 18, 1978, make available for inspection and copying the following documents at the following locations:

1. The documents requested by category 1 of appellant's July 7, 1978, petition for discovery at the DER's regional offices where the documents are maintained, unless the DER, on or before September 18, 1978, shows that the production of the documents at its regional offices is unreasonably burdensome in violation of Pa.R.C.P. 4011.

2. The permit applications and internal review and recommendations therefor, reviewed by David E. Milhous during his employment at the DER's Meadville office, which applications included treatment for removal of hexavalent chrome, shall be produced at the DER's Meadville office.

3. The documents requested by categories 4 and 5 of appellant's July 7, 1978, petition for discovery which are related to the waste water parameters at issue in this appeal shall be produced at the DER's Harrisburg office and/or its Meadville Office.

4. The documents requested by categories 2, 3, 6 through 15 and 17 through 30 of appellant's petition for discovery, shall be produced at the DER's Harrisburg office and/or its Meadville office.

The DER need not, in accordance with the terms of the attached opinion, supply any documents that were prepared solely in the preparation of this litigation or that are specifically within the attorney-client privilege.

The DER shall make copying facilities available and may impose upon appellant a reasonable charge for use of its duplicating equipment.

ENVIRONMENTAL HEARING BOARD

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DATED: August 29, 1978

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CONSOLIDATED GAS SUPPLY CORPORATION : Docket No. 78-028-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
& TREASURE LAKE OF PENNSYLVANIA, INC.

OPINION AND ORDER
SUR APPELLEE'S FIRST PETITION FOR DISCOVERY
AND APPELLANT'S OBJECTION THERETO

Appellee, Department of Environmental Resources (DER), on July 24, 1978, filed a first petition for discovery requesting this board to issue an order requiring appellant, Consolidated Gas Supply Corporation, to produce certain documents and answer certain interrogatories. Appellant, on August 7, 1978, filed objections to the petition and the DER on August 24, 1978, filed a reply to the appellant's objections. The matter is now before the board for disposition.

In response to appellant's assertion that it cannot produce some of the documents requested by paragraph 1 of the DER's request for production because it does not have the documents, appellant needs only to produce those documents in its possession, custody or control. *U. S. Steel Corporation v. DER*, EHB Docket No. 78-033-W (Opinion and Order issued July 11, 1978).

Appellant objects to producing all the documents requested by paragraph 8 and some of the documents requested by paragraph 7 of the DER's request for production on the basis that they were prepared in anticipation of litigation. Documents prepared in anticipation of litigation are exempted from discovery by Pa.R.C.P. 4011(d). However, the appellant shall identify to the DER those documents it believes were prepared in anticipation of litigation by author, sender and receiver, date and subject matter. The DER is providing this same information to appellants for the documents it asserts to be prepared

in anticipation of litigation. If a dispute arises over whether a document was prepared in anticipation of litigation, the board can then resolve it. Also, we are not prepared at this time to state that all the documents requested by paragraph 8 of the DER's request for production are documents prepared in anticipation of litigation. Without any knowledge of the documents, we cannot assume that they were prepared with a focus toward litigation or that litigation was a dominant factor in their preparation.

Appellant asserts that some documents requested by the DER's request for production (including all documents requested by its paragraph 3) are confidential as they "were prepared as a result of research by Consolidated, and the disclosure to third persons who are actual or potential competitors of Consolidated or who may transmit the information contained in those documents to such actual or potential competitors, would have an adverse economic impact on Consolidated." DER in its reply notes that it is not an actual or potential competitor of the appellant and states that it would agree to a confidentiality stipulation which would protect appellant's confidential documents from disclosure to third parties. We believe that if the parties properly restrict access to the confidential documents, the DER's interest in full discovery and the appellant's interest in protection from competitors can be satisfied. On that basis, we order that prior to the production by appellant of documents designated as confidential, counsel for both parties shall negotiate and execute an agreement to protect the confidentiality of the documents. If intervenor, Treasure Lake of Pennsylvania, is to have access to any confidential documents, it shall also agree to a confidentiality stipulation. If the parties are unable to arrive at an agreement within a reasonable period of time, this board will either rule on the differences or issue an order requiring the protection of the confidentiality of the documents.

The DER's first set of interrogatories asks appellant to identify the witnesses it intends to call at the hearing and the documents the witnesses may utilize or refer to. Appellant has agreed to supply the requested information but reserves the right to later amend its answer if it subsequently decides to call additional witnesses or use additional documents. Appellant can only answer the interrogatories to the best of its present knowledge. However, we note that the board, at its discretion, can disallow the testimony of a witness or the use of a document if the identification is made at a time so proximate to the hearing that it prejudices the opposing party.

