# COMMONWEALTH

# OF

# PENNSYLVANIA

## ENVIRONMENTAL HEARING BOARD

# ADJUDICATIONS

# 1976

COMMONWEALTH
OF
PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD
ADJUDICATIONS

CONTAINING
CASES DECIDED
BY THE

PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DURING THE
CALENDAR YEAR

1976

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

Chairman.....PAUL E. WATERS

Member.....JOSEPH L. COHEN

Member.....JOANNE R. DENWORTH

# TABLE OF CASES REPORTED IN THIS VOLUME

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## OPINIONS AND ORDERS

FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1976.

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.
>
> (c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified.
>
> (d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have the power to grant a supersedeas.
>
> (e) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall include time limits for taking of appeals, procedures for the taking of appeals, location at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board.

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

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

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

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

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

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

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

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

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

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*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

HOLIDAY POCONO CIVIC ASSOCIATION :

Docket No. 75-156-C

v. : Clean Streams Act--Sewage Treatment Permit

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
AND WESTERN POCONOS MUNICIPAL AUTHORITY,
Intervenor

ADJUDICATION

By Joseph L. Cohen, Member, January 7, 1976

This matter is before the Board on the appeal of Holiday Pocono Civic Association, representing residents of Kidder Township, Carbon County, Pennsylvania, from the action of the Department of Environmental Resources under date of May 21, 1975, granting Western Poconos Municipal Authority a permit to construct a sewage treatment plant to serve Kidder Township, Carbon County, Pennsylvania. Although appellant's notice of appeal does not so state, it is clear that the citizens of Kidder Township, whom appellant represents, are primarily concerned that the construction of the proposed treatment facility will lead to the inordinate and uncontrolled development in Kidder Township with the consequent change in the character of the Township. The appellant seeks, in the interests of its members, to prevent the further development of the Township. It seeks to do so by raising questions as to the propriety of the permit issued in this matter.

On December 19, 1975, the Board held a hearing in this case at which testimony of the parties was taken. At the conclusion of appellant's case and at the conclusion of the hearing, Western Poconos Municipal Authority, joined by the Department of Environmental Resources, moved to dismiss the appeal. At the conclusion of the hearing, Western Poconos Municipal Authority submitted requests for findingsof fact and conclusions of law. The parties agreed that the Board

could enter an adjudication prior to the receipt of the transcript of the record and without further submissions made to it by any party. On this basis, we enter the following:

## FINDINGS OF FACT

1. Appellant is Holiday Pocono Civic Association, P. O. Box 14, Albrightsville, Pennsylvania, 18210, representing residents of Kidder Township, Carbon County, Pennsylvania.

2. Appellee is the Pennsylvania Department of Environmental Resources (hereinafter DER) the agency of the Commonwealth to administer and enforce The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §690.1 *et seq.*

3. Intervenor is Western Poconos Municipal Authority, duly incorporated under the laws of Pennsylvania, the recipient of permit No. 1373401 from DER, which permit authorizes intervenor to construct a sewage treatment plant and sewers to serve the residents of Kidder Township, Carbon County, Pennsylvania. DER issued the permit to intervenor in this matter on May 21, 1975, in response to an application therefor made by intervenor to DER.

4. On June 20, 1975, appellant through its then President, Thomas C. Glenn, and its then Corresponding Secretary, Edna W. Norwood, filed separate appeals with the Board seeking to set aside the permit issued to intervenor by DER.

5. In the notice of appeal filed by Thomas C. Glenn, the reasons for appeal are stated as:

> "Inadequate design of the proposed sewage treatment plant i.e. 30% of the present building homes in the development will not be connected to this project and 60% of the 1400 building lots are not being considered under the proposed project at this time. Secondly is the annual service charge (approximately $246.00 per home unit per year as quoted by the board, in addition to the cost per foot for the hook-up, which at this time, is still unknown)."

6. In the appeal filed by Edna W. Norwood, the reasons for appeal are stated as:

> "1) Inadequate design of proposed sewerage system in Holiday Poconos,
> a.) 30% of present buildings are not being considered.
> b.) 60% of 1400 building lots are not being considered.

"2.) High cost per unit
a.) The present estimate being an annual fee of $246 per unit plus 'hook-up' fees, etc.

"3.) Sparse population of Township
a.) Kidder Township is 72 sq. mi with a permanent population of less than 2,000."

7. Kidder Township, Carbon County, Pennsylvania, is a resort area in the Pocono Mountains having a permanent population of under 2,000 persons and an area of approximately 72 square miles.

8. Appellant offered no evidence to support its contention that the proposed sewage treatment facility for which DER granted a permit to the intervenor was inadequately designed.

9. Appellant's evidence, offered for the purpose of substantiating its contention that the cost of the proposed facility to the residents of Kidder Township was too high, was based upon conjecture and inference with little or no factual basis.

10. Appellant offered no evidence which would in any manner bear upon its contention that the sparseness of the population in the Township did not justify the proposed treatment facility.

11. DER reviewed intervenor's application for a permit for the proposed sewage treatment facility in Kidder Township, Carbon County, Pennsylvania, and found that it complied with applicable departmental rules and regulations relative to the design and construction of sewage treatment facilities and, on that basis, issued a permit therefor to intervenor.

12. Neither the intervenor nor DER in any manner acted improperly with regard to the application for or issuance of the permit in question.

## DISCUSSION

Appellant is concerned that the construction of the proposed treatment facility authorized by permit No. 1373401 issued by DER to intervenor will result in increased development of Kidder Township and thereby lead to a significant deterioration of the environmental amenities in the area. Moreover, it fears that the costs of the facility will constitute an undue financial burden upon the residents of the Township. For these reasons it is vigorously opposed to the granting of the permit in question.

With regard to the issue of financial burden of the proposed facility upon the residents of the Township, §4(a)(5) of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §690.1 *et seq.*, places the responsibility on DER to consider, where appropriate, the immediate and long range economic impact upon the Commonwealth and its citizens of the grant of the permit in question. Appellant has not shown that DER failed to take the economic impact of the grant of the permit into consideration. All that it produced at the hearing was speculation as to what the cost of the facility would be to the permanent residents of Kidder Township. Even if appellant had submitted more factual substantiation of these alleged high costs, that, in and of itself, would not be sufficient to show that DER did not adhere to its responsibilities under §4(a)(5) of The Clean Streams Law, *supra*.

With regard to the contention that the proposed facility would result in undue development in Kidder Township, it is sufficient to cite *Community College of Delaware County v. Fox,* Pa. Commonwealth Ct. , 342 A.2d 468(1975). As Commonwealth Court made abundantly clear in *Fox,*

> " . . . It is clearly not for the DER, under these sections of the Clean Streams Law, to withhold the issuance of a sewer permit where it independently determines that land might be better planned as open or recreational space rather than for commercial or residential uses. . . ." (Footnote omitted) 342 A.2d at 480.

Appellant cannot sustain its appeal basically for two reasons:

1. It has not proved its contentionsby substantial or competent evidence. *Oaks Civic Association v. Commonwealth of Pennsylvania, Department of Environmental Resources,* EHB Docket No. 73-378-C (issued May 8, 1975).

2. Appellant's reasons for appeal, except the reason related to the design capacity of the proposed plant, even if proved, would not support a setting aside of the permit in this case. Therefore, its appeal must be dismissed.

## CONCLUSIONS OF LAW

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

2. Where an appellant does not present competent evidence to support its contentions that a sewerage permit was improperly issued, but merely offers conjecture and speculation, such appellant has not sustained its burden to justify setting aside the permit in question.

3. Neither the Environmental Hearing Board nor DER in considering whether to grant a sewerage permit, may predicate its decision upon whether it is enhancing or retarding industrial or residential development.

4. Even if proved, the fact that the cost to the individual user of a sewage treatment facility may be high is not a sufficient basis to refuse to grant a permit for the construction and operation of the sewage treatment facility.

## O R D E R

AND NOW, this 7th day of January, 1976, the appeal of Holiday Pocono Civic Association from the action of DER in issuing a permit, No. 1373401 to Western Poconos Municipal Authority for a sewage treatment plant and sewer system in Kidder Township, Carbon County, Pennsylvania, is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: January 7, 1976

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

WHEELING-PITTSBURGH STEEL CORPORATION :

Docket No. 74-279-C

v. : State NPDES Certification

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, January 9, 1976

This matter is before the Board on the appeal of Wheeling-Pittsburgh Steel Corporation (hereinafter Wheeling-Pittsburgh) from the action of the Pennsylvania Department of Environmental Resources (hereinafter DER) in issuing a certification to the Federal Environmental Protection Agency (hereinafter EPA) in connection with a National Pollution Discharge Elimination System (hereinafter NPDES) permit. DER issued the certification to EPA on October 21, 1974, but it did not notify Wheeling-Pittsburgh of this certification until November 20, 1974. Wheeling-Pittsburgh mailed an appeal from this action on December 23, 1974, which was received by this Board on December 26, 1974. Thereafter, DER filed a motion to quash the appeal as untimely filed.

The parties submitted briefs on the issue and orally argued the matter before the undersigned on September 25, 1975. On the basis of the briefs and the oral argument, we make the following:

FINDINGS OF FACT

1. Appellant is Wheeling-Pittsburgh Steel Corporation, doing business under the corporation laws of the State of Pennsylvania, with offices at Wheeling, West Virginia 26003.

2. Appellee is DER, the department of the Commonwealth of Pennsylvania authorized to administer and enforce The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §690.1 *et seq.*

3. On October 21, 1974, DER transmitted to EPA, the Federal Agency authorized to enforce the provisions of the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*, a certification in connection with Wheeling-Pittsburgh's application for an NPDES permit. At that time, DER did not forward a copy of the certification to appellant, Wheeling-Pittsburgh.

4. The certification of DER to EPA set forth certain interim and final effluent limitations for appellant's outfall 002, as well as final effluent limitations for outfall 100, both at Wheeling-Pittsburgh's Monessen Works in Westmoreland County, Pennsylvania.

5. Section 401 of the Federal Water Pollution Control Act provides in relevant part:

> "(a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 306, and 307 of this Act. . . .
>
> "* * *
>
> "(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."

6. On November 15, 1974, DER transmitted to Wheeling-Pittsburgh a copy of the certification transmitted to EPA on October 21, 1974. Wheeling-Pittsburgh received the said copy of the certification on November 20, 1974.

7. When it transmitted a copy of the certification to Wheeling-Pittsburgh on November 15, 1974, DER did not include therein a statement that the certification constituted an action of DER which was appealable to the Environmental Hearing Board.

8. On December 2, 1974, EPA issued NPDES permit #0001554, which included the various conditions set forth in DER's certification to Wheeling-Pittsburgh.

9. On December 13, 1974, Wheeling-Pittsburgh requested of EPA an adjudicatory hearing with regard to the permit issued by EPA.

10. On December 23, 1974, Wheeling-Pittsburgh mailed an appeal from the certification of DER to the Environmental Hearing Board which was received and docketed by the Board on December 26, 1974. Thereafter, DER filed a motion to quash the appeal on the ground that it was untimely filed.

## DISCUSSION

Although this case involves many important questions regarding the interface between the Federal Water Pollution Control Act, *supra*, and the State program of water pollution control administered by DER, DER's motion to quash raises the jurisdictional issue of the untimely filing of an appeal. Upon the assumption that the DER certification to EPA was an appealable action, it follows that when Wheeling-Pittsburgh received notice of this action from DER, the time period for appeals to the Board set forth in §21.21(a) of the Rules of Practice and Procedure before the Board, began to run. Thus, in the absence of valid reasons to allow an appeal, *nunc pro tunc*, this appeal must be quashed.

The basis of appellant's petition for the allowance of an appeal, *nunc pro tunc*, is that DER was uncertain as to whether certification made to EPA for NPDES permits,pursuant to the provisions of §401 of the Federal Water Pollution Control Act, were appealable actions and that once it had concluded that certifications were appealable to this Board, DER had an affirmative duty to notify parties that the certifications were such appealable actions. In the absence of such notice, appellant claimed, it did not know whether the action was, in fact, appealable to the Board. Appellant cites no case which upholds its contentions in this regard. Moreover, we are at a loss to understand why this confusion, if it existed, would justify appellant in not filing its appeal within the requisite time period.

Appellant lays great stress on *Layton v. Unemployment Compensation Board of Review*, 156 Pa. Super. 225, 40 A.2d 125(1944). However, there are two distinguishing characteristics in *Layton* which make it inapposite in this matter. First, the court laid great stress upon the fact that unemployment compensation claimants are by and large, as was *Layton*, unrepresented by legal counsel in the initial proceedings. Secondly, the appellant in that case was actively misled as to the proper procedure to file. Furthermore, although a formal petition was not filed within the requisite

statutory period, the claimant did set forth his objections to the action of the Department of Labor and Industry on the day following the receipt of notice to him. Thus, *Layton* is not precedent in this case.

*Nixon v. Nixon,* 329 Pa. 256, 198 A. 154(1938) and *In Re Estate of Purdy,* 447 Pa. 439, 291 A.2d 93(1972), cited by appellant, may be distinguished from the case before us. In both *Nixon* and *Purdy*, no notice of the action of the courts below were given to appellants therein. These cases would have been precedent in the matter before us, had it not been for the fact that DER did ultimately give notice to Wheeling-Pittsburgh of the action taken. The appeal period *in this case* begins to run from the date that Wheeling-Pittsburgh received notice, not from the date that the certification was given EPA. Thus, the notice of the action given Wheeling-Pittsburgh by DER is the distinguishing characteristic making *Nixon* and *Purdy* inapplicable.

Appellant further argues that there were no specific regulations regarding certifications and that, therefore, it had no notice that certification was an appealable action. Regardless of whether it is ultimately decided that certification is an appealable action, we are of the opinion that once notice of the action was given to Wheeling-Pittsburgh, it could have appealed that action within the thirty day period set forth in the regulation. Not having done so, the appeal must be quashed. There is no valid reason for granting an appeal, *nunc pro tunc* , in this matter. Even if Wheeling-Pittsburgh was awaiting a definitive ruling from EPA as to whether it was entitled to an adjudicatory hearing, it certainly could have, in this case, also filed a precautionary appeal with this Board. Not having done so, this appeal must be quashed.

In addition to requesting this Board to allow its appeal, *nunc pro tunc*, Wheeling-Pittsburgh contends:

(1) This Board has no jurisdiction to review the certification made by DER to EPA in this matter for the reason that such certification is not a "final action" of DER, and

(2) DER has no authority to issue the certification.

Regarding the first of these contentions, we do not concur that the certification is not a departmental action. *Sunbeam Coal Corporation v. DER,* 8 Pa. Commonwealth Ct. 622, 304 A.2d 169(1973), cited by appellant, determined that

notices of violation are neither actions nor adjudications engendering review by administrative boards or courts of record. A notice of violation, without more, cannot be construed to be an adjudication nor an action as defined in §21.21(1) of the Rules of Practice and Procedure before the Board for the reason that such notice, even if final, does not by itself carry legal consequences. The same may not be true of certifications made under §401 of the Federal Water Pollution Control Act. Arguably, therefore, the fact that legal consequences may flow from the certification in a given case may bring it within the definition of either "action" or "adjudication".

Furthermore, it is difficult to understand how appellant can contend that the certification made by DER to EPA in this matter was "interlocutory" in nature. The notion of "interlocutory action" embodies the concept that the official or tribunal taking such action contemplates the taking of future action. With regard to DER, therefore, we cannot construe the certification as interlocutory. Thus, even on the basis of appellant's analysis as to what is appealable to the Board, the certification in question does not fall within that analysis.

Whether DER has the authority to issue certifications to Federal agencies pursuant to the provisions of §401 of the Federal Water Pollution Control Act, *supra*, is a question related to the merits of the appeal. Inasmuch as we have concluded that the appeal was untimely filed and that the petition to allow the appeal, *nunc pro tunc*, should be refused, we lack the jurisdiction to enter into this inquiry.

## CONCLUSIONS OF LAW

1. An appeal from an action of DER taken more than 30 days after notice of said action is given to an appellant is untimely.

2. Where an appellant was not prevented either by DER or the Environmental Hearing Board from taking an appeal within 30 days after receipt of notice of DER action, an appeal, *nunc pro tunc*, will not be allowed by the Environmental Hearing Board.

3. The Environmental Hearing Board has the jurisdiction to determine the validity of a certification made by DER to EPA, if a timely appeal therefrom has been filed, for the reason that such certification is not interlocutory action on the part of DER.

4. Where the Environmental Hearing Board quashes an appeal as being untimely filed, it will not enter into an inquiry regarding the merits of the appeal.

## O R D E R

AND NOW, this 9th day of January, 1976, the petition of Wheeling-Pittsburgh for the allowance of an appeal, *nunc pro tunc*, from the action of the Department of Environmental Resources in certifying to the Federal Environmental Protection Agency, certain conditions in connection with an NPDES permit application by Wheeling-Pittsburgh Steel Corporation at its plant in Monessen, is hereby denied and the appeal quashed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: January 9, 1976

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

JOSEPH ROSTOSKY, t/a JOSEPH ROSTOSKY COAL COMPANY

Docket No. 75-257-C

Surface Mining Order

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, January 9, 1976

This matter is before the Board on the appeal of Joseph Rostosky (hereinafter Rostosky) t/a Joseph Rostosky Coal Company, from actions of the Pennsylvania Department of Environmental Resources (hereinafter DER) of August 4 and August 27, 1975. Thereafter, on September 4, 1975, appellant, through his attorney, mailed his notice of appeal to the Bureau of Administrative Enforcement of DER, 505 Executive House, 101 South Second Street, Harrisburg, Pennsylvania 17120. The Bureau of Enforcement received said appeal September 5, 1975, and thereafter transmitted the appeal to this Board. The Board received the appeal on October 3, 1975, and docketed the same. Thereafter, DER filed a motion to quash the appeal as untimely. It is the disposition of this motion which is the subject matter of this adjudication.

FINDINGS OF FACT

1. Appellant is Joseph Rostosky, t/a Joseph Rostosky Coal Company who conducts mining operations in Somerset Township, Washington County, Pennsylvania.

2. Appellee is the Pennsylvania Department of Environmental Resources which administers and enforces the Bituminous Coal Open Pit Mining Conservation Act, Act of May 31, 1945, P. L. 1198, as amended, 52 P. S. §1396.1 *et seq.*

3. On August 4, 1975, DER, acting through W. E. Guckert, Director of the Bureau of Surface Mining, sent Rostosky the following letter:

> "An administrative hearing was held July 21, 1975, relative to the blasting done over a deep mine contrary to the condition of Surface Mining Permit No. 334-4 at the operation on the Hays' farm. This hearing was held before Mr. Jack Sheffler, Hearing Examiner, from the Office of Enforcement. You represented your own company. Inspector at Large, Jacob Leighty, Mine Conservation Inspector William Cherry, and Mr. Donald J. Zutlas represented the Bureau of Surface Mine Reclamation of the Department of Environmental Resources.
>
> "A decision has been received from the hearing examiner. He has submitted recommendations and we are notifying you to comply with the following:
>
> "1. Your company is assessed a penalty of $1,000. A check shall be made payable to the Department of Environmental Resources, Surface Mining Conservation and Reclamation Fund.
>
> "2. You are permitted to remove the coal from the operation that resulted from the blasting, plus any coal that can be mined on the permitted area without further blasting.
>
> "3. A schedule shall be submitted concerning the time necessary to remove the available coal.
>
> "4. The above schedule shall specify the time necessary to complete the backfilling, leveling, grading, and planting as called for by the permit following coal removal.
>
> "5. Any permits presently being processed by the Department will not be issued until the assessed penalty of $1,000 is paid and the schedule of completion time received and accepted by the Department.
>
> "6. The surface mining permit will be cancelled at the time all reclamation is done, approved by the Department, and the bond released. This is necessary to eliminate any future mining over the area of the deep mine that requires blasting.
>
> "The decision from the hearing and the order contained in this letter was read to you by telephone by Mr. Donald Zutlas of the Bureau and Mr. Jack Sheffler, Hearing Examiner, from the Office of Enforcement in the Department. You did agree with the above; therefore, cease order was lifted on the Hays' Farm operation under the subject mining permit. This was with the understanding that coal could be removed providing there is no blasting.

* * * * * * *

4. On August 27, 1975, DER, acting through Donald J. Zutlas, Chief, Licensing and Bonding Division, Bureau of Surface Mine Reclamation, sent Rostosky the following letter:

> "I have conferred with Bureau Director, W. E. Guckert, on my letter to you dated August 19, 1975. The four (4) year schedule is not acceptable to the Department.

"He has ordered that you accomplish the following:

"1. Remove all remaining coal as promptly as possible that resulted from the unauthorized blasting, plus any coal that can be mined in the present mining permit area without further blasting.

"2. Operable backfilling equipment shall not be removed from this permit and must stay in operation, backfilling concurrent with the mining.

"3. All remaining backfilling, leveling, and final grading shall be done promptly after coal removal, to be followed by restoration of all available topsoil and subsoil.

"4. Completion report and certified map to be filed immediately after completion of item No. 3.

"5. A planting plan shall be prepared concurrent with item No. 4 to be followed by planting to permanently restore vegetation to the area.

"The schedule shall list specific dates, as applicable, to comply with the above order. Prompt removal of the coal will result in your being able to prepare a realistic and reasonable schedule. Until it is received and accepted by the Department, no further permits will be issued to your company."

5. On September 4, 1975, Rostosky, by his attorney, sent his notice of appeal to the Bureau of Enforcement of DER accompanied by a letter of transmittal as follows:

"Commonwealth of Pennsylvania
Department of Environmental Resources
Bureau of Administrative Enforcement
505 Executive House
101 South Second Street
Harrisburg, Pennsylvania 17120

In Re: Mining Permit No. 334-4
M.D. Permit No. 3274SM7
Somerset Township
Washington County
Joseph Rostosky, trading as
Joseph Rostosky Coal Co.
Our File No. T-75-153

Dear Sirs:

Enclosed you will find an Appeal which is to be filed with your Department. Copies of the same have been sent to the Officers who have issued the order and/or decision which adversely affects my client."

6. On September 22, 1975, prior to the filing of any appeal in this matter, Howard J. Wein, Esquire, entered his appearance on behalf of DER with the Board.

7. On October 3, 1975, the Environmental Hearing Board received the appeal of Rostosky, as transmitted to it by the Bureau of Administrative Enforcement of DER.

## DISCUSSION

This matter raises the question of whether transmittal of an appeal to the DER office of Administrative Enforcement within the appeal period set forth in §21.21(a) of the Rules of Practice and Procedure before the Board is a timely appeal even though it is not filed with the Board within such period of time.

We have previously held in *Borough of Grove City v. Commonwealth of Pennsylvania, Department of Environmental Resources,* EHB Docket No. 74-267-C (issued April 10, 1975), that failure to file an appeal with this Board within the time specified in §21.21(a) of the Rules of Practice and Procedure before the Board deprives us of jurisdiction to hear the merits of the appeal. Section 21.21(b) of these rules directs that appeals be filed at the offices of the Board at the Blackstone Building Annex, 112 Market Street, Harrisburg, Pennsylvania 17101. Clearly, the filing of said appeal at some other place than the headquarters of the Board is not in compliance with the rules. Failure to comply with the requirements of §21.21 of these rules deprives the Board of jurisdiction to hear the appeal. *Allegheny River Protective Association, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources, and Emlenton Limestone Company, Inc., Intervenor,* EHB Docket No. 74-280-C (issued August 12, 1975).

Section 21.21(e) of the rules provides:

> "The board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; *the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in Courts of Common Pleas in the Commonwealth. . . .*" (Emphasis added)

The prevailing law regarding the timelinesss of an appeal and the requirements of direct compliance with procedures to perfect an appeal is set forth in the *Delmont Borough Annexation Case,* 2 Pa. Commonwealth Ct. 496, 276 A.2d 549(1971). In light of this provision of the rules and the clear, unambiguous language of *Delmont Borough Annexation Case, supra,* it is clear that these appeals must be quashed.

## CONCLUSIONS OF LAW

1. The filing of an appeal with the Bureau of Administrative Enforcement of DER, although within the time specified in §21.21(a) of the Rules of Practice and Procedure before the Board, does not constitute compliance with such provision inasmuch as §21.21(b) of these rules requires filing at the offices of the Board.

2. Failure to comply with §21.21(b) of the Rules of Practice and Procedure before the Board within the time period set forth in §21.21(a) thereof, deprives the Board of jurisdiction to hear such appeal.

## O R D E R

AND NOW, this 9th day of January, 1976, the appeal of Joseph Rostosky, t/a Joseph Rostosky Coal Company, from the actions of DER under date of August 4 and August 27, 1975, is hereby quashed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

## DISSENTING OPINION

By Joanne R. Denworth

I dissent. The filing of this appeal with the Department of Environmental Resources rather than the Environmental Hearing Board was a careless mistake, which no doubt arose from the often-made, but faulty assumption that the Board, which is constituted to hear appeals from action of the Department, is part of the Department. However, I do not think this mistake should be regarded as a jurisdictional defect in this case since the transmittal of the appeal to the Department did serve to notify the Department, which is the only other party to the case, of the timely taking of an appeal. I believe the mistake here should be treated as a harmless procedural error that will be overlooked where no prejudice results. See, *e.g.*,

*Cleary v. Columbia County Agricultural Assn.*, 70 D. & C 476 (C. P. Columbia Cty. 1950) and Rule 126 of the Pennsylvania Rules of Civil Procedure.

ENVIRONMENTAL HEARING BOARD

JOANNE R. DENWORTH
Member

DATED: January 9, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

CITY OF YORK, et al : EHB Docket Nos. 75-073-W, 75-122-W, 75-123-W, 75-132-W, 75-138-W, 75-139-W, 75-141-W, 75-142-W, 75-143-W, 75-144-W and 75-145-W
Solid Waste Management Act

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

BY Paul E. Waters, Chairman, Issued January 13, 1976

This matter comes before the Board as an appeal by various municipalities in York County, from an order of the Department of Environmental Resources, hereinafter DER, requiring them to implement a plan approved under the Solid Waste Management Act, by specific action. The City of York and a number of other municipalities previously adopted the York County Solid Waste Management Plan. This plan as finally completed by the York County Solid Waste Authority, hereinafter Authority, provided that in the areas of the County here in question, all solid waste would go to the Hopewell Township site for final disposal. This was unsatisfactory to a number of the municipalities upon whom the Authority was depending for sufficient business to make its operation economically feasible. The dissatisfied municipalities then failed to pass ordinances delegating their municipal solid waste powers to the Authority. DER brought the matter to a head on March 7, 1975,[1] when it issued the order which is the subject of this appeal, requiring the municipalities to haul all solid waste to the Hopewell site and to pass a specific ordinance including the delegation of powers to the Authority.

FINDINGS OF FACT

1. The appellants are the City of York and eleven other municipalities in York County.

2. The York County Solid Waste Management Plan, hereinafter Plan, divided York County into five planning areas designated A through E.

3. The greater York metropolitan area is in planning area C.

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1. This order to the City of York was supplemented by an order of April 24, 1975, and the orders to the various municipalities was sent on May 8, 1975.

3. Planning areas D & E encompass all of York County South and Southeast of planning area C, and are the major areas in dispute.

4. At the time the Plan was formulated there were no landfills permitted by DER in any of planning areas C through E.

5. Under alternative 6 of the Plan, a single refuse site would be provided in planning area D and refuse from all the municipalities in planning areas C, D & E would go to this single disposal site. Hopewell Township which is in planning area D was specifically mentioned by the Plan as a potential disposal site. This alternative also contemplated that a transfer station with shredding facilities would be provided in the City of York and that shredding facilities would also be provided at the landfill site.

6. Alternative 6 was selected by the Plan as the alternative to be implemented.

7. Shredding facilities are not economically feasible given the volume of solid waste presently being delivered to the Authority site. Such facilities need at least 200 tons per day to be feasible, and it has not been provided.

8. The Authority site is presently receiving approximately 86 tons per day of solid waste.

9. The Authority is willing to finance, design, construct and operate all the shredding facilities and the transfer station contemplated by the Plan when and if it receives a steady supply of solid waste sufficient to economically justify said facilities.

10. The Plan indicated that its recommendations were flexible so that the boundaries of the five planning areas could be changed. However, the Plan also stated that a county refuse authority would be established and vested with the responsibility to select and purchase disposal sites for the county as a whole.

11. The Plan calls for legislative and administrative implementation of the Plan as follows:

a. Approval of the Plan by each of the county municipalities.

b. The adoption by all county municipalities of a strong solid waste ordinance covering all aspects of solid waste management.

c. Establishment of a County Solid Waste Authority under the Municipal Authorities Act of 1945 by the York County Commissioners.

d. The passage of ordinances or resolutions by all county municipalities delegating their powers for refuse disposal to the Authority, *e.g.*, the appropriate specification by a municipality of the disposal site for all the solid waste collected from it.

12. All of the appellants have adopted the Plan by resolution or ordinance as their Solid Waste Management Plan, and it has been approved by DER.

13. The resolution of the City of York not only adopted the Plan but recognized the existence of the Authority to implement the Plan.

14. On January 8, 1973, the Authority sent to each of the appellants a Model Refuse Ordinance which was similar to the Model Refuse Ordinance appended to the Plan except that Paragraphs 5 and 7 of the Authority's proposed Ordinance required that solid waste be deposited only at a site approved by the Authority, but the Model ordinance which was part of the Plan approved by the appellants, required only disposal at a permitted site.

15. None of the appellants has adopted an ordinance identical to the Authority's 1973 proposed ordinance.

16. On or about February 14, 1975, Authority informed DER that appellants had failed to adopt suitable refuse ordinances and to submit notification thereof to the Authority on forms provided for this purpose on January 8, 1973.

17. Of the appellants, only Hallam Borough, by contract, requires its solid waste refuse hauler to dispose of solid waste at the Authority's site. None of the appellants require, by ordinance, that solid waste collected therein be disposed of at a site approved by the Authority, but simply require a site approved by DER.

18. DER's policy since at least June 4, 1973, has been to issue solid waste permits to all applicants based solely on the technical merits of the application without regard to the status of either existing or proposed solid waste planning for a given area. However, DER has also held that municipalities which have an officially adopted plan must implement that plan so that if a landfill operator receives a permit but is not in the plan he must negotiate an amendment thereto in order to ensure himself business.

19. None of the appellants has submitted to DER a proposed amendment to the Plan recognizing the Modern Trash site which many of them use or any other site.

20. Pursuant to the Plan the Authority is required to acquire enough landfill space to provide for the needs of York County for at least 15 years.

21. The application for the Modern Trash site indicates a per day capacity of 250 tons per day on a six day basis, which DER does not deem sufficient to carry out the Plan for areas C, D & E.

DISCUSSION

These cases arising under the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, as amended, 35 P. S. §6001, *et. seq.*, require for initial discussion, that we also look to the law of contracts, and to the law which limits our own jurisdiction.

At the outset it is important to emphasize that the key entity in this dispute, the York County Solid Waste Authority, is not a party to these proceedings.[2] We must, in our effort to unravel this legal knot before us, look beyond the severe economic problems which it is alleged will befall the Authority should our decision be contrary to DER.

The Solid Waste Management Act, *supra*, requires each municipality here in question to adopt and submit to DER an official plan for solid waste management within their respective areas, and when approved, to implement the Plan. Subsection 10(c) of the Act empowers municipalities to contract with an Authority to carry out their responsibilities for collection, and disposal of solid waste. In this case the question arises as to whether the municipalities did contract with the Authority, as authorized by the Act and if so what obligations flow therefrom. There is no dispute that the municipalities adopted the Authority's Plan, but it is argued that more was required in order to complete the contractual arrangement. Specifically, the municipalities argue that they did not, by ordinance or otherwise, delegate their municipal powers concerning solid waste disposal to the Authority. The fact that they are now ordered by DER to pass just such an ordinance, supports their view that the contractual arrangement was never completed. as will more fully appear hereinafter we do not find this issue to be determinative.



2. The Executive Director of the Authority appeared as a witness for DER.

It is further argued that the Authority's Plan was adopted by the municipalities, but was never fully implemented by the Authority. The Plan, for example, calls for transfer stations,[3] a shredder which never materialized and 20 year financing of the obligation,[4] which was not obtained.

These appear to be breaches of the contract by the Authority, which the municipalities now put forth to justify their own non-performance.

It is obvious from the foregoing that the kinds of questions which the Board is being called upon to resolve are perhaps more properly for an *Assumpsit* action than for an administrative proceeding. This raises the question of how DER is involved and what is its proper role.

The powers and duties of DER as they relate to the questions before us are to:

* * * * * * *

> "(4) Develop a Statewide solid waste management plan in cooperation with local governments, the Department of Community Affairs and the State Planning Board. When feasible, emphasis shall be given to area wide planning.
>
> "(5) Provide technical assistance to municipalities, counties and authorities including the training of personnel.

* * * * * * *

> "(9) Issue such permits and orders and conduct such inspections as may be necessary to implement the provisions of this act and the rules, regulations and standards adopted pursuant to the act." 35 P. L. 788, No. 241, §6

The basic decision making power as it relates to solid waste disposal remains with the local municipality. Act 35 P. S. §6010 (c) provides:

* * * * * * *

> "(c) Municipalities may contract with any person, other municipality, county or authority to carry out their responsibilities for the collection, transportation, processing and disposal of solid wastes."



3. The Authority argues that this must be done in phases, and the lack of support has made this added expenditure impossible.

4. The financing obtained was for only 10 years, but the cost per ton is still alleged to be in line with the projected cost.

DER has its primary function and control in this area through the permit issuance procedure established by the Act. DER must either approve or disapprove the permit application.[5] Once such contract has been made the enforcement thereof is a matter for the courts in the county where the parties have made the contract. Clearly such contract disputes were never intended to come before this Board for resolution. DER by its orders of March 7 and May 8 has attempted to bring jurisdiction to this Board over a clear contract dispute between several municipalities and the Authority which is not even a party to this action. We would be reluctant to dispose of these issues on such a record, even if we otherwise had jurisdiction--which we do not.

The Solid Waste Management Act, *supra*, as indicated does give DER broad, but not unlimited powers. We believe there is an analogy to be properly drawn between the Pennsylvania Sewage Facilities Act,[6] Act of January 24, 1966, P. L. 1965, 1535 §1 and the Pennsylvania Solid Waste Management Act, *supra*. Under the former this Board and the courts have said that DER could issue orders compelling municipal action in solving sewage problems. That Act specifically provides at 35 P. S. 750.10(3) that DER has the power to order the *implementation of official plans and revisions thereto*. We note that the Solid Waste Management Act, *supra*, contains no such specific authorization. Not only do we find no such specific authorization in the Act, but reading the Act as a whole we cannot help but conclude that the legislature wanted to leave the major responsibility and control over solid waste matters to local government. The control given to DER is found in §6011(a):

> "(a) If the department finds that the storage, collection, transportation, processing or disposal of solid waste from a municipality subject to the provisions of section 10 (a) is causing pollution of the land, air or waters of the Commonwealth or is creating a public nuisance, the department may order the municipality to alter its storage, collection or transportation systems or provide such storage, collection or transportation systems as will prevent pollution

5. The permit can, of course, be suspended or revoked for cause. This is the real control.

6. Both Acts require submission of municipal plans to DER for approval.

and public nuisances. Such order shall specify the length of time, after receipt of the order, within which the facility or area shall be repaired, altered, constructed or reconstructed. Any party aggrieved by an order under this section shall have the right of appeal in accordance with the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law."

* * * * * * *

The methods contemplated for the exercise of DER's control are three fold. First as provided by §6001 (c): "The department may institute an action in mandamus in the court of common pleas of the county in which the municipality is located to compel compliance with an order issued under subsection (a) of this section." Secondly and perhaps its most potent weapon is the power to grant, suspend and revoke permits. It would seem clear that DER could refuse to grant a permit where it would run counter to another approved plan and would adversely affect the environment or economic development of the area.[7] Finally, DER may bring a suit in equity in any county where a violation or nuisance has occurred, to restrain the same.[8]

Reduced to its simplest terms what DER has attempted to do by its order is to control the contractual rights between the Authority and individual municipalities by issuing an injunction. Not only is DER without authority to issue such restraining orders as a procedural matter—but in addition it lacks power to resolve the contractual rights between the other parties as a matter of substantive law, except as above outlined.

DER could suggest and recommend that the municipalities in question enter a contract with the Authority. If it deemed such arrangement the only proper way to solve the area solid waste problems, it could refuse to grant a permit for any other disposition of that solid waste. The reasonableness and

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7. Section 6007 (e) provides: "Any permit granted by the department, as provided in this act, shall be revocable or subject to suspension at any time the department shall determine that the solid waste processing or disposal facility or area (i) is, or has been conducted in violation of this act or the rules, regulations, or standards adopted pursuant to the act, or (ii) is creating a public nuisance, or (iii) is creating a health hazard, or (iv) adversely affects the environment or economic development of the area."

* * * * * * *

8. Section 6013 provides: "In addition to any other remedies provided in this act, the secretary may institute a suit in equity in the name of the Commonwealth in the court of common pleas of the county where the violation or nuisance exists for an injunction to restrain a violation of this act or the rules, regulations or standards adopted thereunder and to restrain the maintenance of a public nuisance."

propriety of that action would, of course, be reviewable by this Board on appeal by any aggrieved party. In answer to the question of why DER cannot issue an order requiring the immediate implementation of an approved solid waste plan, the answer is simple. The Act does not say that it has such power, and therefore it does not. It must be kept in mind that the legislature did provide an adequate remedy for dealing with any health hazard or nuisance created by the disposition of solid waste. Where, however, as here, solid waste is in fact being disposed of at a properly operated and permitted site and the only question raised is whether there is or was a contractual arrangement for a different disposition of that solid waste, we believe that to be a matter not properly before this Board.

It cannot be denied that the various statements in the Plan upon which DER relies to support the proposition that all solid waste must go to the Hopewell site, are less than crystal clear. DER itself must concede that there is no single statement precisely to this effect anywhere in the voluminous Plan. In short, the Plan is, at least, ambiguous on the question. It is for this reason that the intention of the parties to the alleged agreement, becomes relevant. The other legal obstacle which is raised by this ambiguity, is that it must be resolved against the party who wrote it. In this case, the Authority. We believe in addition, DER has failed to show that approval of the Plan by the various appellants is alone sufficient for enforcement thereof without the delegation of their solid waste management prerogatives to the Authority by a properly enacted ordinance--also lacking in these cases.

Much has been made of the fact that the municipalities here in question have already entered contracts with refuse haulers to simply dispose of the refuse at an approved site--not necessarily the Hopewell site as DER argues is mandated by the Plan. It is contended that DER's order is unconstitutional in that it impairs the obligation of contracts in violation of Article I, Section 10[9] of the U. S. Constitution. Inasmuch as we have decided that DER is without authority to issue the orders appealed, we of course do not reach a Constitutional question. We do however believe that if a proper judicial tribunal finds that

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9. A similar provision appears in Article I, Section 17 of the Pennsylvania Constitution: "No . . .law impairing the obligation of contracts, . . . shall be passed".

there is a contract with the Authority and that municipal solid waste powers have been properly delegated to it,[10] the aforementioned provision will not prevent enforcement of that contract under the facts of this case.[11]

## CONCLUSIONS OF LAW

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

2. Under the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, as amended, 35 P. S. §6001, *et seq.*, DER is not authorized to issue orders to implement a solid waste management plan approved by it, except as it relates to a health hazard, nuisance or other matters specifically stated in the Act.

3. Where an Authority has attempted to contract with municipal governments to carry out the solid waste disposal responsibilities of the latter, the Environmental Hearing Board has no jurisdiction over any dispute as to the existence, terms or breach of that contract even though DER has approved the plan which is the basis for the alleged contract.

## O R D E R

AND NOW, this 13th day of January, 1976, the appeals of the City of York, et al, are hereby sustained and the orders issued to the respective municipalities in the above matter are hereby revoked.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

Note: Joanne R. Denworth did not participate in the decision in this case.

Joseph L. Cohen is filing a concurring opinion which is attached.

DATED: January 13, 1976

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10. We do not believe that they have been.

11. We are not unmindful of the possible results of this adjudication. In that regard the Board feels strongly that reasonable public officials should be able to meet together and resolve a public problem such as the one outlined in this case. This should be done in a spirit of caring for the public trust, not in an adversary effort to determine who was right and who was wrong. If the Authority fails to carry out its public purpose there will be no need to ask who has the blame. There will be enough to go around.

CONCURRING OPINION

By Joseph L. Cohen, Member

I concur reluctantly with this adjudijation for the reason that the Act does not authorize DER to order a municipality to dispose of its solid waste in a given area. I say "reluctantly" for the reason that the absence of such authority precludes the department from insisting upon a rational system of solid waste management and disposal. Moreover, I am deeply disturbed by the spectacle of the appellants in this matter, all political subdivisions of the Commonwealth, attempting to renege from a duly adopted and duly approved solid waste management plan under the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, No. 241, 35 P. S. §6001 *et seq.* (Supp. 1975-1976). Nevertheless, it is clear to me that the Act does not permit DER to order the implementation of a plan in this circumstance.

First, the clear inference of §7(a) of the Act [35 P. S. §6007(a)] is that municipalities may have their wastes transported to permitted landfills which are not part of their approved plan, if they have the requisite permit to transport said wastes. Second, there are only two provisions of the Act, §5(i) and 11(c), which authorize the department to initiate mandamus proceedings. The first provision relates to compelling municipalities to submit plans pursuant to §5 of the Act. In the other instance, mandamus is specifically provided in the instance in which the department is seeking to compel compliance with an order issued under §11(a). Inasmuch as the order issued in this case does not fall within the provisions of §11(a), mandamus would not be authorized under §11(c).

Section 5(9) of the Act confers upon DER the authority to issue such permits and orders . . . as may be necessary to implement the provisions of the Act and the rules, regulations and standards adopted pursuant thereto. Inasmuch as the substantive provisions of the Act merely authorize the department to proceed by compulsion against municipalities to two limited instances, it is clear that this provision of the Act would not enlarge that power. Furthermore, in view of the general principles with regard to mandamus proceedings, it is doubtful whether

such an order could effectively be enforced. For these reasons, I concur in the adjudication, albeit reluctantly.

ENVIRONMENTAL HEARING BOARD

Joseph L. Cohen

JOSEPH L. COHEN
Member

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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In the Matter of:

CITY OF YORK, et al

Docket No. 75-073-W, 75-122-W
75-123-W, 75-132-W, 75-138-W, 75-139-W,
75-141-W, 75-142-W, 75-143-W, 75-144-W
and 75-145-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ORDER

AND NOW, this 21st day of January, 1976, the adjudication in this matter issued, January 13, 1976, is corrected to delete the statement that "Joanne R. Denworth did not participate in this decision in this case" and substitute the following concurring and dissenting opinion.

CONCURRING AND DISSENTING OPINION

I concur in the result because I do not think it is sufficiently clear under the solid waste management plan as adopted by these York County municipalities that the Authority could select and develop a solid waste site without further consultation and delegation from them, and, therefore, the Department's order in this case cannot be sustained. However, I dissent from the conclusion that The Solid Waste Management Act does not authorize the Department to issue an implementation order to a municipality that has adopted a solid waste management plan and is not abiding by the plan. I think §6006.9 of the Act (giving the Department power to issue orders to implement the Act) and §6010 (a) (giving municipalities the duty to implement their solid waste management plans) can and must be construed to authorize appropriate implementation orders. If the Act is not interpreted in this way the planning process required by it will be an expensive exercise in futility, since there is no apparent enforcement power other than the Department that could require a municipality to abide by its plan. A statute must be construed to avoid an unreasonable or absurd result or one that would defeat the purpose of the statute,

Statutory Construction Act, Act of May 28, 1937, P.L. 1019, art. iv, §52, 46 P.S. §552 (1) and see e.g. *McGregor's Estate* 350 Pa. 93, 103-104, 38 A2nd 313 (1944); *Comm ex rel Duff v. Eichmann*, 353 Pa. 301, 304-305, 45 A2nd 38 (1946); *Pooler v. Grasselli Chemical Co.*, 150 Pa. super 595, 597, 29 A2nd 212 (1943), and I believe that to construe The Solid Waste Management Act to require a plan that never has to be implemented defeats the purpose of the Act.

ENVIRONMENTAL HEARING BOARD

Joanne R. Denworth
Member

DATED: January 21, 1976
vf

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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(717) 787-3483

In the Matter of:

WARREN K. SAMPLES

Docket No. 75-180-W

WATER OBSTRUCTION ACT

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

BY Paul E. Waters, Chairman, Issued January 22, 1976

This matter comes before the Board as an appeal from the issuance by the Department of Environmental Resources, hereinafter DER, of a permit under the Water Obstructions Act, Act of June 25, 1913, P. L. 555, as amended 32 P. S. 381, *et seq.*, to the County of Lancaster, for the construction of a culvert to replace a bridge crossing the Coon Creek. Appellant, Warren K. Samples, is a resident of Lancaster County with property abutting the creek and based on his experience of previous flooding in the area and his experts he believes the culvert, which will be substantially smaller than the presently unusable old bridge, will cause damage to his property and perhaps endanger life.

FINDINGS OF FACT

1. Appellant, Warren K. Samples, owns land on all four sides of the proposed culvert, and resides within a few hundred feet of the water.

2. By application dated May 20, 1975, the County of Lancaster applied to DER's Division of Dams and Encroachments for a permit to erect a plate-arch culvert having a span of 23 feet 0 inches with a rise of 6 feet 11 inches at Station 3+82 on T-301 in Little Britain Township, on Coon Creek.

3. T-301 is a lightly traveled township road and the land surrounding the proposed culvert site is rural in character as the land adjacent to Coon Creek

and extending for some distance on both sides is either lawn or pasture/woodland.

4. There is now a bridge across Coon Creek at Kinseyville owned by the County of Lancaster which carries Little Britain Township Road #301 over Coon Creek.

5. This bridge is approximately 1,000 feet upstream along the thread of Coon Creek from the confluence of Coon Creek with its parent stream, Octoraro Creek, and is within a special flood hazard area on plate #H08 of FIA (HUD) Flood Hazard Boundary Maps of Little Britain Township, Lancaster County, Pennsylvania.

6. Sections 105.91 and 105.104(d) of the Department's Regulations list the information required to be submitted to DER by an applicant seeking a permit for construction of a culvert.

7. Independent calculations were made by DER which showed the proposed culvert would pass a 25 year flood, with a safety factor, according to the Penn State University III (PSU III) method.

8. Section 105.101(b) authorizes the approval of a culvert with a waterway opening smaller than required by curve "B", sometimes referred to as the 100 year flood, in regions where no "drainage" will result.

9. DER interprets subsection 105.101(b) as reading "damage" rather than "drainage", on the basis that it is an obvious error.

10. The existing bridge has a clear span of 62 feet between abutments, a waterway opening of 657.7 square feet, does not restrict the flow of Coon Creek at any stage, and allows Coon Creek to flow through appellant's land in its natural mode, course and volume at any stage.

11. The existing bridge does not create any potential of danger from flooding either to life or property, does not change the natural course of Coon Creek, and does not create the potential to change or divert the natural course of Coon Creek.

12. The County of Lancaster proposes to tear down the existing bridge and replace it with a plate-arch culvert on the same site. The proposed culvert has a waterway opening of 165.6 square feet - a waterway opening only one-fourth as large as the waterway opening of the existing bridge.

13. On March 5, 1975, the County of Lancaster submitted data to DER which purported to prove that the peak flood times of Coon and Octoraro Creeks occur 21 hours apart and asserted that this proved there was no necessity to submit the complete hydrologic and hydraulic reports including backwater computa-

tions, which DER had requested, through Mr. Butler.

14. On April 2, 1975, 28 days after the County of Lancaster submitted the data of March 5, 1975, Mr. Butler again informed the County that it should submit the complete hydrologic and hydraulic reports with detailed analysis of the interaction between Coon Creek and Octoraro Creek he had previously requested.

15. The complete hydrologic and hydraulic reports with backwater computations requested by Mr. Butler were never submitted to DER by the County of Lancaster because the County of Lancaster felt it should not have to spend the money to make the reports.

16. On May 7, 1975, the County of Lancaster submitted to DER its application for a permit to build the proposed culvert with a letter from its solicitor repeating its reliance upon the data submitted on March 5, 1975, and refusing to design the proposed culvert to pass a 100 year flood.

17. The waterway opening of the culvert the County of Lancaster proposes to build to replace the existing bridge was not designed using Curve "B" but instead was designed using the Pennsylvania State University III method from a PennDot manual to pass a flow of 1,150 cubic feet per second - a 25 year flood.

18. The Regulations of DER which control the size of waterway openings of bridges and culverts as published in 25 Pa. Code Section 105.104 generally require the use of Curve "B" which would require that the proposed culvert have a waterway opening at least large enough to pass a flow of 2,079 cubic feet per second. Curve "B" is the Pennsylvania equivalent of the 100 year flood.

19. DER did not require the County of Lancaster to use Curve "B" in designing the culvert it proposes to build to replace the existing bridge in the belief that its Regulation as published in 25 Pa. Code 105.101(b) excused the use of Curve "B" in this case and allowed DER to consider other factors in passing upon the County's application, those factors being the type of structure, the type of road and the degree of risk.

20. The size of the waterway opening that should be used if the County of Lancaster does replace the existing bridge with another bridge or a culvert cannot be determined accurately unless backwater computations are made.

21. The data submitted to DER by the County of Lancaster in support of its application for a permit to build the proposed culvert assumed that the proposed culvert would be governed by inlet control.

22. Physical conditions at the site are such that the culvert of the County of Lancaster proposes to build to replace the existing bridge may be governed by outlet control not inlet control, requiring a much larger waterway opening than that proposed by the County of Lancaster.

23. The waterway opening of the culvert the County of Lancaster proposes to build to replace the existing bridge may not be wide enough to allow large logs and entire trees to be carried through it and may clog during floods.

DISCUSSION

The County of Lancaster applied for and received a permit from DER to construct a culvert to take the place of an old bridge over Coon Creek which is no longer usable.

The Commonwealth regulates the right of the County to build bridges and water obstructions under the Act of June 25, 1913, P. L. 555 of §1-10 as amended (32 P. S. §681-691). The administration of this Act is within the jurisdiction of DER. The Act provides:

> . . . "It shall be unlawful for any person. . .to construct any dam or other water obstruction;. . .or in any manner to change or diminish the course, current,or cross section of any stream . . . without the consent or permit. . ." of DER. 32 P. S. §682

Pursuant to this statute DER promulgated certain regulations concerning water obstructions. 25 Pa. Code §105.101(b) provides: . . . "In regions where no drainage[1] will result from too small an opening, it may not be advisable to provide for large floods which may occur only occasionally, and an opening large enough to pass the frequent flood[2] is all that is necessary." . . . The leading case on this area of law, *Commonwealth Water and Power Resources Board v. Green Spring Co.*, 394 Pa. 1, states that the Act is intended to prevent water obstructions which present a potentiality of danger to life or property. In issuing permits under this Act, the above limitations must be follwed by DER. Let us apply these guide-

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1. Although the regulation used the word *drainage*, this is an obvious typographical error and all parties agree that it was intended to say *damage* or *danger* but not *drainage*.

2. The regulations establish a requirement to provide for the 25 year flood, which DER has reasonably construed to be the frequent flood.

lines to the facts.

The permited culvert will take the place of a bridge which is more than three times larger for the purpose of water passage.

Appellant has argued that the culvert must be designed for the 100 year flood, and bases this on Federal statutes,[3] and proposed State legislation.[4] This argument carries its own refutation. There would be no need for new State legislation requiring 100 year flood figures be used for all water obstructions, if the law already requires it in all cases. We believe the regulations as construed by DER to require construction based on the 25 year flood in the circumstances of this case, to be proper. Certainly there are locations where 100 year flood figures would be required but this small stream in a rural area which is lightly traveled has no such mandate.

Much expert testimony was presented on the very technical question of whether the culvert will have inlet or outlet control. After all is said and done and the conflicting testimony of all experts on both sides is analyzed the only thing that is clear, is that the answer is not clear. It is not a question of who told the truth, but whether, without further study, either party can be sure of the validity of his opinion--no matter how strongly held. Another matter which probably deserved more attention than it received is the question of the likelihood and effect of clogging[5] of the proposed culvert which is only one fourth the size of the present bridge opening.

The real problem that we have in light of what has already been said, is the fact that DER itself recognized that the permit application contained insufficient data to reach a conclusion with regard to damage or danger which could be expected from the proposed new construction by the County. On April 2, 1975, DER through Mr. Butler, Chief of the Division of Dams and Encroachments, wrote to the

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3. Appellant argues that County and Township laws as well as federal law specifically require the 100 year flood figures to be used. We believe such legal violations if they exist, must be pursued at the proper judicial level.

4. Senate Bill I

5. There is a large tract of woodland upstream from the bridge and debris and large trees are to be expected during storms to wash toward the culvert.

County and said:

* * * * * * *

* * * "We will require a resubmittal of the permit application since the original permit has now expired. This application must be accompanied by the following:

"1. Complete hydrologic and hydraulic report with detailed analysis of the interaction between Coon Creek and Cotararo Creek.

"2. Complete plans sufficient to properly appraise the application. These plans should include profile of the stream for 500 ft. on each side with cross sections sufficient in number and location to permit a rigorous hydraulic analysis and a plan showing the stream, the road, all neighboring structures, and the key elevations of all roads and structures. The plans previously submitted did not include the above mentioned information."[6]

* * * * * * *

Finally, we cannot help but note that DER concedes that the appellant is right when he alleges that there will be some damage caused to his property if the permit is allowed to be carried out. DER, however, is satisfied because it will be "repairable damage".[7] It is interesting to note that there was no discussion of who would make these repairs which cause DER no concern. Certainly a citizen has some flood risk which cannot be foreclosed when he elects to live beside a body of water such as here. A prospective builder, or permittee, was never intended to be an insurer. We do believe, however, when that risk is changed through no fault of his own, a property owner is entitled to know with the best degree of accuracy reasonably possible what that *increased* risk to life and property will be. This has not been done. DER apparently decided that additional information on the backwater effect of the culvert was not needed after the County balked at providing it, because of the added expense. This culvert will presumably be in use long after the individuals involved in this case are gone, and, it is with this long range future in mind, that we believe the additional precaution is now justified. We believe it reasonable to assume that the future will bring more rather than less traffic to this sparsely populated area.

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6. The Water Obstruction Act specifically requires:

> "Each application for the consent or permit required by the second section of this act shall be accompanied by complete maps, plans, profiles, and specifications of such water obstruction, or of the said changes or additions proposed to be made, and such other data and information as the commission may require." 32 P. S. §683

7. Erosion, portions of the land sometimes unusable for certain purposes, road temporarily flooded out and closed even to emergency vehicles such as firetrucks or ambulances.

Inasmuch as there are resonable grounds for DER to have required the submission of complete hydrologic and hydraulic reports in order to ascertain the nature and the extent of the risk of additional flood damage, we hereby set aside the permit and remand the matter to DER with instructions not to issue same until the county submits the necessary reports[8] and DER can make an intelligent and fully informed decision as to whether the permit should issue.

The permittee, Lancaster County, assumed that there would be no backwater effect from the Octoraro Creek which would require any adjustment in the culvert opening. Apparently after some misgivings DER joined this assumption. The record before us raises enough doubt as to the accuracy of this assumption, that we believe a detailed analysis of the hydrologic variables as originally suggested by DER is necessary in order to finally resolve the question. If it turns out that the assumption was correct, we are satisfied that DER properly used the 25 year flood as an indicator of culvert size. If, on the other hand the assumption was not accurate we would expect DER to require the necessary adjustments in the size of the culvert before lifting the permit suspension.

## CONCLUSIONS OF LAW

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

2. The Regulations of the Department 105.101(b) promulgated pursuant to the Water Obstruction Act provide that 25 year flood figures may properly be used in determining the size of a culvert opening where the damage from floods of greater frequency will be *de minimus*.

3. Where a permit is sought for construction of a culvert on a creek under the Water Obstruction Act, Act of June 25, 1913, P. L. 555, as amended 32 P. S. 381, *et seq.*, and the application therefore does not clearly show that there will be no backwater effect from another body of water which is within 1,000 feet thereof, DER must require a detailed analysis of the backwater effect on the proposed culvert.

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8. Copies of the calculations shall also be made available to appellant.

O R D E R

AND NOW, this 22nd day of January, 1976, Permit No. 3675713 issued by the Department of Environmental Resources to the County of Lancaster is hereby set aside. The case is hereby remanded to DER for further action consistent with this adjudication.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: January 22, 1976
llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

K. MURIEL BECKER :

Docket No. 75-118-C

Designation of Facilities Planning Area

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, January 23, 1976

This matter is before the Board on the appeal of K. Muriel Becker from the action of the Department of Environmental Resources (hereinafter DER) in designating a facilities planning area to include the whole or portions of Hanover Borough and Penn Township, York County, McSherrystown Borough and Conewago Township, Adams County, Pennsylvania. The designation of a planning area is a prerequisite for the receipt of Federal funds by municipalities for sewage treatment purposes authorized by the Federal Water Pollution Control Act, 33 U.S.C. §1251, *et seq.*

Appellant vigorously opposes any governmental action which in any manner could lead to the receipt by Conewago Township, Adams, County, Pennsylvania, of public funds. The reasons for the appeal are set forth in appellant's letter of April 17, 1975, addressed to this Board and in her notice of appeal, filed with the Board on May 9, 1975. On July 16, 1975, DER filed a motion to dismiss alleging that appellant lacks standing to appeal and that the action from which the appeal was taken is not appealable. On October 15, 1975, the Board issued an order denying appellant's motion to dismiss the appeal.

On November 10, 1975, the writer of this adjudication held a pre-hearing conference with appellant, who was not represented by counsel in this proceeding, and Dennis J. Harnish, Esquire, representing DER. Thereafter, on November 18, 1975, the Board received a letter from appellant authorizing the Board to adjudicate the appeal on the basis of the documents filed in this matter. We therefore, enter the following:

## FINDINGS OF FACT

1. Appellant is K. Muriel Becker, 4436 Burlington Place, N.W., Washington, D.C., 20016.

2. Appellee is DER, the agency of the Commonwealth authorized to administer The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §690.1 *et seq.*, and to discharge certain responsibilities in connection with Federal grants to municipalities authorized by the Federal Water Pollution Control Act, 33 U.S.C. §1251, *et seq.*

3. On or about March 29, 1975, DER took the following action:

> "Notice is hereby given that the Department of Environmental Resources has received a request from Hanover Borough and Penn Township - York County, McSherrystown Borough and Conewago Township - Adams County for delineation of a 201 facilities planning area including the whole or portions of Hanover Borough and Penn Township - York County, McSherrystown Borough and Conewago Township - Adams County. The Department has delineated the 201 facilities planning area in the Commonwealth of Pennsylvania to assure that the Federal construction grants are used in a cost effective and environmentally sound manner. Timely completion of an acceptable facilities plan by the responsible parties for the area delineated is a prerequisite for the award of Federal grants to prepare construction plans and specifications and for the actual construction of water pollution control facilities.
>
> "The Department, therefore, pursuant to 5(b)(2) of the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. 69.15(b)(2) and also the United States Environmental Protection Agency Regulations pertaining to State and local assistance 40 C.F.R. 35-917-2 promulgated under the Federal Water Pollution Control Act Amendments of 1972, herewith delineates a 201 facilities planning area covering, either whole or portions of the Hanover Borough and Penn Township - York County, and McSherrystown Borough and Conewago Township - Adams County.
>
> * * * "

4. On April 21, 1975, the Board received the following communication from appellant:

> "In accordance with Public Notice of Department of Environmental Resources, March 29, 1975, relating to 201 facilities planning for Hanover Borough and Penn Township, York County, McSherrystown Borough and Conewago Township, Adams County, I should like to offer exceptions which pertain to Conewago Twp.
>
> "My former home, a fine property in a residential neighborhood of Conewago Township was invaded and taken for public purposes without compensation, under the exercise of the township's and county's police powers, without recourse to Eminent Domain. This taking took place with the support of the County Court (which refused to entertain my complaints) and the support of the County Commissioners and law enforcement officials. The county and township have promoted conditions which lead to grant of public funds, even when this involves destruction of property and displacement of residents which do not conform to the appropriate statistics. I would respectfully suggest:

"1. Large sums of money have already been wasted on sewage disposal in Conewago Township, because of hasty and careless planning and lack of a feasibility study.

"2. No planning or zoning exists in Conewago Township (or in Adams County).

"3. Conditions in Conewago Township sought to be cured were deliberately contrived, with full knowledge of the damage that would result. Citizen participation was refused.

"4. Civil rights were denied to residents and property owners.

"5. Conewago Township (and Adams County) operate as above the law, i.e. State and Federal law. Only ordinances, regulations and whims which they themselves promulgate--frequently without the legal requirement for publication and notice--are enforced. Thus law enforcement in Adams County is completely at variance with law enforcement in York Co.

"Having been robbed of my home and the savings of a half century, denied the rights guaranteed to a citizen under the Constitution, and displaced from career employment, I take a dim view of even one penny of my tax dollars going into this project. I respectfully request that the conditions referred to above be corrected before any grant of funds be made.

"If the foregoing is not sufficient, I would be pleased to have the appeal form and copy of regulations governing procedure before the Board. I shall be glad to provide proof of the statements I have made. If a hearing is scheduled, I shall be glad to attend. However, for health reasons, I would not be able to attend a hearing in Conewago Township."

5. Thereafter, on May 9, 1975, appellant filed a notice of appeal with the Board in which she recited the following reasons for her appeal:

"As a former resident and property owner of Conewago Township, the following objections apply particularly to that township:

"a. Violation of civil and property rights by the township, its agents and officials, i.e. taking, using, assuming control over and capitalizing on private property at 204 Linden Avenue, Hanover, Pa., for a period of seven years, for public purposes, without compensation.

"b. Neglect and/or refusal to enforce Federal and State laws by the Township, its agents and officials and by Adams County, its officials and agents, specifically, the exercise of police powers to harass, threaten and intimidate a private property owner.

"c. Disparity of local ordinances and law enforcement with those of adjoining municipalities to be served by the contemplated facility; lack of planning, zoning and building regulations.

"d. Refusal to abate environmental nuisances and hazards, ignoring citizen complaint in this regard, thereby causing, contributing to or accelerating conditions now sought to be cured at public expense."

6. At all times relevant to this appeal, appellant neither resided, nor owned property, nor conducted a business enterprise in Conewago Township, Adams County, Pennsylvania, nor in any other portion of the designated facilities planning area.

## DISCUSSION

In its motion to dismiss the appeal, DER, *inter alia*, raises the question of appellant's standing to appeal. Inasmuch as appellant is neither a resident, nor an owner of property, nor the proprietor of a businesss enterprise in either Conewago Township, Adams County, Pennsylvania, nor in any portion of the designated facilities planning area, we have no alternative but to dismiss this appeal on tne basis of *Community College of Delaware County v. Fox*, Pa. Commonwealth Ct. , 342 A.2d 468 (1975). In *Fox*, the court applied "the aggrieved person" standard to determine the standing of a party to appeal a decision of DER to the Environmental Hearing Board. A person may not appeal to the Board from an action of DER unless that person is "aggrieved" by said action. As the court in *Fox* said:

> "To be aggrieved a person must have a direct interest in the action appealed from. *Loudon Hill Farm, Inc. v. Milk Control Commission*, 420 Pa. 548, 217 A.2d 735 (1966); *Committee to Preserve Mill Creek, supra*. . . ."
> 342 A.2d at 475.

Within these standards, appellant is not an aggrieved party and, therefore, lacks standing to maintain this appeal.

## CONCLUSIONS OF LAW

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

2. A person may only appeal to the Environmental Hearing Board from an action of DER if such person has a direct interest in the action.

3. A person does not have a direct interest in DER action if such person neither resides nor owns property nor conducts a business enterprise in the geographical area to which DER action applies.

4. Appellant does not have the requisite standing to appeal the action of DER in designating the area in question as a facilities planning area for the reason that she neither resides nor owns property nor conducts a business enterprise in the affected area.

## ORDER

AND NOW, this 23rd day of January, 1976, the appeal of K. Muriel Becker from the action of the Department of Environmental Resources in designating the whole or portions of Hanover Borough and Penn Township, York County, Pennsylvania, McSherrystown Borough and Conewago Township, Adams County, Pennsylvania, as a facilities planning area, is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: January 23, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

CONSOLIDATION COAL COMPANY

Docket No. 72-297-D

Mine Drainage Permits

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

# ADJUDICATION

By: Joanne R. Denworth, Member, January 30, 1976.

This case includes five appeals by appellants, Consolidation Coal Company, Harmar Coal Company and Christopher Coal Company, that have been consolidated because they all challenge the authority under The Clean Streams Law for the Department of Environmental Resources' present policy of issuing one consolidated mine drainage permit for an entire mine operation instead of continuing the prior practice of issuing a mine drainage permit for each discharge at a given mine. This policy, which was never set forth in a Regulation, was instituted by the Department's predecessor, the Department of Health, in 1970, but because of "manpower limitations" was not immediately applied to consolidate all existing mine drainage permits. Instead, the Department's practice has been to implement the policy by issuing one consolidated permit, usually by amending an existing permit, whenever an applicant applies for a new borehole or shaft at an existing mine. In one of the cases here the Department cancelled two separate drainage permits and issued a consolidation permit for the two when the applicant applied to discontinue a third discharge at the same mine.

The Department's motion to dismiss these appeals on the ground that the Department's action was not an "appealable action" was denied by order of the Board dated February 25, 1975. As the parties have submitted the case to the Board on a stipulation of facts, as provided for in the Board's Rule 21.32 (c), 25 Pa. Code §21.32 (c), no evidentiary hearing has been held.

Based on the stipulation and other evidence of record on this matter, we enter the following:

FINDINGS OF FACT

1. Consolidation Coal Company (hereinafter Consol) owns the Blacksville No. 1 Mine and the Blacksville No. 2 Mine. Christopher Coal Company (hereinafter Christopher) owns the Humphrey No. 7 Mine. Harmar Coal Company (hereinafter Harmar) owns the Oakmont Mine. All four of the mines are underground bituminous coal mines, and all are operated by divisions of Consol.

2. Prior to October 12, 1972, each of the discharges at each of the mines or facilities owned or operated by Consol, Christopher or Harmar in the Commonwealth of Pennsylvania had a separate mine drainage permit.

3. The Oakmont Mine has a total of three discharges which are the Barking Portal Discharge, the Blackburn Borehole and the Pyle Borehole.

4. The Oakmont Mine is located in Allegheny County and, prior to September 12, 1973, its Barking Portal Discharge located in Plum Borough was authorized by Permit No. 468M022 (Permit Authorizing the Operation of a Coal Mine) issued by the Department of Health of the Commonwealth of Pennsylvania on October 18, 1968.

5. On September 12, 1973, Consol made application to the Department for permission to eliminate the discharge from the Barking Portal of the Oakmont Mine.

6. By letter dated December 10, 1973, the Department approved Consol's application to eliminate the Barking Portal Discharge, subject to the special condition that the other two permits for discharges at the Oakmont Mine-the Blackburn Borehole authorized by Permit No. 466M028 and Pyle Borehole authorized by Permit No. 468M009-were to be cancelled and consolidated at Permit No. 648M002.

7. A portion of the Blacksville No. 2 Mine is located in Greene County and, prior to October of 1972, its Carpenter Shaft Discharge was authorized by Permit No. 3071303 issued by the Department.

8. On or about October 24, 1972, Consol applied to the Department for a Mine Drainage Permit for the proposed Staggers Shaft Discharge located in Wayne and Gilmore Townships. However, on November 10, 1972, Consol was advised by the Department that its application for a permit would be considered only as the request for amendment to its Permit No. 3071303 covering the Carpenter Shaft Discharge.

9. On December 8, 1972, Consol requested the issuance of a separate permit for its proposed Staggers Shaft Discharge at its Blacksville No. 2 Mine and by letter dated December 18, 1972, was advised by the Department as follows:

> "[I]t is presently the policy of this Department to issue only one permit for each individual mine regardless of the number of discharges or openings..."

10. On March 21, 1973, Consol renewed its request for a separate permit. On April 9, 1973, the Department issued Consol a letter-permit including the proposed Staggers Shaft Discharge as an amendment to its Permit No. 3071303 for the Carpenter Shaft Discharge.

11. By letter dated April 12, 1973, counsel for Consol advised the Department that by accepting the permit, Consol was not withdrawing its request that a separate permit be issued and that such acceptance did not constitute a waiver of Consol's position that the action of the Department in issuing the Staggers Shaft permit as an amendment is contrary to law.

12. On September 11, 1973, counsel for Consol received notification from the Department advising Consol that the Department would not issue separate permit for the Staggers Shaft Discharge at the Blacksville No. 2 Mine.

13. A portion of the Blacksville No. 1 Mine is located in Greene County and prior to September 10, 1971, its Renner Shaft Discharge was authorized by Mine Drainage Permit No. 3071301.

14. Construction is currently underway on a new and separate shaft approximately 5,200 feet from the Renner Shaft, said shaft to be known as the Fox Shaft located in Wayne Township.

15. Discharges from the present Renner Shaft flow into an unnamed tributary of Dunkard Creek, but discharges from the completed Fox Shaft will flow into Sharps Run and then into Rudolph Creek before entering Dunkard Creek.

16. On or about November 15, 1971, Consol applied to the Department for a Mine Drainage Permit for the proposed Fox Shaft Discharge and on January 18, 1973, Consol was advised by the Department that its application for a permit would be considered only as a request for amendment to its Permit No. 3011301 covering the Renner Shaft Discharge.

17. On March 27, 1972, Consol requested the issuance of a separate permit for its proposed Fox Shaft Discharge at its Blacksville No. 1 Mine and on April 10, 1972, was advised by the Department that:

> "[I]t is presently the policy of this Department to issue only one permit for each individual mine regardless of the number of discharges or openings..."

18. On April 19, 1972, the Department amended the Renner Shaft Discharge Permit No. 3071301 to include the proposed Fox Shaft Discharge. The amended permit

approved Consol's request to construct the Fox Shaft and to discharge water to Sharps Run.

19. On June 14, 1972, Consol received a letter from the Department dated June 12, 1972, advising that the Department would not issue a separate permit for the Fox Shaft Discharge at Consol's Blacksville No. 1 Mine.

20. In addition to the Fox Shaft, Consol is currently constructing the new Rudolph Shaft into its Blacksville No. 1 Mine.

21. On or about October 23, 1974, Consol applied to the Department for a mine drainage permit for the Rudolph Shaft Discharge to be located in Perry Township. In making its application, Consol did not request a modification, revocation and/or amendment of any existing mine drainage permit.

22. By letter dated January 8, 1975, the Department issued Consol a letter-permit including the Rudolph Shaft as an amendment to its existing Mine Drainage Permit No. 3071301 for the Renner Shaft Mine Drainage Permit.

23. In January of 1975, Consol conditionally accepted the Department's grant of a mine drainage permit for the Rudolph Shaft but reserved the right to appeal the Department's action of making the permit an amendment to existing Mine Drainage Permit No. 3071301.

24. The Humphrey No. 7 Mine of Christopher is located in Greene County and prior to July 26, 1967, the Mount Morris discharge at that mine was authorized by Mine Drainage Permit No. 466M080.

25. On or about August 5, 1974, Christopher requested the issuance of a mine drainage permit to cover discharges from the proposed Run Air Shaft located in Perry Township. In making this application, Christopher did not request a modification, revocation and/or amendment of any existing mine drainage permit.

26. By letter dated January 20, 1975, the Department issued Christopher a letter-permit including the Shannon Run Air Shaft as amendment to its existing Mine Drainage Permit No. 466M080 covering the Mount Morris Discharge.

27. In January, 1975, Christopher conditionally accepted the Department's grant of a mine drainage permit for the Shannon Run Air Shaft but specifically reserved the right to appeal the Department's action of making the permit an amendment to existing Mine Drainage Permit No. 466M080.

28. Prior to the date of the first three appeals herein, the practice and/or procedure of the Department to cancel all existing mine drainage permits and issue only one consolidated permit was neither set forth in what is described by Department personnel as the "P and P" Manual nor in any other publication of the Department.

At the time of the filing of the last two appeals, this practice and procedure was set forth in the practice and procedure manual.

29. The practice and/or procedure of the Department to cancel existing mine drainage permits and issue one consolidated permit for each mine or facility was developed prior to the creation of the Department of Environmental Resources.

30. The practice and/or procedure of the Department to cancel all existing mine drainage permits and issue only one consolidated permit was formulated and applied to administer the permit program under The Pennsylvania Clean Streams Law and is intended to be applied generally throughout the Commonwealth.

31. There are no written guidelines for exceptions from the practice and/or procedure of the Department to cancel all existing mine drainage permits and issue only one consolidated permit.

32. The practice and/or procedure of the Department to cancel all existing mine drainage permits and issue only one consolidated permit has not been applied retroactively to all existing mine drainage permits. This practice and/or procedure of the Department is implemented only when an applicant applies for a permit for a new borehole, shaft or the like at an existing facility and is done in this manner because of the Department's belief that manpower limitations would make it impossible for the Department to undertake an immediate consolidation of all permits.

33. The practice and/or procedure of the Department to cancel all existing mine drainage permits and issue only one consolidated permit has not been promulgated as a rule or regulation of the Department.

34. The "P and P" Manual of the Bureau of Water Quality Management sets forth some but not all of the general policies of the Bureau and is not a document of public circulation. The general policies of the Bureau are not fully set forth in any single publication.

35. The Rules and Regulations of the Department set forth in 25 Pa. Code set forth various legal requirements imposed with respect to drainage from coal mines in Pennsylvania and are the only rules and/or regulations, duly promulgated in accordance with applicable Pennsylvania law, that apply to drainage from coal mines.

36. From the depositions of those responsible for instituting the practice and/or procedure of consolidation, it appears that the reason for the change in policy was primarily administrative--so that all the information concerning one mine would appear at one place in the Department's files. However, it was also recognized and intended by those instituting the policy that one permit would be a more effective enforcement tool than several permits by enabling the Department to review a permit upon application for amendment and, possibly, by enabling it to revoke a permit for

an entire operation where there was a discharge violation.

DISCUSSION

The first question appellants raised is whether the Department has the authority under section 315 of The Clean Streams Law, Act of June 22, 1937, P.L. 1977, as amended, 35 P.L. §691.315, to issue one consolidated mine drainage permit for an entire mine operation, including discharges applied for later in time, or whether is it required to issue separate permits for each discharge at a given mine? Section 315 (a) provides in pertinent part:

> "§691.315 Operation of mines
>
> "(a) No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the board or such person or municipality has first obtained a permit from the department. Operation of the mine shall include preparatory work in connection with the opening or reopening of a mine, backfilling, sealing, and other closing procedures, and any other work done on land or water in connection with the mine. A discharge from a mine shall include a discharge which occurs after mining operations have ceased, provided that the mining operations were conducted subsequent to January 1, 1966, under circumstances requiring a permit from the Sanitary Water Board under the provisions of section 315 (b) of this act as it existed under the amendatory act of August 23, 1965 (P.L. 372).[1] The operation of any mine or the allowing of any discharge without a permit or contrary to the terms or conditions of a permit or contrary to the rules and regulations of the board, is hereby declared to be a nuisance. ...

---

"1. This section."

Appellants construe this provision, emphasizing the disjunctive "operation *or* discharge", to mean that the Department must issue a permit either for an "operation", which may or may not have one discharge, or for any separate discharge that is not covered by the operation permit. Appellants argue that the statute would have to read "operation *and* discharge" in order to support the Department's policy, and that the disjunctive "or" must be given effect according to the rules of statutory construction. See Pennsylvania Statutory Construction Act of 1972, Act of November 25, 1970, P.L. 707, NO.230, as amended, 1 Pa. S. §1922 (2); and *Garratt v. Philadelphia*, 387 Pa. 442, 445, 127, A2d, 738, (1956). The Commonwealth argues, on the other hand, that the statute gives it the discretion to issue permits either for an operation or for separate discharges, and claims that, if anything, the statute mandates that permits be issued for entire operations rather than for separate discharges.

We have not been able to uncover any legislative guidance on this point, but we believe appellant's construction is overly literal and not in accordance with the past practice of the Department anymore than the present practice.[1] The disjunctive "or" does not mean to us that operations and discharges must be licensed by separate pieces of paper, but that either must be licensed, with or without the other. See, e.g., *Commonwealth v. United States Steel Corp., et al*, Pa. Commonwealth Ct. Docket No. 252 C.D. 1973, where the court prohibited preparatory work relating to a deep mine, but not involving any discharge, until the company obtained a mine drainage permit. It seems likely, as the Commonwealth contends, that the disjunctive "or discharge" was primarily intended to cover discharges from non-operating mines, which constitute a major portion of the pollutional hazard from mining in Pennsylvania. The third sentence of §315, which defines discharges to include non-operating discharges, makes this clear. Appellants point out that that sentence says discharges "shall include" non-operating discharges, and therefore the phrase "or discharge" must refer to the larger category of discharges in general. While we agree with appellants as to the literal meaning of the words, we do not think it follows that section 315 requires the issuance of a separate permit for each discharge at a mine.

It is clear that the object of section 315 dealing with the "operation of mines" is to prevent discharges to the waters of the Commonwealth. Whether this is accomplished by one permit for a particular mine that includes operations and discharges, or whether it is accomplished by separate permits for the operation and the discharges would not seem to make much difference, and, in our view, section 315 does not specify. At the outset, therefore, the Department would have some discretion to fashion a permit system that accomplishes the goal of assuring that both the operation and discharges, or either occuring separately, at a mine are permitted. In the abstract there would appear to be merit to either a one-permit system or a separate permit system. There is certainly some practical justification for the Department's present policy of treating one mine as a hydrologic entity. On the other hand, it would apparently be consistent with the other permit systems under The Clean Streams Law (such as for industrial wastes) and with the federal NPDES permit system established under the Federal Water Pollution Control Act, 33 U.S.C. §125, *et seq.* to

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1. Previously, the separate discharge permits apparently included operations in the case of an operating mine with a discharge or discharges.

issue separate permits for each point of discharge. Whatever system the Department adopted, however should have some rational basis in administrative practice, should be accessible to the parties affected and should be consistently and fairly applied.

This brings us to appellants' second contention that the revocations, consolidations and amendments here are invalid because of procedural irregularity. Appellants contend that a change in substantive policy such as the one made by the Department must be accomplished by Regulation and cannot be done simply by informal fiat on a case by case basis. The Commonwealth argues, essentially, that if there is statutory authority for the instituted administrative practice, the change does not require any publication or other process other than the notice of the new system given to operators upon their applications for discharge permits. We do not agree.

In the best of all possible administrative worlds, all *general* pronouncements of policy and certainly all changes in general policy would be duly proclaimed by regulation after an appropriate deliberative rule-making procees. See Davis, Administrative Law Treatise, Vol. I §5.01. However, in our view the law does not require a rule-making or other formal procedure unless the pronouncement of policy or change in policy will affect substantive rights. The question thus becomes whether this administrative change affects the appellants' position in any way.

The Department claims that its policy of consolidation was instituted simply for administrative reasons. Mr. Giovanetti, who originated the one-permit policy, said it came about after the Department personnel reviewing a mine drainage application failed to consider every discharge at a certain mine because the mine had discharge points in two different townships and, as the Department's files are organized by townships, the information was in different file drawers.[2] Appellants believe that their substantive rights are potentially affected because the Department will use the consolidated permit as an enforcement tool to close down an entire operation when one discharge, even an unrelated discharge, is in violation. The Department acknowledges that consolidation "enhances" enforcement by giving the Department the power to review a permit on any new amendment or, conceivably, by revoking a permit when any discharge is in violation—although the Department's witnesses did not recall any such revocation in the five years during which the policy has been in effect.

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2. Appellants have pointed out that the new system doesn't make much more sense administratively, since a consolidated permit will appear in one township file when a mine may have a discharge to a different stream in a different township. Apparently the Department has not cross-indexed its files to make the consolidated permit accessible for each affected township.

We have given very careful consideration to appellants' contention under the enforcement sections of The Clean Streams Law because whether or not the new policy improves the Department's filing system, the Department cannot make informal administrative changes based on such considerations if the changes affect substantive rights.[3] Under the enforcement provisions, the Department has a variety of remedies for any violations of the act. Under §609 it may refuse to issue a new permit to an operator who has an existing violation at any operation if it concludes that this violation indicates an intent not to comply with the laws. Under §610 the Department may issue such enforcement orders, including revocations or suspension, "as are necessary to aid in the enforcement of the provisions of The Clean Streams Law". Among its remedies the Department may issue an order "requiring persons or municipalities to cease operation of an establishment which, in the course of its operations has a discharge which is in violation of provisions of this act". This power is constrained by the following sentence with its material proviso:

> "...Such an order may be issued if the department finds that a condition existing in or on the operation involved is causing or is creating a danger of pollution of the waters of the Commonwealth, or if it finds that the permittee, or any person or municipality is in violation of any relevent provision of this act, or of any relevant rule, regulation or order of the board or relevant order of the department: Provided, however, That an order affecting an operation not directly related to the condition or violation in question, may be issued only if the department finds that the other enforcement procedures, penalties and remedies available under this act would probably not be adequate to effect prompt or effective correction of the condition or violation. ..."
>
> 35 P.S. §691.610

Under these provisions it appears to us that whether the Department issues one permit for an operation or several permits for discharges at that operation, it has the same power to close down the operation either by revocation of an operation permit in the case of one permit, or be a cease operations order in the case of separate discharge permits when there is a danger to the waters of the Commonwealth. However, there may be some strategic advantage to revocation since its effect is, at least technically, immediate. See 25 Pa. Code 99.24. The primary instance where one permit might initially enlarge the enforcement power of the Department is in the case of an unrelated discharge at one mining operation. To the extent it is possible to have an unrelated discharge at one mining operation, the revocation of one permit by

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3. We do not accept the Department's argument that we cannot consider the possible effect this consolidation might have on enforcement until an enforcement question actually arises. This is certainly true as to any specific enforcement question; however, these consolidations have occurred, and it is appropriate for us to inquire into their general purpose and consequence in deciding whether or not they are invalid.

the Department could circumvent that requirement of the proviso that an order to cease operations on account of any unrelated discharge only be issued where other enforcement remedies could be inadequate to effect prompt correction of the condition in violation. Although we do not expect the Department to abuse its power and we are aware that on review the Department will be held to a remedy that is appropriate to the offense and necessary to the enforcement of the Act, *Mill Service, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, Pa. Commonwealth Ct. Docket No. 164 C.D. 1975, Issued November 17, 1975, it does appear to us that the one permit system could make some substantive difference to operators, and that it should therefore have been accomplished by a rule-making procedure.

In sum, we believe that a one-permit system for mine operations may be a permissible and even logical procedure under The Clean Streams Law, but that it was a significant interpretative change of general and possibly substantive effect and should therefore have been accomplished by Regulation.[4] The articulation and p cation of the rules under which the Department is operating is necessary as a guarantee of due process and protection against the arbitrary exercise or abuse of administrative power.[5] This Board has held in another context that the Department cannot act on the basis of unpublished policies. See *Doraville Enterprises v. Commonwealth of Pennsylvania, Department of Environmental Resources*, Environmental Hearing Board Docket No. 73-433-C, Issued October 21, 1975. If the Department wishes to implement interpretative policy, it must cause a regulation to be adopted by the Environmental Quality Board in a manner consistent with the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, No. 240,as amended , 45 P.S. §1101 *et seq.*[6] Although the new permit system was not published as a regulation, it certainly meets the definition of a regulation in the Administrative Agency Law, Act of June 4, 1945, P.L. 1388, as amended, 71 P.D. §1710.21 (e), viz.:

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4. Note that there is a presumption in favor of the correctness of contemporaneous administrative interpretations of a statute, which would here favor separate permits. See *Loeb Estate*, 400 Pa. 3601, 373, 16 A2nd, 207 (1960); Davis, *supra*, §5.06. Certainly, such a presumption would need to be overturned by a more formal procedure that was used in these cases. See *Schley v. Conservation Commission of Missouri*, 329 S.W. 2nd 736 (Sup. Ct. of Missouri 1959).

5. See *Taylor v. Weinstein*, 207 Pa. Super 251, 254, 217 A2nd 817 (1966); *West Penn Power v. P. U. C.*, 174 Pa. Super, 123, 100 A2nd 110 (1953), and see "Publishing Practice-Administrative Agencies", 36 Temple L.Q. 551 (1963), as to the need for publication of agency rules. See also 'The Making of Administrative Policy: Another Look at Rule Making and Adjudication and Administrative Procedure Reform', 118 U. Pa. L. Rev. 485 (1970).

6. Conceivably, an administrative policy such as this one could be promulgated by a less formal process than regulation. However, the Department's policies and procedures are apparently largely for internal purposes, and since they are not published or circulated, do not serve to inform those regulated of the rules the Department is applying or proposed changes in those rules.

> "'Regulation' means any rule, regulation or order in the nature of a rule or regulation, or 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."

The present Reulations on mine drainage permits, 25 Pa. Code §99.01 *et seq*, do not make clear whether permit applications are to be for operations including discharges or for separate discharges. Furthermore, they do not set forth any procedure for amendment of permits to include new discharges. While the amendment process may be an acceptable way of permitting new discharge points at a mine, the procedure for amending permits must be clearly set forth and constrained. We do not agree, for instance, with the Department's witness who thought that the opportunity to review a permit on a proposed amendment would enable the Department to alter the conditions of a permit. It is fundamentally offensive to our sense of justice in a democratic society for the state to be able to alter the conditions of a previously granted permit because an applicant is seeking some new permission. If an operator has violated the terms of his permit, the permit may be revoked or suspended for cause in accordance with enforcement provisions; but it is not proper when there is no evidence of violation for the Department to use the occasion of his applying for a new permit to change the conditions of his old permit. The case of the Oakfoot Mine here is particularly offensive. There the operator asked to eliminate a discharge and the Department took that opportunity to consolidate two other discharge permits so as potentially to have more power over the operator.

We should comment finally upon the question of whether, if and when the Department publishes its one-permit system in the form of regulations, these regulations may apply retroactively to consolidate all existing mine drainage permits. The sound view of this issue is that while clarification of unsettled law may sometimes be made retroactively, changes in settled law should be made prospectively. See Davis, *supra*, §5.06, and cases cited therein. In these cases, we would distinguish between existing permits that were consolidated, as in the case of the Oakfoot Mine, and cases where new discharge points were sought after the Department began applying its one-permit system. In the latter cases the operators did in fact have notice of the new system, although the method of adopting the new policy was procedurally inadequate in our view. However, if after due deliberation the Department formally adopts the one-permit system through articulated rules, we believe that the rules could apply retroactively to those operators who had notice of that new policy when they applied for a new discharge permit.

## CONCLUSIONS OF LAW

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

2. Section 315 of The Clean Streams Law does not require the Department to issue separate permits for each discharge at a mine. It requires that the operation of a mine as well as discharges at the mine be permitted, or that either occurring separately is permitted.

3. The change from a separate discharge permit system to a one-permit system is a sufficiently general change in policy of possibly substantive effect to require that this change be effected by prospective, articulating regulation, rather than by informal, individual notice.

4. In view of the procedural defeciencies of the Department's change in administrative policy the revocations, amendments, and consolidations of mine drainage permits attempted in these cases were invalid.

## O R D E R

AND NOW, this 30th day of January, 1976, the appeals in these cases are sustained and the revocations, amendments and consolidations of appellant's mine drainage permits are declared invalid.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: January 30, 1976

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

CONCERNED CITIZENS FOR ORDERLY PROGRESS
and MARY SAYER, Intervenor

Docket No. 75-161-W

v.

Article I, Section 27 Pa. Constitution
The Clean Streams Law

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and EMERALD ENTERPRISES, LIMITED, Intervenor

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

By Paul E. Waters, Chairman, Issued February 11, 1976

This matter comes before the Board as an appeal from the grant of a permit by the Department of Environmental Resources, hereinafter DER, to Emerald Enterprises, Limited, hereinafter permittee, for the operation of a sewage treatment plant with a discharge to an unnamed tributary of the Allegheny Creek in Upper Mount Bethel Township, Northampton County. Appellants, Concerned Citizens for Orderly Progress, a non-profit association and a number of individuals living along the tributary object to the permit on the grounds that the stream is of high quality and will be degraded by effluent, from the plant designed to serve a large modern mobile home park.

## FINDINGS OF FACT

1. On July 21, 1975, Permit No. 4875402 was issued by DER to permittee for the construction and operation of sanitary sewers and a sewage treatment plant to serve High View Mobile Home Park in Upper Mt. Bethel Township, Northampton County, Pennsylvania.

2. The mobile home park will cover 85 acres and will provide dwellings for 665 persons.

3. Appellant, Concerned Citizens for Orderly Progress, hereinafter CCOP, filed its appeal within thirty (30) days after issuance of the permit. CCOP is an

unincorporated association of approximately 150 members formed in June, 1973.