O R D E R

AND NOW, this 12th day of September, 1978, it is ordered that:

1. Appellant shall answer the DER's first set of interrogatories on or before October 4, 1978.

2. Appellant shall, at a time convenient to both parties on or before October 16, 1978, make available for inspection and copying, in accordance with the terms of the attached opinion, the documents requested by the DER's first request for production at the DER's Western Regional Office of the Bureau of Litigation, 12th Floor, Kossman Building, Pittsburgh, PA.

Appellant need not supply any documents that were prepared solely in anticipation of litigation; however, appellant shall identify to the DER those documents it determines were prepared in anticipation of litigation by author, sender and receiver, date and subject matter.

Prior to the production of documents designated by appellant as confidential, counsel for appellant and the DER shall negotiate and execute a confidentiality agreement. Intervenor, Treasure Lake of Pennsylvania, shall also agree to a confidentiality stipulation prior to having access to documents designated as confidential.

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DATED: September 12, 1978

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TOWNSHIP OF SALFORD, ET AL :

Docket No. 76-135-C

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
& MIGNATTI CONSTRUCTION COMPANY

OPINION & ORDER
SUR INTERVENOR'S
REQUEST FOR RECONSIDERATION
& REARGUMENT

Mignatti Construction Company, Inc., Intervenor, on May 23, 1978, requested this board to reconsider that aspect of its May 23, 1978, adjudication which set aside a surface mining permit issued to intervenor to operate a rock quarry until such time as intervenor procurred an air pollution control permit for the quarry. We granted the request on May 26, 1978, for reason that the issue was decided by the board *sua sponte*, without the parties having the opportunity to file briefs on the issue. Briefs have been filed by all parties as well as the Western Pennsylvania Surface Coal Mine Operators Association, Inc. who requested and received permission to file an *amicus curiae* brief in support of intervenor's position.

Intervenor's request and brief in support thereof raise two issues: (1) the proposed rock quarry is not an air contamination source as that term is defined by the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, 35 P.S. §4001 *et seq* (APCA) and thus an air pollution control permit is not required for its operation; and (2) the surface mining permit may be issued by the DER notwithstanding a requirement to procure other regulatory permits from the DER.

Amicus, in its brief, agrees that a rock quarry is an air contamination source but argues that an air pollution control permit is not required for its

operation because a rock quarry is not "constructed, assembled, installed or modified".

After consideration of the arguments of intervenor, amicus, appellants and the DER, we conclude that the result reached in our adjudication is correct. We thus reaffirm our May 3, 1978, adjudication.

It cannot be seriously contended that a rock quarry is not an air contamination source. Section 3(7) of the APCA defines air contamination sources as "any place, facility or equipment...from or by reason of which there is emitted into the outdoor atmosphere any air contaminant". The only question to be decided is whether Section 6.1 of the APCA which requires air contamination sources to be permitted, excludes sources such as rock quarries from its terms. Section 6.1 states in part:

> "(a) On or after July 1, 1972, no person shall construct, assemble, install or modify any stationary air contamination source, or install thereon any air pollution control equipment or device or reactivate any air contamination source after said source has been out of operation or production for a period of one year or more unless such person has applied to and received from the department written approval so to do: Provided, however, That no such written approval shall be necessary with respect to normal routine maintenance operations, nor to any such source, equipment or device used solely for the supplying of heat or hot water to one structure intended as a one-family or two-family dwelling, or with respect to any other class of units as the board, by rule or regulation, may exempt from the requirements of this section...
>
> "(b) No person shall operate any stationary air contamination source which is subject to the provisions of subsection (a) of this section unless the department shall have issued to such person a permit to operate such source..."

Sources not subject to the provisions of Section 6.1 are those in operation before July 1, 1972, and those excluded by the proviso clause of Section 6.1(a). Neither exemption includes rock quarries. Rather, intervenor and amicus contend that the "construct, assemble, install or modify" language of Section 6.1(a) does not include quarry operations because "one does not construct, assemble or install a quarry".

We believe that intervenor and amicus have placed too narrow a construction on the phrase "construct, assemble...", etc. One of the definitions of "construct" given by Black's Law Dictionary (4th Ed.Rev. 1968) is "make ready for use". The DER points out in its brief that "Quarry operations are artificial constructions laid out, designed and operated according to engineering principles. They involve significant alterations of the naturally occurring surface through

the use of equipment and other devices and techniques (e.g. blasting) and fit within the dictionary meanings of "construct" and "install".