4. On October 1, 1975, Emerald Enterprises, Limited, was permitted to intervene, and on October 22, 1975, the Petition to Intervene of Mary Sayer, Robert and Katherine Wright, William B. and Hope A. Carpenter, and Walter O. and Liesel Deichmann abutting property owners, was granted.

5. The permit authorizes the discharge of treated sewage effluent to an unnamed tributary of the Allegheny Creek.

6. According to John P. Durr, it was "extremely unusual" that the DER document entitled "Internal Review and Recommendations Addendum on Planning Evaluations" was signed in August, 1975, and the permit was issued in July, 1975, and he could not explain why this occurred.

7. There is no reference in the permit for approval to discharge treated sewage on to the ground or to ground water.

8. Under the Special Conditions of the permit, the effluent shall not contain more than:

> "a....20 mg/l of five-day biochemical oxygen demand, (BOD), as a five-day consecutive average of values and ... 40 mg/l of five day BOD at any time;
>
> "b....0.5 mg/l of ammonia-nitrogen during the months of June through October and ...1.5 mg/l of ammonia-nitrogen during the remaining months of the year based on a five-consecutive day average of values and ...1.0 mg/l of ammonia-nitrogen at any time during the months of June through October;
>
> "c....20 mg/l of suspended solids as a five-consecutive day average of values and ...40 mg/l of suspended solids at any time;
>
> "d. ...6.0 mg/l of dissolved oxygen at any time.

9. The expected performance of the plant is an effluent with suspended solids of one to four and BOD of two to five milligrams per liter, Phosphorous .3, PH index of 7.5 ammonia .5 and zero fecal coliform.

10. The Pennsylvania Fish Commission recommended against issuance of the permit by DER because of degradation of the high quality of the water and this might effect fish in Allegheny Creek.

11. The unnamed tributary of the Allegheny Creek flows into the Allegheny Creek approximately one-quarter to one-half mile downstream from the location of the proposed sewage plant.

12. The Allegheny Creek flows into the Delaware River approximately five miles downstream from its confluence with the unnamed tributary.

13. The water quality of the unnamed tributary of the Allegheny Creek is excellent.

14. The Pennsylvania Fish Commission found that the Allegheny Creek is one of the few remaining streams in Northampton County with a population of native brook trout.

15. The Pennsylvania Fish Commission Stream Survey Report concluded that the size of the unnamed tributary at the location of the sewage plant and summer flow conditions would result in the sewage outfall comprising the major source of flow.

16. The flow of unnamed tributary of the Allegheny Creek coming from a pond where it originates near the site of the proposed sewage plant was measured at one-eighth c.f.s. or approximately 84,000 gallons per day.

17. The unnamed tributary of the Allegheny Creek which runs through property owned by appellant, Mary K. Sayer, attracts a variety of wildlife such as deer, rabbits and pheasants and is the source of aesthetic enjoyment and recreation for Mary K. Sayer, her family and friends, as well as an ideal hunting area.

18. Mary K. Sayer and other residents maintain wells for drinking and domestic use in the vicinity of the unnamed tributary.

19. The proposed sewage plant is intended to serve a 250 unit mobile home park named High View on approximately 80 acres serving a population of 655 persons.

20. Sewage treatment is proposed for average wastewater flows of 49,125 gallons per day (gpd) resulting from a population of 655 persons from the initial year to design year of 2010.

21. Emerald proposes to discharge treated sewage in dry periods from April 1 to September 30 over the surface of the ground using what is known as the Max Planck system.

22. The turbidity of the treated effluent will be five Jackson units.

23. Living organisms are limited by the least tolerable conditions and therefore determining the effects of pollution on living aquatic organisims, the worst possible conditions must be considered as more important than average conditions.

24. The amount of BOD in the stream should not exceed five parts per million as a maximum to prevent any damage to the aquatic biology and the amount of suspended solids in the stream should not exceed 10 to 15 parts per million as a maximum.

25. The impact of effluent discharged from the proposed sewage plant on invertebrates in the unnamed tributary and the Allegheny Creek will be unfavorable and some may not survive.

26. Although the current state of scientific knowledge and technology can provide only limited control, the minimum and most effective available standard to disinfect against viruses, such as infectious hepatitis, requires the treatment of sewerage to produce a residual of one part per million of chlorine for a minimum retention time of thirty minutes in effluent having one or less Jackson turbidity units or equivilent treatment.

27. The application of chlorine to produce a residual of 1.0 parts per million in the treated sewage having one or less Jackson units of turbidity for at least thirty minutes would not provide complete protection against infectious hepatitis but would provide the minimum acceptable disinfection.

28. Large doses of chlorine for disinfection will likely increase the residue of chlorine in the final effluent, and this might be even more damaging to the stream over the long run.

29. Whether or not an erosion and sedimentation control permit is required, DER has responsibilities to prevent accelerated erosion and sedimentation in order to prevent stream pollution, and to have a plan for same.

30. The Federal Soil Conservation Service is the agency having the technical expertise necessary to evaluate the adequacy of erosion and sedimentation control plans and it reviews such plans for the Soil Conservation District. There is no convincing evidence of the plan being reviewed by the U.S.D.A. Soil Conservation Service in this case, but no more than 25 acres will be disturbed at any one time in any event.

31. Effluent discharges from the proposed sewage plant into the unnamed tributary may get into and recharge the groundwater in the vicinity of the unnamed tributary if the effluent discharge at the point of discharge is 49, 125 gallons per day and the stream flow at the point of discharge is one-eighth c.f.s. and the same process and result could occur if the effluent was discharged into the bog area adjacent to the unnamed tributary.

32. If effluent from the sewage plant is placed into the bog in sufficient quantities so that the level of the water rises, then the water would be seeping from the bog area into the soil and into the groundwater therefore adding the effluent to the groundwater.

33. There is no evidence that either DER or permittee conducted any tests to measure or determine whether or not the groundwater in the vicinity of the unnamed tributary or the Allegheny Creek would be recharged with sewage effluent.

34. If there is a choice, it is far better to discharge effluent into a moving stream rather than to a ponded bog area because the water in the bog area

will have a longer residency time which permits the groundwater to be recharged with effluent.

35. According to John P. Durr, the Regional Sanitary Engineer for DER, the applicant was not required to make any provisions to deal with the question of the low flow in the tributary.

36. An appraisal of the project was made by the Master's Institute of Appraisal, which was done to determine the market value of the project and to obtain financing for the project, and it was determined to be feasible from a financial standpoint.

37. The treatment plant design is of a very high caliber and will perform at levels higher than required by the permit.

DISCUSSION

Again we are faced with the classic confrontation between building development and maintenance of the environmental status quo.

Each party has urged that the other should have the burden of proof in this difficult case. At first blush it would appear to be one in which the usual rule applies[1] and appellants would have the burden. Upon closer examination, however, we are convinced that this is a proper case for the permittee to carry the burden of proof, inasmuch as we have found that the stream quality into which the sewage plant discharge is to go, is unusually high. We believe this case falls within the regulation which provides[2] that a private party shall have the burden of proof where some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a *prima facie* case is made that a law or regulation is being violated. [Section 21.42 (e) See also (f) and (g)]. We therefore conclude that the burden of proof in this case must be carried by the permittee.

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1. Section 21.42(c) provides that the appellant has the burden:

> "Where a party who is not the applicant or holder of a license or permit from the Commonwealth protests its issuance or continuation."
>
> . . .

2. Rules of Practice and Procedure of the Environmental Hearing Board, Title 25 Part 1, Sub-Part A, Article III, Chapter 21.42.

All parties have at least agreed upon one thing. The controlling case in this dispute is *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A2d 86 (1973), which interprets the parties responsibilities under Article I, Section 27 of the Pa. Constitution.[3] At the outset, then let us look at the facts as above outlined, in the light of what has popularly become known as the three pronged *Payne* test.[4]

Was there compliance with all applicable statutes and regulations? We believe that The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1, *et seq.*[5] regulations promulgated thereunder are relevant to this question. The permittee would have us ignore the Pennsylvania Sewage Facilities Act, *supra*, on the grounds that it was not specifically mentioned in the notice of appeal which was filed. The appeal among other things did mention: ". . .(f) Degradation, destruction and irreplaceable loss of waters of the Commonwealth of Pennsylvania and the natural scenic, historic, and aesthetic values of the environment in violation of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania." The appeal itself[6] was from the issuance of Permit No. 4875402 which was issued by DER on July 21, 1975, under The Clean Streams Law, *supra*. Therefore,

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3. 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."

4. See *Payne, supra*:

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

5. Act of August 23, 1965, P. L. 372, 1970, July 31, P. L. 653, 222.

6. The appeal also referred to the fact that the plans for the sewage treatment plant were not engineeringly sound and do not provide adequate protection for the environment.

although, we would have no trouble finding adequate notice in this appeal for any issues properly before us in the Pennsylvania Sewage Facilities Act, we find no applicability of the provisions of that Act in this proceeding.

Appellants have raised a technical violation of DER's Regulations. They argue that a soil erosion and sedimentation permit was and is required for the earth-moving activity which will attend construction and thereafter. There does not appear to be any dispute over the fact that there is presently a soil erosion *plan* in existence for the project area. The question is, whether the plan is sufficient or whether a permit is required. Although DER apparently made some efforts to get a review and approval by U.S.D.A. Soil Conservation Service through the County Conservation District, it is not clear from the record that this was ever accomplished. The significance of the above mentioned approval is that when it is received, no permit is required.[7] In any event, the construction phase of the project does not require earth-moving activity effecting more than 25 acres at one time and therefore no permit is required.[8] With regard to the plan which permittee has prepared, we believe it to be adequate, if carried out. The key to such plans,

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7. See Section 102.41(a):

> "(a) Any person who engages in an earth-moving activity within the Commonwealth shall obtain a permit prior to the commencement of the activity except a permit will not be required:
>
> . . .
>
> "(2) where an erosion and sedimentation control plan has been developed for an earth-moving activity by the U.S.D.A. Soil Conservation Service;
>
> "(3) where an activity is required to obtain a permit pursuant to the Clean Streams Law (35 P.S. §691.1 *et. seq.*), the Surface Mining and Reclamation Act (52 P.S. §1396.1 *et. seq.*), the Water Obstruction Act (32 P.S. §681 *et. seq.*) or the provisions of Chapter 91-101 of this Title (relating to water pollution);
>
> "(4) where an earthmoving activity affects less than 25 acres."

. . .

8. Testimony of Mr. Eugene M. Wentzel, Chief of the Facilities Section under Mr. Durr, the Regional Sanitary Engineer:

> . . .
>
> "Q. Is this the plan done in stages - - I believe you indicated?
>
> "A. This plan - - the construction is in four phases in this case.
>
> "Q. Do any of these four phases include earth moving activities in excess of 25 acres?
>
> "A. No, they do not."
>
> . . .

however, lies in their enforcement. Obviously this must await the actual earth-moving activity. When and if it appears that the measures planned are not sufficient or not being carried out, that will be time enough for further action by DER in that regard, as it is an enforcement problem.

There was considerable dispute as to whether the change in the Township Act 537 Sewage Facilities Plan was a revision as referred to in the Regulations at 71.15(b) or whether it was a supplement which is governed by 71.15(c). Although there is not as much required to be done in order to supplement the plan as there is for a revision thereof, we have reviewed the testimony and conclude that inasmuch as it is clear that the Township approved the change in March of 1975, and DER accepted the change we deem the semantics immaterial for our present purposes. In any event the time for appeal has expired as to this issue.

We can find no clear and specific violation of statute or any regulation of DER. There are, however, a number of DER administrative matters uncovered by appellants, which leave something to be desired. For example, there is no way for an interested citizen to determine whether the fact that this permit grant was disapproved by the Pennsylvania Fish Commission was actually given proper consideration by DER. Although one aquatic biological report on the tributary did reach the proper person in DER before the permit was granted, another was dated a few days after the permit was issued.[9] It is likewise a little confusing to try to reconstruct the approval process in this matter. We have previously had occasion to suggest that a better documented and more easily reviewable internal administrative system could reflect favorably on DER when a challenge is met in an appeal before this Board. Nevertheless, we do not deem anything we have said to amount to a violation of statute.

We must now turn to the second *Payne* test and determine whether DER and permittee have shown a reasonable effort to reduce the environmental incursion to a minimum. In this regard there are two major items of concern. The appellants

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9. Exhibits 6 and 7 are substantially the same report from Robert Frey, Regional Aquatic Biologist to John Durr, Regional Sanitary Engineer. One is dated June 16, 1975, and the other July 25, 1975.

argue that the treatment required under the permit is actually secondary treatment of the plant effluent and they would require tertiary treatment. It is always easy to label any treatment plant which allows a discharge of less than drinking water purity "inadequate". The answer is and must be "yes" to the quesrion: Will the effluent degrade the stream in any way? If this were the proper test for purposes of issuing such permits as here in question, we would not only have concluded this matter with the foregoing answer, we would also preclude, in all likelihood all future sewage treatment plants. When the proper question, as posed in the second *Payne* test, is answered, however, we need only find a *reasonable* effort to reduce environmental harm to a minimum. Obviously, this is a far less stringent requirement. Appellant has persuasively demonstrated that permittee has failed to meet the "non-degradation" test, but the task before us is not that easy. Appellant has failed to indicate any statutory or other requirement for treatment better than secondary. Nevertheless, permittee has clearly demonstrated that the treatment plant which it proposes to build will exceed DER's treatment requirements. For example, the permit allows considerably more suspended solids, and BOD than is expected from this plant. The testimony of the plant designer is that there will be in the effluent suspended solids of only one to four and a BOD of two to five milligrams per liter.

Appellant counters with the argument that this leaves something to be desired inasmuch as there will be some organisms presently in the unnamed tributary that will not survive. We believe this to be true, and that this must properly be calculated along with the other matters which we will later discuss, as the cost of development.[10]

The appellants raise important questions about the low tributary flow in relation to the plant discharge, expecially in light fo the fact that there is a flat bog area in which some effluent ponding is expected. We also have serious misgivings about this procedure and permittee has failed to allay our concern. Many of the appellants depend entirely upon their wells for a water supply and if this tributary and/or bog area in fact recharges the groundwater there might be un-

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10. We have intentionally not used the word "progress".

forseen degradation of drinking water in the area. The plant engineer believes that there will be some treatment for the effluent from the roots and weeds in the bog area by their Max Planck system.[11] This leaves unanswered, the question of what happens when that absorption process ends and there is still effluent ponding in the area. It may be that this will then recharge the groundwater table. It also may be that the soil will renovate it, much as a septic system would. It is the fact that we must speculate on this important question as to what will happen, that now gives us pause. This testimony fails to indicate that sufficient thought was given to this matter.[12] It is certainly clear that permittee did not carry the burden of proving reasonable effort was made to satisfactorily deal with this concern.[13] This problem is only compounded by the misunderstanding as to exactly where the discharge point will be. For this reason we must remand this matter to DER with instructions that it obtain more information.

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11. This is the name of an alternate sewage disposal system developed in Germany by the Max Planck Institute. It is apparently still in an experimental stage in the U.S. and the patent is held by the U.S. Government.

12. The entire testimony of the plant designer, Ms. Eileen Abbott, on direct examination regarding this important question is the following. See Notes of Testimony lines 13 through 23:

> . . .
> "A. In wet weather it discharges into the stream channel of the unnamed tributary of the Allegheny Creek.
>
> "Q. What happens in dry weather?
>
> "A. In dry weather we are using the Max Planck system of the pipe extending over the surface of the ground and discharging through the swamp on the embankment within the property.
>
> "Q. What is the anticipated effect of routing this through the swamp area?
>
> "A. Effectively, it should provide further diversion. Also, it will disperse the effluent."
> . . .

13. On cross examination permittee was asked:

> . . .
> "Q. Will this (discharge) not stimulate the growth of vegetation in the swampy area?
>
> "A. Well it should.
>
> "Q. Have there been any studies by you to determine the amount--the rate of growth that would result from the injection of the nutrients into this area?
>
> "A. No."

The third and probably the most difficult question is whether the environmental harm from the proposed project, so clearly outweighs the benefits that it would be an abuse of discretion to proceed further.

It is this last test which raises what appears to be a conflict between the decision reached by Commonwealth Court in *Payne, supra*, and its decision in *Community College of Delaware County and Community College of Delaware County, Authority, Appellants and Township of Marple, Intervening Appellant v. Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellee,* 654 C. D. 1974, (July 18, 1975), and *Central Delaware County Authroity, Appellant v. Mrs. Cyril G. Fox and Natural Lands Trust, Inc., Appellees,* 743 C. D. 1974, (July 18, 1975). In *Payne* the Court in effect indicated *what* standards should be used to interpret and apply Article I, Section 27 of the Constitution. In *Fox, supra,* the Court among other things, indicated *who* should apply them. The third test or standard as above indicated, requires by necessity a balancing, weighing and measuring by DER of the benefits versus the environmental harm of a particular activity for which a permit is requested.[14] In *Fox* the Court said: ". . .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." The Court went on to say: "We cannot say, as did the EHB, that the DER should evaluate local planning decisions or decide for itself what the best present and future uses of a watershed might be." The Court concluded as to the third test: "It is also clear, from our own review of the record, that the benefits of the proposed sewer extension are substantial when viewed against the almost negligible direct environmental harm which will result from the sewer construction, a test required under the third of the *Payne* standards." . . .

In an effort to evaluate the benefits of a particular proposed activity which will by necessity cause some degradation of the earth, DER and/or this Board

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14. In *Payne* the Court specifically said: ". . .decision makers will be faced with the constant and difficult task of weighing conflicting environmental and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural . . . resources."

must place a weight value on that activity. In so doing, one cannot avoid a consideration of the project, land usage and all, as a whole. It is this determination which the Court has already said must be left to local agencies. Are we not then placed squarely on the horns of a dilemma? In other words, if DER disagrees with a local determination regarding the benefit of a particular project as against the environmental harm it will cause, whose determination will control? If the local agency makes the final decision, as to the land use as suggested by *Fox, supra,* why should DER bother to consider the third *Payne* test. We will not attempt to resolve this problem, but we will assume for the purpose of this adjudication that DER must follow *Payne* to the letter.

The major harm which has been suggested by appellant, beyond rendering the tributary unfit for children to play in[15] is the specter of infectious hepatitis and other diseases or viruses in the drinking water supply. The risk of such disease is ever with us. We believe that there will, of course, be some increased risks by the operation of this plant, but with the chlorine contact and other measures which are being taken, which are comparable to the only precaution that can be taken, we believe it would be pure speculation on our part based on this record, to decide, that there will be even the slightest increase in hepatitis infection due to this permit grant.[16]

There was very little testimony presented on the actual benefits to be derived from the sewage plant and by implication the mobile home park. We can, of course, take notice of the fact that new living quarters being made available at a reasonable price frequently means the achievement of a life-long ambition for many. Likewise, we can assume that there is a projected need or lending institutions would never make the funds available to go forward. But this is perhaps not

---

15. Appellant has mentioned the asthetic value of the tributary, but there is little evidence that the appearance will change and none that any odor can be expected.

16. In *Fox, supra*, the Court said:

> ". . .
>
> "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, . . ."

the quantity and quality of proof which the Constitution through *Payne* requires. We believe this to be a borderline case on this last issue but inasmuch as we are remanding the case for reasons previously mentioned, additional support should be required by DER on the question of need versus benefit.[17]

CONCLUSIONS OF LAW

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

2. Where, as here, a sewage plant permit is granted to allow its discharge into a high quality low-flow tributary the burden of proof as to the legality and propriety of that permit, must be upon DER and the permittee.

3. DER has not violated any statute or regulation in granting the permit herein.

4. The law requires that a reasonable effort be made to reduce environmental incursion to a minimum, and we are not convinced on this record that enough information was made available regarding the long range consequences of a treated sewage discharge during dry weather, into the swamp or bog area on the tributary to Allegheny Creek.

5. We express some doubt as to the applicability of the third test outlined in *Payne v. Kassab*, to a case such as this, but nevertheless conclude that that inasmuch as the matter is being remanded for other reasons it would be appropriate for DER to require additional information on the benefits to be derived from the permit issuance.

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17. The mobile home park does have excellent facilities for recreation, etc. and the plans do offer the good life, for those who respond. Our concern here, however, extends to the general surrounding community which the appellants represent.

## ORDER

AND NOW, this 11th day of February, 1976, Permit No. 4875402 issued to Emerald Enterprises, Limited, in the above matter is hereby set aside and DER is ordered to obtain more detailed information regarding the discharge area and/or it shall require permittee to specifically design a monotoring procedure to provide information on the efficiency of the Max Planck system and such other information as it deems necessary consistent with this adjudication.

When and if this information is supplied to the satisfaction of DER, the permit may then be reinstated by DER with notice to all parties.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: February 11, 1976
llj

*COMMONWEALTH OF PENNSYLVANIA*

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

In the Matter of:

HENRY J. ARNOLD, JR., et al : Docket No. 75-146-C

: Order to Cease Discharge of Sewage

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, February 13, 1976

This matter is before the Board on an appeal from an order of the Pennsylvania Department of Environmental Resources (hereinafter DER) under date of May 9, 1975, requiring appellants to cease a discharge of sewage from their property in West Lebanon Township, Lebanon County, Pennsylvania, onto the surface of the ground and into the basement of the property of another. Although Elizabeth H. Wells is one of the parties to whom the order was issued, the department subsequently withdrew its order against her on the basis of testimony adduced at the hearing on this matter in which it appeared that the said Elizabeth H. Wells was an employe of the Arnolds. For this reason, the order embodied in this adjudication will set aside the May 9, 1975, order insofar as Elizabeth H. Wells is concerned. On the basis of the hearings in this matter and the filings made by the parties, we enter the following:

FINDINGS OF FACT

1. Appellants are Henry J. Arnold, Jr., and Mildred I. Arnold, his wife, of 2572 Long Lane, Lebanon, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources.

3. Appellants own property located at 2201-2203 West Lehman Street in West Lebanon Township, Lebanon County, Pennsylvania. The property consists of:

a restaurant operated by the appellants, known as The Old Tunnel Inn; two apartment units in the same building; two additional apartment units in a separate building set back from the street and fronted by a large unenclosed and grassy vacant lot.

4. A subsurface sewage disposal system serves both The Old Tunnel Inn and the apartments. The system utilizes two septic tanks and a tile field to dispose of sewage from the buildings. The tile field is located in the vacant lot fronting the apartment building.

5. Appellants' property is situated within a residential area.

6. Appellants' subsurface sewage disposal system has not functioned properly since October 1971, when they purchased the property.

7. The soils of appellant's lot are unsuitable for a subsurface sewage disposal system for the reason that (1) the soils have become saturated over the years, (2) the vacant lot is too small in area to accept the quantity of the sewage flowing into it and (3) the water table, at times being within a foot of the surface, is very high.

8. Effluent from appellants' sewage system frequently discharges to the surface of appellants' lot, forming ponds thereon, and overflows onto the street. Said discharges occur during periods of fair weather as well as after wet weather.

9. The characteristic odor of sewage eminating from appellants' vacant lot is frequently detectable in the neighborhood. This odor is offensive and noxious to the residents of the neighborhood and has permeated their homes, causing them annoyance and discomfort.

10. School children walk past the appellants' vacant lot while going to and from school, and have crossed through the effluent from the lot.

11. Children play upon the appellants' vacant lot and have done so when the effluent was ponding on the lot.

12. Seepage into the basement of a dwelling at 2215 West Lehman Street, the east wall of which abuts appellants' vacant lot, originates from the effluent

being discharged by appellants' sewage disposal system.

13. During the period between February and October, 1975, there was pumped from the basement of 2215 West Lehman Street, approximately 1,397 gallons of seepage.

14. Whenever appellants' septic tanks have been pumped out, the seepage into the basement of 2215 West Lehman Street temporarily stops.

15. Although there is some relationship between the amount of the seepage entering the basement of 2215 West Lehman Street and the amount of recent rain, rain had not occurred during most of the time that seepage was required to be pumped from the basement.

16. The basement seepage is not caused by a malfunction of the sewage system serving the property at 2215 West Lehman Street.

17. Surface run-off of rainwater from properties north and uphill of appellants' property does not significantly affect appellants' sewage system, since most runoff is diverted to the southwest, away from appellants' property, by streets, alleys and a man-made ditch.

18. In spite of the frequent pumping of their septic tanks claimed by appellants (pumping monthly, or, on occasion, as frequent as twice a week), sewage from appellants' sewage system is entering the groundwater, rising to the surface of the vacant lot, and seeping into the neighboring basement at 2215 West Lehman Street.

19. The seepage, ponding and run-off of sewage-contaminated effluent from appellants' vacant lot constitute an insanitary condition and a condition detrimental to public health and otherwise unreasonably interfere with rights of public and private enjoyment in the vicinity of appellants' property.

20. The residential area around the appellants' property is not served by public sewers; public sewers are planned by the township, with construction scheduled to begin around May 1977.

21. The installation and use of a holding tank[1] is the only alternative to the appellants' present subsurface sewage disposal system, other than closing appellants' property to further occupancy, which would eliminate the seepage of

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1. A holding tank is defined by 25 Pa. Code §71.1 as "a watertight receptacle which receives and retains sewage and is designed and constructed to facilitate ultimate disposal of the sewage at another site."

sewage into the basement of the neighboring dwelling and which would prevent a discharge of sewage to the surface of the ground.

22. The department issued an order to appellants on May 9, 1975, citing violations of 25 Pa. Code §243.2(b) and requiring appellants to take the following abatement actions:

a. Immediately cease the discharge of sewage onto the surface of ground and into the basement of the adjacent dwelling.

b. Within thirty days apply for a permit to alter their system in order to comply with the provisions of the Pennsylvania Sewage Facilities Act, and following issuance of the permit, install holding tanks in conformance with department regulations, 25 Pa. Code §73.82.

DISCUSSION

The May 9, 1975, order of DER requires appellants to:

> "A. Immediately, upon the date of receipt of this Order, cease the discharge of sewage into the basement of the property located at 2215 West Lehmar (*sic*) Street and cease the discharge of sewage onto the surface of the ground.
>
> "B. Within thirty (30) days upon receipt of this Order, you shall:
>
> "(1) Apply for the proper permit for the alteration of the sewage system to comply with the provisions of the Pennsylvania Sewage Facilities Act.
>
> "(2) Upon issuance of said permit proceed to install a holding tank in conformance with Section 73.82 of Chapter 73, Standards For Sewage Disposal Facilities and inform the Department of the arrangements for the maintenance of this sewage retention system."

Appellants rely heavily on *Commonwealth v. Wyeth Laboratories,* 12 Pa. Commonwealth Ct. 227, 315 A.2d 648(1974) to support their contention that they are not required to take the action set forth in the DER order. However, we agree with appellee that *Wyeth* has no application to the facts before us. *Wyeth* is predicated upon an existing condition which was neither caused nor aggravated by the conduct of defendant therein. Here, it is appellants' affirmative acts which are creating the problem. Hence, *Wyeth* cannot be applied to this case.

Appellants' reliance on *Commonwealth v. Flynn,* Pa. Commonwealth Ct. , 344 A.2d 720(1975), is likewise misplaced. Surely appellants cannot contend that the issuance of a permit for an on-lot sewage disposal system confers upon appellants a vested right to maintain a nuisance. As the court observed in *Flynn:*

" . . .In the event that individual property rights or the public health, safety or welfare do, in the future, become endangered, appropriate remedies may then be applied against Flynn. . . ." 344 A.2d at 725.

The clear implication of this statement is contrary to the appellants' contention.

The permit[2] granted appellants was issued pursuant to the provisions of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, as amended, 35 P. S. §750.1 *et seq.* The act is designed to regulate the on-lot disposal of sewage in such a manner that a nuisance will not result. Its purpose is not to legitimate insanitary conditions hazardous to health. Merely to state the issue is sufficient to reject appellants' contention in this regard.

DER issued the above order pursuant to its nuisance abatement powers under §1917-A of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, as amended 71 P. S. §51 *et seq.* The facts of this case leave little doubt that appellants' sewage disposal system is being operated in such a manner as to become a public nuisance and a condition detrimental to public health. As such, it is clearly abateable.

In *Haugh's Appeal*, 102 Pa. 42(1883) our Supreme Court stated:

"the right to have a privy is a right only so long as it is used without material injury to the property of others; when its fetid contents begin to leak over upon the adjoining lands it becomes a nuisance and actionable as such. The proposition that one man should, under any circumstances, be permitted to deposit any part of his health-destroying filth in or upon his neighbor's premises is simply absurd." 102 Pa. at 44.

We cannot sanction in 1976 what was clearly recognized in 1883 as a nuisance and a condition detrimental to public health.

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2. On August 13, 1973, the Township of West Lebanon issued appellants a permit for the repair of their existing sewage disposal system. Previous to the issuance of the said permit, appellants received from DER a notice of violation advising them that their sewage disposal system was malfunctioning and required repair.

## CONCLUSIONS OF LAW

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

2. DER has the power to order insanitary conditions and other nuisances to be abated pursuant to §1917-A of the Administrative Code of 1929, *supra*.

3. The Findings of Fact in this adjudication are supported by substantial, credible evidence. The Findings of Fact clearly establish a condition, existing by virtue of a malfunctioning of appellants' sewage disposal system, which constitutes a public nuisance.

4. The directives in the DER order of May 9, 1975, to appellants Henry J. Arnold, Jr., and his wife Mildred I. Arnold, are proper exercises of DER's authority under §1917-A of the Administrative Code of 1929, *supra*, but the direction in said order to Elizabeth H. Wells was improper under the circumstances.

## O R D E R

AND NOW, this 13th day of February, 1976, the appeal of Henry J. Arnold, Jr., and Mildred I. Arnold, his wife, from the May 9, 1975, order of DER, requiring appellants to abate their discharge of sewer and to undertake corrective measures, is hereby dismissed. The appeal of Elizabeth H. Wells from the aforesaid order is hereby sustained, and only as to the said Elizabeth H. Wells, the aforesaid order of the Department of Environmental Resources is hereby set aside.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: February 13, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

ALLEGHENY VALLEY RESIDENTS
AGAINST POLLUTION

Docket No. 74-232-C

Water Encroachment Permit

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ALLEGHENY LUDLUM INDUSTRIES, INC.

ADJUDICATION

By Joseph L. Cohen, Member, February 24, 1976

This matter is before the Board on the appeal of Allegheny Valley Residents Against Pollution (hereinafter AVRAP) from the action of the Pennsylvania Department of Environmental Resources (hereinafter DER), taken on or about September 10, 1974, whereby DER granted Allegheny Ludlum Industries, Inc. (hereinafter Allegheny Ludlum) an extension of a permit originally issued to Allegheny Ludlum on February 11, 1964, subject to certain conditions. This permit, which DER from time to time extended, authorized Allegheny Ludlum to "change the channel of the Allegheny River by placing a fill along the right bank and dredging along the left bank of the main channel between Mile 24.5 and mile 25.65 in Harrison Township, Allegheny County". It is the conditions attached to the extension of the permit which AVRAP appeals.

After numerous interlocutory petitions, motions and orders in this matter, we must now adjudicate the issue raised by Allegheny Ludlum's motion to dismiss, filed August 4, 1975. The motion to dismiss alleges that the appeal is moot for the reason that the land created by the dredge and fill operation was transferred by the Commonwealth to Allegheny Ludlum by a land patent signed by the Governor on July 29, 1975. Consequently, according to Allegheny Ludlum, it does not occupy the said land by virtue of the encroachment permit or any condition or conditions attached to the extension thereof.

In its answer to Allegheny Ludlum's motion to dismiss, AVRAP alleges, in essence, that the encroachment permit, the extensions thereto, and the conditions

attached to the latest extension are still in effect.

On the basis of the foregoing, the respective briefs filed by Allegheny Ludlum and AVRAP, and without a formal evidentiary hearing, we enter the following:

FINDINGS OF FACT

1. Appellant is AVRAP, a nonprofit corporation organized and doing business under the laws of Pennsylvania with offices at 401 Burtner Road, Natrona Heights, Allegheny County, Pennsylvania.

2. Appellee is DER, the agency of the Commonwealth of Pennsylvania authorized to issue dredge and fill permits under the authority of §1908-A of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, P. S. §51 *et seq.*[1]

3. Intervenor is Allegheny Ludlum, a corporation doing business pursuant to the laws of Pennsylvania, Two Thousand Oliver Building, Pittsburgh, Pennsylvania 15222.

4. On January 29, 1964, Allegheny Ludlum applied to the Water and Power Resources Board for a permit to place a fill along the right bank of the Allegheny River adjacent to Allegheny Ludlum's steel making facilities in Harrison Township, Allegheny County, Pennsylvania. In its application, Allegheny Ludlum disclosed that it proposed to utilize the fill site for slag reclamation and dock facilities. On February 11, 1964, the Water and Power Resources Board, in response to said application, issued Allegheny Ludlum permit No. 14437-A. The Water and Power Resources Board granted Allegheny Ludlum periodic extensions of time within which to complete the permitted operation.

5. On March 13, 1968, the Water and Power Resources Board granted Allegheny Ludlum an extension of time under the aforesaid permit from December 31, 1967, to December 31, 1973. Thereafter, in October of 1973, Allegheny Ludlum made application to DER, successor to the Water and Power Resources Board, for an

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1. Prior to the enactment of §1908-A of the Administrative Code of 1929, *supra*, the now defunct Water and Power Resources Board exercised the authority to issue dredge and fill permits under §1808 (now repealed) of the Administrative Code of 1929, *supra*.

extension of time until December 31, 1980. In response to this request, DER, in a letter to Allegheny Ludlum under date of April 2, 1974, granted an extension until October 1, 1975, subject to certain conditions which were to become effective April 8, 1974.

6. On May 10, 1974, Allegheny Ludlum filed an appeal with this Board alleging the condition set forth in the letter of April 2, 1974, to be legally improper. The appeal was captioned *Allegheny Ludlum Industries, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources and Allegheny Valley Residents Against Pollution, Intervenor*, EHB Docket No. 74-117-B. During the course of those proceedings, Allegheny Ludlum and DER were in constant communication in an effort to negotiate a resolution of the appeal satisfactory to both DER and Allegheny Ludlum. On September 9, 1974, Allegheny Ludlum filed with this Board a withdrawal of appeal. On September 10, 1974, DER issued a set of amended extension conditions. On September 16, 1974, we entered an order closing and discontinuing the appeal pursuant to Allegheny Ludlum's notice of withdrawal.

7. The extension of time granted by DER to Allegheny Ludlum on September 10, 1974, was subject to three sets of conditions. The first set required compliance with certain provisions of the rules and regulations of the Allegheny Department of Health relating to air pollution control; the second set related to conditions sought to be imposed pursuant to the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *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. §690.1 *et seq.*; the third set of conditions, purportedly issued pursuant to §1917-A of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq.*, required Allegheny Ludlum to reduce certain noise generated by its activities at the fill site and to abate other nuisances.

8. On October 7, 1974, AVRAP filed an appeal with this Board alleging, *inter alia:*

> "3. On or about September 10, 1974 Allegheny Ludlum Industries, Inc., the permittee, and the Department of Environmental Resources, the appellee, agreed upon a set of extension conditions for said 1964 fill permit, a copy of which is attached hereto as Exhibit 3 and made a part hereof. These extension conditions, in part, bear no reasonable relation to said stated consent of the 1964 fill permit.
>
> "4. Some of the extension conditions incorporated within Exhibit 3 are self-executing and would result in the continuation of serious pollution.

"5. Some of the extension conditions incorporated within Exhibit 3 open the door to further proliferation and continuation of industrial operations on the fill site, operations which bear no reasonable relation to said stated consent of the 1964 fill permit.

"6. Irreparable harm is likely to result to appellant because some of said extension conditions would continue serious pollution and nuisance.

"7. Some of appellee's methods of resolution to the pollution and nuisance inherent in the industrial operations on the fill site remain questionable and objectionable to appellant."

9. On October 8, 1974, Allegheny Ludlum petitioned to intervene in the proceedings, which petition was granted by the Board on October 17, 1974.

10. In the course of the present appeal, Allegheny Ludlum filed motions to dismiss on November 12, 1974, December 30, 1974, and August 4, 1975. The first two motions were dismissed.

11. The August 4, 1975, motion to dismiss by Allegheny Ludlum alleges:

"Intervenor hereby asks that this appeal be dismissed, on the ground that the issues involved herein have become moot.

"The subject matter of this appeal is the set of conditions attached by the appellee to its extension of Encroachment Permit No. 14437-A. This permit authorized Allegheny Ludlum to place fill along the right bank of the Allegheny River in Harrison Township.

"As a result of the placement of fill pursuant to the permit, a new tract of land was created. The aforesaid permit extension placed restrictions on the use by Allegheny Ludlum of the Commonwealth's land. On June 26, 1974 Allegheny Ludlum applied for a patent with respect to said tract, consisting of 31 acres and 146 perches, under the Pennsylvania Public Lands Act [as amended, 64 P.S. §§601-616]. Land Patent #700, transferring title of the said tract to the Intervenor, was signed by Governor Milton J. Shapp on July 29, 1975.

"Allegheny Ludlum has agreed not to place any additional fill in the river under the authority of the aforesaid permit. As the former fill site is now the property of Intervenor, its occupancy and use of such land is no longer predicated upon Encroachment Permit No. 14437-A. Thus, there is no DER action now in effect to aggrieve the Appellant, and there is no live case or controversy before this Board."

12. On September 11, 1975, AVRAP filed an answer to Allegheny Ludlum's motion alleging:

"Appellant hereby asks this Board to deny the intervenor's Motion to Dismiss Appeal, dated July 31, 1975, on the ground that Encroachment Permit No. 14437-A and its Extension Conditions effective April 8, 1974, as amended September 10, 1974, are still in effect.

"Furthermore, completion of the subject landfill pursuant to the said Extension Conditions has not occurred to date.

"Consequently, DER's subject action is still in effect and is grievable."

DISCUSSION

We have now to consider whether the instant appeal is moot, as alleged in the motion to dismiss filed by Allegheny Ludlum on August 4, 1975.

AVRAP represents residents living in the vicinity of Allegheny Ludlum's facility who desire to place strict environmental controls upon Allegheny Ludlum's plant in order to reduce the noise eminating therefrom and other environmental insults. The initial imposition of conditions on the extension of permit No. 14437-A in April of 1974 and the amended conditions attached thereto in September of the same year represented an effort by DER to alleviate the environmental insults of which AVRAP complained. However, AVRAP, by filing the current appeal, indicated its displeasure with the September amended conditions.

Permit No. 14437-A permitted Allegheny Ludlum to create a filled in area which it intended for use in connection with its slag reclamation operations. The permit made it quite clear that the filled-in area created by the dredging operations did not result in title to the area vesting in Allegheny Ludlum. Condition No. 11[2] of the permit made it clear that the fill area was Commonwealth's property and remains so under the permit. Thus, the permit did not convey any property interest to Allegheny Ludlum insofar as the filled-in area was concerned. Under such circumstances, the conditions to the extension of time granted Allegheny Ludlum in September, 1974, from which AVRAP now appeals, are conditons under which Allegheny Ludlum was permitted to use the area already filled in under the permit and subsequently to be filled in under its terms.

The permit conditions now in question, therefore, may be characterized as conditions under which Allegheny Ludlum could use the area already filled in under the permit and subsequently to be filled in under its terms. On June 26, 1974, Allegheny Ludlum applied for a patent with respect to the tract of land

2. Condition No. 11 of permit No. 14437-A provides in relevant part: "Neither the permittee, the Pennsalt Chemicals Corporation, nor anyone else, shall acquire title to the filled-in portions of the stream bed belonging to the Commonwealth of Pennsylvania but such title and ownership shall remain in the Commonwealth. . . ."

created by the placement of the fill pursuant to the permit under consideration. On July 29, 1975, land patent No. 700, transferring title of the said tract of land to Allegheny Ludlum, was signed by Governor Milton J. Shapp. On the basis of this patent and the stated agreement of Allegheny Ludlum not to place additional fill in the river under the authority of the permit, Allegheny Ludlum alleges that it no longer occupies and utilizes the land pursuant to permit No. 14437-A but does so by virtue of its ownership of said tract of land, therefore, according to Allegheny Ludlum, the validity of the permit conditions is a moot question inasmuch as Allegheny Ludlum is not occupying and utilizing the land under the permit.

We are of the opinion that with regard to condition No. 1 of the amended conditions of September 10, 1974, Allegheny Ludlum is correct. Under the provisions of §12 of the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, *as amended,* 35 P. S. §4001, *et seq.*, the administrative procedures for the abatement, reduction, prevention and control of air polltuion set forth in the Air Pollution Control Act, *supra*, do not apply to any political subdivision which has an approved air pollution control agency. It is our understanding that the Allegheny County Health Department, Bureau of Air Pollution Control, is an "approved agency" under the provisions of §12 of the Act. Inasmuch as the Allegheny Department of Health, Bureau of Air Pollution Control is such an approved agency, DER may not exercise its regulatory authority under the Air Pollution Control Act, *supra*, in Allegheny County. Therefore, DER could enforce condition No. 1 of the amended conditions only so long as the Commonwealth owned the land in question. When the land was transferred to Allegheny Ludlum under the aforementioned land patent, DER had no basis upon which to enforce condition No. 1. Thus, the question of the validity of that condition is moot and the appeal will be dismissed insofar as that condition is concerned.

However, the same is not true of conditions No. 2 and 3. These conditions are predicated upon the regulatory authority of DER under the authority of the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended* , 35 P. S. §6001 *et seq.*, The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended,* 35 P. S. §690.1 *et seq.* and §1917-A of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq.* We cannot conceive that DER by imposing these conditions upon Allegheny Ludlum, intended to exercise its regulatory authority in the areas covered by the condition only so long as Allegheny Ludlum

occupied Commonwealth property. If the operations of Allegheny Ludlum are such as to cause DER to invoke the authority of the above mentioned acts with regard to such operations, then the assertion of this authority, although contained in permit conditions No. 2 and 3, is an action of DER independent of their being made conditions of the permit. Any other characterization of DER action in this regard would be inconsistent with DER's powers and duties under these statutes. We must, therefore, conclude that these conditions are also independent directives to Allegheny Ludlum to comply with these laws. Their inclusion in the permit at a time when the Commonwealth owned the property in question gave DER an additional enforcement tool in regard to its environmental responsibility which it would not have had otherwise.

The circumstances under which the conditions forming the basis of this appeal were imposed upon Allegheny Ludlum by DER, in effect, amount to an agreement between Allegheny Ludlum and DER whereby the corporation would conduct its operation at the fill site in conformance with those conditions. It does not appear to us that Allegheny Ludlum intended that it be relieved of these conditions once it acquired title to the filled-in land. We assume that it meant to comply with the aforementioned conditions so long as it conducted operations at the site to which the conditions pertained.

Because of the foregoing, we are of the opinion that the validity of conditions No. 2 and 3 do not depend upon either the permit or that the title to the land in question is in the Commonwealth. The validity of these conditions depends upon whether they are a proper exercise of DER authority under the aforementioned statutes. Thus, with reference to conditions No. 2 and 3, we deny Allegheny Ludlum's motion to dismiss.

## CONCLUSIONS OF LAW

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

2. Under the provisions of §12(b) of the Air Pollution Control Act, *supra*, DER cannot exercise its administrative or regulatory authority under said act in any political subdivison which has an "approved" air pollution control agency.

3. Without first revoking the approval which DER or its predecessor under the Air Pollution Control Act, *supra*, gave to Allegheny County, the Department

of Health, Bureau of Air Pollution Control, DER possessed no regulatory authority in Allegheny County either to compel compliance with Allegheny County air pollution control regulations or to enforce the provisions of the Air Pollution Control Act, *supra*, in Allegheny County.

4. The conditions set forth in condition No. 1 of permit No. 14437-A could only be enforced by DER if title to the filled property remained in DER and Allegheny Ludlum was occupying and using said property on conditions established by DER.

5. When Allegheny Ludlum acquired title to the filled-in portion of land created by operations authorized by permit No. 14437-A, DER could not enforce condition No. 1 against Allegheny Ludlum.

6. Since DER could not enforce condition No. 1 against Allegheny Ludlum, the validity of such condition is a moot question.

7. Conditions No. 2 and 3 are purported exercises of authority under the Pennsylvania Solid Waste Management Act, *supra*, and the Administrative Code of 1929, *supra*, and as such, may be enforced independently of the ownership of the filled-in property. Consequently, questions relating to the validity of these conditions are not moot.

O R D E R

AND NOW, this 24th day of February, 1976, the motion of Allegheny Ludlum Industries, Inc., to dismiss the appeal of Allegheny Valley Residents Against Pollution in the above captioned matter is hereby granted with respect to condition No. 1 of the amended conditions attached to permit No. 14437-A on September 10, 1974. The said motion is denied with regard to conditions No. 2 and 3 thereof.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNA R. DENWORTH
Member



DATED: February 24, 1976

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

BADER BROTHERS, INC.

Docket No. 75-019-W

" 75-115-W

v.

Water Obstructions Act
Article I, Section 27 of the
Pennsylvania Constitution

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Paul E. Waters, Chairman, Issued February 27, 1976

This is an appeal by Bader Brothers, Inc. from the refusal by the Department of Environmental Resources, hereinafter DER, of a permit for construction of culverts to serve a proposed industrial park in Bristol Township, Bucks County, Pennsylvania. The property is 45 acres in size and the total watershed is approximately 640 acres. Below the area in question and not on appellant's property, a number of other culverts have proven to be inadequate in size during heavy rains. DER, believing the industrial park will be in a flood plain and that it will add to this drainage problem, will not issue the Water Obstructions Act permit, here in question, unless and until appellant solves the indicated drainage problem.

FINDINGS OF FACT

1. Appellant is the equitable owner of a 45-acre site in Bristol Township, Bucks County, Pennsylvania, which is the subject of this appeal, across which runs a wet weather watercourse which is a tributary of the Neshaminy Creek.

2. The aforesaid property is industrially zoned and although it is not in any flood plain designated by any governmental authority portions of the property are subject to periodic flooding.

3. Appellant seeks a stream encroachment permit under the Water Obstructions Act, Act of June 25, 1913, P. L. 555, *as amended*, 32 P. S. §381, *et seq.*, to build three culverts across a wet weather watercourse on its Bristol Township property.

It also seeks permission to run sewer and water lines under the watercourse. DER, by letter of December 18, 1974, denied the application.

4. In a 50-year recurrence flood of short duration, it is estimated that 1,053,000 cubic feet of water would be generated in the drainage area of which this 45-acre tract is part. This tract will generate 7 percent. The drainage basins as provided for on the tract will hold 257,000 cubic feet or 24 percent of all water generated in the entire area, thereby impounding 17 percent of the off-site drainage.

5. The wet weather ditch which crosses appellant's property leaves the property at the Franklin Street Culvert, a small culvert installed by Bristol Township. The area below Franklin Street has been subject to periodic flooding because of upstream development and the inadequacy of the drainage below Franklin Street.

6. DER in denying the application admits that it did not consider only the application itself or the culverts proposed to be build as set forth in the application, but considered buildings that appellant would likely build.

7. DER had reason to believe that the buildings to be built on the property would displace flood waters although they could be constructed in a manner so that this would not be done.

8. DER considered the application as one providing for construction of storm water retention basins along the tributaries of the Neshaminy Creek in Bristol Township.

9. DER has no regulations concerning building in the flood plain or that it would not issue stream encroachment permits if such would lead to any development in an area which may be flooded during a 50-year storm of short duration. Before purchasing this property, appellant had no notice that DER would seek to prevent its development.

10. The wet weather watercourse causes flooding below the Bader Brothers' property and such flooding would exist and would continue even if there were no development of the property because of the existence of inadequate culverts and inadequate downstream piping between the property and the Neshaminy Creek.

11. The Township of Bristol could correct the existing flooding problem by enlarging the size of the drainage pipes at the Franklin Street culvert and downstream.

12. DER advised both the Chairman of the Environmental Hearing Board and the appellant in this matter by letter that it was the responsibility of the Township to provide proper drainage and that it would issue an order under the provisions of the Water Obstructions Act, *supra*, ordering it to do so but failed to do so.

13. A further reason for denying the application as was stated in the letter of denial was that the proposed channel work and the addition of the runoff on the paved and roofed areas of the industrial park would increase the risk of flooding. There were no plans submitted as to what buildings would be built or what areas would be paved inasmuch as it is an industrial park which will later be sold by lots and custom-made buildings possibly erected. The Department never asked for and never received any such information and could not have, inasmuch as even the applicant does not know at this time exactly what industrial use will be made by buyers of lots sold.

14. On April 14, 1975, DER issued a conditional permit to Bader Brothers for the stream encroachments provided that the downstream drainage problem is solved by putting in culverts of the proper size. The applicant refused to do so because it would be financially unfeasible to provide drainage for 640 acres so it could use its 45 acres. Such improvements would have to be made on municipal property or the private property of others and appellant does not have the power of eminent domain.

15. Appellant in this case has purchased the land as industrially zoned land from one Veronica Tryon in December of 1971 at a cost of $879,000.

16. The annual taxes paid on this land for its industrial use is approximately $19,000 annually.

17. The best estimate of the ultimate economic value is that if the industrial park is build it will add $10,000,000 in taxe ratables to the Township tax rolls and supply several hundred new jobs.

18. DER would approve the stream encroachment permit for the building of three culverts and water and sewer line crossings because they are not derogatory to the regimen of the stream and are innocuous, if the land were not to be used as an industrial park, and would approve it if it were to be used, for example, for agricultural purposes at the present grade.

19. Vaden Butler, of DER's division of Dams & Encroachments, testified that the permit itself was merely for culverts across the stream and that the appellant was going to put in impounding basins but they would not be subject to permit because they were nowhere near the stream.

20. Bristol Township, hereinafter Township, could solve the drainage problem by enlarging the Franklin Street culvert and the downstream piping. Mr. Gerrity, the Township's engineer testified that he had prepared plans for an interceptor to resolve the problem.

21. The Franklin Street culvert and the downstream piping, with the exception of the culvert under Rt. 13 and the Penn Central rail line, were installed without permits from DER, and are not presently under permit.

22. Appellant's property is in a flood plain. Although, neither DER nor any other agency has formally designated this land as flood plain, the fact that it floods regularly makes it a flood plain. Historical evidence that a property floods recurrently is a sufficient basis to determine that the property is in a flood plain.

23. The Township, or more accurately nature, is using appellant's land as a holding basin. Mr. Gerrity has testified that in applying for the permit to install the Rt. 13 culvert, he indicated the Township's intent to place a retention pond on appellant's property. The terms retention pond and holding basin are interchangeable. Both indicate an area in which storm waters are held. Mr. Gerrity stated that the present use of the site is a holding basin for the Township. On cross examination, Mr. Gerrity qualified his statement to say that the Township was not "using it as a holding basin" but that "Nature was using it as a retention pond". Mr. Gerrity stated that his intent is to condemn appellant's land for the installation of an "engineered retention pond".

24. DER has attempted to have the Township solve this drainage problem. While it is stipulated that DER has not issued any order to the Township or commenced any prosecution against the Township, DER has attempted to have the Township resolve its drainage inadequacies.

25. The limited resources of DER preclude its issuing an order to the Township, at this time.

26. The four impounding basins proposed by appellant are of sufficient capacity to handle the runoff that would be generated on appellant's property in a 50-year recurrence rainfall of short duration prior to development.

27. Appellant's project will likely result in some filling of the property based on the present elevation of plans for an industrial park.

DISCUSSION

The appellant has applied to DER pursuant to the Water Obstructions Act, *supra*, to construct three culverts across a stream[1] which passes through their large industrially zoned properties, in order to make access roads for a planned industrial park. They also seek permission to lay sewer and water lines under the stream channel. Although there are a number of other interesting legal questions raised by this appeal, the major and controlling question concerns the extent of the authority vested in DER by the Water Obstructions Act, *supra*. Specifically we are called upon to decide whether DER may refuse a permit for culverts which have no deleterious effect on a stream, based on the fact that a flooding problem exists further downstream, for which appellant has no responsibility.

At the outset we agree with DER that the appellant has the burden of proof pursuant to 25 Pa. Code 21.42. We further agree that DER is not limited in its review of the Water Obstructions Act permit here in question, to the physical and other attributes of three culverts and proposed utility crossing. We deem it appropriate based on the responsibilities outlined in Article I, Section 27 of the Pennsylvania Constitution[2] for DER to look at the entire project in the vicinity of the stream encroachments. Any direct and inevitable effects of the permit grant are certainly not outside of the scope of DER's proper interest. We therefore reject the appellants' argument to the contrary. This same logic leads us to agree with DER that the proposed impounding basins, although, not requiring a

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1. Appellant raises the question of whether, in fact, the ditch through which water traverses its property is sufficiently permanent or sizeable to be considered a stream. We are satisfied that it is within the coverage of the Act.

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."

separate permit under the Act, must be considered in acting upon the Water Obstructions permit that was in fact requested. The next question which arises is whether, in light of the foregoing, DER must also consider the "fill" which all available data leads it to believe will be required at the site. Appellant argues that perhaps some "fill" will be required but that it does not know where, or how much, and that in any event, this matter is outside of the scope of legitimate DER concerns at this time.

Having concluded that the impounding basins are presently within the scope of DER concern, we by necessity, have to deal with the question of fill because there is no way to calculate the required size of the basins without knowledge of the fill and the structures which will surely change the amount of run off at the site. It would seem to be an unknown quantity in an equation which DER is called upon to solve by issuing a permit.

Both DER and appellant seem to agree that there is presently a problem with drainage caused at a point below appellant's property, which is basically the responsibility of the Township. The Township was not a party to this proceeding and, of course, nothing we say here can bind it, but apparently the cost factor and not denial of need for corrective flood protection measures, has prevented a resolution of this problem by the Township. This also raises the interesting question of who must ultimately bear the burden of inaction when the Legislature has failed to provide sufficient funds for enforcement of obligations placed by statute and the Constitution upon DER? The answer generally appears to be that the public must accept a selective enforcement program as properly within the discretion of DER under these circumstances. In this case, however, we must look beyond the Pennsylvania Constitution, to the 14th Amendment to the United States Constitution.

Inasmuch as appellant has a potentially valuable piece of real estate, which it is unable to develop unless and until a third party over whom it has no control takes specific action, we deem this to raise a substantial due process question. For solution we look to the case of *Commonwealth of Pennsylvania, Department of Environmental Resources v. David Trautner,* 19 Pa. Commonwealth Ct. 116,

A2d. ____, 1975, where Commonwealth Court said:

". . .

"The problem with DER's position is that, under the regulations currently in effect, a property owner can be effectively denied his right to use his property until such time as the municipality has satisfied DER that sewage disposal on the property is in conformity "with a comprehensive program of water quality management". The burden is placed upon the property owner to motivate his municipality to (1) comply with the regulations relevant to amending municipal plans; and (2) satisfy DER that the property owner's plan for sewage disposal is otherwise acceptable. If the municipality fails to act to amend its plan, or cannot or will not fully satisfy DER, for whatever reasons, the property owner is left with no sewage permit and no opportunity to use his land in what is otherwise a completely lawful manner. This situation is confiscatory and tantamount to a taking without due process of law. Robin Corporation v. Board of Supervisors of Lower Paxton Township, ___ Pa. Commonwealth Ct. ___, 332 A. 2d 841 (1975); Township of Neville v. Exxon Corporation, 14 Pa. Commonwealth Ct. 225, 322 A. 2d 144 (1974)."

. . .

In the *Trautner* case, there was an alternative course of action available to appellant, the Court nevertheless went on to say:

". . .

"It is certainly true that this regulation provides the property owner with a course of action to follow. It does not, however, necessarily provide an adequate means of protecting the owner's property rights. The landowner is still not free to use his land until such time as another party, over whom he has absolutely no control, acts in a manner satisfactory to DER. There is no guarantee that such action will occur within a resonable time, or for that matter, ever occur."

. . .

It is clear from the foregoing that appellant need only meet the reasonable requirements of the statute and cannot properly be asked to do the impossible, or to solve a problem it did not cause as a condition to make reasonable use of its own land.

DER has stipulated that the proposed impounding basins could satisfactorily hold all of the water generated on the appellants' property from a 50-year recurrance rainfall of short duration. Appellant further contends that not only will the basins retain all water from its tract of land but in addition will hold 17 percent of the water occurring above its land as runoff. In short, appellant admits that it cannot solve the entire water problem but argues that its development will not make the problem any worse than it is now, and will in fact help alleviate it to some small extent. We believe this is all that is reasonably required of appellant under the circumstances of this case. The problem that we have with the testimony is that it is not clear whether appellant proposes to retain the runoff at its present level only prior to development or whether it can retain the runoff at present levels even after development of the tract is completed. It is the latter which we deem to be required. The question that is controlling here is not where was the water generated, but rather, will there be an increase in runoff which will by necessity increase the risk of flooding due to the existence of culverts which are already inadequate? It is true that appellant does not have responsibility for all water generated in the watershed, but by the same token, it has no right to develop its land in such a way as to increase risks to life and property downstream. Clearly, DER has a responsibility under the Water Obstructions Act, *supra*, to prevent this, where possible. Indeed, it is the purpose of the Act.

The appellant has indicated that it does not know precisely when or how its tract is to be graded and developed and that this is immaterial. We agree, only to the extent that there will be no increase in runoff until the present downstream flooding problem is alleviated.

The condition which DER required for the permit issuance is too broad and as literally construed would, we believe, violate the rule set down by *Trautner, supra*. Appellant need not solve or even help to solve a flooding problem which it did not create. The condition for the permit should require only that appellant not make the flooding problem any worse by increasing the runoff from its property. We believe the necessary calculations for retention basins must be made by appellant and approved by DER based on information which only appellant can supply. It is therefore necessary that we remand the proceeding for further administrative action.

CONCLUSIONS OF LAW

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

2. The Water Obstructions Act, *supra*, read in conjunction with Article I, Section 27 of rhe Pennsylvania Constitution empowers DER to consider the total direct impact of the issuance of a permit under the Act.

3. Where the refusal of a permit would unduly restrict the use of land in violation of the due process clause of the 14th Amendment, DER may properly condition the permit issuance on the requirement that the permittee cause no additional runoff that will lead to flooding of an already inadequate downstream culvert.

O R D E R

AND NOW, this 27th day of February, 1976, the above matter is hereby remanded to the Department of Environmental Resources for action consistent with this adjudication.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

DISSENTING OPINION

By Joseph L. Cohen, Member

The facts of this case lead me to the inescapable conclusion that the only reason for either the denial of the permit or the granting of it on condition is that the existing culverts over which appellants concededly have no control could not accomodate the run-off associated with the development of appellant's property as an industrial park. If, as the adjudication seems to suggest, the proposed culverts set forth in the application will not in and of themselves cause increased flooding, I can see no reason why the permit should not have been granted. Further, if my understanding is correct, the majority of the run-off from appellant's

land will occur downstream of the proposed culvert. If this is the case, there appears to be no reason not to grant the permits for the construction of the culverts in question.

I am of the opinion that Article I, Section 27 of the Pennsylvania Constitution does not allow the denial of this permit. If the granting of the permit were to have an adverse environmental impact which would be directly attributable to the proposed culverts, then I believe Article I, Section 27 would permit the denial of the application. However, it is not the proposed culverts that are causing the concern, it is the existing culverts and the proposed use to which appellants seek to put their land. This secondary or indirect result of the permit issuance is, in my judgment, not a proper reason to deny the permit in question. Moreover, the condition attached to the grant of the permit is, as indicated in the adjudication, not proper. I do not believe Article I, Section 27 allows DER to enter the flood plain zoning business any more than it permits DER to engage in land use regulation generally. See *Community College of Delaware County v. Fox,* Pa. Commonwealth Ct. , 342 A.2d 468(1975).

ENVIRONMENTAL HEARING BOARD

Joseph L Cohen

JOSEPH L. COHEN
Member

DATED: February 27, 1976

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

GEORGE F. SCHIDING

Docket No. 75-200-W

Pennsylvania Sewage Facilities Act

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and BRADLEY and DIXIE SCHILLER, *et ux*, Intervenor

# ADJUDICATION

By Paul E. Waters, Chairman, Issued March 12, 1976

This matter comes before the Board as an appeal by George F. Schiding, hereinafter, appellant, from a refusal by the Department of Environmental Resources, hereinafter DER, to order Washington Township to revise its Act 537 Sewage Facilities Plan. Appellant desires to build and operate a mobile home and camping park in the Township near the Conewago Creek in York County, Pennsylvania. The Township passed a resolution to reqest the necessary plan amendment, but a month later revoked that resolution. Appellant now seeks to have DER compel the Township to revise its plan to allow for proper sewage disposal for his proposed project. The intervention of nearby property owners objecting to the requested order on the basis that the disposal system will be on a flood plain was allowed.

## FINDINGS OF FACT

1. The appellant, George F. Schiding, owns land on the Conewago Creek in Washington Township, York County, Pennsylvania, and resides at 2605 Hartford Road, York, Pennsylvania.

2. By deed dated July 27, 1972, appellant purchased the tract of land in Washington Township, York County, Pennsylvania, intending at the time of purchase and prior thereto to establish a campground specifically for travel trailers or tents.

3. The Washington Township official sewage plan does not provide for or allow for the development of the campground as proposed by Mr. Schiding.

4. In approximately April or May of 1974, appellant presented to the Washington Township Board of Supervisors a proposed module that would effect a change in the municipality sewage plan, such as would allow for the development of the campground in question.

5. On July 15, 1974, the municipality adopted the Schiding Plan as part of its official plan.

6. In August of 1974, the resolution adopting the Schiding Plan was officially rescinded by the Township.

7. By letter of August 21, 1974, the Township informed DER that the resolutions adopting the Schiding project had been rescinded. This letter was received by DER's York office on August 26, 1974.

8. On December 31, 1973, Washington Township adopted an ordinance regulating, *inter alia*, the construction of buildings and installation of sewage systems in flood-prone areas.

9. The ordinance of December 31, 1973, at Section 12, Subparagraph (u) prohibits on-site sewage disposal systems within the identified flood-prone area shown by map.

10. Prior to its decision to deny the private request for amendment to the sewage plan, DER was aware of the ordinance of December 31, 1973, having been supplied with a copy of said ordinance by the York County Planning Commission.

11. Prior to the hearing, a representative of DER requested permission of appellant to go on the land in question for the purpose of determining whether or not the proposed seepage bed or sewage system would be within the flood hazard area as shown on the maps accompanying the ordinance. He was denied permission by Mr. Schiding to enter the land.

12. During high water conditions resulting from hurricane Agnes and from tropical storm Eloise, the area of the proposed sewage treatment facility was underwater.

13. A Washington Township Ordinance dated December 16, 1974, would, by its terms, regulate the proposed campground, and require, among other things, that each lot be "easily accessible to a public street".

14. Access to the proposed mobile home park would only be by way of private road.

DISCUSSION

Appellant has come for relief from a situation which would understandably cause frustration to any property owner acting in good faith to embark upon a legal business venture. What makes the situation difficult is the fact that Washington Township, on July 15, 1974, passed the resolution necessary to permit appellant to move ahead with his plans to open and operate a camping reservation on his property. The Township, not a party to this proceeding, then revoked this resolution a month later on August 19th of 1974, without giving any notice to appellant. Appellant learned of this revocation during the month of August, and has taken separate legal action against the Township, which is not relevant to this proceeding. The question that we must answer is whether, in light of the above, DER has acted arbitrarily in refusing to order the Township to amend its Act 537 plan.[1] The appellant's request to DER was made pursuant to 25 Pennsylvania Code, Section 71.17, which allows any person who is a resident or property owner in a municipality to request the Department: "(a) . . .to order the municipality to revise its official plan where said person can show that the official plan is inadequate to meet the resident's or property owner's sewage disposal needs." Although the Township's actions throughout this matter leave much to be desired, this alone is not grounds for a DER order. We must look to the basis for the Township refusal or revocation of the plan amendment resolution and if we find any reasonable basis for that action, certainly, DER need not act contrary thereto. The two reasons given for the Township's revocation action were that the appellant's property has no public street access and that it floods due to the proximity of Conewago Creek.[2] There would appear to be the exercise of sound judgment by the Township if the allegations are true. In this regard, although there is no serious dispute by appellant regarding the lack of public road access, he does, however, contend that the area proposed for installation of the drain fields and sewage disposal system, does not ordinarily experience flooding,

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1. See Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.1, *et seq.*

2. The testimony of Donald A. Hull, a Township Supervisor, is helpful on the reasons and occasions for the revocation. See Notes of Testimony Page 42, Lines 20 through 25, Page 43, Lines 1 through 20:

> "Q You stated that at the July meeting the thinking of the supervisors was that they had to approve it, is that correct?
>
> "A That is correct.

Continued on next page

and that it is more than 300 feet from the Conewago Creek.[3] The problem that we have with this, is that it was appellant who refused to permit DER to verify the flooding potential of his property when a representative went to the premises for that very purpose in 1975. This taken together with the fact that the burden of proof as to the impropriety or unreasonableness of DER's refusal to issue an order under Section 71.17 is on the appellant, leads us to the conclusion that DER has not abused its discretion in this difficult case.

The appellant has failed to carry his burden of proof by showing that the proposed sewage disposal system would not be within a flood plain of the

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2. Continued:

> "Q In other words, you felt that you had no discretion in the matter.
>
> "A That is correct.
>
> "Q How did you learn you had discretion?
>
> "A We were told that we could turn it down. We got to checking into it and found out it was in a flood area and he has to go over private driveway to get to it. We felt it wasn't suitable for a sewage system.
>
> "Q Was a formal resolution introduced in August of 1974?
>
> "A That is correct.
>
> "Q In the township minutes?
>
> "A That's right.
>
> "Q Do you, Mr. Hull, of your own personal knowledge, have familiarity with this real estate of Mr. Schiding's?
>
> "A That's right, I do.
>
> "Q Do you know whether or not that area floods in high water?
>
> "A It does definitely. Not only just the two floods we had, but prior before that, whenever there is high water, that whole area gets under water down there."

3. An ordinance passed by Washington Township on December 31, 1973, provides that:

> "(u.) No part of any on-site sewage disposal system shall be allowed within the identified flood-prone area."

Conewago Creek. On the contrary, most testimony seems to indicate that at least a portion of the drain field will flood periodically. It is true that Washington Township passed, and then revoked the necessary ordinance to amend its 537 Plan. We must, of course, make our decision based on the revocation, which means the Township does not favor the appellant's project. Only compelling reasons could cause this Board to overrule both the Township and DER in a matter such as this.

Although appellant was not given timely notice of the Township's revocation of its resolution to amend the 537 Plan, there was no evidence presented indicating that appellant made any expenditures or took any action to his detriment in reliance on the July 15, 1974, action prior to the actual notice of revocation thereof. It is therefore our opinion that the question of estoppel as suggested by appellant cannot arise under the facts of this case.

Finally, appellant argues that the Act of 1968, July 13, P. L. 805, 53 P. S. 10508, provides that no ordinance passed after 1972 when he decided upon the campsite, can now be used to change his rights adversely.[4] This Act, however, does not control DER's authority with regard to orders issued pursuant to the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.1, *et seq.*

We do, however, believe that the Township's ordinance passed December 16, 1974, regarding lots having easy access to a public street cannot now be used to deny the requested plan amendment. It is clear that the request, which gave rise to this appeal, was in effect refused by the Township in August, 1974, when it revoked the July resolution. An ordinance not passed until four months after the revocation is not a proper consideration to be used by this Board in passing upon an appeal which followed directly from that Act.

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4. Section 10508 provides:

> "(4) From the time an application for approval of a plat, whether preliminary or final, is duly filed as provided in the subdivision and land development ordinance, and while such application is pending approval or disapproval, no change or amendment of the zoning, subdivision or other governing ordinance or plan shall affect the decision on such application adversely to the applicant and the applicant shall be entitled to a decision in accordance with the provisions of the governing ordinances or plans as they stood at the time the application was duly filed." . . . (Footnote omitted.)

## CONCLUSIONS OF LAW

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

2. Appellant herein bears the burden of proof and the burden of proceeding, and must establish in order to prevail that DER, in denying a request to order the Washington Township Official Plan amended, committed a manifest abuse of discretion or a purely arbitrary exercise of agency duties.

3. It would be unreasonable for DER to order a municipality to amend its official plan to allow for the installation of a sewage treatment facility in an area that would, if installed, violate that municipality's flood plain ordinance.

4. It would be unreasonable for DER to order a municipality to amend its official plan to allow a subsurface sewage treatment facility to be installed in an area that was subject to periodic inundations with flood waters, and the refusal by appellant to allow DER to make an inspection on site of the flood hazard to the disposal area raises an inference against appellant who failed to carry the burden of proof.

## O R D E R

AND NOW, this 12th day of March, 1976, the decision of the Department of Environmental Resources refusing to order Washington Township, York County to amend its Act 537, Sewage Facilities Plan in accordance with a request made by appellant, George F. Schiding, is hereby sustained.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: March 12, 1976
llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

SHARON STEEL CORPORATION

Docket No. 75-150-C

State NPDES Certification

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, March 12, 1976

This matter is before the Board on the appeal of Sharon Steel Corporation (hereinafter Sharon) from the action of the Pennsylvania Department of Environmental Resources (hereinafter DER) in issuing to the Federal Environmental Protection Agency (hereinafter EPA), a state certification in connection with an application Sharon made to EPA for a National Pollution Discharge Elimination System (hereinafter NPDES) permit. Thereafter, DER filed a motion to quash on July 8, 1975, alleging that Sharon's appeal was untimely filed. On September 2, 1975, DER filed a petition to quash the appeal as to certain waste parameters. It is to the motion to quash and to the petition that this adjudication is directed.

FINDINGS OF FACT

1. Appellant is Sharon, a corporation with corporate offices at Thomas Road, Hubbard, Ohio 44425.

2. Appellee is DER, the agency of the Commonwealth authorized to administer and enforce the water pollution control programs of the Commonwealth, sanctioned by The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.*

3. Sharon has a steel making facility located in Farrell, Pennsylvania, with respect to which it made application to EPA for an NPDES permit under the provisions of §402 of the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.* (hereinafter FWPCA).

4. Section 401(a)(1) FWPCA provides:

> "Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 306, and 307 of this Act. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302, and there is not an applicable standard under sections 306 and 307, the State shall so certify, except that any such certification shall not be deemed to satisfy section 511(c) of this Act. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be."

5. In connection with Sharon's application for an NPDES permit, DER issued a certification to EPA, purportedly pursuant to §401(a)(1) of FWPCA, which certification forms the basis of this appeal.

6. The certification in question was issued to EPA by DER on or about October 29, 1974. James McCauley, Vice-President of Sharon, received from DER a copy of the said certification subsequent to October 29, 1974, and prior to May 14, 1975. Sharon also received a copy of the said certification from EPA on or about May 14, 1975.

7. June 13, 1975, is the thirtieth day after May 14, 1975, and was a legal holiday, Flag Day, in the Commonwealth of Pennsylvania, June 14 and 15, 1975, were a Saturday and Sunday, respectively.

8. In its notice of appeal, Sharon set forth the reasons therefor as follows:

> "(a) The limit of 10 mg/l for oil and grease as the maximum is arbitrary, capricious and not in accordance with law because it

is not necessary to achieve any stream quality standard and is not economically justified.

"(b) The limit of 10 mg/l for oil and grease has no basis in any established regulation of the Commonwealth of Pennsylvania and is not necessary for the proper protection of the public interest.

"(c) The limits for cyanide A found in the certification cannot be attained with best practicable control technology currently available. In addition analysis for cyanide A is not sufficiently reliable at the levels contained in the certification to permit it to be used as a standard. The cyanide limits set in the certification are not necessary to protect the receiving water.

"(d) The limits for phenol found in the certification cannot be attained with best practicable control technology currently available. In addition the phenol limits set in the certification are not necessary to protect the receiving water.

"(e) The limit for total iron found in the state certification cannot be attained with best practicable control technology currently available. In addition the limit for total iron found in the certification is not necessary to protect the receiving water.

"(f) Outfall 002. Sharon objects to the requirement that the Outfall contain only non-contact cooling water after January 1, 1976 as arbitrary, capricious and not in accordance with law.

"(g) Outfall 003. The requirement that certain standards should be achieved by January 1, 1976 does not permit sufficient time to even attempt to attain them. In addition the limit for total suspended solids should be changed to make it consistent with that on Outfall 006.

"(h) Outfall 004. The requirement that certain standards should be achieved by October 1, 1975 does not permit sufficient time to even attempt to attain them."

9. On July 31, 1972, Sharon was issued industrial wastes permit No. 4372206 by DER to cover the wastes discharged from Outfall 003. Said permit allowed a total iron discharge of five parts of iron per million parts of water (5.0 p/m ). Special condition "C" of said permit specifies that the effluent contains no more than 10 milligrams of oil per liter of water (10 mg/l).

10. On August 27, 1973, DER issued Sharon industrial wastes permit No. 4372203, which permit covered the wastes discharged from Outfall 004. Special condition "C" limited the discharges from said outfall as follows:

(a) No more than 10 mg/l of oil and grease;

(b) No more than 5 lbs. per day of cyanide;

(c) The discharge of phenols was to average 8 lbs. per day and be no more than 14 lbs. in any given day.

11. Permit No. 4372203 permitted a discharge of total iron from Outfall 004 of 4.8 p/m.

12. On March 21, 1972, DER issued Sharon industrial waste permit No. 4371201 covering the waste discharge from Outfall 006. This permit allowed a discharge of grease and oil from Outfall 006 of 3.0 mg/l.

13. Sharon never appealed from any of the conditions set forth in permit Nos. 4372206, 4372203 or 4371201.

14. On June 13, 1972, Sharon and DER entered a stipulation regarding discharges from its plants in Sharon, Farrell, Wheatland and Hickory Township, Pennsylvania. Paragraph 1(d)(2) provides:

> "That Sharon shall submit a permit application to the Bureau for final treatment facilities for the main steel mill sewer within two months from the first day of operation of the treatment facilities for cyanide and phenol in subparagraph 1(d)(1)(a) above. Such application shall provide for treatment facilities which will reduce the discharge of cyanide and phenol to no more than two (2) pounds per day each, plus the cyanide and phenol content of its intake waters, from all outfalls from the entire plant, if technology is then available to provide such treatment. Allowance shall be made for the presence of cyanide and phenol in the intake waters. A permit for such facilities shall be issued or the application rejected within sixty (60) days of the receipt of the application by the Bureau. Such facilities are to be installed and in operation in conformity with the permit requirements on or before fourteen (14) months from the date of receipt of a permit from the Bureau."

15. Paragraph 1(d)(1) of the said stipulation provides:

> "(1) That Sharon shall submit a permit application to the Bureau for additional interim treatment facilities for the main steel mill sewer discharge by July 1, 1972. Such permit application will provide:
>
> "(a) For treatment facilities which will reduce the discharge of cyanide from all outfalls from the entire plant to no more than five (5) pounds per day plus the cyanide contents of its intake waters and the discharge of phenol from all outfalls from the entire plant to an average of eight (8) pounds per day and no more than fourteen (14) pounds on any one day plus the phenol contents of its intake waters. Allowance shall be made for the presence of cyanide and phenol in the intake waters. A permit for such facilities shall be issued or the application rejected within sixty (60) days of receipt of the application by the Bureau. Such facilities are to be installed and in operation in conformity with the permit requirements on or before twelve (12) months from the date of receipt of a permit from the Bureau.
>
> "(b) For the following additional treatment facilities: In the existing 60" Hot Strip Mill scale pit, the present division wall which separates the light and heavy scale sections will be sealed to make each pit independent of the other. This change will facilitate scale removal with a minimum of slugs. Clean water streams which now enter the pit will be diverted to

the sewer direct to reduce the flow through and allow longer settling times. Side streams filters will be installed to reduce the solid content of water discharged to the sewer. These additional treatment facilities on the main steel mill sewer are expected to reduce the discharge of iron from said sewer to 5.0 ppm or less net increase in iron over the iron content of Sharon's intake waters and to reduce the discharge of oil from said sewer to 10.0 ppm or less net increase in oil over the oil content of Sharon's intake waters. Allowance shall be made for the presence of iron and oil in the intake waters. A permit for such facilities shall be issued or the application rejected within sixty (60) days of receipt of the application by the Bureau. Such facilities are to be installed and in operation in conformity with the permit requirements on or before eighteen (18) months from the date of receipt of a permit from the Bureau."

DISCUSSION

There are basically two legal issues in this appeal: (1) whether the appeal has been timely filed and (2) whether Sharon is precluded from attacking the validity of certain waste discharge parameters which have been embodied in permits previously issued to Sharon and in a stipulation entered into by Sharon and DER on June 13, 1972.

In its motion to quash, filed July 8, 1975, appellee moves to quash the appeal for the reason that the appeal was not taken within 30 days of receipt of notice of the DER action from which the appeal is taken. The motion alleges that Sharon received notice of the action of DER on May 14, 1975, and did not file its appeal until June 16, 1975, more than 30 days from its receipt of notice. This, appellee urges, is violative of §21.21(a) of the Rules of Practice and Procedure before the Environmental Hearing Board. Were this the only issue with respect to the timeliness question, we would deny the motion for the reason that June 13, 1975, was a legal holiday and a Friday. 1 Pa. Code §31.12; §21.1(c) of the Rules of Practice and Procedure before the Board. See also, 1 Pa. C. S. A. §1908; 76 P. S. §172; *DeFrancis v. Commonwealth*, 17 Pa. Commonwealth Ct. 436, 333 A.2d 202(1975).

Had Sharon been content to rest with an answer to the specific allegations contained in DER's motion to quash, the issue with regard to timeliness of the appeal would have rested at that point. However, in its response to the motion to quash, Sharon, in addition to specifically controverting the legal effect of the allegations contained in DER's motion to quash, alleges additional matter to which DER replied on August 14, 1975. These additional allegations may be grouped into the following categories:

(1) Although Sharon received notice of the certification prior to May 14, 1975, no notice was contained therein indicating that it was an appealable order or that appellant would have 30 days within which to appeal same, (paragraphs 6 and 7 of Sharon's response to motion to quash).

(2) Sharon received inadequate notice of its right to appeal and, in this regard it received no such notice at a time when other parties for which certifications were issued received such notice. (paragraph 11 and 12 of appellant's response to motion to quash).

(3) When Sharon first received the certification, James McCauley, Vice-President of Sharon, contacted Craig Yendell of DER to inquire of him with regard to the significance of the certification. In the course of that conversation, Mr. McCauley is alleged to have asked Mr. Yendell when Sharon could contest the standards set forth in the certification. It is asserted that Mr. Yendell advised Mr. McCauley that Sharon would have 30 days from the time the Federal government issued an NPDES permit within which to appeal (paragraph 8 of appellant's response to motion to quash).

(4) That the 30 day appeal period set forth in §21.21(a) of the Rules of Practice and Procedure before the Board do not apply to the certification in question for the reason that the certification is neither an adjudication nor an action of DER from which an appeal must be filed within the said 30 day period. (paragraph 9 of appellant's response to motion to quash).

(5) DER has no legislative authority to issue the certification in question (paragrpah 10 of appellant's response to motion to quash).

(6) If the appeal is quashed, Sharon will be deprived of an opportunity to present its case and show material errors in the basis for the certification (paragraph 14 of appellant's response to motion to quash).

With regard to the first of these contentions, it is sufficient to refer to *Commonwealth v. Derry Township, et al,* 10 Pa. Commonwealth Ct. 619, 314 A.2d 868(1973). In *Derry* the court remarked:

> ". . . 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. We recommend, approve and encourage administrative agencies to extend such procedural courtesy, as DER extended in this case, in the interest of an orderly record and so as to advise citizens of their rights which might be otherwise overlooked. . . ."
> 10 Pa. Commonwealth Ct. 629-630, 334 A.2d at 872-873.

That DER did not extend to Sharon "procedural courtesy" may be a lapse in administrative etiquette on the part of DER, but it hardly rises to the point of a legal error.

With regard to Sharon's second category of allegations, the above quoted passage from *Commonwealth v. Derry Township, et al, supra,* answers this contention also. Insofar as Sharon's allegation that it received no notice of its right to appeal at a time when other parties for whom certifications were issued received such notice is concerned, we are of the opinion that if Sharon knew or should have known that the certification was "an action of DER" from which an appeal would lie, the fact that it may have received no notice of its right to appeal is, in itself, not legally improper. If, however, which was notalleged, DER deliberately withheld such notice from Sharon while giving it to others in the same circumstances, this matter would bear on Sharon's petition to file an appeal, *nunc pro tunc*. We would be extremely surprised if DER would deliberately single out Sharon for such invidious discrimination.

We are of the opinion that the third category of allegations listed above, if true, may have some implication for the *nunc pro tunc* issue. See *Sturzebecker v. Unemployment Compensation Board of Review*, 196 Pa. Super. 164, 169 A.2d 310(1961); *Flynn v. Unemployment Compensation Board of Review*, 192 Pa. Super. 251, 159 A.2d 579 (1960). As the court said in *Flynn, supra:*

> "Generally neither court nor administrative board has the power to extend statutorily fixed time limits for taking appeals in such cases. However, there are recognized exceptions. The time may be extended in cases of fraud or its equivalent. Bee Unemployment Compensation Case, 180 Pa. Super. 231, 119 A.2d 558. In cases where a claimant is unintentionally misled by an official who is authorized to act in the premises, the time may also be extended when it is possible to relieve an innocent party of injury consequent on such misleading act. In re Tuttle Unemployment Compensation Case, 160 Pa. Super. 46, 49 A.2d 847; Layton v. Unemployment Compensation Board of Review, 156 Pa. Super. 225, 40 A.2d 125. Appellant seeks to bring herself within this second exception to the general rule. Although we may infer that the Board resolved the issue of deception adversely to appellant from the fact that her appeal was dismissed, we think the better practice is to have the referee and Board make specific findings on such a crucial and controversial point. . . ."
> 159 A.2d at 580-581.

We are of the opinion that insofar as there are facts in controversy with regard to this *nunc pro tunc* issue, a hearing is required under the *Flynn* rationale. However, the burden upon Sharon is great. See *Von Kaenel v. Unemployment Compensation Board of Review*, 163 Pa. Super 173, 60 A.2d 586(1948). In *Von Kaenel, supra,* the court said:

"Suffice it to say that the employer has not complied with the statutory requirement that an appeal be taken within ten (10) days from the decision of the referee. That statutory requirement is mandatory and cannot be waived by agreement. Devlin v. Grabler Mfg. Corp., 151 Pa. Super. 216, 30 A.2d 138. It was incumbent upon the employer to meet the burden cast upon it of showing conduct emanating from the officers charged with administering the unemployment compensation law which misled the employer to his detriment. Tuttle Unemployment Compensation Case., 160 Pa. Super. 46, 49 A.2d 847; Turner v. Unemployment Compensation Board of Review, 163 Pa. Super. ___, 60 A.2d 583. Cf. Layton v. Unemployment Compensation Board of Review, 156 Pa. Super. 225, 40 A.2d 125.

"The burden was upon the employer to show facts which would place it within the principle that where a party has been prevented from doing an act through fraud or its equivalent, i.e., ignorance or negligent acts of an administrative official, power exists to allow an appeal nunc pro tunc if prosecuted within a reasonable time. The employer attempted to meet this burden by introducing into evidence the letter hereinabove recited. The compensation authorities have no record of receipt of that letter; nor is there satisfactory proof it was mailed; all the evidence thereon is negative. It is clear that the letter was not an appeal nor was it intended to serve as an appeal. It merely evidenced a present desire or intent to take an appeal which could either be perfected or abandoned before the expiration of the appeal period. Assuming that the letter was sent requesting forms of appeal, the employer could not thus so easily shed its burden of effecting a timely appeal; it should have pursued its request with alacrity and diligence. Moreover, it was not necessary for it to use the forms provided by the compensation authorities. Nor can the responsibility for the lateness of the appeal be shifted to the administrative agency, particularly where, as here, employer's counsel, experienced in the law, gave only passing attention to an expiring right."
60 A.2d at 588-589.

While the rationale of *Flynn* predisposes us to grant an evidentiary hearing on the *nunc pro tunc* issue, we remind appellant that appeals, *nunc pro tunc*, may not be granted as a matter of indulgence. *Nardo v. Smith*, 488 Pa. 38, 292 A.2d 377(1972); *Luckenbach v. Luckenbach*, 443 Pa. 417, 281 A.2d 169(1971).

If it should subsequently appear to the Board that Sharon received notice of the certification prior to May 14, 1975, and either was not misled to its detriment by an official of DER, or had no right to rely on such a statement within the context of this case, we shall have no alternative but to quash this entire appeal.

The fourth contention of Sharon relates to the question of whether the certification on appeal constitutes either an adjudication or an action from which an appeal lies to the Board. In this regard, we reiterate what we said in *Wheeling-Pittsburgh Steel Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 74-279-C (issued January 9, 1976), wherein we stated:

> "Regarding the first of these contentions, we do not concur that the certification is not a departmental action. *Sunbeam Coal Corporation v. DER*, 8 Pa. Commonwealth Ct. 622, 304 A.2d 169(1973), cited by appellant, determined that notices of violation are neither actions nor adjudications engendering review by administrative boards or courts of record. A notice of violation, without more, cannot be construed to be an adjudication nor an action as defined in §21.21(1) of the Rules of Practice and Procedure before the Board for the reason that such notice, even if final, does not by itself carry legal consequences. The same may not be true of certifications made under §401 of the Federal Water Pollution Control Act. Arguably, therefore, the fact that legal consequences may flow from the certification in a given case may bring it within the definition of either 'action' or 'adjudication'."

Moreover, if, as appellant alleges, the certification in question is not an adjudication or action giving rise to an appeal to this Board, it should join with DER to have this appeal dismissed, as it would be admitting that it filed a "premature" appeal in this matter.

As to the fifth contention, the question of whether DER has the authority to issue a certification such as the one herein is a question on the merits of this appeal. The motion to quash of DER questions the jurisdiction of this Board to hear an appeal which it alleges to be untimely. We must dispose of this question before we can enter into an inquiry on the merits of this case for the reason that a question of jurisdiction is a logically prior matter the disposition of which must take place before we can address the merits.

Finally, on the *nunc pro tunc* issue, Sharon urges that if the appeal is quashed, it will be deprived of an opportunity to present its case and to show material errors on the basis for certification. The short answer to this contention is that that is exactly what happens generally when *nunc pro tunc* appeals are not granted. If there is a basis for granting an appeal *nunc pro tunc* under the stringent standards announced by the courts of this Commonwealth, then Sharon will be entitled to be heard on the merits of its claim, as affected by the remainder of this adjudication. However, we will not relax these settled rules merely because Sharon will lose its opportunity for a hearing on the merits. If the applicable rules are such as to not permit an appeal *nunc pro tunc* in this case, the basic responsibility for that situation lies with appellant. It cannot shift that responsiblity to the Board by such an appeal.

We now must consider appellee's petition to quash Sharon's appeal with regard to certain waste parameters set forth in the certification and which were also included in previous permits issued to Sharon or set forth in the stipulation between Sharon and DER. It is the position of DER that with regard to waste water effluent limitations set forth in previously issued permits from which Sharon took no appeal within the requisite appeal period, such limitations cannot now be questioned merely because they are also contained in the state certification to EPA. With regard to the limits set forth in the stipulation of June 13, 1972, DER claims that Sharon is bound by its provisions. On the other hand, Sharon claims that inasmuch as these effluent limitations are being used for a purpose other than to effectuate a provision of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.*, the principle of exhaustion of statutory remedies does not apply as to preclude the Board from considering the appropriateness of these limitations in the context of the certification. Moreover, Sharon claims it is not mounting a collateral attack upon either the previous issued permits or the stipulation of June 13, 1973. In order to assess the relative merits of these legal contentions, we must examine them relative to provisions of FWPCA.

Section 510 of FWPCA provides:

> "Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges or pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

This section of FWPCA expresses an unequivocal congressional intent not to preempt state water pollution control measures more stringent than those adopted pursuant to the provisions of the Federal Act. Although the act does preempt less stringent state standards, it is clear that stricter state standards may be adopted. Not only are more stringent state standards explicitly authorized by FWPCA, but it is a clear and manifest objective of the act that more stringent state standards be implemented. In this regard, §301(b)(1) specifically provides:

"(b) In order to carry out the objective of this Act there shall be achieved--

> "(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and
>
> "(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act; or,
>
> "(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act."

Clearly, with regard to point sources to which reference is made in §301(b)(1)(A)(i) of FWPCA, §301(1)(C) mandates the achievement of effluent limitations more stringent than those set forth in §301(b)(1)(A) of the act, if the more stringent standard is required by state law or regulations, other Federal law or regulation, or required to implement any applicable water quality standard under FWPCA. If, therefore, the state standard is the more stringent, there can be no question but that FWPCA mandates the state standards in any given case. Moreover, §401(d) of FWPCA provides:

> "Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."