Further, intervenor and amicus have misconstrued the purpose of the bifurcated nature of the air pollution control permitting system. The "plan approval permit" requirement is not only to "focus on the technical review of proposals to construct complicated air pollution control devices" as argued by amicus. The plan approval permit is also to insure that before any air contamination source exists a determination is made that it will not adversely affect air quality levels. See Section 127.1 "Purpose" wherein it is stated that:

> "It is intended that by the application of the provisions of this Article, air quality shall be maintained at existing levels in those areas where the existing ambient air quality is better than the applicable ambient air quality standards, and that air quality shall be improved to achieve the applicable ambient air quality standards in those areas where the existing air quality is worse than the applicable ambient air quality standards. In accordance with this intent it is the purpose of this Chapter to insure that all new sources shall conform to the applicable standards of this Article and that they shall not result in producing ambient air contaminant concentrations in excess of those specified in Chapter 131 of this Title (relating to ambient air quality standards). It is further the intent of this Chapter to insure that in those areas of this Commonwealth where concentrations of air contaminants are significantly lower than those specified in Chapter 131 of this Title (relating to ambient air quality standards), new sources shall not be established unless it is affirmatively demonstrated that:
>
> (1) the establishment of such new sources is justifiable as a result of necessary economic or social development;
>
> (2) such new sources shall not result in the creation of air pollution as defined in section 3 of the act (35 P.S. §4003);
>
> (3) such new sources shall conform to all applicable standards of this Article;
>
> (4) such new sources shall not result in the creation of ambient air contaminant concentrations in excess of those specified in Chapter 131 of this Title (relating to ambient air quality standards); and
>
> (5) such new sources shall control the emission of air pollutants to the maximum extent, consistent with the best available technology."

Finally, to reiterate what we stated in our May 3, 1978, adjudication, the legislature could have exempted rock quarries from the permitting requirements by listing them in the specific exemption clause of Section 6.1. The Environmental Quality Board could have exempted rock quarries from the permitting requirements by listing them with the seven types of specific sources it exempted in Section 127.14, and the DER could have exempted rock quarries from the permitting requirements under Section 127.14(8) by determining that the emissions therefrom are of

minor significance. In marked contrast to the lack of an exemption for rock quarries, farming activities, which intervenor and amicus have argued would be required to be permitted if our May 3, 1978, adjudication stands, have been explicitly exempted by Section 4.1 of the APCA from "rules and regulations relating to air contaminants and air pollution..."

In answer to intervenor's assertion that the necessary air pollution control permits may be acquired after receipt of its surface mining permit, we emphasize that we do not hold that all permits from the DER must be issued simultaneously or that one permit must pre-date another. The reason that the surface mining permit was set aside is that it is clear from the record that the DER had decided not to require an air pollution permit from intervenor prior to its operating the quarry, a decision which violates the APCA and therefore Article I, Section 27 of the Pennsylvania Constitution. See *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973), affirmed, 468 PA.226, 361 A.2d 263 (1976) and *Concerned Citizens for Orderly Progress, et al v. DER and Emerald Enterprises Ltd.*, ___Pa. Commonwealth Ct.___, ___A.2d___ (*per curiam* opinion dated June 21, 1978).

O R D E R

AND NOW, this 12th day of September, 1978, the May 3, 1978, adjudication in this matter is affirmed in its entirety.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS, Chairman

JOANNE R. DENWORTH, Member

THOMAS M. BURKE, Member

(Carbon copies on next page)

DATED: September 12, 1978

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COMMONWEALTH OF PENNSYLVANIA

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KENVUE DEVELOPMENT, INC. and
KENVUE SERVICE COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
& KENNEDY TOWNSHIP

Docket No. 78-106-B

ORDER AND OPINION
SUR PETITION FOR SUPERSEDEAS

Appellant, Kenvue Service Company (KSC), owns and operates a sewage treatment plant providing sewerage service to 35 homes in a development known as the Kenvue Manor Plan of Lots, which was developed by appellant Kenvue Development, Inc. (KDI). Although KSC has operated the plant and provided sewerage service since September 1971, the permit for the plant (permit no. 0271441) was issued by the Department of Environmental Resources (DER) to Kennedy Township apparently because of a DER policy that only municipal entities or persons possessing a PUC certificate of public convenience are eligible to receive a sewage treatment plant permit.

Special condition "C" of sewage permit no. 0271441 states:

> "If facilities become available for conveying the sewage to and treating it at a more suitable location, upon order from the Department of Environmental Resources, the permittee shall provide for the discharge of the sewage to such facilities and shall abandon the use of the herein approved sewage treatment works."