In summary, where there exists a limitation of the type set forth in §301(b)(1)(C) which is more stringent than the limitation required by §301(b)(1)(A), FWPCA mandates the imposition of the more stringent limitation. Where the state standard or requirement is the more stringent, the act, in effect,

makes the state requirement the requirement established pursuant to §301(b)(1) of the act. Where this is so, §401(d) of FWPCA requires the state certification to include the requirement of state law. Once this is done, that section requires that the matters to which certification has been made become conditions of any Federal license or permit which is subject to the provisions of §401 of FWPCA.

It, therefore, becomes the duty of the certifying agency to include the more stringent of the requirements in the certification. Inasmuch as Sharon has not in its appeal suggested that the state limitations set forth in the certification are not the more stringent limitations, we must assume for the purposes of this proceeding that the state limitations to which DER has certified are, in fact, the more stringent limitations. Therefore, our only inquiry with regard to the limitations from which Sharon has appealed is whether these limitations are authorized by state law. If the limitations set forth in the certification are authorized by state law, the Federal law would mandate that they become a condition of the Federal permit issued to Sharon in this matter.

Sharon essentially contends that, even though certain of the waste parameters which DER set forth in the certification in this matter were previously set forth in permits issued to Sharon or in a stipulation entered into between Sharon and DER, it nevertheless may attack before this Board the propriety of their inclusion in the certification. Thus, according to Sharon, the principle of exclusive statutory remedies does not bar this inquiry. With regard to the limitations previously set forth in permits issued by DER to Sharon, we are of the opinion that these contentions must fall.

Sharon, we believe, has confused two separate issues: (1) whether the inclusion of these parameters in the certification in question is consistent with FWPCA; (2) whether the parameters in question are authorized by The Clean Streams Law, *supra*. In fact, in its notice of appeal Sharon does not even specify whether it is objecting to the content of the certification because they are inconsistent with FWPCA or The Clean Streams Law.

It is our opinion that we have no jurisdiction to review whether the certification in question is proper under Federal law. Exclusive jurisdiction of the review of the propriety of the Federal permit granted under §402 of FWPCA is lodged in the Federal Courts of Appeals. See §509(b) of FWPCA. Thus, for example, Sharon's claim that the limits for cyanide A found in the certification cannot be attained

with the best practicable control technology currently available is, in our opinion, a Federal question not within the jurisdiction of this Board to determine. Moreover, if we are correct in our interpretation of §301(b)(1) of FWPCA, such a question would be irrelevant to any proceeding involving this permit inasmuch as §301(b)(1)(C) would authorize the more stringent standard.

We, therefore, conceive our jurisdiction in the premises only to extend to the question of whether the limitations complained of as being incorporated in the certification are proper under The Clean Streams Law, *supra*, and the rules and regulations adopted pursuant thereto. It is with regard to that limited question that we address Sharon's contentions.

Sharon contends that it is not barred from contesting the validity of the inclusion of the permit limitations in the certification issued by DER to EPA and asserts in support thereof: (1) The principle of law requiring strict pursuit of statutory remedies is identical with the principle of *res judicata*. Therefore, it does not apply to the matter in question for the reason that the present proceeding, although between the same parties, is not the same cause of action as that giving rise to the issuance of the permits. (2) Inasmuch as *res judicata* does not apply, the principle of collateral estoppel is germane to the question. Therefore, since Sharon did not appeal from the permit conditions imposed upon it by DER, facts and issues relative to these conditions were never litigated. Therefore, according to Sharon, facts and issues relating to these conditions are not barred from being litigated by the principle of collateral estoppel. (3) The principle requiring the strict pursuit of statutory remedy only applies in the limited instance where the second action is an enforcement action. Inasmuch as this is not an enforcement action, the principle has no application to these proceedings. (4) Lastly, Sharon contends, that it is not seeking to attack collaterally the permit issued by DER, but merely is attempting to prevent the inclusion of the permit conditions in a certification to EPA.

Appellant's first contention necessitates an understanding of the distinction between the principle of *res judicata* and that of collateral attack, for the reason that the principle of strict pursuit of statutory remedies relates to the question of whether an action of an administrative agency may be subject to collateral attack. See *Commonwealth v. Wheeling-Pittsburgh Steel Corporation*, Pa. Commonwealth Ct. , 348 A.2d 765(1975). There is a distinction between the principles relating to

*res judicata* and those of collateral attack. In 46 AM JUR 2d, Judgments, §399, it is stated:

> "There is some relationship between the doctrines of res judicata and collateral attack, in that both doctrines involve the effect of a judgment in subsequent independent legal proceedings, both doctrines involve the application of the rule of conclusiveness of judgments, and both doctrines are based upon the public interest in the final adjudication of controversies. There is a difference, however, in the impact of the two doctrines: the doctrine of res judicata is not operative in the case of a void judgment, whereas the doctrine of collateral attack is concerned with the circumstances under which and the extent to which an earlier judgment may be impeached and shown to be invalid. Moreover, a determination of the question whether a particular judgment may be impeached and shown to be invalid. Moreover, a determination of the question whether a particular judgment may be subjected to a collateral attack does not necessarily involve an inquiry regarding the scope and effect of the judgment as a former adjudication upon the facts or causes of action included therein." (Footnotes omitted)

The principles of *res judicata* and collateral estoppel have no applicability to the issue in question. We are not concerned with anything other than the permits themselves and what they require of Sharon. We are not concerned with an inquiry regarding the scope and effect of the permit as former adjudications of the facts or causes of action that may have been included therein.

In regard to the question of whether the doctrine of exclusive statutory remedies may only be invoked in enforcement proceedings, two answers may be given: (1) There is nothing in the law that would require this limitation. Moreover, the implication of *Standard Lime and Refractories Company v. Department of Environmental Protection*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383(1971) is clearly to the contrary. (2) To the extent that the incorporation of state standards in a Federal permit results in the possibility of more stringent enforcement of the standards than is currently allowable under The Clean Streams Law, *supra*, the inclusion of a state standard in the Federal certification and thereafter into the Federal NPDES permit is, in our opinion, an enforcement action for the purpose of precluding a collateral attack on the state's permits.

Finally, if, as Sharon contends, it is not mounting a collateral attack upon the state permit, we cannot understand why it is before this Board in this matter. Inasmuch as Sharon contends that it is not attacking the permits granted

it by DER, we cannot fathom how this Board can adjudicate the propriety of the conditions of the permits being included in the certification.

For the above stated reasons, it is our ruling that:

(1) If Sharon is not collaterally attacking the permits in question, there is no basis upon which this Board can determine whether the conditions in the permit are proper conditions to be included in the certification to EPA. This is a question solely for the Federal review process to determine.

(2) If, on the other hand, Sharon is attacking the standards in the permit conditions as a basis for excising them from the certification, this amounts to a collateral attack on the permit and may not be allowed. *Erie Human Relations Commission v. Erie Insurance Exchange,* Pa. , 348 A.2d 742(1975); *Commonwealth v. Wheeling-Pittsburgh Steel Corporation, supra.*

We are unable to understand how promissory estoppel is relevant to the stipulation in this matter. Clearly, the stipulation is a contract supported by consideration. In such a circumstance, the doctrine of promissory estoppel is not applicable. The doctrine of promissory estoppel is designed to prevent injustice where one has relied upon a gratuitous promise. Restatement of Contracts, §90; *Travelers Insurance Company v. Hartford Accident and Indemnity Company,* 222 Pa. Super. 546, 294 A.2d 913(1972). As the court stated in *Travelers:*

> "Even before the nomenclature 'promissory estoppel' was coined, and before the doctrine was adopted in §90 of the Restatement of Contracts, Pennsylvania jurisprudence had accepted the notion that where a party acts or fails to act to his detriment in reasonable reliance upon the promise of another, the promissor may be estopped from repudiating his promise, even in the absence of legal consideration. See Fried v. Fisher, 328 Pa. 497, 196 A. 39(1938); also Cameron v. Townsend, 286 Pa. 393, 133 A. 632(1926)." 222 Pa. Super. at 551, 294 A.2d at 915.

However, the fact that §90 of the Restatement of Contracts has no applicability to the stipulation in question is of no aid to Sharon. The provisions of the stipulation, insofar as they require adherence to certain waste parameters, must be considered state limitations within the meaning of FWPCA. However, the stipulation speaks for itself. If the limits set forth in the certification are different and more onerous upon Sharon than those to which it agreed in the stipulation, the provisions of the stipulation would prevail, except as to those limitations set forth in permit Nos. 4372206, 4372203 and 4371201.

With regard to the other provisions of the certification from which an appeal has been taken, but which are not subject to the petition to quash certain waste parameters, we construe our jurisdiction to decide only whether such limitations are proper under The Clean Streams Law, *supra*. Claims regarding whether the limitation set forth in the certification otherwise implements Federal standards are not for this Board, but are more properly the subject of the appeal provisions of §509(b) of FWPCA.

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and the subject matter of these proceedings.

2. DER is not required to extend additional notice of appeal rights inasmuch as the Environmental Quality Board has published a procedure for appeal to the Board from actions of DER.

3. When a petition to allow an appeal *nunc pro tunc* is filed with the Board alleging facts which, if true, might constitute a valid basis for the grant of such petition, and the facts set forth in the petition are controverted by DER, the Board will not dispose of the petition without a hearing to ascertain whether the facts set forth in the petition are true.

4. Petitioner has the burden to show its entitlement to an appeal *nunc pro tunc*.

5. A DER certification pursuant to §401 of FWPCA is an appealable action to this Board.

6. The question of whether DER has the authority to issue a certification is a matter going to the merits of this appeal and will not be decided upon a motion to quash alleging a lack of jurisdiction.

7. An appeal is timely filed if the last day for filing the appeal is a Friday and a legal holiday and the appeal is filed on the following Monday.

8. The fact that a party may lose an opportunity to present its case if a petition for an appeal *nunc pro tunc* is not granted, is descriptive of a conclusion from the failure to grant such a petition and is not a reason for its being granted.

9. Where DER has granted a permit relating to industrial waste discharges and such permit contains conditions from which the permittee never took an appeal within the requisite appeal period, the inclusion of such conditions in a certification under the provisions of §401 of FWPCA does not constitute a basis for a collateral attack upon such conditions.

10. Where appellant and DER have stipulated to certain conditions and subsequently thereto these conditions are alleged to have been inserted in a certification pursuant to §401 of FWPCA, appellant, if its appeal is timely, is permitted to show whether the conditions set forth in the certification are different than those set forth in the stipulation.

## O R D E R

AND NOW, this 12th day of March, 1976, the petition of the Department of Environmental Resources to quash the appeal with regard to certain waste parameters is hereby granted with regard to those permit conditions set forth in the certification of DER to EPA contained in permit Nos. 4372206, 4372203 and 4371201. With regard to conditions not contained in the aforementioned permits but which were contained in a stipulation of the parties dated June 13, 1972, the said petition is hereby denied.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: March 12, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES
v.
RUSHTON MINING COMPANY
1106 First National Bank Building
Johnstown, PA 15901
Rush Township, Centre County
&
WARREN H. HINKS, JR., PRESIDENT
603 Tioga Street
Johnstown, PA 15905

Docket No. 72-361-CP-D

Assessment of Civil Penalties

# ADJUDICATION

By: Joanne R. Denworth, Member, March 12, 1976

This is a civil penalties action brought by the Department of Environmental Resources (Department) alleging that the respondent, Rushton Mining Company (Rushton), violated The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.*, on 27 separate occasions by discharging wastes with either or both an unpermitted pH and/or iron content into the waters of the Commonwealth. The Commonwealth has conceded that no civil penalty can be assessed for 13 of the alleged violations that occurred prior to July 31, 1970, the effective date of the amendment to The Clean Streams Law that authorized civil penalties. These violations are still at issue however, as the Department contends that they may be used as evidence to demonstrate the wilfulness of respondent's subsequent violations. The Commonwealth also asks for the assessment of civil penalties against Warren H. Hinks, Jr., president of Rushton personally. Although the complaint also named Michael Cimba, Jr., Secretary-Treasurer of Rushton, as a defendant, no evidence was offered to establish his liability.

Hearings in this matter were held before Robert Broughton, former Chairman of the Environmental Hearing Board, on July 19 and 20, 1973, October 15, 16 and 18, 1973, and November 26, 27 and 28, 1973. The parties filed proposed findings of facts and conclusions of law as well as post-hearing briefs in June, 1974. The Commonwealth filed a supplementary brief in May, 1975, and respondent filed its reply brief in August, 1975.

FINDINGS OF FACT

1. Rushton is a Pennsylvania Corporation engaged in the mining of Bituminous Coal and is a subsidiary of Greenich Colleries which, in turn, is a subsidiary of Pennsylvania Power and Light Company.

2. Rushton operates one mine in Rush Township, Centre County, Pennsylvania, originally known as the Dunbar Mine, but subsequently and thereafter referred to as the Rushton Mine.

3. The Company began the active mining of coal in 1965 as a new mine. It employs the slope method of mining to the Brookville "A" seam of coal, which exists at a depth of approximately one hundred sixty (160') feet, the coal height being approximately four (4') feet. The mine exists below the water table of the Moshannon Basin and has an estimated coal reserve of fifteen years. The raw coal is of inferior quality and must be cleaned for marketability. After cleaning, the sulphur content of the coal is approximately 2·3%.

4. The mine is considered to be a wet mine. Whereas, it initially discharged approximately one million gallons of water per day, the volume has increased to over three million gallons per day.

5. Some of the water load of the Rushton Mine is due to old or abandoned workings, two in particular, the Bigelow Run Mine, and the Big Spring Coal Company, both of which have been inactive for many years, but drain or discharge into the present workings of respondent.

6. Despite the fact that the coal seam does not have a uniform grade, the Company is mining to the "dip" of the coal, that is downgrade so that water produced must be collected at one or more central points and pumped to the surface.

7. At the time of the hearings in this matter respondent had two pumping points, which are vertical bore holes lined with plastic pipe, from which the water is pumped via pumps having a capacity of 2,000 gallons per minute.

8. The ground storage capacity is approximately seven hours, which means that if each pump were to cease for longer than this period, the mine would begin to "flood out".

9. The mine employs approximately 170 persons, of whom approximately 65% are underground personnel. The mine is located on a hillside on the watershed of the Moshannon Creek, within a sparsely populated area. All water is treated and discharged into the water of the Moshannon Creek.

10. The initial water permit was issued after an application was filed in April, 1963. At this time, formal water permits were not issued by the Commonwealth

of Pennsylvania and, therefore, respondent did not receive a water permit until after the effective date of the 1966 Amendment to The Clean Streams Law, which made that law applicable to mining operations.

11. As a result of the 1966 Amendment, all permits issued prior to that date were to expire unless extended by the Sanitary Water Board. Rushton then filed an application for a permit under the new Act on October 13, 1966, and the existing application was thereupon extended by the Sanitary Water Board until January 31, 1967.

12. On January 31, 1967, Rushton made an application for a water drainage permit which was issued by the Department on February 7, 1968.

13. The application as filed on January 31, 1967, contained supporting data by which the respondent proposed to treat its acid discharge by a process of neutralization, oxidation, and compaction of the resultant ferric hydroxide.

14. The application as approved on February 7, 1968, incorporated standard conditions that had been promulgated by the said Sanitary Water Board on March 31, 1967, by which pH was required to be between limits of 6.0 and 9.0, and iron concentrations were forbidden in excess of 7 milligrams per liter.

15. The limitations expressed in the conditions were still in effect, unchanged, on the dates alleged in the complaint.

## THE CHEMISTRY OF TREATMENT

16. Rushton operates the Brookville seam of coal which contains iron pyrites, sometimes called "fools gold". The chemical symbol for this compound of iron is $FeS_2$, sometimes incorrectly written FeS. In the presence of water and oxygen, this compound undergoes a reaction to form ferrous sulfate ($FeSO_4$) and sulfuric acid.

17. In the presence of oxygen the reaction is speeded up, so that in the case of respondent's operations, by the time the mine discharge is pumped to the surface, substantial quantities of sulfuric acid are evident.

18. There are many compounds that could be used for the neutralization of the created acidity such as caustic soda or quicklime (Ca)). The use of hydrated lime is generally accepted because of its relatively low cost, availability and stability.

19. Neutralization at Rushon is accomplished by the direct introduction of hydrated lime and water mixed into a "slurry", which is then injected into the raw mine water as it travels along a sluiceway. The introduction of the lime slurry results in a reaction between the iron sulfate ($FeSO_4$) and the lime, to form ferrous hydroxide ($Fe(OH)_2$) plus calcium sulfate ($CaSO_4$), commonly called gypsum.

20. Concurrently a more rapid reaction between the sulfuric acid and the lime occurs, which results in water and additional gypsum.

21. If additional oxygen is introduced and the pH is above approximately 4.0, another reaction takes place resulting in the oxidation of ferrous sulfate ($FeSO_4$) to ferric sulfate ($Fe(OH)_3$). This is accomplished by causing the lime treated water to tumble along a baffled sluiceway, where the turbulence of the water caused by its striking the baffles, exposes it to the atmosphere where oxygen is absorbed. This conversion is pH dependent. As the pH increases, the oxidation increases on a logarithmic curve at a rate varying from 10 to 100 times the increase for each point of pH.

22. There is another chemical reaction that occurs as a result of the oxidation of ferrous to ferric sulphate. In the settling pond, through hydrolysis the ferric sulphate is charged to ferric hydroxide plus $H_2SO_4$, thus increasing the acidity in the settling pond as the hydrolysis continues.

23. Ferric hydroxide (commonly called "yellow boy", or "sludge") is a light, reddish brown, stable compound, with specific gravity greater than water. It has just become recently known that its ability to precipate is dependent upon temperature, size of the solid material, solubility which is pH dependent, and is also believed by some to be dependent upon the "zeta potential" (also a pH related phenomenon), which is the characteristic of the acquisition of the same electrostatic charge by each molecule, causing them to repel each other, and thus remain dispersed rather than quiescently settling.

24. The minimum solubility, i.e., the point of maximum precipitation of the ferric hydroxide is at a pH of about 8.5.

25. The zeta phenomenon, which holds sludge in suspension by an electrostatic charge, dissipates rapidly above a pH of about 8.3.

26. The dominant criteria which determines the maximum efficiency of the iron removal-sludge formation system is the pH of the detention pond.

## THE TREATMENT FACILITIES

27. The treatment of acid mine waste discharge in Pennsylvania is relatively new. Whereas, early permits permitted acid mine discharge directly into polluted streams, it was not until March 31, 1967, that the Department of Health prescribed limits of pH and iron as standard conditions in water permits.

28. The initial treatment facility proposed by Rushton and approved by the Department in the permit issued in February of 1968, was based on the expecta-

tion arrived at by Rushton in consultation with its engineering expert, that sludge removal could be accomplished by natural compaction. The compaction, which was to follow neutralization and oxidation, was to take place in a large abandoned strip mine cut near the mine, into which the water was to be diverted, the heavier sludge there to settle to the bottom, while the clear, treated water would pass over a small wooden dam at the end of the cut and pass eventually to the Moshannon Creek, approximately 1/4 mile away. The depth of the strip cut would determine the life of the facility. It was envisioned that the proposed pit would accommodate the sedemented sludge for a 10-15 year period.

29. During the fall and early winter of 1969 and the spring of 1970, it became apparent that the sludge would not behave as expected. Instead of compacting, the sludge exhibited a rather high degree of turgidity with the iron staying in suspension and with the consequence that high iron concentrations begin to appear in the discharge water.

30. At one point during the winter of 1970 Rushton attempted to resolve its sludge problem by the design of a filter bed system, which, instead of decanting water from the surface, would percolate the treated water through the filter media and release it by pipes at the bottom of the pit, leaving the dense sludge to cling to the filter material. This system proved impracticable in operation, because the large quantity of water required huge areas of filter bed material.

31. Representatives of Rushton met with representatives of the Department on March 30, 1970, to discuss the sludge disposal problem and the series of permit violations of which Rushton had been notified. At that meeting Rushton proposed the system that is basically the system now in use--that is, the turgid sludge was to be pumped from a settling basin to a drying basin and the water removed by decanting and evaporation (the latter being of practical importance because of the unique property of sludge to dehydrate under even the most moist of atmospheric conditions).

32. Rushton filed an amended application on June 15, 1970, proposing its new method of sludge control. In the proposal sludge was to be pumped from the settling basin via submersible pumps suspended from floating rafts to a holding pond, where excess water (now in an alkaline state), would be decanted and recycled. The residual sludge was then to be conveyed via pumps and pipe lines to drying ponds, located about six thousand (6,000') feet from the mine site. There the sludge would remain while the now alkaline water drained away or was evaporated, leaving the sludge as a gelatinous mass to further dry and harden. As a drying pond

filled, the now dry sludge would be excavated and transported to a disposal site where it would be buried.

33. Rushton requested prompt consideration of its application. However, although the application was forwarded to the Sanitary Water Board in August of 1970, the application was not approved until January 14, 1971, one day before the scheduled completion date set forth in June 15, 1970 application.

34. Even though there had been no Departmental approval of the amended application, Rushton began construction of the facilities in the summer of 1970 and continued construction during the fall and winter of 1970-71.

35. The original facilities had an authorized discharge for pond No. 2 only. The discharge point consisted of a wier constructed of wooden boards designed to maintain a certain level in the pond. After the permit amendments were approved in January, 1971, three discharge points were approved, one from the wooden wier at the end of basin No. 2, one from basin No. 3 and one from basin No. 4. No discharge was authorized from basin No. 5 at any time.

36. The water level in basin No. 2 could be controlled for some period of time by shutting off the flow from the water storage pond while removing the sludge with pumps or by adding boards to raise the height of the wier.

37. Facilities for the control of pH were only located adjacent to the sluiceway between the raw water storage pond and the strip cut-basin No. 2. Rushton has no automatic monitoring device for pH, but instead monitors pH manually by taking several daily readings of the water in the sluiceway at the end of the oxidation channel. A daily pH check of raw water and treated water pH is maintained and a record kept. In addition samples are taken weekly at the point of discharge from basin No. 2 and copies of the laboratory analyses of these samples are furnished to the Department.

38. Monitoring for pH was performed only at the lime slurry tank. No pH monitoring, other than the weekly monitoring, was performed at any point of discharge to the waters of the Commonwealth. No monitoring for iron other than the weekly monitoring was performed at any point.

39. Rushton had no precise method of determining whether sufficient lime was being introduced into the detention pond, basin No. 2, to maintain the optimum pH required for hydrolysis, sludge precipitation and neutralization of the zeta charge.

40. Rushton had no method other then the weekly monitoring for determining whether the discharge from basins No. 2, 3 or 4 complied with the water quality limitations imposed by the permit.

## THE PERMIT CONDITIONS

41. Standard Condition No. 7 of Rushton's permit requires:

"Whenever, because of an accident or otherwise, a discharge not allowed by the permit occurs, the permittee shall immediately telephone the reporting agency to report such incident and shall promptly take such steps as are necessary to halt the unauthorized discharge."

42. Standard Condition No. 10 of Rushton's permit requires:

"The permittee shall at no time discharge to the waters of the Commonwealth mine drainage from any source the pH of which is less than 6.0, or greater than 9.0."

43. Standard Condition No. 11 of Rushton's permit requires:

"The permittee shall at no time discharge to the waters of the Commonwealth mine drainage from any source containing a concentration of iron in excess of 7 milligrams per liter."

44. Standard Condition No. 12 of Rushton's permit requires:

"The permittee at no time shall discharge to the waters of the Commonwealth mine drainage from any source the acid content of which, as determined to a pH value of 8.0 by the hot phenolphthalein, exceeds its alkaline content as determined to a pH of 4.0 by the bromphenol blue test."

45. Standard Condition No. 19 of Rushton's permit requires:

"The treatment works and its components herein approved shall be maintained in proper working condition and operated so that they will individually and collectively perform the functions for which they were designed as proposed in the application."

46. Standard Condition No. 21 of Rushton's permit requires:

"The permittee shall conduct such tests and/or install such equipment for continuous monitoring as are necessary to assure continuous satisfactory operation of the treatment facilities."

## PERMIT VIOLATIONS PRIOR TO JULY 31, 1970

47. In the period from the inception of mining to the date of The Clean Streams Amendment, *supra*, 20 inspections were conducted by the Department, out of which 13 were reported as violations of the Act and 7 found no evidence of violation.

48. On February 18, 1969, a sample of the discharge from the settling pond taken by a DER inspector had a pH of 3.3 and an iron content of 28 mg/l. At that time the treatment facilities were still under construction and the settling pond, which was the old strip mine pit, still contained a large amount of acid water.

49. On July 29, 1969, the liming device broke down and acid water was discharged from the settling basin. The sample taken by the Commonwealth had a pH of 4.2.

50. On August 27, 1969, a pigeon carcass delivered with the lime caused the limer to clog. The Commonwealth's sample of the discharge showed a pH of 4.9. A discharge violation on September 2, 1969, when the Commonwealth's sample had a

pH of 4.5, was also caused by bird carcasses in the lime. Within seven days of this violation Rushton did install an automatic monitoring device on the limer, which would sound an alarm if the flow of lime slurry were for any reason halted.

51. On January 13, 1970, a sample collected by the Commonwealth of the discharge from the strip cut settling pond had a pH of 8.8, but an iron content of 412.5 mg/l. This discharge violation was caused by the freezing of the boards of the weir, which allowed a discharge high in iron content to flow from the bottom of the pond. Another discharge from basin No. 1, which had by that time been constructed, had an iron content of 15.8 p.p.m. That discharge was unpermitted.

52. On January 20, 1970, the discharge sample from the strip pit settling pond showed an iron content of 750 mg/l. At that time Rushton had drained the new basin No. 1 into No. 2 in order to attempt to install a filter system on the bottom, and the increase in sludge in the main settling pond caused a high iron content in the discharge.

53. The remaining discharge violations prior to The Clean Streams Law Amendment were related to the increasing build-up of iron in the existing settling ponds and failure of the iron to compact and precipate out as expected. These violations were as follows:

February 17, 1970 - discharge from No. 2 basin had an iron content of 240 mg/l

March 4, 1970 - discharge from No. 2 basin - 258 mg/l iron

March 24, 1970 - discharge from basin No. 1 - 86 mg/l iron

" " " - discharge from basin No. 2 - 232 mg/l iron

April 7, 1970 - discharge from No. 2 basin - 142 mg/l iron

April 29, 1970 - discharge from basin No. 2 - 20 mg/l iron

June 18, 1970 - discharge from basin No. 1 - 23 mg/l iron

June 21, 1970 - field pH 7.1, with lab pH of 4.8; iron content 7.4 mg/l

VIOLATIONS SUBSEQUENT TO JULY 31, 1970

54. The first violation of the discharge limitations occuring after July 31, 1970, the effective date of §605 of The Clean Streams Law, was on August 26, 1970. Analysis of a sample collected in the discharge flowing from basin No. 2 showed that it had a pH of 5.9 and contained iron in a concentration of 34 p.p.m. An employee thought that the discharge must have been due to the limer's clogging during the night-shift period.

62. The ninth and tenth violations of the discharge limitations occurred on May 13, 1972. Analysis of the sample collected in the discharge flowing from basin No. 2 showed iron in a concentration of 67 p.p.m. and analysis of a sample collected in the discharge flowing from basin No. 5 showed iron in a concentration of 1020 p.p.m. The discharge from basin No. 2 was explained by Rushton's employee in charge of the treatment facilities as due to the fact that the submersible pumps were not working and were being rewired. The discharge from basin No. 5, which was unpermitted, was apparently caused by bad valves in the sludge pump line, which permitted the wastes to siphon back through the line. While the inspector was there Rushton's employees stopped the discharge by tightening the valves. This discharge had a distinct orange color and, as it was next to the pump house, was readily visible.

63. The eleventh and twelveth violations of the discharge limitations occurred on June 7, 1972. Analysis of the sample collected in the discharge flowing from basin No. 5, which was an unpermitted discharge, showed iron in a concentration of 16.3 p.p.m., and an analysis of the sample collected in the discharge flowing from basin No. 2 showed iron in a concentration of 15 p.p.m. The discharge from basin No. 5 (which acts as a large sump for the transportation of sludge from basin No. 2 to the drying ponds) was caused by the fact that the basin was about to overflow and to avoid this water was siphoned out of the basin into a ditch.

64. Inspections by the Department on which Rushton was found to be in compliance with its permit conditions were conducted on the following dates: September 29, 1970; April 14, 1971; June 16, 1971; June 29, 1971; July 8, 1971.

65. The Moshannon Creek is a highly acid, nearly sterile, inert stream the victim of a long and continual series of mine discharges. A report of Appalachian Mine Drainage Pollution published by the Department of Interior in 1969 revealed Moshannon Creek to have two active mines contributing a daily net acidity of 200 lbs., 49 inactive surface mines contributing an additional 50,600 lbs. acidity; 89 inactive underground mines adding an additional 80,600 lbs., 20 other sources contributing 4,800 lbs. daily, for a total daily net acidity load of 136,000 lbs. The pH of Moshannon Creek just above the point of the Rushton discharge is approximately 3.4-3.6.

66. Rushton's extensive analysis of the Moshannon Creek at 30 different sampling stations shows that on 13 sampling dates the pH was slightly higher below the Rushton discharge than above. This was further supported by analysis of Rushton's weekly operating reports, which indicate that over the period of time from December 5,

55. An inspection on October 27, 1970, is the basis of the Department's second and third violation charges. Samples taken from the two discharge points had a field pH of 6.4 and 6.6. However, when these samples were analyzed in the lab sometime before November 9, 1970, the Ph's were found to be 5.7 and 5.9. Due to the posibility of oxidation of the samples and the fact that the date they were analyzed in the lab is uncertain, no violations of the permit were established by this inspection.

56. An inspection made on December 9, 1970, and subsequent analysis established a permit violation in that the discharge from basin No. 2 showed iron in an concentration of 198 p.p.m. The employee in charge of the treatment facilities said that this violation was caused by the fact that someone neglected to turn on the pump in the sludge basin.

57. An inspection on December 16, 1970, revealed two violations. Analysis of a sample collected in the discharge flowing from basin No. 2 showed iron in a concentration of 264 p.p.m., and analysis of the sample collected from basin No. 1 showed iron in a concentration of 115 p.p.m. The discharge from basin No. 1 was through an unpermitted channel.

58. A fifth violation of the discharge limitations occurred on January 13, 1971. Analysis of the sample collected in the discharge flowing from basin No. 4 showed iron in a concentration of 180 p.p.m.

59. A sixth violation of the permit limitations occurred on May 20, 1971. Analysis of the sample collected in the discharge flowing from basin No. 4 showed iron in a concentration of 36 p.p.m.

60. The seventh violation of the discharge limitations was established by an inspection on August 11, 1971. Analysis of a sample collected from the discharge flowing from basin No. 2 showed a pH of 3.8 and iron in a concentration of 10 p.p.m. Although there is some question about the pH here because the field pH was 6.0, the lab pH is probably more reliable since around this time the Department inspector was having trouble with the probe on his field meter.

61. An eighth violation of the discharge limitations occurred on August 17, 1971. Analysis of the sample collected in the discharge flowing from basin No. 2 showed a pH of 3.8 and iron in a concentration of 13.5 p.p.m. Again there was a discrepancy between the field pH, which was 5.5, and the lab pH, which is resolved in favor of the lab pH because of the defective probe on the field meter. The inspector surmised that the pH had dropped to these low levels in the two August inspections because the lime supply was low. The inspection report noted that Rushton planned to order lime earlier in the future.

1968, through October 12, 1972, Rushton's discharges that were monitored weekly contributed a net alkalinity to the Moshannon Creek, despite the fact that Rushton's discharge co-mingled with the highly acid, untreated mine discharge of the abandoned Brighton Mine prior to its entry into the Moshannon Creek.

67. The orange stain on the stream bottom caused by ferric hydroxide was greater immediately downstream from the point of the Rushton discharge in Moshannon Creek than it was upstream.

68. The Commonwealth has expended no funds for restoration or abatement particularly on account of the Rushton discharge. However, under The Clean Streams Law the Commonwealth and the Department have responsibility for cleaning up the polluted waters of the Commonwealth. In the discharge of this responsibility the Department has, among other things, embarked upon a study of the west branch of the Susquehanna River including the Moshannon Creek. The cost of the particular study of the Moshannon and Clearfield Creek Watershed, which was initiated in June of 1972, was $235,000.

69. Warren H. Hinks, Jr., is and was at all times material hereto, president of Rushton Mining Company.

70. Mr. Hinks functioned as general manager of the Rushton mine, and spent 90% of his time on matters related to Rushton's activities.

71. Mr. Hinks spent about one day per week at the mine.

72. Mr. Hinks visually inspected all construction projects and reviewed projects and problems on a consistent basis with the superintendent.

73. Mr. Hinks participated directly in the design of the treatment facilities and signed the permit application.

74. Mr. Hinks had personal knowledge of all the violations since all correspondence from the Department was sent to him personally, and all replies are from him.

75. Mr. Hinks participated on behalf of the Company in all meetings with the Department.

## DISCUSSION

Despite respondent's very colorful briefs in this matter, depicting the plight of coal miners struggling to comply with the new environmental legislation, this case comes down to several rather elementary legal principles. Since the 1966 amendment to The Clean Streams Law, mine operators are responsible under Section 315 of that law for discharges to waters of the Commonwealth in violation of the amounts permitted by Regulation or permit issued by the Department. Since the effective date

of the 1970 amendment to The Clean Streams Law, July 31, 1970, civil penalties may be imposed for violations of that act. After that date, respondent did on twelve occasions discharge water that contained iron, and in several cases had a pH, outside the limitations of its permit, and in so doing did violate Section 315 of The Clean Streams Law. Most all of the voluminous record in this case goes to the questions of wilfulness and harm to the waters of the Commonwealth, which are elements of these offenses that the Board must consider in assessing penalties under section 605 of The Clean Streams Law, 35 P.S. §691.605.

Before discussing these issues however, there are several preliminary issues that must be dealt with. The first is the question of whether a penalty may be imposed for the violation of August 26, 1970, or whether it is barred, as respondent has argued, by the following statute of limitations:

> "When actions for forfeiture may be brought (:)
> "All actions, suits, bills, indictments or informations, which shall be brought for any forfeiture, upon any penal act of assembly made or to be made, whereby the forfeiture is or shall be limited to the Commonwealth only, shall hereafter be brought within two years after the offense was committed, and at no time afterwards; and that all actions, suits, bills or informations, which shall be brought for any forfeiture, upon any penal act of assembly made or to be made, the benefit and suit whereof is or shall be by the said act limited to the Commonwealth, and to any person or persons that shall prosecute in that behalf, shall be brought by any persons or persons that may lawfully sue for the same, within one year next after the offense was committed; and in default of such pursuit, that then the same shall be brought for the Commonwealth, any time within one year after that year ended; and if any action, suit, bill, indictment or information shall be brought after the time so limited, the same shall be void, and where a shorter time is limited by any act of assembly, the prosecution shall be within that time." 12 P.S. §44

In this case, the Commonwealth filed its civil penalty action on October 2, 1970. If this statute applies to civil penalty actions, it would preclude recovery for the violation of August 26, 1970. While this question is not terribly significant in this matter, since it affects only one of Rushton's violations, it is a significant question for civil penalty actions in general, and, as it has not been raised before, must be dealt with at some length.

In Pennsylvania it has long been the rule that statutes of limitations do not apply to the Commonwealth in civil proceedings unless the state is expressly named in the particular limitations provision. *Commonwealth v. Musser Forests, Inc.*, 394 Pa. 205, 218, 146 A.2d 714 (1959); *Bagley v. Wallace*, 16 S&R 245, 250 (Pa. Supreme Ct., 1827). As stated in *Frey's Estate*, 342 Pa. 351, 353, 21 A.2d 23, (1941), "Statutes of Limitation do not apply to [The Commonwealth], because the maxim *nullum tempus occurrit regi*[1] though probably in its origin a part of royal perogative has

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1. "Time does not run against the king." *Blacks's Law Dictionary* at 1217 (4th Ed., 1968).

been adopted in our jurisprudence as a matter of important public policy." (footnote added)

Due to its ancient origin, the courts have established the rule that §44 will be given only the most narrow construction in determining its applicability to statutes providing for remedies in the form of monetary penalties, lest it otherwise operate to frustrate the Legislature's remedial intent. *Allegheny City v. McClurkan & Co.*, 14 Pa. 81, 86-87 (1850); *Shapiro v. Paramount Film Distributing Corp.*, 274 F.2d 743, 745 (3rd Cir., 1959). (Holding §44 inapplicable to federal anti-trust treble damages provision.)

Accordingly, where it has been argued that Section 44 applies to bar a suit under a statute providing for monetary relief, the courts in Pennsylvania have recognized a crucial difference between the coverage of the limitations provision, "...upon any *penal act* of the assembly..." and acts which merely provide for dollar "penalties". *Commonwealth v. Musser Forests, Inc., supra; Ward v. Rice*, 29 F. Supp. 714, 715 (E.D. Pa., 1939). See *Popkin v. Eastern Airlines, Inc.*, 204 F. Supp. 426, 436 n.17 (E.D. Pa., 1962).

This distinction rests upon the theory that in providing for the collection of a fixed or variable sum for its violation, a statute like Section 605 of The Clean Streams Law does not thereby become a "penal act of the assembly under Section 44 merely because that amount is in excess of, or in lieu of, the actual monetary damages provable as a consequence of the defendants' acts. If the statutory penalty is, in effect, a provision mainly for liquidated damages with a compensatory basis it is not subject to Section 44. If, on the other hand, the particular statute provides a monetary reward with no compensatory purpose, it is a "pure" penalty, and cases brought under it are subject to the limitations imposed by 12 P.S. §44.

We do not believe that civil penalties under The Clean Streams Law come within the meaning of a "forfeiture, upon any penal act of assembly made or to made..." in 12 P.S. §44. A "forfeiture" means the loss of something as a penalty for doing or omitting a certain required act. *Cassell v. Crothers*, 193 Pa. 359, 363, 44 A.446 (1899). Although "forfeiture" is often equated with penalty, see e.g. *Jador Service Co. v. Werbel*, 140 N.J. Eq. 188, 53 A.2d 182 (1947); *Cantlay & Tanzola v. Ingels*, 31 Cal. App. 2.d 553, 88 P.2d 141, 143 (1939); *U. S. v. One Pitcairn Biplane*, 11 F. Supp. 24, 26 (W. D.N.Y. 1935); the term penalty is broader then the term forfeiture. See *In re Thrift Packing Company*, 100 Fed. Sup. 907, 908 (D.C. Tex. 1951). In our view the word forfeiture as used in this statute means the divestiture of property or money by a specific penalty provided either by statue or contract pursuant to statute (e.g., a statutory fine for criminal act or a specific

forfeiture of property in consequence of a criminal act), and does not apply to an action for damages of indeterminate amount authorized by a statutory provision for civil penalties. See *U. S. v. Strangland*, 242 F.2d 843, 847 (7th Cir. 1957) (where in the context of the federal rules the court said a "forfeiture of property" connotes a proceeding in the nature of an in rem action). The rule that damages that are partially compensatory in nature as well as punitive are not subject to 12 P.S. §44, was most clearly enunciated in *Commonwealth v. Musser Forest, Inc., supra*, where the Court held that 12 P.S. §44 was not applicable to the state's suit upon a contract that incorporated a statutory penalty provision for damages in an amount three times greater than the sale value of the trees, shrubs or vines that were prohibited to be sold under the provisions of the statute involved in that case. It has also been held, citing *Commonwealth v. Musser Forest, Inc.*, that this statute cannot be enlarged to apply to private actions for treble damages for anti-trust violations. *Shapiro v. Paramount Film Distributing Corporation*, 274 F.2d, 743 (3rd Cir. 1960); and see *Momand v. Universal File Exchange*, 43 F. Supp. 996, 1008 (D. Mass. 1942); *Hansen Packing Company v. Swift and Company*, 27 F. Supp. 334, 367 (D.C.N.Y. 1935).

In addition to our conclusion that civil penalties are not a "forfeiture" within the meaning of 12 P.S. §44, we conclude that §605 of The Clean Streams Law is not a "penal act" within the meaning of 12 P.S. §44. This is consistent with the cases holding that various statutes authorizing civil penalties for treble or other partially punitive damages are not penal, in the sense of criminal, acts. *Commonwealth v. Musser Forest, supra; U. S. v. Strangland, supra.* Moreover, the Board has previously ruled in other contexts that §605 of The Clean Streams Law Authorizes noncriminal, remedial actions for the Commonwealth, which are not "penal" for the purpose of applying criminal standards. In an opinion on objections to interragotories in *Department of Environmental Resources v. Harmer Coal Company*, EHB Docket No. 73-196-B. Issued February 7, 1974, then Chairman Broughton ruled that the civil penalties section was not a criminal statute for purposes of barring pre-trial discovery. Also in *Department of Environmental Resources v. Froehlke*, EHB Docket No. 72-341, Issued July 31, 1973, the Board held that a civil penalties action is not criminal action for the purposes of requiring proof beyond a reasonable doubt. The Board there analogized between civil penalties and punitive damages in tort law. In those cases the Board has observed that although the Board must consider wilfulness in assessing civil penalties, wilfulness is only one of many factors to be considered in arriving at the proper amount of the penalties, and the statute specifically provides that penalties may be assessed whether or not the violation was wilful. Most of the other factors to be considered in assessing penalties are compensatory.

In sum, we believe 12 P.S. §44, which has consistently been narrowly construed by the courts of this state, should not be applied to bar the Commonwealth from bringing actions for penalties for violations committed more than two years prior to the filing of suit. As a matter of policy it may be noted that while it is certainly desirable for the Commonwealth to pursue it's remedies with alacrity, it is often the case that a civil penalty action is not initiated until a series of violations have accumulated over a long period of time. We do not think it would be desirable, or that it was ever intended under The Clean Streams Law, to limit the civil penalty remedy available to the Commonwealth to a two year period.

Another preliminary issue, which we will deal with briefly, is respondent's objection to all of the Department's laboratory evidence based on the "chain of custody" of the Department's samples between the field and the lab. Respondent made this objection many times at the hearing, and it was overruled by order of then Chairman Broughton subsequent to the hearings. We think it appropriate to comment that we believe the Department's laboratory analyses were properly admitted into evidence in this case. Respondent's objection was based on the fact that the Department's procedure was for the field inspector to place his samples, with their identifying inspection reports, on a Greyhound bus for shipment to Harrisburg where they were picked up by the Department's laboratory personnel.

A good statement of the law on this point with regard to admisibility is found in *U. S. v. S. B. Penick and Company*, 136 F.2d 413 (2nd Cir. 1943) where Judge Swan said in a criminal case:

> "It is true that before a physical object connected with the commission of a crime can properly be admitted in evidence, there must be a showing that such object is in substantially the same condition as when the crime was committed. 2 Wharton, Criminal Evid., 11th Ed. §757. But there was no hard and fast rule that the prosecution must exclude all possibility that the article may have been tampered with [cite omitted].
>
> "In each case the trial judge before he admits it in evidence must be satisfied that in reasonable probability the article has not been changed in important respects. Wigmore, Evidence, 3d Ed., §437(1); 32 C.J.S., Evidence, §607. In reaching his conclusion he must be guided by the nature of the article, the circumstances surrounding the perservation and custody of it, and the likelihood of intermeddlers tampering with it. [at 415]"

In this case that the Department clearly established the regularity of its procedure for collecting and identifying samples and for shipping the samples and handling them in the laboratory; and no evidence was offered to indicate that the samples had in fact been tampered with. Without such evidence, we think that the shipments by Greyhound bus were as likely to be secure as many of the procedures that have been upheld in other cases. See *Pasadena Research Laboratories v. U.S.*,

169 F.2d 375 (9th Cir. 1948), *Cert. den.* 69 S. Ct. 83 (1948) *Gallego v. U.S.*, 276 F.2d 914 (9th Cir. 1960); *Williams v. U.S.*, 381 F.2d 20 (9th Cir. 1967); *Gass v. U.S.*, 416 F.2d 767 (D.C. Cir. 1969); *U. S. v. Clark*, 425 F.2d 827 (3rd Cir. 1970); *U. S. v. Graham*, 464 F.2d 1073 (5th Cir. 1972).

We turn now to a consideration of the appropriate amount of civil penalties to be assessed for the violations in this case. Section 605 of The Clean Streams 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 board, 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), plus five hundrend dollars ($500) for each day of continued violation. In determining the amount of the civil penalty the board shall consider the wilfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors. It shall be payable to the Commonwealth of Pennsylvania and shall be collectible in any manner provided at law for the collection of debts. If any person liable to pay any such penalty neglects or refuses to pay the same after demand, the amount, together with interest and any costs that may accrue, shall be a lien in favor of the Commonwealth upon the property, both real and personal, of such person but only after same has been entered and docketed of record by the prothonotary of the county where such is situated. The board may, at any time, transmit to the prothonotaries of the respective counties certified copies of all such liens, and it shall be the duty of each prothonotary to enter and docket the same of record in his office, and to index the same as judgments are indexed, without requiring the payment of costs as a condition precedent to the entry thereof."

Much of the argument in this case is centered upon the meaning of wilfulness as used in this section and the proper characterization of respondent's acts within that standard. It should be noted the outset that the Board may assess civil penalties whether or not a violation is "wilful"; however, it is obvious that the civil penalties may be more significant if there is a wilful element in the violation.

The Board has previously stated that the concept of wilfulness for purposes of §605 can be likened to the similar concepts in tort law and criminal law. *Commonwealth of Pennsylvania, Department of Environmental Resources v. Froehlke, supra*, at p. 14. In criminal law an act is performed with wilfulness if a "person acts knowingly with respect to the material elements of the offence..." 18 C.P.S.A. §302 (g). Without binding the Board absolutely to tort law (where the law has developed to deal with direct injuries to the person rather than the environment), that law does provide an analysis of degrees of knowing or wilful conduct that is useful in considering this element for purposes of civil penalties. For instance, there is clearly a difference between deliberate, intentional acts, which are the

most "wilful", see, e.g. *Evans v. Philadelphia Transit Company*, 418 Pa. 567, 573-74 (1965); and accidental, unintentional, unknowing negligence, which is in no sense wilful. See, Restatement of Torts, 2nd Vol. 2, §282. In between, are degrees of negligence or misconduct with varying degrees of knowledge attached, which may make an act more or less wilful, although not amounting to "wilful misconduct" in tort law. Thus, 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. In tort law, these various degrees of knowledge and care lead to distinctions of degree such as "gross negligence" and "wanton misconduct" or "reckless disregard of safety", see *Evans v. Philadelphia Transit Company, supra, Geelan v. Pennsylvania Railroad Company*, 400 Pa. 240, 161 A.2d 595 (1960); *Kasanovich, admx. v. George et al Trustees*, 348 Pa. 199, 203, 734 A.2d, 523 (1943); Restatement of Torts 2nd Vol. 2, §500. As to gross negligence, Prosser has pointed out:

> "The prevailing view is that there are no 'degrees' of care or negligence as a matter of law; there are only different amounts of care as a matter of fact, and "gross" negligence is merely the same thing as ordinary negligence, 'with the addition', as Baron Rolfe once put it, 'of a vituperative epithet'." *Torts, p. 183, 1971 Ed.*

Gross negligence in fact appears to be the failure to take slight care to avoid an injury, whereas wanton misconduct or reckless disregard of safety, as it is captioned in the Restatement, involves an added element of actual knowledge of facts that would lead a reasonable man to conclude that injury will be likely to result from the doing of a certain act or the failure to do a certain act.

With these distinctions noted, we can proceed to a consideration of the wilful character of Rushton's violations. We must agree with respondent's assertions that its permit violation were clearly not wilful in the sense of being intentional or deliberate. In fact, Rushton was attempting to solve its discharge problem over the period of time in which these violations occurred. And these problems were certainly complicated by facts such as the lack of knowledge generally about how to treat ferric hydroxide and the large volume of acid mine water with which respondent had to contend.

On the other hand, once The Clean Streams Law was amended to apply to mine operators, respondent had the obligation to mine without discharges in violation of the act or implementating regulations. And though we have some sympathy with respondent's dramatically portrayed struggles with great masses of feathery sludge that refused to settle, we must observe that from the date of the 1966 amendment to The

Clean Streams Law, respondent was required by law to mine without unacceptable discharges to the waters of the Commonwealth. Respondent *could* have ceased to mine until it developed a reliable means for treating its acid mine drainage or at least learned of a satisfactory treatment process from other sources. Instead, Rushton quite naturally chose to proceed with mining and to develop an adequate treatment process on something of a tried and error basis - with the consequent risk that discharges in violation of the permit limitations might very well occur. This is not to say that such violations were wilful in the most intentional sense. However, there is some sense in which Rushton knowingly chose to take the consequences of likely discharges to the waters of the Commonwealth in violation of its permit.

We are not impressed, either, with the argument that there is equal blame to be laid upon the Legislature for so precipitously changing the law or upon the Department for not knowing how to solve Rushton's problem or for not immediately approving Rushton's amended permit application. It is true that the Department no more knew how to solve Rushton's sludge problems than Rushton did and that the Sanitary Water Board should perhaps have acted more promptly on Rushton's amended application--although the lack of certainty about a workable process undoubtedly contributed to the delay in approving the proposed system. These considerations do mitigate respondent's liability; nevertheless, the fact remains that it was Rushton that was engaged in the mining business and consequently, it was Rushton that had the responsibility to develop a method of mine drainage treatment so as to avoid unpermitted discharges to the waters of the Commonwealth.

The Commonwealth has contended that Rushton's permit violations that occurred prior to July 31, 1970, the effective date of the amendment to The Clean Streams Law providing for the imposition of civil penalties, can be considered as evidence of wilfulness since they show knowledge of a continuing problem and failure to remedy it. While we agree that prior events or violations are admissible for the purpose of showing knowledge, see *Commonwealth v. Skufca*, §456 Pa. 121, 134, 321 A.2d 889 (1974); 87 ALR 2d 891 (1963), the prior violations here do not add much of an element of wilfulness here except on the question of monitoring as discussed below. A number of the early violations were accidental and unrelated to the subsequent violations (see Findings of Fact numbers 50, 51, 52, 53, 54). The violations resulting from the failure of the ferric hydroxide to compact (Findings of Fact number 55) do show that respondents had reason to anticipate likely discharges. But other evidence also shows that respondents were attempting, although perhaps too slowly to solve the problem.

The Commonwealth's major contention on the issue of wilfulness is based on Rushton's failure to monitor its discharges for pH and iron in violation of permit condition 21 (Finding of Fact number 47). The Commonwealth argues that this shows a knowing lack of concern for the quality of respondent's discharges amounting to wilful disregard. Respondent counters that it did monitor for pH at the end of the sluiceway and that monitoring the discharge could have been of no use since respondent could do nothing at that point to avoid a violation. Rushton did perform the weekly monitoring of its discharge and furnish copies of its reports to the Department as required by its permit.

Although we would not go so far as the Commonwealth on this point, we agree that the failure to monitor its discharges is some evidence of a degree of wilfulness--at the least, gross negligence[2]. Whether or not respondent could have taken any remedial action in every case if it did discover a discharge violation (see Finding of Fact number 36), we think that failure to monitor certainly shows a disregard for the consequences of treatment and suggests that respondent's efforts were not as diligent as they might have been. Contrary to respondent's view that all monitoring required by the permit was performed, we think that Standard Condition 21 imposed a duty on a mine operator to check on the quality of its discharges continuously (or at least daily), *particularly* if the operator has reason to know that there may be discharges in excess of the permit limitations. The law is aimed at discharges to the waters of the Commonwealth, not discharges to settling ponds. It would not make any sense to limit the meaning of Standard Condition 21 to require monitoring only at the liming device and not from the settling ponds, which are also part of the "treatment facilities". Standard Condition 7 of the permit requires the permittee to give notice of an unpermitted discharge and to "promptly take such steps as are necessary to halt the unauthorized discharge". Rushton could hardly comply with this permit condition (and in fact it never did notify the Department of any discharge) since it had no way of knowing whether its discharges were in compliance or not.

We do not agree with the Commonwealth that there was any element of wilfulness present in Rushton's failure to monitor the pH of the detention pond until it became known that the pH of the detention pond was critical to the "zeta potential"

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2. There is a great deal of testimony in the record concerning the availability of monitoring devices and the value of automatic v. manual devices for monitoring iron as well as pH. The significant point to us is that it is clearly possible to monitor for iron and pH. Whether it is done manually or automatically would not seem to matter so long as the method chosen provides reliable results. It did appear from the record that manual monitoring might be more satisfactory for pH--at least at the liming device. We cannot say from this record what is the best method of monitoring for iron, but we think that if a reliable device for continuous automatic monitoring of iron is or becomes available, it should be used.

of the sludge molecules and its effect on the ability of the sludge to precipate. It is not clear from the record just when this knowledge became available, but it appears to have been after the violations complained of here. There can be no element of wilfulness without knowledge.[3] Further, it must be observed as to pH that, except for the violations of August, 1971, which are somewhat suspect because of the discrepancy between the field and lab pH's and were apparently due to the failure to have a sufficient supply of lime on hand, Rushton's discharges did not violate the pH standard of its permit. Rushton's problem was iron, so the failure to monitor for pH is only significant in this case as it relates to the control of iron in the discharges.

In assessing penalties here we must distinguish between some violations in terms of seriousness. The failure to monitor for iron was continuous and, therefore, applies to each offense. However, the discharge from basin No. 5 on May 13, 1972, was clearly the most serious violation, both in the amount discharged and the added element of reckless disregard for the consequence of the unpermitted discharge, which contained iron in a concentration of 1020 p.p.m. Distinctions in the appropriate amount of penalty for each offense are made on the basis of differences in the significance of the violation, as well as the circumstance surrounding each violation. We are also mindful of the fact that Rushton had brought its discharge problems under control by the time of the hearings in this matter.

On the question of "damage or injury to the waters of the Commonwealth", we cannot accept respondent's argument that discharges to an already polluted stream do not cause any real injury for which a penalty can be assessed. It is certainly true that in view of the sterile, inert character of the Moshannon Creek, Rushton's discharge caused no specifically traceable damage to the waters of the Commonwealth. The Moshannon Creek contains barely any life. Therefore, penalties cannot be based upon any specific costs of cleanup or restoration or damages to aquatic life. However, §3 of The Clean Streams Law, *supra*, 35 P.S. §691.4 (3) provides:

> "It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted;"

Under §4 (a) (2), 35 P.S. §691.5 (a) (2), the Department is charged with considering, among other things, "the present and possible future uses of particular waters" in

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3. Prior to the discovery that the zeta potential would dissipate at a pH of around 8.3, Rushton was already attempting to control the pH of the detention pond by the simple process of "overliming" so as to counteract the known hydrolysis reaction in the settling ponds.

taking any action "for the purposes of implementing the declaration of policy set-forth in §4 of this Act". To hold that civil penalties cannot be assessed for unpermissible discharges to an already polluted stream would be to contradict directly the goal of The Clean Streams Law to reclaim the polluted waters of the Comonwealth. Although it may be that Rushton contributed a net alkalinity to the Moshannon Creek over the period of time that included these violations, and therefore we cannot say that Rushton's pH violations did any real damage to the creek, Rushton clearly did discharge excess amounts of iron to Moshannon Creek and thereby did do further injury to that already injured stream. Obviously, the cost of restoration of Rushton's particular discharges cannot be measured with any specificity. And certainly others have done far greater injury to the Moshannon Creek. We disagree with respondent however, that the overall cost of restoration of the stream may not be considered as a factor in assessing civil penalties; although we certainly agree that it would be wrong to charge a specific portion of that large cost against one relatively insignificant contributor to the pollution problem. The cost of restoration here will ultimately be borne, if it is accomplished, by the Commonwealth and its citizens. The particular study of the Moshannon Creek stream, which cost $235,000, was just an attempt to identify the sources and amounts of pollution of the creek and is merely preliminary to any actual restoration, the cost of which is unknown. If we were to adopt respondent's view that because Rushton's iron is not specifically traceable, and may in fact have been thoroughly diluted or washed out to sea by the time any cleanup of Moshannon Creek is attempted, we would encourage rather than deter pollution of already polluted streams.[4] Therefore, although we cannot specifically measure the damage caused by Rushton's discharges against the ultimate cost of restoration, we can say that any contribution of iron in excess of the permit limitations causes an added injury to the waters of the Commonwealth; and that one who does such injury must make a contribution to the Clean Water Fund (which is a fund to be applied to costs of restoration generally, 35 P.S. §691.8) on account of that injury. With these consideration in mind, we believe we are justified in adding an element for

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4. The testimony of David Alan Bish of the Department is apt on this point:

> "A I would just like to pose another aspect of the type of thing we're discussing, that if the state or the Department or the people of Pennsylvania view discharges in the light of the immediate receiving stream, no matter how badly degraded - and this may be an absurdity, but let's carry it to an absurdity just to make a point - that if we go in this premise that you can discharge to a polluted stream so long as you don't harm the aquatic life in that stream, and admittedly in this particular stream, specifically there is very little, it any, aquatic life, and damage to that -- it would take a radical discharge to harm anything in the stream. But if we pursue that to its logical conclusion in that these discharges would continue to mount and build up, that conceivably the entire West Branch Susquehanna River system could be reduced to an acid impregnated sewer."

injury to the waters of the Commonwealth in assessing penalties in this case.

Insofar as the liability of Mr. Hinks is concerned we recognize his responsibility for the operation of Rushton, but we do not think that his conduct in this matter was sufficiently wilful to warrant the imposition of a separate penalty as the Commonwealth urges, or to creat a separate liability. Mr. Hinks was making an effort to solve the mine's discharge problems. Although he might have been more insistent concerning the need to avoid unpermitted discharges, his conduct is in direct contrast to that of the individual held liable in *Department of Environmental Resources v. Froehlke, supra*, which involved a wilful and seemingly studied disregard of continuous serious violations. Here in our opinion the elements of knowledge or wilfulness do not arise, except perhaps in connection with the violation of May 13, 1972, (for which it is not clear Mr. Hinks is responsible) to wilful or wanton misconduct. Mr. Hinks did consult experts and involve himself actively in the design of treatment facilities that would adequately handle Rushton's sludge from the time that he knew treatment would be required. We are unwilling to pinpoint Mr. Hinks as the one responsible for the failure to monitor for iron since the record shows that he clearly believed that the monitoring Rushton was doing was sufficient to detect problems, and apparently, he did not get any contrary advice. While we think he might have had more foresight with regard to the need for monitoring discharges for iron (and pH for that matter) we think that in this case it is sufficient to assess penalties against Rushton Mining Company for the collective responsibility of its personnel and consultants.

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties in the subject matter of these proceedings.

2. The statute of limitations found at 12 P.S. §44, is not applicable to civil penalty actions under The Clean Streams Law, and hence does not bar the assessment of a civil penalty for the violation in this case occurring on August 26, 1970.

3. The Department's laboratory analyses were properly admitted into evidence in this case.

4. Failure to take daily or continuous monitorings of discharges to the waters of the Commonwealth, was a violation of Standard Condition 21 of Rushton's permit, and while not amounting to wilful or wanton misconduct, did in this case show a disregard for the likely consequences of the known inadequacies of Rushton's treatment facilities.

5. In assessing civil penalties under §605 of The Clean Streams Law, the Board may find injury to the waters of the Commonwealth for unpermitted discharges to a completely polluted stream even though the amount of that injury or damages is not specifically measurable.

6. The president of Rushton Mining Company will not be held separately and personally liable for the violations where he was making an effort to solve Rushton's discharge problems and although he could have insisted upon greater care to avoid discharges, his conduct did not amount to wilful or wanton misconduct.

7. Between August 26, 1970, and June 7, 1972, Rushton had 12 discharges to the waters of the Commonwealth that contained iron and in two cases pH, in amounts in violation of the limitations of its permit and the Rules and Regulations of the Department. Taking account of the factors to be considered by the Board under §605 of The Clean Streams Law in accordance with the principles discussed above, the Board assesses penalties for these violations in varying amounts as follows:

a. August 26, 1970 - a penalty of $500 is assessed for the unlawful discharge of excess iron.

b. October 27, 1970 - no violations were found to have occurred and therefore no penalties are assessed.

c. December 9, 1970 - a penalty of $1,000 is assessed for the unlawful discharge of excess iron.

d. December 16, 1970 - a penalty of $1,000 is assessed for unlawful discharge of excess iron from basin No. 2. A separate penalty of $1,000 is assessed for the excess iron discharge from basin No. 1.

e. January 13, 1971 - a penalty of $1,000 is assessed for the unlawful discharge of excess iron.

f. May 20, 1971 - a penalty of $500 is assessed for the unlawful discharge of excess iron.

g. August 11, 1971 - a penalty of $500 is assessed for the unlawful discharge of excess iron and for violation of the pH standard.

h. August 17, 1971 - a penalty of $1,000 is assessed for the unlawful discharge of excess iron and for violation of the pH standard.

i. May 13, 1972 - a penalty of $500 is assessed for the unlawful discharge of excess iron from basin No. 2. A separate penalty of $3,000 is assessed for the unpermitted and substantial discharge of iron from basin No. 5

j. June 7, 1972 - a penalty of $500 is assessed for the unlawful discharge of iron from basin No. 5. A separate penalty of $500 is assessed for the unlawful discharge of excess iron from basin No. 2.

O R D E R

AND NOW, this 12th day of March, 1976, in accordance with §605 of The Clean Streams Law, 35 P.S. §691.603, civil penalties are assessed against respondent, Rushton Mining Company in the total amount of $10,000.

This amount is due and payable into The Clean Water Fund immediately. The Prothonotary of Centre County is hereby ordered to enter these penalties as liens against any property of the aforesaid defendants with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Joseph L. Cohen

JOSEPH L. COHEN
Member

Joanne R. Denworth

BY: JOANNE R. DENWORTH
Member



DATED: March 12, 1976

AMENDED ORDER

AND NOW, this 16th day of March, 1976, in accordance with §605 of The Clean Streams Law, 35 P.S. §691.605, civil penalties are assessed against respondent, Rushton Mining Company in the total amount of $11,000.

This amount is due and payable into The Clean Water Fund immediately. The Prothonotary of Centre County is hereby ordered to enter these penalties as liens against any property of the aforesaid defendants with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: March 16, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

MARK E. BUFFAMOYER

Docket No. 75-166-D

v. Clean Streams Act-Sewage Treatment Permit

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
& DALE E. YINGST d/b/a/LEBANON VALLEY MOBILE
HOME PARK, INTERVENOR

ADJUDICATION

By: Joanne R. Denworth, Member, March 31, 1976.

This is an appeal from a grant of a permit by the Department of Environmental Resources (Department) to Dale E. Yingst, intervenor herein, for the construction and operation of a package sewerage treatment plant on property adjacent to appellant's land to serve the Lebanon Valley Mobile Home Park in Bethel Township, Lebanon County, Pennsylvania. The Department and the intervenor moved to dismiss this matter on the ground that the appeal was untimely. The permit was issued on November 21, 1974, and issuance of the permit was published in the Pennsylvania Bulletin on December 7, 1974. Appellant, alleging that he had actual knowledge of the issuance of the permit on or about July 12, 1975, filed this appeal on August 8, 1975, claiming that there was "fraud or serious mistake in the issuance of the permit in that the treatment plant would not discharge to a tributary of Little Swatara Creek as stated in the application but to a stream on appellant's land that is a dry bed four or five months of the year". By order dated October 27, 1975, the examiner reserved a ruling on the motion to dismiss until a hearing could be held because it appeared that appellant might be able to establish good cause for the filing of an appeal *nunc pro tunc* as allowed by the Board's Rule 21.21 (e), 25 Pa. Code 21.21 (e). The hearing in this matter was held on February 24, 1976. At the conclusion of appellant's testimony the Department renewed its motion to dismiss and the examiner, believing that the motion would have to be sustained, ruled that the Department and the intervenor need not put on any rebuttal testimony.

FINDINGS OF FACT

1. Appellant, Mark E. Buffamoyer, owns a 190 acre farm on Route 2 in Bethel Township, Lebanon County, Pennsylvania.

2. Intervenor, Dale E. Yingst d/b/a/Lebanon Valley Mobile Home Park is the owner of the trailer park across Route 2 to the northeast of appellant's property. The trailer park has been in existence since approximately 1968.

3. On November 21, 1974, appellee, the Department of Environmental Resources, issued a permit to intervenor for the construction and operation of a sewage treatment plant on property adjacent to appellant's land that was purchased by the intervenor in 1973.

4. Notice of the application for a permit was published in the Pennsylvania Bulletin on October 12, 1974, and notice of the issuance of the permit was published by the Department in the Pennsylvania Bulletin on December 7, 1974.

5. Appellant filed this appeal from the issuance of the permit on August 8, 1975.

6. Although appellant did not read the Pennsylvania Bulletin and was not specifically informed at the date of the issuance of the permit for the package treatment plant, his attendance at meetings of the Bethel Township Board of Supervisors prior to the issuance of the permit to protest the construction of the treatment plant, and his observation of the construction of the plant in the spring of 1975 indicate that he had or should have had knowledge that would have enabled him to file a timely appeal.

7. Intervenor's treatment plant discharges to a "stream" that prior to the construction of the plant was a dry bed approximately four months of the year.

8. The Department does approve discharges of adequately treated water to wet weather streams where that is the only practical solution to a sewerage treatment problem.

9. Prior to the construction of the treatment plant and since the existence of the trailer park, appellant and others in the area have experienced water problems that were caused by the park's inadequate on-lot sewerage disposal systems.

10. The discharge from the treatment plant, as well as the previous discharges from the septic systems, create a marshy area on appellant's land where he cannot use his tractor for weed control as he did prior to the existence of the trailer park.

DISCUSSION

The preliminary question in this case, and the one which we find to be dispositive of the appeal, is the question of whether appellant should be allowed to file an appeal *nunc pro tunc* within the Board's Rule 21.21 (e) which provides as follows:

> "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."

The standards as to what constitutes good cause for the filing of an appeal *nunc pro tunc* are very stringent. The courts have allowed the filing of appeals *nunc pro tunc* only where there is (a) fraud or a break down in the court's or agency's operations that prevented the filing of a timely appeal or (b) an unconstitutional deprivation of the assistance of counsel. See *In re: Annexation of a Portion of the Township of Franklin by the Borough of Delmont*, 2 Pa. C. 496, 499, 276 A.2d 549 (1971); *Turner v. Unemployment Compensation Board of Review*, 163 Pa. Super. 168, 171, 172, 60 A.2d 583 (1948); *Standard Lime & Refractories Co. v. Department of Environmental Resources*, 2 Pa. C. 434, 439, 441, 279 A.2d 383 (1971); *Brown v. Department of Transportation*, 4 Pa. C. 308, 286 A.2d 492 (1972); *Daniel E. Duggan v. Environmental Hearing Board*, 13 Pa. C. 339, 341, 342, 321 A.2d 392 (1974). The court in the *Township of Franklin* case said at page 499:

> "...It is the general rule that, where an act of assembly fixes the time within which an appeal may be taken, courts have no power to extend it, or to allow the act to be done at a later day, as a matter of indulgence. Something more than mere hardship is necessary to justify an extension of time, or its equivalent, an allowance of the act *nunc pro tunc*. *Tuttle Unemployment Compensation Case*, 160 Pa. Superior Ct. 46, 49 A.2d 847 (1946); *Yeager v. United Natural Gas Company*, 197 Pa. Superior Ct. 25, 176 A.2d 455 (1961); *Morgan v. Pittsburgh Business Properties, Inc.*, 198 Pa. Superior Ct. 254, 181 A.2d 881 (1962). Two notable exceptions to this general rule are where there is presence of fraud or a breakdown in the court's operation to the prejudice of a party (*Nixon v. Nixon*, 329 Pa. 256, 198 A. 154 (1938)); *See Christiansen v. Zoning Board of Adjustment*, 1 Pa. Commonwealth Ct. 32 (1971), or where the failure of a defendant in a criminal case to take a timely appeal is the result of an unconstitutional deprivation of the assistance of counsel (*Commonwealth ex rel. Light v. Cavell*, 422 Pa. 215, 220 A.2d 883 (1966))."

In this case there was no fraud or action of the Department that caused appellant's failure to take a timely appeal. The Department did publish notice of the issuance of the permit in the Pennsylvania Bulletin. While we are not sure

(Rule 21.13 (b), which deals with notice of actions before the Board, notwithstanding), that publication of notice in the Pennsylvania Bulletin would always be adequate, constitutional notice to an affected, adjacent landowner, in this case appellant had reason to know of the issuance of the permit long before the filing of his appeal in the summer of 1975. Minutes of the meetings of the Bethel Township Board of Supervisors in March, September and October of 1974 show that Mr. Buffamoyer was present and inquired about and objected to the construction of the proposed sewerage treatment plant for the Lebanon Valley Mobile Home Park. In March of 1974, the Board of Supervisors approved the amendment of the Act 537 official Sewerage Facilities Plan to allow for the treatment plant. Construction of the treatment plant was begun in the spring of 1975. The plant itself was visible on the property in April of 1975. Mr. Buffamoyer attended the April and May, 1975, meetings of the Board of Supervisors and objected to the issuance of the building permit for the sewerage treatment plant. Thus, it is clear that the appellant knew or had reason to know of the issuance of the permit before July 8, 1975, and has not established good cause for the filing of an appeal *nunc pro tunc*. The reason for the requirement of the filing of a timely appeal is demonstrated by this case. Intervenor had nearly completed the construction of the sewerage treatment plant by the time appellant filed his appeal in this case. At some point in time a permittee must be able to act on his permit without further challenge to its validity.

While the ruling on timeliness is dispositive of this appeal, we wish to comment that here again we have a case where failure to consider sewage disposal problems by way of initial planning for the use of the land has created a problem that has to be solved by substituting a less objectionable problem for a more objectionable one. From the testimony of Mr. Donato of the Department of Environmental Resources it appeared that the Department, although its map was not exactly accurate did recognize that the discharge from this plant would be to a wet weather stream, but approved the permit because it was the best thing that could be done in the circumstances to remedy the intolerable situtation caused by inadequate on-lot sewerage septic systems. What seems apparent is that the trailer park should never have been built on this land in the first place, but should have been located on land where proper sewage disposal could be accomplished without unneighborly effects. However, it is too late for Mr. Buffamoyer or the Department or this Board to tell that to either the owner or the tenants of the trailer park.

## CONCLUSIONS OF LAW

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

2. An appeal *nunc pro tunc* will not be allowed where the appeal was taken eight months after publication in the Pennsylvania Bulletin of notice of the issuance of the permit appealed from, and where it is clear from appellant's actions that he had reason to know of the issuance of the permit considerably prior to the time of taking of his appeal.

## ORDER

AND NOW, this 31st day of March, 1976, the appeal of Mark E. Buffamoyer is dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: March 31, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

v.

PENNSYLVANIA POWER COMPANY
One East Washington Street
New Castle, PA 16103
Lawrence County, Taylor Township

Docket No. 72-428-CP-C

Assessment of Civil Penalties

# ADJUDICATION

By the Board: April 16, 1976.

In this very difficult case, the Board is adopting, with some modifications, the adjudication written by our collegue Joseph L. Cohen, who in our opinion did a masterful job of analyzing the labyrinthian procedural complexities of this case. We are, however, largely because of those complexities, unable to agree with him as to the amount of penalties to be assessed in this matter. Consequently, we are adopting his opinion as the Board's opinion with the addition of our own discussion and conclusions concerning the appropriate amount of civil penalties to be assessed.

The Commonwealth of Pennsylvania, acting through the Department of Environmental Resources (hereinafter DER), filed a Complaint for Civil Penalties against Pennsylvania Power Company (hereinafter Penn Power) alleging that the emissions from its power plant in Taylor Township, Lawrence County, Pennsylvania, violated DER regulations with regard to emissions of particulate matter and sulfur dioxide. At the time DER filed this Complaint for Civil Penalties there was in progress in the Court of Common Pleas of Lawrence County, a proceeding initiated by DER against Penn Power and its President, Roy E. Semmler alleging that respondents were in contempt of an order of the said Court of Common Pleas of Lawrence County for the reason that they disobeyed an order of that court, issued September 1, 1972, ordering Penn Power to submit an application that would bring the emissions from its power plant into compliance with DER regulations.

On April 19, 1973, the Court of Common Pleas of Lawrence County adjudged Penn Power and its President, Roy E. Semmler, not to be in contempt of court.[1]

This matter is complicated by the legal issues arising from the fact that the proceedings in the Court of Common Pleas of Lawrence County, initiated by the Commonwealth culminated in a dismissal by that court of the Commonwealth's contempt petition. This had the effect of raising many legal issues which, although not novel in themselves, presented themselves in a new and complicated context.

The defendant in this matter raised certain preliminary legal issues, the resolution of which were the subject of an opinion and order by the then Chairman of the Board, the Honorable Robert Broughton, dated October 25, 1973. In that opinion, we preliminarily disposed of the issues of *res judicata*, collateral estoppel, estoppel, preventing a multitude of actionsand the principle of the election of remedies. Defendant continues to assert these defenses to the civil penalties action herein.

In addition to the record compiled at the hearing in the matter before the Board, plaintiff and defendant stipulated that the entire record of the proceedings in the Lawrence County Court of Common Pleas would become part of the Board's record in this matter. Moreover, inasmuch as the decision of the Court of Common Pleas of Lawrence County in the contempt proceeding antedated the hearing before the Board, the principles of collateral estoppel would apply to facts litigated in the contempt proceeding which are also relevant to a determination in this matter, as indicated by former Chairman Broughton in his opinion, *supra*.

On the basis of the record in this matter and the briefs filed by the parties, we make the following:

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1. Commonwealth Court upheld the Lawrence County Court in *Pa. 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).

## FINDINGS OF FACT

1. Plaintiff is the Commonwealth of Pennsylvania.

2. Defendant, Pennsylvania Power Company, is a corporation duly organized under the laws of the Commonwealth of Pennsylvania and duly certificated as an electric power utility by the Pennsylvania Public Utilities Commission.

3. Defendant operates an electrical generating station in Taylor Township, Lawrence County, Pennsylvania. The electrical generators are powered by five coal-fire boilers which provide the steam necessary for their operation.

4. When in operation the coal-fire boilers of defendant emit into the outdoor atmosphere particulate matter, sulfur dioxide and other air contaminants.

5. Prior to April 22, 1970, and thereafter, there was in effect a regulation of the Air Pollution Commission, now defunct, entitled "Regulation V" adopted pursuant to the provisions of the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, *as amended*, 35 P. S. §4001 *et seq*. Under the provisions of this regulation the maximum allowable emission rate for each boiler is:

Boiler No. 1, 60 pounds per hour; Boiler No. 2, 80 pounds per hour; Boiler No. 3, 122 pounds per hour; Boiler No. 4, 130 pounds per hour; and Boiler No. 5, 160 pounds per hour.

6. Prior to April 22, 1970, and thereafter, the emissions of particulate matter from each of defendant's boilers substantially exceeded the maximum allowable emission rate set forth in Regulation V.

7. On April 22, 1970, the Pennsylvania Department of Health issued to defendant an air pollution abatement order pursuant to the provisions of §4(4.1) of the Air Pollution Control Act, *supra*, which order in relevant part provided as follows:

> "The Department, therefore, this 22nd day of April, 1970, issues the following order pursuant to the provisions of said Act:
>
> "(1) That the Pennsylvania Power Company shall, on or before December 31, 1971, install air pollution control equipment and/or institute process changes designed to control particulate matter emissions from the boiler facilities of its electrical generating station located in Taylor Township, Lawrence County, Pennsylvania, to within the limits specified in Section 1.4 of Air Pollution Commission Regulation V.
>
> "(2) That the Pennsylvania Power Company shall, on and after December 31, 1971, reduce the particulate matter emissions from its aforesaid electrical generating station to a level such that the emissions will not exceed the limits specified in Section 1.4 of Air Pollution Commission Regulation V.

"(3) That the Pennsylvania Power Company shall submit to the Department of Health, on or before October 1, 1970, a plan setting forth the procedures to be used to comply with paragraphs (1) and (2) of this order. The plan is to contain:

(a) A detailed description of the methods or devices to be used to control the particulate matter emissions.

(b) A schedule of dates for completion of specific phases of the program.

(c) A statement indicating that quarterly progress reports will be submitted to the Department of Health commencing on January 1, 1971."

8. On May 15, 1970, defendant, pursuant to the provisions of the Air Pollution Control Act, *supra*, filed an appeal from the order of the Department of Health with the Air Pollution Commission.

9. After hearing, the Air Pollution Commission on January 11, 1971, affirmed the order of the Department of Health, issued April 22, 1970, in an adjudication which contained the following order:

"AND NOW, to wit, this 11th day of January, 1971, the order of the Department of Health issued to Pennsylvania Power Company, a corporation, is hereby affirmed; provided, however, that the time for compliance with paragraphs (1) and (2) of said order is extended to October 1, 1972, and provided further that the time for compliance with paragraph (3) of said order is extended to June 1, 1971."

10. Upon request of defendant the Department of Health extended the time for compliance with paragraph three of the departmental order from June 1, 1971, as provided in the Air Pollution Commission's adjudication, to September 1, 1971. Thereafter, no further extensions of time were granted to defendant with regard to paragraph (3) of the departmental order. No extensions were granted to defendant from paragraphs (1) and (2) of that order as modified by the adjudication of the Air Pollution Commission under date of January 11, 1971.

11. On three separate occasions, October 19, October 28 and December 7, 1971, representatives of the Pennsylvania Department of Environmental Resources, (hereinafter DER)[2] met with representatives of defendant in an effort to secure

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2. DER succeeded the Pennsylvania Department of Health in the administration and enforcement of various environmental protection laws heretofore administered and enforced by the Department of Health. The legislative authority for said transfer is set forth in §2101-A of the Administrative Code of 1929, Act of April 9, 1927, P. L. 177, *as amended*, 71 P. S. §52 *et seq.* (1975-1976 Supp.).

voluntary compliance with the adjudication of the Air Pollution Commission of January 11, 1971. No plan for compliance with paragraphs (1) and (2) of the order was submitted to the Department at such meetings nor have any plans been submitted to the Department after said meetings except in response to orders of the Court of Common Pleas of Lawrence County, more particularly described below.

12.. On January 12, 1972, the Commonwealth filed a complaint in equity in the Court of Common Pleas of Lawrence County to Docket Number 2 of 1972 EQUITY, to compel defendant to comply with the order of the Air Pollution Commission of January 11, 1971.

13. On July 24, 1972, the Court of Common Pleas of Lawrence County, after hearing, sustained the Commonwealth's objections to defendant's answer to its complaint in equity and decreed that a preliminary injunction against defendant be issued.

14. On August 7, 1972, the Court of Common Pleas of Lawrence County made the following Order:

> "NOW, this 7th day of August, 1972, it appearing, as the result of briefs submitted and oral argument, that since the institution of this suit, the Commonwealth of Pennsylvania has enacted new regulations governing particulate matter emissions and relating to the control of sulfur dioxide, and it further appearing that the defendant, Pennsylvania Power Company, is willing to comply with the newly enacted regulations in these matters, it is now therefore ORDERED, ADJUDGED and DECREED that:
>
> "(1) Within thirty (30) days from the date of this Order, defendant shall submit to the Bureau of Air Quality and Noise Control, Department of Environmental Resources, Meadville ("Bureau"), a preliminary plan and schedule containing:
>
> a. A detailed description of the methods or devices to be used to control particulate matter emissions and sulfur dioxide emissions to comply with the limits specified in Title 25, Chapter 123, Sections 11 and 12 of the Rules and Regulations of the Department of Environmental Resourses; and
> b. A schedule of dates for completion of the various phases of the control program.
>
> "(2) Within sixty (60) days from the date of this Order, defendant shall submit to the Bureau an application pursuant to the provisions of Title 25, Chapter 127, Section 11 of the Rules and Regulations for the construction or installation of air pollution abatement equipment at its electrical generating station in Taylor Township to control particulate matter emissions and sulfur dioxide emissions to within the limits specified in Title 25, Chapter 123, Sections 11 and 22 of the Rules and Regulations. Upon approval by the Bureau, the approved plan shall become incorporated as a part of this Order.
>
> "(3) The air pollution abatement equipment in the above approved plan shall be installed and operating in compliance with a permit issued under Title 25, Chapter 127, Section 21 of the Rules and Regulations, by July 1, 1975.
>
> "It is further ordered that a Decree supplemental hereto shall be entered dealing with defendants responsibility to comply with the adjudication of the Air Pollution Commission dated January 11, 1971, in lieu

of defendant being required to apply for a variance under Title 25, Chapter 141 of the Rules and Regulations."

15. On September 1, 1972, the Court of Common Pleas of Lawrence County entered the following Amended Order:

"NOW, this 1st day of September, 1972, the previous Order of Court in this matter, dated August 7, 1972, is hereby amended to read as follows:

"It appearing, as the result of briefs submitted and oral argument, that since the institution of this suit, the Commonwealth of Pennsylvania has enacted new regulations governing particulate matter emissions and relating to the control of sulfur dioxide, and it further appearing that the defendant, Pennsylvania Power Company, is willing to comply with the newly enacted regulations in these matters, it is now therefore ORDERED, ADJUDGED and DECREED that:

"(1) Within sixty (60) days from August 7, 1972, defendant shall submit to the Bureau an application pursuant to the provisions of Title 25, Chapter 127, Section 11 of the Rules and Regulations for the construction or installation of air pollution abatement equipment at tis electrical generating station in Taylor Township to control particulate matter emissions and sulfur dioxide emissions to within the limits specified in Title 25, Chapter 123, Sections 11 and 22 of the Rules and Regulations. Upon approval by the Bureau, the approved plan shall become incorporated as a part of this Order.

"(2) The air pollution abatement equipment in the above approved plan shall be installed and operating in compliance with a permit issued under Title 25, Chapter 127, Section 21 of the Rules and Regulations, by July 1, 1975.

"It is further ordered that a Decree supplemental hereto shall be entered dealing with defendant's responsibility to comply with the adjudication of the Air Pollution Commission dated January 11, 1971, in lieu of defendant being required to apply for a variance under Title 25, Chapter 141 of the Rules and Regulations."

16. On December 21, 1972, the Court of Common Pleas of Lawrence County entered the following Supplemental Order of Court:

"NOW, this 21st day of December, 1972, the Amended Order of Court, dated the first day of September, 1972, in this matter is hereby supplemented as follows:

"It is further ORDERED, ADJUDGED and DECREED that:

"3. In lieu of defendant being required to apply for a variance to the Bureau under Title 25, Chapter 141 of the Rules and Regulations, defendant shall be required to do the following in order to attempt to comply with the adjudication dated January 11, 1971, of the Air Pollution Commission:

"A. (1) From January 1, 1973, until February 1, 1973, defendant shall burn on a daily average not less than thirty (30%) per cent washed coal in its boilers;

(2) From February 1, 1973, until March 1, 1973, defendant shall burn on a daily average not less than forty (40%) per cent washed coal in its boilers;

(3) From March 1, 1973, until April 1, 1973, defendant shall burn on a daily average not less than sixty (60%) per cent washed coal in its boilers;

(4) From April 1, 1973, until May 1, 1973, defendant shall burn on a daily average not less than eighty (80%) per cent washed coal in its boilers;

(5) From May 1, 1973, until June 1, 1973, defendant shall burn on a daily average not less than ninety (90%) per cent washed coal in its boilers;

(6) From June 1, 1973, until the provisions of paragraphs one and two of the Amended Order of Court, dated September 1, 1972, are fully complied with, defendant shall burn coal in its boilers with a monthly average ash content of no more than ten point five (10.5%) per cent.

"B. Defendant shall submit monthly reports to the Bureau as to the coal burned containing:

(1) The total amount of coal burned in each boiler;

(2) The maximum ash content of the coal delivered during such month;

(3) The minimum ash content of the coal delivered during such month;

(4) The average ash content of the coal delivered during such month.

"C. The technical information in such reports shall be compiled by an independent testing laboratory at such times as is requested by the Commonwealth.

"D. During daily periods beginning at nine (9:00) o'clock A.M. prevailing time and ending at nine (9:00) o'clock P.M. Prevailing time, the equivalent opacity of emissions from the stacks shall not be equal to or greater than thirty (30%) per cent (Equivalent to Ringelmann 1-1/2) subject, however, to the following exceptions:

(1) During scheduled boiler start-up not to exceed two (2) hours;

(2) During emergency boiler start-up not to exceed four (4) hours;

(3) During boiler tube cleaning not to exceed two (2) hours;

(4) During sudden or radical load changes arising from emergency conditions not to exceed fifteen (15) minutes for each change.

"4. If at any time after June 1, 1973, the average monthly ash content of the coal burned exceeds ten point five (10.5%) per cent, defendant shall pay the following monthly penalty into the "Clean Air Fund" of the Commonwealth:

| Average Ash Content | Penalty |
|---|---|
| 10.5+ - 11 | $ 5,000.00 |
| 11 + - 12 | 10,000.00 |
| 12 + - 13 | 15,000.00 |
| 13 + - 14 | 20,000.00 |
| Over 14 | 25,000.00 |

"5. Notwithstanding the provisions set forth in paragraph three above, if defendant's compliance with the provisions of paragraph three above become impossible due to third-party inadequacies or third-party supplier's inability to supply materials necessary for defendant's compliance, then during such periods, defendant may be excused from complete compliance herewith upon a proper showing to this Court."

17. On November 20, 1972, in consideration of a petition filed by the Commonwealth, the Court of Common Pleas of Lawrence County entered a rule upon the Pennsylvania Power Company and its President Ray E. Semmler to show cause why they should not be adjudged in contempt for failing to comply with the Amended Order of Court entered September 1, 1972.

18. On April 19, 1973, after hearing, the Court of Common Pleas of Lawrence County entered an Opinion and Order of Court holding defendant and its President Ray E. Semmler not to be in contempt of court.

19. On December 18, 1972, the Commonwealth filed with this Board a Complaint for Civil Penalties against defendant. In that complaint the Commonwealth alleged that defendant was in violation of the Order of the Air Pollution Commission issued in its Adjudication of January 11, 1971, and that the defendant was also in violation of the Rules and Regulations of the Department of Environmental Resources relating to standards for particulate matter, for visible emissions and for sulfur dioxide emissions.

20. On May 18, 1973, defendant filed an answer to Commonwealth's Complaint for Civil Penalties in which it raised essentially legal defenses rather than seriously controverting allegations of fact.

21. On January 27, 1972, the Environmental Quality Board promulgated regulations for the control of particulate matter and sulfur dioxide from combustion units such as those operated by defendant.

22. For the period November 1, 1972, to November 30, 1973, the Department of Environmental Resources made calculations to determine the average hourly emission rate under Regulation V for each day of operation, the actual average hourly emission rate for that day and the average hourly allowable emission for each day of operation under §123.11 of the Regulations adopted on January 27, 1972.

23. During the period from November 1, 1972, to November 30, 1973, inclusive, defendant's Boiler No. 1 exceeded the allowable emission rate under Regulation V a total of 27 days and the allowable emission rate under Regulation 123.11 for a total of 117 days; Boiler No. 2 during this same period exceeded Regulation V 111 days and Regulation 123.11 a total of 238 days; Boilers No. 3, 4 and 5 exceeded both Regulations a total of 356 days, 349 days and 375 days respectively.

24. For the period beginning November 1, 1972, to and including November 30, 1973, the Department of Environmental Resources made calculations to determine the allowable rate of sulfur dioxide emissions per day for each boiler under Regulation 123.22, adopted January 27, 1972, and the actual rate of such emissions. The total number of days on which the actual emission from said boilers exceeded the allowable rate under Regulation 123.22, relating to sulfur dioxide, during this period, are as follows: Boiler No. 1 exceeded said Regulation a total of 292 days; Boiler No. 2 exceeded said Regulation 260 days; Boiler No. 3, 359 days; Boiler No. 4, 349 days; Boiler No. 5, 377 days.

25. Defendant, during the period beginning November 1, 1972, to and including November 30, 1973, if it had complied with the requirements of Regulation V, would only have exceeded the requirements of 25 Pa. Code §123.11 with respect to Boiler No. 1 90 days and with respect to Boiler No. 2, 127 days. Under such conditions it would not have exceeded 25 Pa. Code §123.11 with respect to Boilers No. 3 to 5.

26. Under the provisions of the Federal Clean Air Act, 42 U. S. C. §1857 *et seq.*, the administrator of the Federal Environmental Protection Agency promulgated primary and secondary ambient air quality standards with regard to, *inter alia*, particulate matter emissions and sulfur dioxide emissions.