The Kennedy Township Municipal Sewer Authority has recently completed at a cost of over 8 million dollars the construction of a municipal sewer system to service the residents of Kennedy Township. The sewage will be conveyed to the Alcosan sewage treatment plant. As a consequence, the DER on August 17, 1978, issued an order to appellants and Kennedy Township cancelling permit no. 0271441 for the Kenvue plant and requiring, *inter alia*, the abandonment of the Kenvue sewage treatment plant and the interconnection of the Kenvue sewer system with the recently completed municipal sewer system on or before September 22, 1978.

Appellants on August 30, 1978, filed an appeal from the DER's order alleging, *inter alia*, that it requires the destruction of KSC's property without due process of law and without compensation. On September 11, 1978, appellants filed a petition for supersedeas alleging that the implementation of the DER order would produce irreparable harm to appellants, to wit, the abandonment of the Kenvue plant, prior to a hearing on the merits of its appeal, while resulting in only a relative minor inconvenience to the public, the township and the DER.

A hearing on the petition for supersedeas was held on September 19, 1978. Prior to the taking of testimony, a petition to intervene filed by Kennedy Township in support of the terms of the order, was granted.[1]

At the close of petitioner's evidentiary case, the DER moved to deny the petition for supersedeas. We denied the DER's motion as we believed that if this case involved solely the substitute of sewage treatment facilities that serve the 35 homes in the Kenvue plan, the transfer could await the adjudication by this board of the merits of the order and thus a supersedeas should be granted.

However, the testimony presented by Kennedy Township showed that a delay in the implementation of the order has broader consequences to Kennedy Township than its effect on the 35 homes in Kenvue Manor. 185 homes in the Herbst Manor Road, Rose Road, Vigne Road, Mary Street area of Kennedy Township are not served by a public sewerage system, although the laying of lateral sewer lines to serve this area (Herbst Manor Road System) was completed in April of this year. The homes cannot be connected until the Kenvue sewer system is disconnected from the Kenvue plant and connected to the municipal sewage system as the Herbst Manor Road system must enter the municipal system via the Kenvue system. Thus until the Kenvue system, municipal system interconnection is made, these 185 homes cannot be serviced by the municipal system.[2]

It is apparent from the testimony presented by intervenor, Kennedy Township, that a majority of these 185 homes are served by malfunctioning on-lot

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1. Kennedy Township filed the petition to intervene on September 8, 1978, and appellants filed an answer opposing the intervention on September 19, 1978. The petition to intervene was granted for two reasons: (1) the order appealed from was also issued to Kennedy Township, thus any order the board might enter in this matter would also affect the rights and obligations of Kennedy Township, and (2) the board has no reason to believe that the interests of the DER and Kennedy Township are similar, therefore unless intervention is granted, Kennedy Township's interests may not be adequately represented.

2. Also the Kenvue sewage treatment plant lacks the capacity to serve an additional 185 homes.

septic systems. Ten residents of the area testified in graphic detail to the community's affliction with raw sewage discharges from ineffective on-lot systems. They testified to sewage flowing in the streets, to the digging of trenches and culverts to route the sewage from their yards. They described portions of yards which seepage from septic systems has turned into muck, raw sewage odors from basements, sewage back-ups in homes, vectors from sewers and an infestation of rats. One resident testified that the stench becomes at times so overwhelming her family is forced to leave the home. Another testified to installing a holding tank which must be pumped every five days. Some residents have understandably disconnected their homes from their septic systems and reconnected their sewage lines to storm sewers; others have disconnected all waste waters except sewage from their septic system.[3] The residents' testimony was corroborated by a representative of the Allegheny County Health Department who testified that the soils in the Herbst Manor Road area are not suitable for on-lot systems.

The project engineer for the municipal sewer system testified that unless these homes are connected to the sewer line before the first of December, frozen ground will prohibit their connection until the spring.

At the conclusion of the September 19, 1978, hearing, the board (Member Thomas M. Burke presiding) denied the petition for supersedeas. The denial was based on the uncontroverted testimony of the existence of the raw sewage discharges and their effect on the residents of the area.

Section 21.16(d) of the board's rules sets forth the criteria under which a supersedeas will be granted or denied. It provides in relevant part as follows:

> "In all cases, a supersedeas will be denied in cases where nuisance or significant (more than de minimis) pollution or hazard to health or safety either exists or is threatened during the period while the supersedeas would be in effect."