27. The National Primary Ambient Air Quality standards for sulfur oxide (sulfur dioxide) are set forth in 40 C.F.R §50.4 and the National Secondary Ambient Air Quality standards for sulfur oxide (sulfur dioxide), in effect at the time of the institution of these proceedings, are set forth in 40 C.F.R. §50.5. These standards are as follows:

> "§50.4 National primary ambient air-quality standards for sulfur oxides (sulfur dioxide).
>
> "The national primary ambient air quality standards for sulfur oxides, measured as sulfur dioxide by the reference method described in Appendix A to this part, or by an equivalent method, are:
>
> "(a) 80 micrograms per cubic meter (0.03 p.p.m.)--annual arithmetic mean.
>
> "(b) 365 micrograms per cubic meter (0.14 p.p.m.)—Maximum 24-hour concentration not to be exceeded more than once per year.
>
> "§50.5 National secondary ambient air-quality standards for sulfur oxides (sulfur dioxide).
>
> "The national secondary ambient air quality standard for sulfur oxides, measured as sulfur dioxide by the reference method described in Appendix A to this part, or by an equivalent method, is 1,300 micrograms per cubic meter (0.5 p.p.m.)--maximum 3-hour concentration not to be exceeded more than once per year."

28. The National Ambient Air Quality standards for particulate matter are set forth in 40 C.F.R. §§50.6 and 50.7 as follows:

> "§50.6 National primary ambient air quality standards for particulate matter.
>
> "The national primary ambient air quality standards for particulate matter, measured by the reference method described in Appendix B to this part, or by an equivalent method, are:
>
> "(a) 75 micrograms per cubic meter--annual geometric mean.
>
> "(b) 260 micrograms per cubic meter--maximum 24-hour concentration not to be exceeded more than once per year.
>
> "§50.7 National secondary ambient air quality standards for particulate matter.
>
> "The national secondary ambient air quality standards for particulate matter, measured by the reference method described in Appendix B to this part, or by an equivalent method, are:
>
> "(a) 60 micrograms per cubic meter--annual geometric mean, as a guide to be used in assessing implementation plans to achieve the 24-hour standard.
>
> "(b) 150 micrograms per cubic meter--maximum 24-hour concentration not to be exceeded more than once per year."

29. During the period from December 11, 1973, to and including January 24, 1974, DER conducted an ambient air sampling program in the vicinity of defendant's power plant in Taylor Township, Lawrence County, Pennsylvania. The purpose of this program was to ascertain the levels of particulate matter and sulfur dioxide in the ambient air.

30. DER's air sampling program consisted of setting up five sampling stations in the vicinity of the power plant of defendant. Sampling location No. 1 is west and slightly south of the plant. The purpose of locating the sampling station at this point was to determine backgroud levels of particulate matter and sulfur dioxide in the atmosphere upwind of the power plant. It also had the subsidiary purpose of ascertaining low level wind direction recordings for the samplings. Sampling location No. 2 is south of the power plant located in a valley at the same level as the power plant. Sampling station No. 3 was located south and east of the power plant and in the vicinity of the most frequent complaint. It is located in a populated area and generally downwind of the plant. Sampling station No. 4 is located on the valley floor slightly at a higher elevation than the power plant and located to the north of the power plant. Sampling site No. 5 is located northeast of the power plant and is on the western slope of the eastern wall of the valley in which the power plant is located. The purpose of locating the station at this point was to obtain data somewhat more distant from the power plant than could be obtained from the other sampling stations and also to ascertain whether there was any substantial difference between emissions on the valley floor and on the upslope.

31. At each of the five sampling points, there were sampling instruments to measure particulate matter in the outdoor atmosphere. However, at sampling points one and three there were also located instruments to measure levels of sulfur dioxide in the air.

32. The results of the sampling with regard to sulfur dioxide in the ambient air show that during the sampling periods, the levels of sulfur dioxide recorded at sampling station No. 3 were significantly in excess of those recorded at sampling station No. 1. Moreover, on December 21, 1973, the sulfur dioxide level recorded at sampling station No. 3 was 0.16 p.p.m., thereby exceeding the 24 hour maximum set forth in 40 C.F.R. §50.5(b). Furthermore, on December 17, 1973 and January 5, 1974, the recordings at sampling station No. 3 exceeded the secondary standards of 40 C.F.R. §50.5(b).

33. During the period November 1, 1972, through November 30, 1973, the sulfur dioxide emissions from each boiler stack exceeded the maximum allowable emission rate for sulfur dioxide in DER regulations for each day the boilers were in operation.

34. During the period within which DER's air sampling program was in effect, there was only one recorded level of particulate matter at sampling station No. 3 which exceeded the Federal ambient air quality standards.

35. The quality of the ambient air downwind of defendant's generating station was in general significantly more deteriorated than was the air quality upwind of the said station.

36. The results of DER's ambient quality sampling program clearly show that the emissions from defendant's boiler are a significant factor in determining the quality of the ambient air in the vicinity of defendant's generating plant.

37. Inasmuch as the emissions from defendant's generating facility in Taylor Township, Lawrence County, Pennsylvania, make a significant contribution to the quality of the outdoor atmosphere in the vicinity of the plant, there is no reasonable expectation that the air quality therein can reach the national ambient air quality standards with regard to particulate matter and sulfur dioxide unless and until the emissions from defendant's stacks are controlled to such an extent that they do not exceed the particulate matter or sulfur dioxide limitations set forth in DER regulations.

DISCUSSION

Pennsylvania Power Company, the defendant in this matter, is a duly certificated public utility rendering electric service to the public in Western Pennsylvania. It owns and operates an electric generating plant in the village of West Pittsburgh, Taylor Township, Lawrence County. The plant has a production capacity of 430 megawatts utilizing five coal-fired steam boilers which were installed between 1939 and 1964. On December 18, 1972, DER, plaintiff in this matter, filed a four count complaint for civil penalties against the defendant alleging four separate categories of violations of the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, *as amended* 35 P. S. §4001 *et seq.* Count I alleges a continuing violation of an order of the Air Pollution Commission contained in its adjudication of January 11, 1971, from which the defendant never appealed. Counts II and III allege violations of 25 Pa. Code §123.11 (pertaining to particulate matter emissions) and §§123.41-123.43 (pertaining to visible emissions). Count IV alleges violations of 25 Pa. Code §123.22 (pertaining to sulfur oxide emissions). Each count of the complaint, if proved, would constitute unlawful conduct as that term is defined in §8 of the Air Pollution Control Act, *supra*. This Board, then, could assess civil penalties for such unlawful conduct under the provisions of §9.1 of the Act.

At the hearing in this matter, DER offered no evidence to substantiate Count III of the complaint, which alleged violations of 25 Pa. Code §123.41 (relating to visible emissions). Not having proved the violations alleged in Count III, DER abandoned its demands for the imposition of civil penalties for alleged violations contained therein.

With regard to the remaining counts in the complaint, the evidence is clear that the emissions from each of defendants five boiler stacks exceeded departmental regulations and would, without more, constitute violations of the Air Pollution Control Act, *supra*. However, this matter is complicated by the fact that the Commonwealth in January 1972 commenced an action in the Court of Common Pleas of Lawrence County to compel compliance on the part of Pennsylvania Power Company with the Adjudication of the Air Pollution Commission issued January 11, 1971. This litigation culminated in the issuance of several orders by the Court and subsequent contempt proceedings brought by the Commonwealth, all of which have a bearing upon whether the excess emissions constituted a violation of the Air Pollution Control Act, *supra*. In order to resolve the complicated legal problems that face this Board in adjudicating this matter, we will discuss each of the remaining three counts under a separate heading.

I.

On January 12, 1972, the Commonwealth of Pennsylvania commenced a civil action against the Pennsylvania Power Company in the Court of Common Pleas of Lawrence County to compel compliance with the January 11, 1971, adjudication of the Air Pollution Commission, a predecessor agency of DER. The history of that litigation is concisely set forth 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). The adjudication of the Air Pollution Commission was based upon a previous order of the Pennsylvania Department of Health, which provided as follows:

> "(1) That the Pennsylvania Power Company shall, on or before December 31, 1971, install air pollution control equipment and/or institute process changes designed to control particulate matter emissions from the boiler facilities of its electrical generating station located in Taylor Township, Lawrence County, Pennsylvania, to within the limits specified in Section 1.4 of Air Pollution Commission Regulation V.
>
> "(2) That the Pennsylvania Power Company shall, on and after December 31, 1971, reduce the particulate matter emissions from its aforesaid electrical generating station to a level such that the emissions will not exceed the limits specified in Section 1.4 of Air Pollution Commission Regulation V.
>
> "(3) That the Pennsylvania Power Company shall submit to the Department of Health, on or before October 1, 1970, a plan setting forth the procedures to be used to comply with paragraphs (1) and (2) of this order. The plan is to contain:
>
> (a) A detailed description of the methods or devices to be used to control the particulate matter emissions.
>
> (b) A schedule of dates for completion of specific phases of the program.
>
> (c) A statement indicating that quarterly progress reports will be submitted to the Department of Health commencing on January 1, 1971."

The Air Pollution Commission, acting pursuant to the then operative provisions of the Air Pollution Control Act, *supra*, upheld the order of the Department but extended the times for compliance with its order. Although §5 of the Air Pollution Control Act, *supra*, expressly provided for appeals from adjudications of the Air Pollution Commission, Pennsylvania Power Company never took such an appeal.

Section 1.4 of Regulation V of the Air Pollution Commission required that 99% of the particulate matter emitted from each of defendant's stacks be removed prior to emission into the outdoor atmosphere. Prior to the adoption of of Regulation V, defendant had installed air pollution control devices and equipment

on these stacks which removed 98% of the particulate matter before entry into the outdoor atmosphere. Thus the Commission adjudication of January 11, 1971, required that the efficiency of the collection system on the stacks be increased by 1%.

The order of the Department of Health under date of April 22, 1970, required that Pennsylvania Power Company submit to the Department on or before October 1, 1970, a plan by which the Power Company would be in compliance with the requirements of §1.4 of Regulation V on or before December 31, 1971. The Air Pollution Commission in its Adjudication extended the plan submittal time to June 1, 1971, and the time for compliance with Regulation V to October 1, 1972. Thereafter, defendant was granted an extension of time for plan submittal from June 1, 1971, to September 1, 1971, but the time for compliance with §1.4 of Regulation V was not extended. The Department granted no further extensions beyond the September 1, 1971, deadline.

Inasmuch as defendant never submitted a plan in compliance with the order of the Air Pollution Commission, the Commonwealth on January 12, 1972, commenced a civil action in the Court of Common Pleas of Lawrence County under the authority of §10 of the Air Pollution Control Act, *supra*, to compel compliance with the Adjudication of the Air Pollution Commission.

At the time the Commonwealth brought the suit in January 1972, §10 of the Air Pollution Control Act, *supra*, provided as follows:

> "(a) In addition to any other remedies provided for in this act, the Commission may request the Attorney General to petition the court of common pleas in the county in which the defendant resides or has his place of business for an injunction to restrain all violations of this act.
>
> "(b) The penalties and remedies prescribed by this act shall be deemed concurrent and the existence of or exercise of any remedy shall not prevent the Commission from exercising any other remedy hereunder, at law or in equity."

The present provisions of that section were not yet enacted. Neither were the provisions of § 9.1 of the Act which provide for civil penalties as part of the law. These provisions were enacted on October 26, 1972, and became effective immediately upon enactment.

The Court of Common Pleas of Lawrence County upheld the validity of the January 11, 1971 order of the Air Pollution Commission and in a series of orders made specific provision, *inter alia*, regarding compliance with the Air Pollution Commission order. On December 21, 1972, it entered a Supplemental Order, clearly contemplated by its prior orders of August 7, 1972, and September 1, 1972, going into specific detail of how defendant was to comply with the order of the Air Pollution Commission. Paragraph three of the Order of December 21, 1972, provides in relevant part as follows:

> "3. In lieu of defendant being required to apply for a variance to the Bureau under Title 25, Chapter 141 of the Rules and Regulations, defendant shall be required to do the following in order to attempt to comply with the adjudication dated January 11, 1971, of the Air Pollution Commission: . . ."

Defendant, in addition to denying the allegations of paragraphs 9 and 10 of plaintiff's Complaint for Civil Penalties and affirmatively averring certain matters, raised the following legal defenses in its answer to the Complaint:

> "Legal proceedings begun prior to the institution of the within action; that is, on January 12, 1972 in the Court of Common Pleas of Lawrence County, Pennsylvania, at No. 2 - 1972, in Equity, in which the parties were the same as those herein and which inter alia related to the issues raised in Count I of the within Complaint were disposed of by said Court in a manner favorable to Respondent. From this action the Complainant has appealed to the Commonwealth Court of this state as does appear by reference to Docket Number 543 C. D. 1973 of said Court.
>
> "Incident to the disposition by the Court of Common Pleas of the matters raised in the Lawrence County Court, certain legal defenses, it is averred, are available to the Respondent herein and are applicable in response to all matters raised in Count I of the within Complaint as well as in response to the other counts contained in the Complaint, all of which said legal defenses preclude the Complainant from pursuing this case, which said legal defenses include the following:
>
> "1. The law relating to estoppel and collateral estoppel.
>
> "2. The law prohibiting multiplicity of actions.
>
> "3. The law of res judicata.
>
> "4. Inasmuch as Respondent is complying with the lawful Orders of a Court of competent jurisdiction relating to the matters complained of in the instant Complaint, permitting Complainant to pursue this suit would produce an irreconcilable dilemma legally intolerable under the law in that if a divergent result was reached in the instant action, appealable to the Commonwealth Court, Respondent would be confronted with a requirement to obey an Order, compliance with which would violate the contrary Order of a Court of competent jurisdiction."

We first address ourselves to the defenses of *res judicata* and collateral estoppel asserted by Penn Power in regard to Count I. Inasmuch as Penn Power asserts these defenses relative to the proceedings in the Lawrence County Court of Common Pleas, it is necessary to distinguish, in this regard, the equitable action commenced by the Commonwealth to compel compliance with the Air Pollution Commission adjudication from the subsequent contempt proceedings brought to compel compliance with the orders of court which resulted from the prior proceedings. In our opinion, the contempt proceedings cannot be considered *res judicata* with regard to the present civil penalties action in regard to the violations alleged to have taken place in Count I of the Commonwealth's complaint herein. One of the elements that must exist before the principle of *res judicata* can apply is that the cause of action in the second proceeding be the same as that litigated in the first proceeding. However, the cause of action litigated in the contempt proceeding is not the same cause of action litigated in the civil penalties proceeding with regard to the alleged violations of the order of the Air Pollution Commission set forth in Count I of the civil penalties complaint herein.

The contempt proceeding, commenced November 20, 1972, was instituted for the reason that the Commonwealth contended that Penn Power violated the order of the Court of Common Pleas of Lawrence County issued September 1, 1972. Parenthetically, it should be mentioned that the order of the Court of Common Pleas of Lawrence County intended to encourage compliance with the Air Pollution Commission adjudication, although contemplated by the order of September 1, 1972, was not issued until December 21, 1972. Thus, the contempt proceeding could not be considered to be based upon the same cause of action as Count I of the civil penalties complaint is. Arguably, if the contempt proceedings were brought to enforce the December order, we might have a different situation as far as *res judicata* is concerned; however, such is not the case.

With regard to the equity action commenced by the Commonwealth in January of 1972 to compel compliance with the aforementioned Air Pollution Commission adjudication, said proceeding cannot be considered *res judicata* of the alleged violation set forth in Count I of the Commonwealth's civil penalty complaint herein. Defendant makes a comparison between Count I of the civil penalties complaint with the allegations set forth in the complaint in equity commencing the action in the Court of Common Pleas in Lawrence County. However, we are of the opinion that this comparison

is meaningless for the reason that the civil penalties action is predicated on violations of the Air Pollution Commission order occuring subsequent to the preliminary injunction which the court issued after having decided that Penn Power was in violation of the Air Pollution Commission order. We fail to understand how the determination in the equity action that Penn Power was in violation of the Air Pollution Commission order as of a certain date can act as a bar to a civil penalties action brought for alleged violations of the same order occurring at subsequent times. Defendant has cited us no authority to substantiate this position.

The distinction between technical *res judicata* and collateral estoppel is set forth in *McCarthy et al v. Township of McCandless, supra,* wherein it is stated:

> "Although the rule of res judicata is said not to have been definitely formulated until 1776, *Duchess of Kingston's Case,* 3 Smith, *Leading Cases* 1998 (9th ed. 1776), it has evolved into an important doctrine of public policy to maintain general peace, promote certainty, and conserve the time of the courts.
>
> "Res judicata literally means a matter adjudged or a thing judicially acted upon or decided. From long usage it has come to encompass generally the effect of one judgment upon a subsequent trial or proceeding. Two quite distinct aspects are included: first, the effect of a judgment in a subsequent action between the parties based upon *the same cause of action;* second, the effect on the parties in a trial on *a different cause of action. See, e.g., Piro v. Shipley,* 33 Pa. Superior Ct. 278, 281-83 (1907); Restatement of Judgments §§47-55, 68-72 (1942)."
> (Footnotes omitted)

The effect of collateral estoppel is set forth in *McCarthy, supra,* as follows:

> ". . . Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel in the second action only as to those matters in issue that (1) are identical; (2) were actually litigated; (3) were essential to the judgment (or decree, as the case may be); and (4) were "material" to the adjudication."

Applying this rule to Count I in the civil penalties complaint herein, it is clear that with regard to the contempt proceedings, collateral estoppel would not operate to the defendant's benefit. This is so for the reason that nothing in the contempt proceeding was litigated relative to the adjudication of the

Air Pollution Commisssion upon which Count I is predicated. With regard to the equity action which preceeded the contempt proceeding, it is sufficient to say that the Commonwealth was not seeking to relitigate issues that were decided in that proceeding. As a matter of fact, on July 24, 1972, the Court of Common Pleas of Lawrence County sustained the Commonwealth's preliminary objection to defendant's answer and new matter. To the extent that defendant's new matter in its answer to the Commonwealth's complaint in equity replicates some of the defenses which it asserts in this matter, the principles of collateral estoppel would seem to prevent defendants from raising those issues in this matter. More particularly, we are of the opinion that the defenses that full compliance with the Air Pollution Commission order would have violated certain directives, orders, rules and policies of the Pennsylvania Public Utilities Commission and would also violate the purposes of the Air Pollution Control Act, *supra*, are issues that were raised by defendant in the equity proceeding and were decided against defendant when the court sustained the preliminary objections of the Commonwealth.

Penn Power asserts that the doctrine of estoppel and the interest which the law has in preventing a multiplicity of actions prevents the Commonwealth from pursuing this present civil penalties action, inasmuch as it has commenced the equity proceeding in the Court of Common Pleas of Lawrence County. However, we are of the opinion that neither the doctrine of estoppel nor the interest in preventing a multiplicity of actions applies in this matter. With regard to the law relating to the multiplicity of actions, defendant misapplies that principle in these proceedings. The interest of the law in preventing a multiplicity of actions is to prevent a party from separating one cause of action into parts and sue for one on one occasion and for the other on another. 1 P.L.E. Action §50. However, applying that rationale to this matter is akin to forbidding a subsequent action for damages in a case involving a temporary nuisance, when the plaintiff prevailed in a prior nuisance action involving the same conduct of defendant, but which occurred at a different time. Likewise, in this case, the Air Pollution Control Act, *supra*, makes each day of continuing violation a separate offense. Thus, for reasons similar to those principles applicable to *res judicata*, we are of the opinion that the cause of action involved in this civil penalties proceeding is a different cause of action from that which gave rise to the injunctive action in the Court of Common Pleas of Lawrence County. Upon this analysis, defendant's

reliance upon the law of opposition to a multiplicity of actions is not well placed.

As to the doctrine of estoppel, the defendant contends that compliance with the three orders of court required it to depart from pre-existing method of operation and required it to make commitments and incur expenses not heretofore required of it. This contention, at least with regard to the Air Pollution Commission adjudication, is contrary to fact. That adjudication, from which defendant did not appeal within the requisite appeal period, required the submission of a plan by June 1, 1971, on the part of defendant, which plan would contain, *inter alia*, a detailed description of the methods or devices to be used to control particulate matter emissions, a schedule of dates for the completion of specific phases of the program and a statement indicating progress reports be submitted commencing on a certain date. This date, June 1, 1971, was extended by the Department to September 1, 1971. The equity action, begun on January 12, 1972, was to enforce this legal requirement against a recalcitrant Penn Power Company. Thus, defendant is quite mistaken in this contention. Moreover, we concur with the observation of our former Chairman, Robert Broughton, who observed in an interlocatory opinion in this matter:

> "(2) & (3) As presented by the appellant, the doctrine of estoppel seems to be merely a variant of an election of remedies argument: The Department sought to enforce the air pollution laws by seeking an injunction in the Lawrence County Court of Common Pleas; the Department got the injunction it sought; the Department is therefore estopped to seek, now, some other sanction. To permit the Department to seek civil penalties, at this point, would be to subject Penn Power "to multiple litigation,...possible harassment and potentially inconsistent results." *Commonwealth v. Leechburg Mining Co.*, Pa. Cwlth. (No. 1214 C. D. 1972, p. 7) (Filed May 22, 1973).
>
> "This is part of the basic rationale for the doctrine of election of remedies, a doctrine which is in part based on estoppel principles. 1 Standard Pennsylvania Practice §§68.81. The quoted passage, above, concerns that doctrine of election as such. We do not see that it would make any difference to the applicability of the doctrine of election of remedies (or estoppel, for that matter, to the extent that is regarded as a separate doctrine in this context whether or not the Department got the order it sought in the Lawrence County Court of Common Pleas. The principle asserted is that, once the Department has sought a remedy in one tribunal it should not, for reasons of fairness and also for reasons relating to the rational use and allocation of judicial resources, be allowed to seek a different remedy in a different tribunal for the same act.
>
> "The problem with the application of this principle is that we have, here, a statute that provides for cumulative remedies. The Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, as amended by the Act of October 26, 1972, P. L. , 35 P. S. §§4001 *et seq.*, provides for administrative action by way of abatement orders, and a permit system, backed up by or in addition to direct action by way of criminal penalties, civil penalties, and injunctive relief. The statute then goes on to provide, 35 P. S. §4010(e):

"'(e) The penalties and remedies prescribed by this act shall be deemed concurrent and the existence of or exercise of any remedy shall not prevent the department from exercising any other remedy hereunder, at law or in equity.'

"Further, §9.1 of the Act, 35 P. S. §4009.1 provides that civil penalties may be assessed 'In addition to...any other remedy available at law, or in equity...'"

With this clear indication of legislative policy to the contrary, defendant's argument based on estoppel must fall also.

A much more difficult issue is presented, however, with regard to whether the Air Pollution Commission order was merged with the order of December 21, 1972, in such a manner as to preclude any further enforcement of that Adjudication and thereby precluded the Commonwealth from taking any further enforcement action with regard to the Adjudication of the Air Pollution Commission, except by seeking to enforce the Court order. Although it has been held in *United States v. Morton Salt Company*, 338 U.S. 632, 94 L. Ed. 401, 70 S. Ct. 357 (1950) that an Administrative Agency order merges with a Court decree seeking to enforce the order, it is not clear whether this would preclude the imposition of sanctions for violating the order itself without reference to the Court decree. Furthermore, the terms of the Court order of December 21, 1972, do not impose upon defendant demands inconsistent with the demands of the Air Pollution Commission Adjudication. By its very words the Court order is an "attempt" to seek compliance with the Air Pollution Commission Adjudication. Thus, it cannot be said that by enforcing the Air Pollution Commission Adjudication by way of civil penalties defendant would be placed in any inconsistent position with regard to the Court order.

However, we are of the opinion that the Court order of December 21, 1972, was tantamount to the grant of a variance to defendant. In this connection, defendant proffered a copy of a letter written by counsel for plaintiff to the Court of Common Pleas of Lawrence County setting forth a proposed order with regard to the enforcement of the Adjudication of the Air Pollution Commission. The writer of this Adjudication sustained an objection by the Commonwealth to the admission of the letter. We have reconsidered our ruling and find that the interest of justice would have been better served if the Commonwealth's objection had been overruled. We therefore set forth in *extenso* that letter which reads as follows:

"Pursuant to your request of July 21, 1972, enclosed herewith is a proposed Order in the above case.

"The dates in paragraphs 1, 2 and 3 have been discussed with the administrators of the Bureau of Air Quality and Noise Control and are consistent with the statewide policy for compliance with our new regulations. In addition, the July 1, 1975 is a mandatory end-date under the Federal Clean Air Act.

"Paragraph 4 is an attempt to get Defendant close to compliance with the Adjudication which precipitated this litigation. If a paragraph similar to this is not included in the Order, Defendant will have to apply for a variance and either it will be denied or these or similar conditions will be attached. Most likely the case will end right back in court at that point. It greatly simplifies the matter, if a court issues such an Order now. In addition, it is justified based on the proof in this case, since low ash coal is the only means by which Defendant can now comply with the original Adjudication without installing expensive equipment. Defendant is really getting a break other power companies did not since additional fuel costs can be passed on to their consumers under a recent P.U.C. ruling.

"The penalty clause of paragraph 4-d is necessary to take away all incentive to use cheaper high ash coal. It has precedent in Stipulations and Consent Orders which the Commonwealth has entered into.

"A copy of the new Rules and Regulations is enclosed for your information. I can be reached at 565-5363 or 565-5370 if you have any further questions.

"Thank you for your cooperation in this matter."

It is, therefore, clear that the order of December 21, 1972,of the Court of Common Pleas of Lawrence County reflected agreement with the contention of Commonwealth counsel as set forth in his letter. In the present matter, the Commonwealth seeks to avoid the impact of this inference by stating that the Rules and Regulations of the Department preclude a variance from orders such as this. In effect, the Commonwealth seeks to attack collaterally the order of the Court of Common Pleas of Lawrence County from which it took no appeal. But it is clear that it was the intent of the Court to grant a variance in this case. Inasmuch as this order is not void on its face or beyond the jurisdiction of the Court to enter, this Board cannot refuse to give that order the legal effect intended by the Court.

Were it not for the fact that the Court clearly intended by its order to grant a variance from the Adjudication of the Air Pollution Commission and that it had done so under the urging of the Commonwealth, we would have no hesitancy in assessing substantial civil penalties against defendant for violation of the Air Pollution Commission Adjudication. The record is clear and convincing that defendant never intended to comply with the Air Pollution Commission Adjudication except in its own good time, even though it was under a clear and indisputable legal duty to do so according to the terms of the Adjudication itself. We cannot condone the deliberate

wilful disregard of this order, but we are not in a position to ignore the order of December 21, 1972, entered by the Court of Common Pleas of Lawrence County against defendant. Especially so, when that order was in direct response to a letter from the Commonwealth to enter such order.

In its letter to the Court the Commonwealth took a legal position directly contrary to the legal position it took before this Board in regard to the order as a variance. We concur with the Commonwealth that the Rules and Regulations of the Department do not permit the issuance of a variance in cases where a pre-existing order of the Department is valid and in effect. We cannot understand how the Department took a contrary position before the Court. Be that as it may, however, the December 21, 1972 order of the Court cannot be ignored by this Board nor can it be subject to a construction obviously not intended by the Court.

II.

With regard to the alleged violations of 25 Pa. Code §123.11, the record indicates that DER took no action on Penn Power's application made purportedly pursuant to the September 1 Court order of the Court of Common Pleas of Lawrence County insofar as the particulate matter question is involved. In this connection, the observation of Commonwealth Court in *Commonwealth of Pennsylvania Department of Environmental Resources v. Pennsylvania Power Company*, 12 Pa. Commonwealth Court 212, 316 A.2d 96(1974) is *a propos*:

> "There is another procedural aspect to this case which is puzzling to the Court. The lower court's order in the injunction case dated September 1, 1972, refers to approval by the "Bureau" of the plan to be submitted by PPC. The record indicates that there was never any approval or disapproval communicated to PPC of the plan filed in October of 1972. The testimony of DER in the contempt proceeding indicates that Richard H. Zinn, who is the regional air pollution control engineer for Region 6 (which includes Lawrence County) is the employe of DER who received the October 1972 application of PPC. There is nothing in this record to indicate whether DER or the "Bureau" passed upon this application. The record indicates that Mr. Zinn alone passed upon the acceptability of the application. He stated that it was *his* opinion that the application would not meet the $SO_2$ standards set forth in Section 22, and that *he* decided that there was not sufficient engineering data submitted for *him* to make a judgment on the particulate removal plan submitted. He further admitted that he would have been able to determine the sufficiency of the application with additional technical information. He frankly admitted that such additional information was not requested. Instead, DER proceeded with its contempt proceeding complaint. Zinn also stated that it is not the policy of DER to assist citizens in solving pollution problems but rather only to enforce the regulations. This record shows a rather startling lack of communication between DER and PPC but it in no way supports a conclusion that PPC did not act in good faith in filing its application."

It is clear that there was a possibility that the particulate matter portion of Penn Power's application could have been passed upon by DER had it chose to do so. There is an inference, in both the opinion of Commonwealth Court and that of the Court of Common Pleas of Lawrence County, that the application insofar as particulate matter control was concerned could have probably been approved at some point in time. This issue, however, was not adjudicated in the contempt proceeding. That proceeding was solely concerned with whether Penn Power and its President, Mr. Semmler, were guilty of contempt insofar as the sulfur dioxide portion of the application was concerned.

Under the provisions of 25 Pa. Code §141.5(a) it is provided:

> "A petition which complies with the requirements of §141.11 of this Title (relating to filing), and which is received by the Department within six months of the effective date of this Chapter, shall operate prospectively as an automatic stay of prosecution for violations of those provisions of this Article with respect to which the variance is sought, until one year after the effective date of this Chapter or until the Department takes action on such petition, whichever occurs first, except that the filing of a petition for a variance, or the grant thereof, shall not relieve the petitioner from full compliance with any orders and permits previously issued or any stipulations and agreements previously entered into by the Department, nor shall such filing in any way preclude the Department from pursuing any and all remedies available to it, at law or in equity, to enforce such orders, permits, stipulations, or agreements."

Although Chapter 141 of Title 25 of the Pennsylvania Code was adopted January 27, 1972, notice of their promulgation was published on March 4, 1972, in 2 Pa. Bulletin 383. The effective date set forth in the notice was 15 days after the publication in the bulletin. Thus, Chapter 141 could not take effect prior to March 19, 1972.

It follows from the foregoing that any application for a variance which would operate as a stay of prosecution in conformity with 25 Pa. Code §141.5(a) must have been filed with DER on or before September 19, 1972. Finding of Fact No. 14 of the opinion of the Court of Common Pleas of Lawrence County in the contempt proceedings states that an application was filed by Penn Power pursuant to the amended order of Court dated September 1, 1972, on or about October 1, 1972. Therefore, the said application could not have acted to stay prosecution of violations of §123.11 of 5 Pa. Code.

Defendant Penn Power argues that inasmuch as the Court of Common Pleas of Lawrence County concluded that Penn Power's application, as filed, should be incorporated into the order of Court of September 1, 1972, as compliance with DER regulations, there is a variance now in effect with regard to particulate matter emissions insofar as 25 Pa. Code §123.11 is concerned. We must reject this contention out of hand. In the first place, the opinion of the Lawrence County Court of Common Pleas in the contempt proceeding specifically states that the particulate matter portions of the application of Penn Power were not involved in the contempt proceeding. Secondly, the testimony of Richard Zinn, DER Air Pollution Control Engineer, specifically states that there was insufficient data in the application in order to make an informed judgment as to whether the proposed control devices would reduce particulate matter emissions to such an extent as to comply with 25 Pa. Code §123.11. In view of the foregoing, it is difficult to understand how the Court of Common Pleas passed upon the acceptibility of the particulate matter portion of Penn Power's application if, indeed, it had done so. Nothing in the Court's opinion seems to touch on this issue other than the Conclusion of Law No. 6 of the Court's opinion. However, we believe that this conclusion of law was aimed at the sulfur dioxide portion of the application and not the particulate matter portion upon which no testimony was taken in the contempt proceeding.

Section 9.1 of the Air Pollution Control Act (35 P. S. §4009.1), *supra*, relating to civil penalties, 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 willful. 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. It shall be payable to the Commonwealth of Pennsylvania and shall be collectible in any manner provided at law for the collection of debt. If any person liable to pay any such penalty neglects or refuses to pay the same after demand, the amount, together with interest and any costs that may accrue, shall be a lien in favor of the Commonwealth upon the property, both real and personal, of such person, but only after same has been entered and docketed of record by the prothonotary of the county where such is situated. The hearing board may, at any time, transmit to the prothonotaries of the respective counties certified copies of all such liens, and it shall be the duty of each prothonotary to enter and docket the same of record in his office, and to index the same as judgments are indexed, without requiring the payment of costs as a condition precedent to the entry thereof."

Inasmuch as we have determined that Penn Power did not petition for a variance from 25 Pa. Code §123.11 in regard to particulate matter, any emission exceeding that regulation from the stacks of Penn Power within the relevant periods in this matter constituted violations of said regulation and, hence, violations of the Air Pollution Control Act, *supra*, upon which civil penalties could be predicated.[3] Therefore, we are concerned solely with the size of any civil penalty to be levied. In such a situation we must consider whether the violation is wilful and the extent of damage or injury to the outdoor atmosphere of the Commonwealth or its uses, and other relevant factors.

The issue of wilfulness with regard to a violation of 25 Pa. Code §123.11 can only be considered with regard to events after October 26, 1972, when the 1972 amendments to the Air Pollution Control Act, *supra*, incorporating the provision for civil penalties became effective. At that time, Penn Power had already submitted to DER an application for the control of particulate matter emissions and sulfur dioxide emissions. On November 20, 1972, nearly two months after Penn Power filed its application with DER, DER filed a Petition for Contempt. Between the filing of Penn Power's application and the filing of DER's contempt petition, Penn Power was not informed by DER of any insufficiency in its application with regard to particulate matter control. In such a circumstance, we cannot attribute any wilfulness to Pennsylvania Power between October 26 and November 20, with regard to violations of 25 Pa. Code §123.11. Granted, Penn Power knew or should have known that its sulfur dioxide control portion of the application was not responsive to DER regulations, the same did not appear to be true with regard to the particulate matter portion of the application.

In our recent decision in *Commonwealth of Pennsylvania, Department of Environmental Resources v. Rushton Mining Co.*, EHB Docket No. 72-261-CP-D (issued March 12, 1976), we referred to both criminal law and tort law to elucidate the concept of wilfulness under the civil penalties section of The Clean Streams Law (which is nearly identical to the civil penalties section of the Air Pollution Control Act). Title 18 C.P.S.A. §302(g) defines wilfulness within the context of the culpability requirements of §302 as doing an act knowingly. Tort law, which we believe to be more appropriate to the concept of wilfulness under the civil penalties

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3. We have previously held that violations of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.* to be *malum prohibitum*. See *Commonwealth of Pennsylvania, Department of Environmental Resources v. Township of Pleasant*, EHB Docket No. 73-252-C (issued March 14, 1975). Likewise, violations of the Air Pollution Control Association, *supra*, fall within that category. Hence, intention is not a necessary element in a violation of the act.

section, similarly regards an act as "wilful" when it is done with deliberate intent, but also recognizes degrees of knowledge or care in the performance of an act. See also, *Alan v. Unemployment Compensation Board of Review, et al*, 168 Pa. Super. 295, 77 A.2d 889 (1951) *Sunship Building and Drydock Company v. Commonwealth*, 10 Commonwealth Ct. 289, A.2d (1973). Here, with regard to the particulate matter violations after October 26, 1972, we have a different aspect of the concept of knowledge. There is no doubt that defendant "knew" it was emitting contaminants into the atmosphere in excess of those permitted by 25 Pa. Code §123.11, but we think a finding of wilfulness in this context requires more than a knowledge of that violation. Conduct to be wilful must also be without justificable excuse. See *Commonwealth v. Hendrick*, 455 Pa. 36, 312 A.2d 402 (1973).

We cannot overlook the manner in which the Commonwealth through DER acted relative to this matter. The substantial complexities of this case and the difficulties in the characterization of the conduct of defendant are in no small measure attributable to the actions of DER. Had DER communicated to the defendant that the particulate matter portion of its application was unacceptable, the parties in all probability could have come to a satisfactory resolution of the particulate matter problem. This is reinforced by Commonwealth Court's observation that "[it] would appear that DER was satisfied with the October 1972 application of PPC insofar as it complied with the particulate regulation . . ." *Commonwealth, Department of Environmental Resources v. Pennsylvania Power Company, supra*, 316 A.2d at 101. Given this state of affairs, this Board cannot conclude that defendant was wilfully violating 25 Pa. Code §123.11 during the period of the complaint.

Inasmuch as the defendant's conduct regarding 25 Pa. Code §123.11 was not wilful, we must consider the nature of the impact of defendant's violation of 25 Pa. Code §123.11 on the air quality in the New Castle area. In doing so, however, we must take into account that the Lawrence County Court granted defendant a variance from the requirements of Regulation V, as noted in Part I of this adjudication. Given that variance and the fact that the difference between the requirements of Regulation V and 25 Pa. Code §123.11 amounts to only five pounds per hour of emissions per boiler and, further, that there were 217 violations of 25 Pa. Code §123.11 which were in addition to the violations of Regulation V, it is apparent that the violations attributable to exceeding the limits of 25 Pa. Code §123.11 are minimal in their impact on air quality, no substantial civil penalty for these violations is in order. Therefore, we assess defendant a civil penalty in the amount of $21,700.00 for these violations.

III.

In order to determine whether defendant is liable for civil penalties for the violation of the emissions limitations for combustion units set forth in 25 Pa. Code §123.22, it is necessary to deal in detail with the legal defenses asserted by defendant. Before doing so, however, it will be helpful to notice that the orders of August 7 and September 1, 1972, of the Court of Common Pleas of Lawrence County antedated the enactment of the civil penalty provision in the Air Pollution Control Act, *supra*. The Air Pollution Control Act, *supra*, was amended on October 26, 1972, and made effective immediately upon enactment. Thus, defendants claim that the Commonwealth is precluded from instituting an action of civil penalties because of the operation of the doctrine of election of remedies cannot be predicated on these Court orders. We reiterate our agreement with the previously quoted portion of the interlocutory opinion and order by former Chairman Broughton on October 25, 1973.

Commonwealth Court has noted that the contempt proceedings in this matter did not involve the validity of the rules and regulations of DER. Further, it has noted that the issue in the contempt proceedings was whether there was a contumacious noncompliance with the Court order. Since the civil penalties action is predicated, not upon any Court order, but upon an alleged violation of departmental regulations, the initiation of a contempt proceeding cannot, in our view, constitute an election of remedies.

With regard to the August 7 and September 1, 1972, orders of the Court of Common Pleas of Lawrence County, we cannot understand defendant's claim regarding their *res judicata* effect on the matter now before us. As we have previously noted, the facts necessary to sustain those orders seems to inure to the benefit of the Commonwealth. However, with regard to the April 19, 1973, opinion of the Court of Common Pleas of Lawrence County, a different question arises. The doctrine of collateral estoppel, we think, precludes us from finding that the violations of 25 Pa. Code §123.22, found to exist by this Board, were

in any sense wilful as of April 19, 1973. This is the thrust of findings of fact 19, 20, 21 and 23 of the opinion of the Court of Common Pleas of Lawrence County of April 19, 1973.[4]

Nor are we persuaded that the action of the Court of Common Pleas of Lawrence County dismissing the Commonwealth's petition for contempt had the effect of granting a variance to defendant with regard to the sulfur dioxide regulations. The courts' approval of Penn Power's plan for compliance may be in substance if not in form a variance for future operations when its tall stacks are built; however, we do not believe this approval was a variance for interim, uncontrolled emissions.[5] Significantly, the Lawrence County Court of Common Pleas in its order of August 7

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4. These findings are as follows:

> "19. The defendant, Penn Power, does not have the ability to comply, and it is impossible for it to comply, with the regulations cited with respect to the control of sulfur dioxide emissions or the court's order of September 1, 1972, relating to the installation of air pollution abatement equipment to control sulfur dioxide emissions to within the limits specified therein, or to comply with said regulations by the use of an alternate low sulfur fuel.
>
> "20. The present state of technology relative to the control of sulfur dioxide emissions by the use of devices or processes for removal thereof from flue gases remains theoretical. No device is commercially available today, as distinguished from technique or theory, with an adequate degree of reliability to solve the problems of sulfur dioxide control, as would permit Penn Power to comply with the Commonwealth regulations, and the prior order of this court.
>
> "21. No adequate source of a low sulfur fuel is available to defendant, Penn Power, that would enable it to comply with the Pennsylvania regulations.
>
> "23. The inclusion by the defendant in its application, in issue in this case, of a proposal to install a high stack at its Taylor Township generating station, which in conjunction with its proposal to upgrade its particulate emission controls, represents an honest and diligent effort by defendant to improve the ambient air, (the air people in this community breathe) and an attempt by defendant to abide by the regulations of the State by making use of the "best available technology" to control sulfur dioxide."

5. We might note that we do not think the courts' approval of Penn Power's plan for compliance can be construed as a permanent variance for tall stacks when it is no longer "impossible" for Penn Power to comply with Regulation 123.22 because the technology has become available. Litigation over this issue continues in other forums. Defendant is one of the utilities that appealed, under §307 (b) (1) of the Clean Air Act, the EPA Administrator's approval of Pennsylvania's state implementation plan on the grounds that the sulfur oxide limitations in that plan (ie., Regulation 123.22) are economically unfeasible and technologically unavailable. The Third Circuit in its most recent decision in this matter remanded the case to the Administrator for the third time for consideration of "adverse economic effects arising from the plan" and further consideration of technological infeasibility. *Duquesne Light Co. v. EPA*, 8 ERC 1065 (3rd Cir. 1975). There is considerable confusion among the circuits about if and when these issues can be raised under the Clean Air Act. See, e.g., *Union Electric Co. v. EPA*, 515 F.2d 206, (8th Cir. 1975), cert. granted, 44 U.S.L.W. 3200 (U.S. Oct. 7, 1975) (No. 74-1542); *Indiana & Michigan Power Co. v. EPA*, 509 F.2d 839, 7 ERC 1433 (7th Cir. 1975); *Buckeye Power Inc. v. EPA*, 481 F.2d 162 (6th Cir. 1973). On the other hand, it has clearly been held that tall stacks and other supplementary control systems that do not constitute emission limitations are only acceptable as interim measures in conjunction with a control technology that reflects the "maximum degree of emission limitation available" to meet ambient air quality standards. *NRDC et al v. EPA*, 489 F.2d 390 (5th Cir. 1974); *Big Rivers et al v. EPA*, 523 F.2d 16 (6th Cir. 1975); and see EPA publication, "Legal Interpretation and Guideline to Implementation of Recent Court Decisions on the Subject of Stack Height Increase as a Means of Meeting Federal Ambient Air Quality Standards", January 6, 1976. We do not assume that the Pennsylvania courts intended to grant Penn Power a permanent exemption from the installation of technology that is or will be required for other power plants.

and September 1, 1972, did not allude in any manner to the granting of variances, except with regard to its intention to grant a variance from the order of the Air Pollution Commission, to which reference is made in part I of this discussion. In order for a variance to be in effect for uncontrolled emissions of sulfur dioxide, it would have to be granted upon defendant's application under Chapter 141 of the Rules and Regulations of the Department or by order of a court clearly granting an exception for interim, uncontrolled emissions. We conclude that neither of these events has occurred.

In the contempt proceeding, the Commonwealth charged, *inter alia*, that defendant and its president, flagrantly and wilfully disobeyed the orders of court by submitting on October 1, 1972, to DER an application which did not meet the sulfur dioxide regulations of DER. The court, after hearing, on April 19, 1973, found that the defendant and its president were not wilful in their noncompliance with the aforesaid orders of court. The principles of collateral estoppel preclude us from reaching a contrary result. Thus, at least as of April 19, 1973, there was no wilful noncompliance with the sulfur dioxide limitation of 25 Pa. Code §123.22 on the part of Penn Power. The Commonwealth did not offer any further evidence than the record of the contempt proceedings in the Lawrence County Court of Common Pleas to establish a wilful noncompliance with these regulations on or subsequent to April 19, 1973. Inasmuch as we are not at liberty to evaluate the evidence produced at the contempt hearings differently from that of the Lawrence County Court of Common Pleas, it follows that the evidence therein produced cannot be used to support a Commonwealth allegation of wilfulness on the part of defendant Penn Power. In light of the disposition of the contempt proceedings and their consequent affirmance by both the Commonwealth Court and the Pennsylvania Supreme Court, it was incumbent upon the Commonwealth to produce evidence concerning wilfulness after April 19, 1973, in regard to these regulations had it seriously intended to pursue this issue. Inasmuch as the Commonwealth did not produce any evidence that noncompliance on the part of Penn Power after April 19, 1973. With regard to the sulfur dioxide regulations was in any sense wilful, we are of the opinion that the Commonwealth failed to meet its burden on this issue.