Also, this board in *DER v. Crucible Inc.*, EHB docket no. 73-342-B (Opinion and Order sur Petition for Supersedeas dated December 5, 1973) described one of the common criteria for supersedeas as follows:

> "Alternatively, if the injury to the public was substantial, then we would (as indicated by §21.16 (b)

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3. There are also an unknown number of homes on Herbst Manor Road served by the Herbst Manor treatment plant, apparently a small package plant which also will be abandoned upon interconnection of the Kenvue and municipal systems. There was testimony by a member of the township board of commissioners that this plant is not providing proper treatment; but since it will soon be abandoned, no monies have been appropriated for its repair.

of our Rules of Procedure) not grant a supersedeas at all, no matter what the showing of harm to the petitioner, short of a hearing on the merits to determine not merely whether the petitioner has a likelihood of winning on the merits, but whether the petitioner will win."
(Emphasis in original)

Therefore, considering the nature of the harm that will continue to afflict the residents of the Herbst Manor Road area of Kennedy Township until their homes are connected to the municipal sewage system and the requirements of Section 21.16(d) of our rules, we deny the petition for supersedeas.

ORDER

AND NOW, this 29th day of September, 1978, it is hereby ordered that the petition for supersedeas filed by Kenvue Development, Inc. and Kenvue Service Company is denied.

ENVIRONMENTAL HEARING BOARD

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DATED: September 29, 1978

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:

:

Docket No. 77-051-B

:

GATEWAY COAL COMPANY

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR APPELLEE'S FIRST PETITION FOR DISCOVERY
AND APPELLANT'S OBJECTION THERETO

Appellee, Department of Environmental Resources (DER), on June 28, 1978, filed a petition for discovery requesting this board to issue an order requiring appellant, Gateway Coal Company, to answer certain interrogatories which the DER avers pertain to testimony to be presented at hearing by appellant and to issues raised by appellant's notice of appeal. Appellant on July 10, 1978, filed objections to the petition and the DER on July 31, 1978, filed a reply to the appellant's objections. The matter is now before the board for disposition.

Appellant initially objects to the DER's definition of the term "communication" for reason that it pertains, in part, to matters other than the issues in litigation. Appellant's objection is overruled. Although "communication" is defined by the DER to include any transaction between the DER and appellant, its scope is limited by the subject matter of the interrogatory in which it is used.

Appellant's objections to interrogatory nos. 1(b), 1(c), 1(d) and 1(e) are overruled. The DER is merely requesting the identity of witnesses who will testify on the subjects stated therein.

In interrogatory no. 2(d), the DER requests the identity of everyone who participated in or witnessed any oral communications which will be the subject of testimony by appellant's witnesses. Appellant objects because the interrogatory is not limited to the identity of persons who are known to appellant. Appellant's objection is overruled insofar as the identity of the person or persons can be ascertained through a reasonable investigation. If after a reasonable

investigation, appellant is unable to identify a person or persons witnessing the aforesaid oral communication(s), it merely needs to say so.

Appellant's objections to interrogatory nos. 3, 4, 5 and 6 are overruled. The DER is merely requesting that appellant provide a description of the documents its witnesses will use or rely on when testifying on the subjects stated therein and the origin of those documents.

Interrogatory nos. 7, 8 and 9 request appellant to provide a description of each document used or considered by appellant in implementing or reviewing:

(a) The measures employed at the Gateway mine for ventilating any area inby the last open crosscut;

(b) The methane testing procedure employed at the Gateway mine; and

(c) The roof support measures at the Gateway mine.

Appellant objects to interrogatory nos. 7, 8 and 9 on the basis that they are unlimited as to time; they would disclose the evidence of reports, etc., secured in anticipation of litigation and/or preparation for trial and because the information sought is, in part, irrelevant to this proceeding.

We find that the interrogatories are limited as to time by the subject matter of the interrogatories. Also, the documents considered by appellant in implementing the measures referred to in the interrogatories were manifestly prepared for a purpose other than anticipation of litigation or preparation for trial and must be described. (This is not to say that appellant must describe those documents which are obviously the work product of its attorney such as memoranda of counsel regarding preparation for this hearing.) Cf. *Sharon Steel Corporation v. Comm. of Pa., DER*, EHB Docket No. 77-181-B (Opinion and Order issued August 29, 1978) and *DER v. U.S. Steel Corp.*, EHB Docket No. 75-205-D (Opinion and Order issued August 13, 1976). Appellant needs not describe those documents reviewing the measures referred to in the interrogatories which were prepared in anticipation of litigation.

We are unwilling to state at this time that the methods of ventilation inby the last open crosscut, the methane testing procedures or the roof support measures are irrelevant to this proceeding.

O R D E R

AND NOW, this 10th day of October, 1978, it is hereby ordered that appellant, Gateway Coal Company, shall answer, under oath, the interrogatories attached to the DER's petition for discovery dated June 26, 1978, on or before Monday, December 11, 1978.

Appellant need not describe those documents reviewing the measures employed at the Gateway mine referred to in interrogatory nos. 7, 8 and 9 which were prepared in anticipation of litigation.

ENVIRONMENTAL HEARING BOARD

Thomas M. Burke

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DATED: October 10, 1978

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COMMONWEALTH OF PENNSYLVANIA

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:

:

Docket No. 78-064-B

CONCERNED CITIZENS OF
BREAKNECK VALLEY, ET AL

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and MINE SAFETY APPLIANCES COMPANY

OPINION AND ORDER

Appellants, on October 13, 1978, filed a motion for leave to amend their appeal to conform to the evidence presented at the September 27-29, 1978, hearings held before the board. Intervenor, Mine Safety Appliances Company (MSA), on October 23, 1978, filed a response opposing the motion on the basis that the amendment is an attempt to add a new issue to the proceeding and that MSA is prejudiced thereby because it does not have the opportunity to present explanatory evidence to refute the contention espoused by the amendment.

Appellants in this proceeding have challenged the DER's issuance of a Plan Approval permit to MSA to construct a N-hexylcarborane plant in Forward Township, Butler County. In its appeal, appellants' averred, *inter alia*, that the proposed plant will produce a sufficiently large quantity of emissions to require the DER, in its review of the Plan Approval application, to apply the Environmental Protection Agency's (EPA) Prevention of Significant Air Quality Deterioration Requirements and the EPA's non-attainment region requirements.

Appellant now wishes to amend its appeal to include the averment that the DER erred by not including the potential increase in emissions from MSA's existing plant caused by the need to supply diborane to the proposed facility in its calculations of increased emissions caused by the proposed facility. Appellant states in its motion that the averment is offered post hearing because the evidence supporting the allegation, i.e. a need for the substantial expansion in production of diborane at the existing plant, was obtained only at the hearing itself.

Section 21.18 of the board's rules state that the pleadings described in the Pennsylvania Rules of Civil Procedure shall be the pleadings permitted before this board. Rule 1033 of the Pa.R.C.P. allows a party to amend its pleading post hearing to cause it to conform to the evidence offered or admitted. *Stewart v. Uniroyal Inc.*, 72 D. & C. 2d 179 (1974); 2 B ANDERSON PENNSYLVANIA CIVIL PRACTICE §1033.3 and 2 Goodrich Amram 2d §1033.11. We do not believe that MSA is prejudiced by this amendment to the appeal as, in reality, there is no variance between the allegations stated in the appeal as originally filed and the evidence offered at hearing. The amendment merely sets forth facts in support of the conclusion pleaded in the original appeal that the DER erred in not requiring MSA to obtain a P.S.D. permit and erred in not applying the non-attainment region requirements. The amendment to the appeal is therefore only an amplification of the original appeal.

ORDER

AND NOW, this 3rd day of November, 1978, appellant's motion for leave to amend their appeal to conform to the evidence presented at hearing is granted.

ENVIRONMENTAL HEARING BOARD

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DATED: November 3, 1978
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Docket No. 78-132-B

BUTLER COUNTY MUSHROOM FARM
AND ROY LUCAS

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
PETITION FOR SUPERSEDEAS

Petitioner, Butler County Mushroom Farm, Inc., is engaged in the growing and processing of mushrooms in two, worked-out, underground, limestone mines located at West Winfield, Butler County and Worthington, Armstrong County. Petitioner, Roy Lucas, is the supervisor of maintenance at both underground facilities. Petitioner employs approximately 950 persons, 50% of whom work underground.

The Department of Environmental Resources' (DER) Office of Deep Mine Safety has since 1973 been attempting to persuade petitioner, Butler County Mushroom Farm, to implement a "check system" at the mines which would make the names of everyone underground at any given time accessible to a person on the surface. Petitioner has steadfastly refused. Consequently on October 10, 1978, Walter Vicinelly, Commissioner of the Office of Deep Mine Safety, issued an order requiring petitioners to develop and implement a "check system" within 30 days.

The October 10, 1978, order, which was issued under the authority of the Pennsylvania Health and Safety Act, the Act of May 18, 1937, P.L. 654, 43 P.S. §25-1, *et seq.*, (Health and Safety Act), alleged that a check system to identify the persons underground is needed to protect the safety of persons working underground and persons engaged in rescue operations in the event of a fire or like emergency.

Petitioners on October 23, 1978, filed an appeal from the order, together with a petition for supersedeas. The petition for supersedeas avers that: (a) enforcement of the order pending appeal would result in irreparable harm

to petitioners; (b) the likelihood of harm to the public is extremely remote; and (c) petitioners are likely to prevail on the merits of the appeal because the DER lacks the statutory authority to issue the order.

Hearings on the petition were held on October 31 and November 3, 1978, before Member Thomas M. Burke. At the conclusion of the hearings, judgment was reserved until November 13, 1978. Both parties filed briefs on November 9, 1978.

Section 21.16(d) of the board's rules sets forth the criteria by which this board decides whether to grant or deny a supersedeas. Section 21.16(d) states:

> "The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors: (a) irreparable harm to the petitioner, (b) the likelihood of the petitioners prevailing on the merits, (c) the likelihood of injury to the public. In all cases, a supersedeas will be denied in cases where nuisance or significant (more than de minimis) pollution or hazard to health or safety either exists or is threatened during the period while the supersedeas would be in effect."

Initially, petitioners have not shown that they would suffer irreparable harm if the supersedeas is not granted. In fact, the testimony is clear that petitioners will not suffer any harm by complying with the order during the appeal period. The DER has informed petitioners that the time clock card system used by the hourly employees when entering and leaving the mines is a satisfactory check system for the hourly employees. All that petitioners need to do to satisfy the order for those persons who enter the mines without punching the time clock is to require them to sign a register.

Petitioners argue that we should find that they will suffer irreparable harm if the supersedeas is not granted because they are subject to enforcement actions including criminal penalties during the pendency of the appeal. However, petitioners' plight is the same as all others who are recipients of a DER order, to wit, they are all subject to enforcement of the order if they don't comply therewith. A holding that persons who receive DER orders prior to a hearing suffer irreparable harm as a matter of law would be inconsistent with Section 1921-A(c) of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. 510-21(c), which authorizes the DER to issue orders prior to the opportunity for hearing. See *DER v. Crucible*, EHB Docket No. 73-342-B (Opinion and Order Sur Petition for Supersedeas dated December 5, 1973). In any event, to avoid the enforcement action, petitioners only need to have persons sign a register before entering and upon leaving the mines.

Further, in judging the potential harm to the public, we find that the absence of a "check system" in the event of a fire or other such emergency would unnecessarily jeopardize the safety of those underground as well as the safety of those engaged in rescue.

Nor do we believe that petitioners have shown a likelihood of success on the merits. The main thrust of petitioners' argument is that the DER lacks the authority to issue the order.

The DER bases its authority to issue the order on the Health and Safety Act and Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §51 *et seq.*, which authorizes the DER to issue orders to abate nuisances. The authority to enforce the Health and Safety Act and its regulations at underground facilities was transferred to the DER from the Department of Labor and Industry by the Reorganization Plan No. 2 of 1975, 71 P.S. 756.2. Section 2(f) of the Health and Safety Act requires that mines other than coal mines be conducted so as to provide reasonable and adequate protection for workers therein.[1] Section 13 of the Health and Safety Act grants to DER the authority to "issue the necessary instructions to the superintendent, manager or responsible agent of the employer to correct violations of this act or regulations based on this act". It appears from these sections that DER has the authority to issue "instructions" to petitioners to perform or implement certain acts which are reasonable and necessary for the protection of the health and safety of the workers employed in petitioners' underground facilities. Thus, we find that the DER has the statutory authority to issue such orders as the one at issue.[2] (We do not decide the validity of the order as the DER must establish at a hearing that a check system is necessary and reasonable for the protection of workers underground.)

Since we find that the DER has the authority under Sections 2(f) and 13 of the Health and Safety Act to issue the order, that petitioners have not shown that they will suffer irreparable harm and that petitioners have not shown that the public will not be affected by the grant of a supersedeas, petitioners' request for a supersedeas is denied.

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1. Section 2(f) of the Health and Safety Act states:
"All pits, quarries, mines other than coal mines, trenches, excavations, and similar operations shall be properly shored, braced, and otherwise guarded, operated, and conducted as to provide reasonable and adequate protection to workers employed therein."

2. Since we find that the DER has the authority under the Health and Safety Act to issue the order, there is no need to address the applicability of 34 Pa. Code 33.251 or Section 1921-A of the Administrative Code to the order.

ORDER

AND NOW, this 14th day of November, 1978, it is hereby ordered that the petition for supersedeas filed by Butler County Mushroom Farm, Inc. and Roy Lucas is denied.

ENVIRONMENTAL HEARING BOARD

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DATED: November 14, 1978

pmg

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CONCERNED CITIZENS OF FREEPORT : Docket No. 78-068-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and FREEPORT TERMINALS, INC.

OPINION AND ORDER
SUR MOTION TO DISMISS AND
MOTION TO QUASH

This matter is before the board on Intervenor, Freeport Terminals, Inc.'s motion to dismiss and motion to quash appeal.

Appellant, Concerned Citizens of Freeport, has appealed an action of of the Department of Environmental Resources (DER) in issuing two plan approval permits to Freeport Terminals, Inc. for the modification of the coal handling facility and the installation of a crusher screen at intervenor's Freeport Borough, Armstrong County, plant. Appellant asserts in its notice of appeal that:

> "A. The area that the Freeport Terminals occupies is zoned for light industry, the type of work they plan to do is not light industry. B. There will be more air pollution in the Freeport area with the new industry. There are many senior citizens residing in Freeport that will not be able to tolerate the increased air pollution. C. There will be increased noise from the machinery being run at the Freeport Terminals. D. There will be an increase of trucks going into and coming out of the terminals. The truck volume now is disturbing to the residents with all the noise they create. E. The coal dust is ruining our homes."

Intervenor's motion to dismiss is denied. Its assertion that appellant has not stated matters in its notice of appeal which are subject to the jurisdiction of this board is incorrect. Appellant's allegations that the new source will cause "more air pollution" and "increased noise" are sufficient to invoke the jurisdiction of this board.

Intervenor moves that we quash this appeal for reason that:

(a) appellant failed to give notice to the permittee;

(b) The Concerned Citizens of Freeport are not and cannot be a proper party; and

(c) The appeal which was filed in the form of "Mrs. Thomas Wetter, Agent for Concerned Citizens of Freeport, PA", constitutes an unlawful practice of law as an "agent" cannot take an appeal on behalf of others.

Intervenor asserts that it was not served by appellant with a copy of the appeal within the time required by Section 21.21 of the board's rules.[1] However, our docket is silent as to when intervenor was served by appellant.[2] Rather than guess at, or assume, the date of service, we will deny intervenor's motion. (Intervenor's motion contains an averment that it was not served in a timely manner; however, it is not verified on oath or affirmation.)

In support of its argument that the Concerned Citizens of Freeport are not, and cannot be a proper party, intervenor cites *Northampton Residents Assn. v. Northampton Township*, 14 Pa. Commonwealth Ct. 515, 322 A.2d 787 (1974) wherein the Court held that an incorporated association lacked standing to challenge a zoning ordinance because the association itself was not a property owner and thus was not aggrieved. The status of the members of the association as "aggrieved" was of no consequence as the action was filed in the name of the association.

We do not believe that the Northamptom case is determinative of this matter. In Northampton, the association was incorporated; here, appellant is an unincorporated association. The distinction is decisive since corporations, by force of law, are entities separate and distinct from their members. An unincorporated association however is viewed as an aggregate of its members rather than an entity separate and distinct from its members. Thus we do not believe that it is logical or required by law for an unincorporated association to be able to satisfy the criteria for standing, independent of its members.

Finally, we agree with intervenor that appellant cannot file its appeal in the form "Mrs. Thomas Wetter, Agent for Concerned Citizens of Freeport".

Section 21.18 (a) of the board's rules states that:

> (a) Except as provided otherwise in these Rules of Procedure, the various pleadings described in the Pennsylvania Rules of Civil Procedure shall be pleadings permitted before this board, and such pleadings shall have the functions defined in the Pennsylvania Rules of Civil Procedure. The form of pleadings, including where applicable the requirement for verification shall be as specified in the Pennsylvania Rules of Civil Procedure."

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1. Section 21.21 of the board's rules provides that where an appeal is from the granting of a permit, the appellant must serve a copy of its notice of appeal upon the recipient of the permit within 10 days after the filing of the notice of appeal with the board.

2. Our docket shows that appellant did certify to the board on July 28, 1978, that it had served a copy of the appeal on intervenor but it does not state the date of service.

Pa.R.C.P. 2152 provides that an action by an unincorporated association shall be prosecuted in the name of a member or members thereof as trustees *ad litum*. Therefore, in accordance with board rule 21.18 (a) and Pa.R.C.P. 2152, appellant shall amend its appeal to provide for its prosecution in the name of a member or member of the association as trustees *ad litum* for the association.

ORDER

AND NOW, this 24th day of November, 1978, it is hereby ordered that:

(1) Intervenor's motion to dismiss is denied.

(2) Intervenor's motion to quash is denied.

(3) Appellant shall within fifteen (15) days of receipt of this order amend its appeal to provide for its prosecution in the names of a member or members of the Concerned Citizens of Freeport as trustees *ad litum* for the Concerned Citizens of Freeport in accordance with Pa.R.C.P. 2152.

ENVIRONMENTAL HEARING BOARD

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