Defendant argues that its proof of lack of ability to comply with the order of the court in regard to the sulfur dioxide limitations of 25 Pa. Code §123.22 is also a defense to the civil penalties action. This is the heart of the matter, and we do not agree. The question is what is the effect in a civil penalties action of the courts' determination that compliance with the regulations was impossible, and the courts' approval of Penn Power's plan to build tall stacks as the best means of compliance it could offer. Although the Lawrence County Court's incorporation of Penn Power's plan in its order, and the affirmance of that order by the Commonwealth Court and the Supreme Court of Pennsylvania, may amount to a variance from the sulfur dioxide regulations in the future when the tall stacks are built, we have concluded that the court did not in form or substance grant a variance for interim, uncontrolled emissions. Furthermore, the Department has not consented or agreed to any interim noncompliance with the sulfur dioxide regulations, which might be the case if it had approved Penn Power's plan or negotiated an agreement with the company.[6]

Our conclusion that civil penalties can be imposed for interim uncontrolled emissions despite the courts' approval of Penn Power's tall stacks is based on what we believe to be the broad reaching intent and effect of §9 of the Air Pollution Control Act 35 P. S. §4009.1. Under that section, civil penalties are a cumulative remedy available to the State to compensate for damages to the environment. Such penalties may be imposed whether or not the violations were wilful. In this case we are collaterally estopped from finding wilfulness on the part of Penn Power. Also, we must discount the penalties to be imposed by the courts' conclusion that it would be impossible for Penn Power to comply completely with the regulations. However, we think that §4009.1 allows us to require that Penn Power make some contribution to cleaning up the air of the Commonwealth as compensation for the damages caused by uncontrolled emissions, which were clearly in violation of the law. In our view, the civil penalties section, since it does not rely on intent, means that penalties can and should be assessed as a cost of polluting in order to deter insults to the environment and to contribute to their elimination.

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6. Such an agreement might have provided for the payment of interim damages toward the cost of cleaning up the air.

This is particularly so since under §4009.2 of the Act all penalties collected are to go into a "Clean Air Fund" "which shall be administered by the Department for use in the elimination of air pollution." It seems entirely fitting that Penn Power Company, which has benefited from years of litigation over its plan for compliance, should make some contribution to the citizens of the Commonwealth for the uncontrolled emissions that have gone on during that period of time.

It must be remembered that the Lawrence County Court in its orders prior to the contempt proceeding, and in the order entered in the contempt proceeding itself, recognized that uncontrolled emissions are unacceptable. As we interpret it, its ruling was simply that Penn Power was not in contempt for submitting a plan that could not guarantee complete compliance. Although all three courts talked at some points in terms of the reasonableness of the regulation as applied to Penn Power, the courts did not strike down the sulfur dioxide regulation as invalid. Subsequent to its decision in Penn Power, the Commonwealth Court had this to say in *Rochez Brothers v. Commonwealth of Pennsylvania, Department of Environmental Resources*, Pa. Comm. Ct. , 334 A.2d 790 (1975):

> "Lucerne points to the opinion of this Court in Commonwealth of Pennsylvania, Department of Environmental Resources v. Pennsylvania Power Company, 12 Pa. Cmwlth. 212, 316 A.2d 96 (1974) as support for its contention that if it is impossible to comply with the regulations then the regulations cannot be enforced. This reasoning is fallacious for the reason that the *Pennsylvania Power* case dealt with contempt proceedings arising out of an equity action, and the validity of DER's regulation was not specifically at issue. In *Pennsylvania Power* we decided that under the law, the defense of impossibility of performance was available to a defendant in a contempt proceeding, where his inability was not of his own making. This case and *Pennsylvania Power, supra*, are not alike, either substantively or procedurally." (Footnote omitted).

The court went on to describe what would constitute an attack on the validity of the regulation:

> "...A proper challenge to the reasonableness of the regulations would have to be based upon a claim that they are unnecessarily stringent and unnecessary for the protection of the public health, safety and welfare. In this case Lucerne presented evidence of little or no complaints by persons living in the vicinity of the coke ovens, of little or no damage to adjacent foliage or property, and of possible economic loss to the community if the ovens are not operated. Lucerne does not seriously contend, however, that the regulations are unreasonably stringent and unnecessary for the protection of the public health, welfare and safety. If Lucerne had proven that its proposed emissions would not pollute the air, or that the particulate matter, smoke and gases emitted would not harm humans, animals or vegetation, or even that the amount of the proposed emissions could reasonably be expected not to do any such harm, then it would have presented issues properly challenging the reasonableness of the regulations. This, it did not do."

We adopt the view of the Penn Power case as expressed by the Commonwealth Court in *Rochez* that limits the defense of impossibility to a criminal proceeding. A civil penalty is not a criminal sanction, see *Commonwealth of Pennsylvania, Department of Environmental Resources v. Rushton Mining Company*, Docket No. 72-361-CP-D, issued March 12, 1976; *Commonwealth of Pennsylvania, Department of Environmental Resources v. Froehlke*, Docket No. 72-341-CP-B, issued July 31, 1973, but in this case purely some measure of compensation for the harmful emissions that emanated from Penn Power's plant over the period of time of this complaint. Although defendant's action in exceeding the limits of 25 Pa. Code §123.22was not wilful, nevertheless, the evidence is clear that defendant is a significant contributor, if not the major one, to the degradation of the outdoor atmosphere in the vicinity of Taylor Township and New Castle by sulfur dioxide emissions. This degradation of the outdoor atmosphere is detrimental both to public health and welfare in the area affected--a conclusion that follows inexorably from the fact that the emissions violate a regulation implementing the national ambient air quality standards, which are based on scientific research establishing levels of pollutants that are harmful to health and welfare. Inasmuch as there have been 1,737 violations of 25 Pa. Code §123.22 during the period November 1, 1972, through November 30, 1973, we assess the defendant $173,700.00 as civil penalties for said violations. We recognize that this represents a small fraction of the penalties that could be imposed under §4009.1 (which would allow maximum penalties of $2500 a day). However, we are unable to agree with our Brother Cohen that the penalties should be more substantial here because we are collaterally estopped from finding wilfulness on the part of Penn Power, and because of the courts' determination in the contempt proceeding that complete compliance would be impossible. [7]

We must point out that here we have a defendant that made no effort to appeal from or comply with the orders that it was subject to prior to its submission of a plan that did not comply in October of 1972. It then defended its position in the posture of a contempt proceeding. Although the blame for the complex litigation posture of this case must be equally borne by the Department, the people of Taylor Township and New Castle, Pennsylvania, should not be prejudiced by the mistakes of DER. Neither should they inure totally to the benefit of the defendant, which, in this Board's opinion, played the waiting game with extraordinary finesse. All things considered we are of the opinion that a $173,700 civil penalty is appropriate.

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7. We have some hesitancy also about assessing substantial penalties against a public utility without some showing as to how they would be borne--ie., would they necessitate a rate increase and if so, would that be appropriate?

## CONCLUSIONS OF LAW

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

2. Although defendant during the period November 1, 1972, to and including November 30, 1973, substantially exceeded the limits of Air Pollution Commission Regulation V, the orders of August 7, September 1 and December 21, 1972, issued by the Lawrence County Court of Common Pleas had the legal effect of granting defendant a variance from the requirements of said regulation.

3. Count II of plaintiff's complaint for civil penalties, having no evidence to support it in this record, is not supported by substantial evidence and therefore must be dismissed.

4. Although defendant did not wilfully violate 25 Pa. Code §123.11, nevertheless, it is subject to civil penalties for the violation, that did occur over the period of the complaint. Because of the fact that defendant was granted a variance from the operation of Air Pollution Commission Regulation V, its violations of 25 Pa. Code §123.11 were not substantial, and the Board consequently assesses penalties of $21,700 for the 217 particulate matter violations.

5. During the period of this compliant, from November 1, 1972, to November 30, 1973, the daily emissions of sulfur dioxide from each of the five boilers at Penn Power's plant exceeded the allowable emissions under Regulation 123.22 of the Rules and Regulations of the Department 1,737 times. Those emissions constituted a significant cause of the degradation of the atmosphere in the area of New Castle and the Township of Taylor, Pennsylvania.

6. The Board is not collaterally estopped from assessing civil penalties for these emissions by the decision of the Lawrence County Court of Common Pleas, which was affirmed by the Commonwealth Court and the Supreme Court of Pennsylvania, and which held that Penn Power was not in contempt of the court's order when it submitted to DER a plan for compliance that proposed tall stacks as a means of controlling sulfur dioxide emissions because it was "impossible" under current technology for Penn Power to propose a system that would guarantee complete compliance. That decision, however, does collaterally estop the Board from finding wilfulness on the part of Penn Power in relation to the sulfur dioxide emissions since the Commonwealth did not present any evidence on the issue of wilfulness other than that appearing in the record of the contempt proceeding.

7. The court decision in the contempt proceeding, although approving Penn Power's plan for tall stacks as a means of future compliance, did not operate as a variance from the operation of Regulation 123.22 for interim, uncontrolled emissions of sulfur dioxide.

8. The standard for sulfur dioxide emissions set forth in Regulation 123.22 was not invalidated by the court decision in *Commonwealth of Pennnsylvania, Department of Environmental Resources v. Pennsylvania Power Company, supra.*

9. Under the civil penalties provision of the Air Pollution Control Act, a civil penalty is a cumulative remedy that is available whether or not the violation for which the penalty is sought was wilful. Civil penalties, which are payable to the "Clean Air Fund" to be used for eliminating air pollution, may be imposed simply as some measure of compensation for damage to the atmosphere.

10. Taking account of the impact of defendant's sulfur dioxide emissions upon public health and welfare, and discounting the amount of the penalties that could be assessed on account of the courts' conclusions as to the lack of wilfulness and the impossibility of total compliance, the Board assesses penalties of $173,700.00 for 1,737 violations.

## ORDER

AND NOW, this 16th day of April, 1976, a civil penalty in the amount of $195,400.00 is hereby assessed against Pennsylvania Power Company for its violations of 25 Pa. Code §§123.11 and 123.22.

This amount is due and payable into The Clean Air Fund immediately. The Prothonotary is hereby ordered to enter these penalties as liens against any private property of the aforesaid defendants with interest at the rate of 6 percent annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

## DISSENTING OPINION

By Joseph L. Cohen, Member

I dissent from the adjudication of the Board in this matter for the reason that the civil penalties assessment is far too low, given the number of violations of the sulfur dioxide regulations of DER on the part of defendant, Penn Power. In its adjudication, the Board imposes upon defendant civil penalties in the amount of $173,700.00 for violations of sulfur dioxide regulations. This amounts to a penalty of $100.00 per violation. Section 9.1 of the Air Pollution Control Act of January 8, 1960, P. L. 2119, *as amended*, 35 P. S. §4001 *et seq.*, provides for the imposition of civil penalties not to exceed $10,000.00 for the first violation plus a sum not to exceed $2,500.00 for each subsequent violation. Assuming *arguendo* that these violations would fall within the $2,500.00 or less category, the total civil penalties assessed in this matter amount to approximately 4% of the civil penalties that could have been assessed against the defendant. While there are factors in this case which mitigate against the maximum civil penalties permissible by law, I am of the opinion that a 4% figure is definitely too low.

During the period November 1, 1972, to and including November 30, 1973, the sulfur dioxide emissions from each boiler stack of defendant exceeded the maximum allowable emission rates under DER regulations for each and every day the boilers were in operation. The DER sulfur dioxide regulations are part of the state implementation plan of the Commonwealth of Pennsylvania submitted to and approved by the Administrator for the Federal Environmental Protection Agency pursuant to the Clean Air Act. Under the Clean Air Act, each state must submit an implementation plan setting forth, *inter alia*, a control strategy by which national ambient air quality standards will be achieved within a state within the mandated period of time set forth in §110 of the Clean Air Act. Inamsuch as the control strategy set forth in the state implementation plan is designed to achieve an air quality consistent with the national ambient air quality standards, we may assume that the continuous failure to adhere to the DER regulations on the part of a major source of air contaminants will preclude the attainment of the required air quality.

The required air quality under the Clean Air Act is related to public health and welfare considerations. In this regard, although occurring subsequent to the period for which civil penalties are assessed, the fact that on December 21, 1973, sulfur dioxide limitations downwind of defendant's plant were in excess of the 24 hour maximum set forth in 40 C.F.R. §50.4(b) is highly significant. It shows that during a period of approximately a month and a half, there was one time in which the ambient air downwind of the plant exceeded the national primary ambient air standards by 14%. I have no doubt that had the sampling program of DER been coextensive with the period for which it sought civil penalties, the ambient air quality in the air, with regard to sulfur dioxide, would have exceeded the national primary standard more than once. The implication is that the persistent violation of the DER emission regulations with regard to sulfur dioxide are not consistent with protecting the public health of the residents of the affected area. For this reason alone, a more substantial civil penalty should have been assessed.

Moreover, major sources of pollution within the Commonwealth may, however wrongfully, assume that this Board is not likely to utilize its civil penalty powers effectively to deter future pollution. If this is the message that emanates from this adjudication, the Commonwealth will have lost an effective tool for requiring compliance with valid air pollution control regulations.

For the reasons stated above, I would have assessed against defendant civil penalties in the amount of $800,000.00 for violation of the sulfur dioxide regulations alone. I therefore most vigorously dissent.

ENVIRONMENTAL HEARING BOARD

Joseph L Cohen

JOSEPH L. COHEN
Member

DATED: April 16, 1976

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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Harrisburg, Pennsylvania 17101
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In the Matter of:

DILLSBURG SEPTIC SERVICE :

Docket No. 75-195-W

The Clean Streams Law

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

## ADJUDICATION

By Paul E. Waters, Chairman, April 30, 1976

This matter comes before the Board as an appeal from an order issued by the Department of Environmental Resources, hereinafter DER, to the Dillsburg Septic Service, appellant herein, finding that it had caused contamination to the wells of adjacent property owners from a large chemical storage area. Appellant stores more than fifty, five-gallon drums on its unpaved property, which drums are removed monthly by another company. The drums contain a chemical known as 1,1,1 trichloroethane and this is the same pollutant found in the drinking water of nearby property owners. This discovery led finally to the issuance of an order requiring certain remedial action by appellant, who now denies responsibility.

## FINDINGS OF FACT

1. Dillsburg Septic Service is a business corporation incorporated under the laws of Pennsylvnaia and located at Range End Road, R. D. #1, Dillsburg, York County, Pennsylvania. The corporation has owned and/or occupied and maintained an open, unpaved storage area for drums of chemicals including 1,1,1 trichloroethane on its site in Dillsburg at all relevant times.

2. Some time prior to July of 1974, Mrs. Florence Davis, a resident of Dillsburg for over forty years who had never had any prior problems with her water supply was alerted to problems with her water supply. In response to complaints from Mrs. Davis and her relatives, on July 24, 1974, Mr. C. Kerry Leberknight, then an employee of DER inspected the Davis property and took a sample of water from Mrs. Davis' tap.

3. The water in Mrs. Davis' tap comes from a hand-dug well located behind her house, which well is sealed with a concrete cover. This water sample was analyzed in DER's laboratory for a hydrocarbon chemical-like carbon tetrachloride, after Mr. Leberknight, an ex-biology teacher, recognized a strong hydrocarbon smell from the water sample and requested special analysis of the sample.

4. The laboratory analysis of the sample from Mrs. Davis' well, which is reported on a form marked as Commonwealth Exhibit 2, indicated the presence of 1,1,1 trichloroethane in her well.

5. Mr. Livingston, the president and owner of Dillsburg Septic Service, admitted to Mr. Leberknight that his employee had used 1,1,1 trichloroethane on at least one occasion to clean heavy equipment.

6. Mr. Peffer, an employee of DER, visited the site on three occasions, the last of which was just prior to the hearing on January 14, 1976. At this time, he again sampled the Davis, Husic and Griffie wells. These samples were analyzed and the results of said analyses, which are designated as Commonwealth's Exhibits 12, 13 and 14, confirmed in each case, results of the earlier sampling. These 1976 samples also show that the contamination of groundwater especially in the area of the Davis well and the Husic well was a continuing phenomena. Mr. Peffer's examination of the water from Mrs. Davis' tap on January 14, 1976, indicated that this tap water still smelled strongly of hydrocarbon contamination.

7. The Davis well is located approximately 120 feet from the Dillsburg Septic Service property. Mrs. Davis' well was covered with a concrete slab but was not bolted down.

8. There was never an inspection made of the Dillsburg Septic Service well, nor were any water samples taken from the property of Dillsburg Septic Service even though the Commonwealth's own witness testified that a test should have been made from that location.

9. The well on the Davis property is easily accessible to anyone and can be gotton to and opened without interference. It was discovered in January, 1976, that the Davis well pump itself can be lifted and moved away from the foundation without any difficulty.

10. Dillsburg Septic Service picks up various drums containing materials from Berg Electronics and stores these drums on its property until the contents of the drums are removed by an individual who transfers the materials to Fayetteville, Pennsylvania, for reprocessing. The said individual comes once each month and by means of a vacuum truck pumps out the drums by inserting a hose in them so as to

avoid any spillage. Once the drums are pumped dry they remain on the property of Dillsburg Septic Service.

11. The substance in question was used on only one occasion as a cleansing agent by employees of Dillsburg Septic Service. A push spigot was attached to the drum, at that time, and a large pan was placed under the spigot so as to prevent any spillage. When the cleaning process was completed, the unused substance was poured back into the drum with the aid of a funnel.

12. The drums are stored in any open area on the Dillsburg Septic Service property and are in an upright position with screw caps on top and easily accessible to the general public.

13. In addition to a business located there, several residents make their homes on the Dillsburg Septic Service property. There are three wells on the property to service the business, home and rental units, and there has been no evidence of polluting these wells, either by taste or smell of the tap water. Additionally, one well is located in the immediate vicinity of the drum storage area, but it has not produced any evidence of being contaminated or polluted.

## DISCUSSION

DER has alleged a violation of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §691.1, *et seq*. The law provides: "No person or municipality shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, into any of the waters of the Commonwealth unless 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." 35 P. S.§691.307. DER is authorized and indeed has the duty under The Clean Streams Law, *supra*, to: "(3) Issue such orders as may be necessary to implement the provisions of this act or the rules and regulations of the board", and to "(4) Make such inspections of public or private property as are necessary to determine compliance with the provisions of this act. . ." Act as amended 1970, July 31 P. L. 653, §4, 35 P. S. 691.5 (d) 3,4. If the alleged violation is proved, we are satisfied that DER can issue a proper order requiring corrective action on the part of the responsible person.

We are here concerned primarily with the question of the sufficiency of proof to identify the party responsible for the contamination of two wells used for drinking water and other household uses in the vicinity of appellant's storage area.

It is clear from the outset that a chemical pollutant, 1,1,1 trichloroethane, did get into the water supply of at least two property owners downslope from appellant's property. Also undisputed is the fact that a well on a higher level above appellant's property was not contaminated. Appellant stores this particular chemical in large drums on its property more or less continually. On at least one occasion, appellant's employees admit having used the chemical from one of the storage drums to clean equipment.[1] The storage area is unpaved, and the groundwater table

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1. We find the following cross examination revealing, after appellant admitted using the stored chemical:

"Q. Mr. Leberknight, I believe, testified that you had the drum sitting on top of the other drums horizontally. There was a spigot below?

"A. Right.

"Q. I suppose the spigot was opened somehow and when the bucket or whatever vessel was filled up, it was closed?

"A. Correct.

"Q. What kind of a spigot was it?

"A. Just a press type.

"Q. It is not uncommon for those typesto drip a little bit, is it?

"A. It didn't drip.

"Q. It is not uncommon for that type of spigot to drip?

"A. It could be. Any spigot could drip.

"Q. How about the other hole that Mr. Leberknight discovered was open? Do you remember that ever being open?

"A. Well, that hole is open when you want to get anything out or you don't get it out.

"Q. Right, otherwise you build up a vacuum behind it.

Still, that hole was open. Supposing the drum was jostled when you weren't there? Isn't it possible some of the material came out then?

"A. I didn't sleep by the drum if that is what you mean.

"Q. Is it possible that some of your workmen -- when you were not there and not, perhaps, even on this project -- used some of this material?

"A. No, they didn't use it.

"Q. How do you know?

"A. I know that because they told me so and I believe it.

"Q. Did you ask them if they — you were kind of mad at them when you talked to them, weren't you?

"A. No, not really.

"Q. If you were one of your workmen and you knew that the boss was in trouble about spilling lll-trichloroethane, would you tell them, yes, I used that to wash down the tractor out back?

"A. No.

"Q. I didn't think so."

is not at a great depth from the surface. The general terrain and soil composition are consistent with a theory of drainage from the storage area to the wells. We have not overlooked the fact that the offending chemical is colorless and it would disappear leaving no trace if poured on the ground surface. These, as I indicated, are the *undisputed* facts. There are questions raised as to the completeness of DER's investigation. Appellant argues that more tests should have been taken in various other locations and from additional wells. We agree. The question, however, which we are now called upon to answer is not whether additional relevant information could have been gathered by DER, but rather, based on the information it did gather, whether the action it took in issuing the order of August 7, 1975, was fully justified. The order in question, required appellant to take immediate steps to insure no further discharge or spillage of the chemical 1,1,1 trichloroethane,[2] to which appellant takes no strenuous objection, and to take such steps as necessary, either by pumping or digging new wells, to correct, the two adjoining property owners, their 1,1,1 trichloroethane water problems. It is the latter proposal which has brought this matter to my desk.

Appellant says the case is *circumstantial*--and it is. It does not follow, however, that it is *insubstantial*. We believe there is a consistent link of the facts which lead to a preponderance of the evidence supporting the theory DER has outlined. We freely admit that if this were a criminal case, the evidence would not reach beyond a reasonable doubt. Our concern here, is simply whether there is substantial evidence to support the order issued by DER and we believe there is. See *Parago v. Department of Public Welfare*, 6 Pa. Commonwealth Ct. 16, 1972; *Poisson v. State Harness Racing Commission*, 287 A.2d 852, 5 Pa. Commonwealth Ct. 20, 1972; *A.P. Weaver and Sons v. Sanitary Water Board*, 284 A.2d 515, 3 Commonwealth Ct. 499, 1971. The order does give options to appellant, and we are satisfied that some steps should be taken immediately by appellant toward the goal of completely eliminating the offending chemical from the wells of its neighbors. If it believes further testing would be fruitful, certainly nothing in the order prohibits this.

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2. The order to Dillsburg Septic Service provided *inter alia:*

> "2. Within (30) thirty days of receipt of this order Respondent shall take all steps necessary to return the wells at the aforesaid Davis and Husic properties to background quality, including but not limited to, the pumping of said wells and the drilling and pumping of any other wells necessary to eliminate 1,1,1 trichoroethane from the ground water in this area. Said chemical shall not be considered eliminated unless and until three separate chemical samples on three separate days as analyzed at the Department's laboratories indicate the absence of this chemical."

## CONCLUSIONS OF LAW

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

2. DER has carried its burden of proving that appellant, Dillsburg Septic Service, has contributed to the introduction of a pollutant, 1,1,1 trichloroethane, into the water supply of two of its neighbors.

3. The order issued by DER on August 7, 1975, requiring appellant to prevent further incidents of the escape from its storage area of 1,1,1 trichloroethane and to return the wells of its two neighbors to background quality was proper under the facts of this case.

## O R D E R

AND NOW, this 30th day of April, 1976, after hearing and due consideration, the order of the Department of Environmental Resources issued to appellant on August 7, 1975, is hereby sustained and the appeal of Dillsburg Septic Service is dismissed.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: April 30, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

WESTERN PENNSYLVANIA CONSERVANCY

Docket No. 74-028-C

Sewer Interceptor Permit

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and LAUREL MOUNTAIN DEVELOPMENT CORPORATION

ADJUDICATION

By Joseph L. Cohen, Member, May 7, 1976

This matter is before the Board on the appeal of Western Pennsylvania Conservancy from a consent adjudication entered into by the Department of Environmental Resources (hereinafter DER) and intervenor, Laurel Mountain Development Corporation and approved by the Board on April 3, 1975. The Conservancy objects to the consent adjudication for the reason that, if implemented, it would permit the development of a sizeable number of second homes in Laurel Mountain Village, a real estate development of intervenor, adjacent to two state parks, alleged to be in violation of Article I, Section 27 of the Pennsylvania Constitution.

Previous to the entry of the consent adjudication, intervenor appealed a DER action which refused the application of Jenner Township Joint Area Sewer Authority for a permit to construct a sewer interceptor line to serve the undeveloped areas of Laurel Mountain Village. After extensive hearings on that appeal, the parties submitted for the Board's consideration, a proposed consent adjudication. This proposed consent adjudication, approved April 3, 1975, is the action which is the subject matter of this appeal.

FINDINGS OF FACT

1. Appellant is the Western Pennsylvania Conservancy, 204 Fifth Avenue, Pittsburgh, Pennsylvania 15222, a non-profit organization of approximately 7,000 members and an annual budget of approximately $400,000. The Conservancy is devoted to land conservation.

2. Appellee is DER, the agency of the Commonwealth authorized to administer

the provisions of The Clean Stream Law , Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1, *et seq.*, and the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.1, *et seq.*

3. Intervenor is Laurel Mountain Development Corporation, a corporation organized under the laws of Pennsylvania and the developer of a realty subdivision known as Laurel Mountain Village.

4. On April 3, 1975, the Environmental Hearing Board approved a proposed consent adjudication submitted by Laurel Mountain Development Corporation and DER which provides as follows:

> "The Commonwealth of Pennsylvania's Department of Environmental Resources (hereinafter "Department") and Laurel Mountain Development Corporation (herinafter "the Developer") have agreed to a settlement of the above-captioned appeal, the major provision of which include:
>
> "1. Upon fulfillment of the conditions set forth in Paragraph 2 hereof, the Department shall issue a sewage permit (per sewage application no. 5673408) to the Developer.
>
> "2. The issuance of the aforementioned permit shall be conditioned upon the following:
>
> "(a) That Jenner Township shall adopt an Act 537 Plan revision for the sewering and development of Laurel Mountain Village including the construction of an interceptor line. The aforesaid plan shall set forth a schedule for completing the development of Sections D, E, F, H and G of the Laurel Mountain Development plan of lots within four (4) years after issuance of permit no. 5673408. In addition, the aforesaid plan shall provide for sewerage for a portion of Section C extending from the area where the swimming pool and the proposed club house are located. The plan shall also include the construction of a sewage collection system in the aforesaid sections which shall be built according to a schedule to be submitted to the Department all as more fully hereinafter set forth.
>
> "(b) For a period of four (4) years from the date that the sewer permit issued, as per application no. 5673408, the use of on-site holding tanks shall be permitted subject to conditions hereinafter set forth.
>
> "(c) The Developer shall provide the Jenner Area Joint Sewer Authority (hereinafter "Authority) with a surity bond or other binding financial guaranties in an amount of $300,000.00 or the bidable costs from the eastern boundary of Laurel Mountain Development to the western boundary of the proposed Jenner Boswell Sewer System. Provision may be made to release the said bond or other so guarantees in the event that the Authority secures sufficient funds by way of federal grant otherwise to construct the interceptor system. Otherwise, Laurel Mountain Development Corporation shall provide such necessary funds to insure the construction of the interceptor sewer within four (4) years of the date of the issuance of the sewer permit as per application no. 5673408.

"(d) From and after the date of the issuance of of the sewage permit, the Developer shall be permitted to sell lots to the public, in blocks of approximately 150 lots extending from the logical terminus with the interceptor and shall construct and install an acceptable collection system for each entire block, as per the Act 537 plan to be ultimately approved. The Developer shall post a bond with the Authority in an amount equal to the updated bidable cost of construction of the collection system for each block of lots, which bond shall be retained by the Authority until that given block of lots has been sewered at which time the bond will be released. Installation of holding tanks shall be limited to the blocks for which a bond has been posted as provided for herein.

"(e) Laurel Mountain Development Corporation shall prepare and submit to the Department and the Township a schedule of construction of sewage facilities to each and every section mentioned in (a) above which schedule shall be illustrated on the plot plan for the development as well as narratively demonstrated.

"(f) The Township shall include in its Act 537 Plan Revision a proposed plan for eventual sewage of all remaining sections, namely Sections A, B and part of C of the Laurel Mountain Development, but no specific commitment as to time for construction is required by this Agreement.

"(g) As a condition for permission to use holding tanks during the period aforementioned, Jenners Township shall re-enact Ordinance No. 21 (which has been approved by the Department) and shall enter into a binding agreement with the Ligonier Authority to accept the disposal of contents of the holding tanks during the period they are in use, containing the same substantive provisions of the letter, appropriately updated, from the Ligonier Authority dated April 10, 1973, previously submitted to the Department. In addition, the Township or Authority shall enter into a binding contract with a contract hauler, for a period of four (4) years, which shall contain the same substantive provisions of the agreement between the Township and Arthur Bell dated April 10, 1973, appropriately updated and providing for legal consideration, and containing a requirement that each and every holding tank shall be emptied on demand or when necessary to prevent overflow and requiring routine periodic inspections by the hauler to determine when the tanks shall be emptied.

"(h) The Developer shall prepare a disclosure to be issued to each and every purchaser of lots setting forth the limitations of use of holding tanks and a reasonable estimate of consumers cost in constructing and servicing the same.

"(i) The Developer and Authority shall enter into an Agreement in form and substance essentially the same as previously submitted to the Department, but embodying any additional terms and conditions contained in this settlement.

"(j) The Department shall promptly and fairly review any

revised 537 plan submitted by the Township, in conformity with Act 537 and 25 Pa. Code, Chapter 71 (and approved by the County Planning Commission) and expedite the approval by the Department of any such application to the end that the issuance of the sewage permit is not unreasonably delayed.

"3. Upon execution of this Consent Adjudication and approval hereof by the Environmental Hearing Board, the parties shall be deemed bound hereby in the same manner as by a final adjudication of the said Board."

5. On April 19, 1975, notice of the substantive provisions of the consent adjudication were published in the Pennsylvania Bulletin.

6. Rule 21.38(a) of the Rules and Regulations pertaining to the practice and procedure before the Environmental Hearing Board provides as follows:

"(a) In all cases where a proceeding is sought to be terminated by the parties as a result of a settlement agreement, the terms of such settlement shall be submitted to the board for approval and the major substantive provisions thereof shall simultaneously be published in the *Pennsylvania Bulletin*. Such settlement, unless the terms of the settlement itself provide otherwise, shall be effective immediately upon approval by the Board, subject to reopening if an objection is filed as set forth below, and upheld by the Board. Any aggrieved party objecting to the proposed settlement may, within twenty (20) days after adjudication, appeal to the board in accordance with these rules and request a hearing on its objections."

7. Appellant filed its appeal in this matter on May 5, 1975.

8. Appellant is engaged in a policy of land acquisition and preservation for the conservation of undeveloped land. It implements this policy by studying large parcels of land and determining whether such lands have unique characteristics. If the land is found to have such characteristics, appellant acquires it and then conveys it to public agencies for the purpose of preserving such land in its natural state.

9. The aforementioned policy of appellant commenced in 1930. Appellant has been acquiring and transferring land to agencies of the Commonwealth since 1954.

10. Although agencies of the Commonwealth have always preserved the lands transferred to them by the Conservancy in their natural state, the Conservancy has not retained with respect to such land any possibility of reverter or any reversionary interest whatsoever.

11. The Laurel Hill area is unique, containing extensive areas of State Parks, forests and game lands.

12. Appellant has acquired approximately 32,000 acres of land in the Laurel Hill area since 1961 at a cost of approximately $3,600,000.00. Substantially all of this land has been conveyed through the Commonwealth for preservation and

conservation purposes. The funds used by the Commonwealth to purchase land from appellants were mainly Project 70 and Project 500 funds.

13. Members of the Conservancy, as do other members of the public, use the public lands in Laurel Hills for a variety of recreational uses, including hiking, picnicing, camping, hunting, fishing and backpacking.

14. The Conservancy leads organized excursions through public land in Laurel Hill, including trailwalks through Laurel Ridge Trail and the Forbes State Forest.

15. The Conservancy does not own any land immediately contiguous to Laurel Mountain Village, but does own a 216 acre tract which is approximately 15 miles from Laurel Mountain Village and a smaller holding on which is located the Bear Run Nature Reserve and Falling Water, which is approximately 30 miles from Laurel Mountain Village. Both of these holdings of appellant are contiguous to public land in the Laurel Hills.

16. There exists highways, towns, villages, and other settlements between appellants Falling Water property and Laurel Mountain Village.

17. Laurel Mountain Village is a partially-developed second home subdivision consisting of 984 lots on 750 acres. It is adjacent to two state parks in the Laurel Hills.

18. No erosion and sedimentation plan has been submitted to DER as to the development of Laurel Mountain Village. The submission and approval of such plan has not been made a condition of the approval of the permit as set forth in the consent adjudication.

19. Prior to entering into the consent adjudication, DER made no investigation as to the cost of the interceptor system nor did they consult with the engineering firm representing Jenner Township Area Joint Sewer Authority as to the cost of such an interceptor to the Authority.

20. Neither Jenner Township nor Jenner Area Joint Sewer Authority are parties to the consent adjudication.

21. There are presently 40 to 50 residents in Sections A, B and C of Laurel Mountain Village, all of which are currently serviced by septic tanks, some of which, have malfunctions.

22. Although the consent adjudication only provides for the construction of an interceptor and collector system for Section D, E, F, G and H, prior to the issuance of the interceptor permit, it clearly contemplates Jenner Township will be required to provide for the eventual sewering of Sections A, B and C. The consent adjudication does not propose a specific time within which these sections are to be sewered.

23. Laurel Mountain Village, for the most part, contains soils which are not well suited for the installation of on-lot sewage disposal facilities utilizing septic tanks and tile fields. For that reason, intervenor is seeking to obtain DER permission to have an intercepting sewer connecting its development with the Jenner Area Joint Sewer Authority's treatment facilities. Pending the construction of the intercepting sewer and the attendant sewer system for the development, intervenor seeks permission to install a holding tank as an interim measure.

24. Under DER regulations holding tanks are permissible as an interim measure for the storage of sewage under certain specified conditions relating to the enactment of appropriate municipal ordinances, timely emptying of holding tanks and the proper disposal of their contents.

25. Prior to the date of the consent adjudication, DER ordered Jenner Area Joint Sewer Authority to provide service to Lincoln Township. The sewage treatment facilities now under construction by the Authority are not large enough to service Lincoln Township with its present population and more than half of a fully developed Laurel Mountain Village.

## DISCUSSION

Intervenor, Laurel Mountain Development Corporation, is in the process of developing a vacation resort area in Jenner Township, Somerset County, Pennsylvania, known as Laurel Mountain Village. Two sections and a portion of a third have been completed. The residences in the completed portion of the Village are served by on-lot sewage disposal systems consisting of septic tanks and drainage fields. Many of the existing disposal systems now function. The remainder of the Village may not contain on-lot sewage disposal systems for the reason that the soils are not suitable therefor, and the installation of such systems would be contrary to the rules and regulations of DER adopted pursuant to the Pennsylvania Sewage Facilities Act, *supra*.

The only way in which the remainder of the Village can be developed is if public sewerage facilities become available to the development. This would require the building of an intercepting sewer connecting the development with the Jenner Area Joint Sewer Authority treatment facility. The Authority made application for such an intercepting sewer, but DER denied that application on January 31, 1974. Laurel Mountain Development Corporation appealed this denial to this Board which conducted several hearings on the matter.

Had DER approved the interceptor application, Laurel Mountain Development Corporation may have been able under certain well-defined conditions set forth in DER regulations to install as an interim measure pending requisite sewer connections to install holding tanks. This would have been a benefit to Laurel Mountain Development Corporation for the reason that it would be able to develop the remainder of Laurel Mountain Village and thereby sell lots developed as residences for vacationers.

The lengthy hearings in the appeal commenced by Laurel Mountain Development Corporation terminated in a consent adjudication of April 3, 1975, se forth above. Notice of the consent adjudication was duly published in the Penns vania Bulletin on April 19, 1975. Thereafter, on May 5, 1975, the Western Pennsylvania Conservancy filed a timely appeal in which it objects to the consent adjudication as follows:

> "(a) If the Commonwealth enters into the proposed settlement, it will be violating its trust obligations pursuant to Article 1, Section 27 of the Pennsylvania Constitution.
>
> "(b) The proposed agreement does not impose a duty on the Commonwealth, the Developer or Jenner Township to make any of the required studies under Article 1, Section 27 of the Pennsylvania Constitution prior to the submission or approval of the revised Sewage Facilities Act Plan.
>
> "(c) The Commonwealth does not have authority under the Clean Streams Law, 35 P.S. 691.1 et seq. or the Sewage Facilities Act, 35 P.S. 750 et seq. to grant a permit under the conditions set forth in the proposed agreement.
>
> "(d) The time limitations prescribed in the proposed agreement have no basis in fact and the consent to them by the Commonwealth is arbitrary and unreasonable.
>
> "(e) The terms for compliance in the proposed agreement have no basis in fact and consent to them by the Commonwealth is arbitrary and unreasonable.
>
> "(f) The settlement provisions are not supported by the record in this matter.
>
> "(g) The consent to this proposed agreement by the Commonwealth after denial of a permit and after hearing thereon is arbitrary and unreasonable."

Intervenor, Laurel Mountain Development Corporation, claims appellant, Western Pennsylvania Conservancy, lacks standing to prosecute this appeal. *Louden Hill Farms, Inc. v. Milk Control Commission,* 420 Pa. 548, 217 A.2d 735 (1966); *Committee to Preserve Mill Creek v. Secretary of Health,* 3 Pa. Commonwealth Ct. 200, 281 A.2d 468 (1971); *Community College of Delaware v. Fox,* Pa. Commonwealth Ct. , 342 A.2d 468 (1975).

Under the Pennsylvania precedents, a party must be aggrieved by an action of an Administrative agency in order to question that action through an *appeal* procedure. *Community College of Delaware County v. Fox, supra; Committee to Preserve Mill Creek v. Secretary of Health, supra.* To be aggrieved, a person must have a direct interest in the action from which the appeal is taken. *Louden Hill Farm, Inc. v. Milk Control Commission, supra.* As the court announced in *Louden Hill*:

> "Who is a 'person aggrieved' has been explained many times by this Court. In *Pennsylvania Commercial Drivers Conference et al. v. Pennsylvania Milk Control Commission et al.*, 360 Pa. 477, 62 A.2d 9 (1948); this Court reiterated what it had said in Lansdowne Borough Board of Adjustment's Appeal, 313 Pa. 523, 525, 170 A. 867, 868 (1934): 'A cardinal principle, which applies alike to every person desiring to appeal, whether a party to the record or not, is that he must have a (direct) interest in the subject-matter of the (particular) litigation, otherwise he can have no standing to appeal. And not only must a party desiring to appeal have a (direct) interest in the particular question litigated, but his interest must be immediate and pecuniary, and not a remote consequence of the judgment. The interest must also be substantial.' To be thus aggrieved the interest of the party must be adversely affected by the order, judgment or decree appealed from. Thus, in *Atlee Estate*, 406 Pa. 528, 532, 178 A.2d 722, 724 (1962), this Court said: 'A party is "aggrieved" when he is directly and adversely affected by a judgment, decree or order and has some pecuniary interest which is thereby injuriously affected.'" 217 A.2d at 736-737

In *Fox*, Commonwealth Court specifically disapproved the expansive view of standing we adopted in that matter. It did so in the following language:

> "As we said in *Committee to Preserve Mill Creek v. Secretary of Health*, 3 Pa. Cmwlth. 200, 281 A.2d 468 (1971), a litigant must meet the 'person aggrieved' standard in order to have standing to challenge the action of an administrative agency through an *appeal* procedure. In its opinion here, the EHB seems to have rejected this rule as a requirement for standing in situations where an appeal is asserted to challenge the action of the DER as a violation of its duties as a trustee of the public natural resources under Section 27. The EHB's opinion would appear to broaden the privilege of challenge to an action of this administrative agency by appeal in a case such as this so as to include litigants such as Mrs. Fox and Natural Lands who might not traditionally be considered aggrieved under some prior decisions. We must hold it in error for so doing, for we believe that, in any administrative appeal, a party must still be a 'person aggrieved' by the adjudication in order to appeal from it. We do not rule that a more broad standard might not apply to standing in an *original action* as a direct challenge to an administrative agency for a violation of its duties as trustee of public natural resources. But here the challenge is being made, not directly by means of an original action against the agency but on appeal from an agency decision to the EHB and then, of course, to this Court for review. And the challengers in an appeal must clearly be persons aggrieved." 342 A.2d at 474 (Footnotes omitted)

Appellant claims that the aforementioned Pennsylvania authorities are not precedents to be followed in this matter for the reason that none of them involve a Commonwealth agency as a trustee of public lands allegedly threatened by the action herein appealed. For that reason, appellant urges, this Board should follow the Federal cases regarding standing rather than the Pennsylvania authorities.

The Federal cases arise under §10 of the Administrative Procedure Act, 5 U.S.C. §702, which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The Federal cases regarding standing to obtain judicial review of challenged governmental action have a constitutional dimension to them. The Federal courts under Article III of the Federal Constitution may only exercise their jurisdiction involving a justiciable dispute, See *Sierra Club v. Morton*, 405 U.S. 727, 31 L.Ed.2d 636, 92 S.Ct. 1361(1972). However, Congress has the power to determine whether in an otherwise justiciable controversy a litigant is a proper party to seek judicial review. *Ibid.* If the matter constitutes a case or controversy within Article III of the Federal Constitution, then a party may seek judicial review of Federal agency action under the standards set forth in *Sierra Club v. Morton, supra.* Under the *Sierra* formulation, a party has standing if the party suffers "injury in fact" by the challenged action and the injury alleged was to an interest arguably within the zone of interests to be protected or regulated by the statutes that the agency was claimed to have violated. *Sierra v. Morton, supra*, 405 U.S. at 733. Under *Sierra Club*, the party seeking standing must allege that it has suffered "injury in fact". It is not enough, under the *Sierra* rationale, that there is injury to a protected interest. The party seeking review must have suffered the injury in order to bring the contested action before a Federal court for review.

In the cases that follow *Sierra Club v. Morton, supra,* the Federal courts have clearly established that a user of public lands has standing to challenge governmental action that will affect his use of such lands, and that an association, some of whose members are users of a particular public facilitiy may sue on behalf of its members. *Sierra Club v. Mason,* 351 F. Supp. 419(D. C. Conn. 1972); *Friends of the Earth v. Armstrong,* 360 F. Supp. 165(D. C. Utah 1973), rev'd on other grounds 485 F.2d 11(10th Cir. 1973), cert. den. fub. nom. *Friends of the Earth v. Starr,*

414 U.S. 1171(1974); *Montgomery Environmental Coalition v. Fri,* 366 F. Supp. 261 (D. C. D. C. 1973); *Environmental Defense Fund v. TVA,* 468 F.2d 1164(5th Cir. 1972); *Viavant v. Trans-Delta Oil and Gas Company,* F.2d , 7 E.R.C. 1423(10th Cir. 1974); *National Forest Preservation Group v. Butts,* 485 F.2d 408(9th Cir. 1973); *Sierra Club v. Train,* F. Supp. , 7 E.R.C. 230(D.C. Neb. 1975); *Committee for Greenfoot Hills v. Froehlke,* F.Supp. , 5 E.R.C. 1849(N.D.Cal. 1973). The breadth of the injury in fact test as applied to associations whose members use public lands is demonstrated by *U.S. v. SCRAP,* 412 U.S. 669(1973). There the court found that an unincorporated association had standing to challenge a railroad rate increase that the association claimed could lead to higher recycling costs which would result in more litter in the local parks that its members used and enjoyed. The court said that a significant injury to the members was not required so long as they suffered some perceptible harm. See also *Pa. Environmental Council v. Bartlett,* 315 F.Supp. 238(M.D. Pa. 1970).

The United States Supreme Court has recently ruled in a non-environmental context that an association has standing to sue on behalf of its members if only some of them are directly affected by the action sued upon. *Warth v. Sheldon,* 422 U.S. 490(1975). In *Warth,* the court said:

> "Even in the absence of injury to itself, an association may have standing solely as the representative of its members. E.g., *National Motor Freight Traffic Assn. v. United States,* 372 U.S. 246(1963). The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. See *Sierra Club v. Morton,* 405 U.S. 727(1972). The association must allege that its members, *or any one of them,* are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.... So long as this can be established...the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." (Emphasis supplied) 422 U.S. at 511.

We think it appropriate to state that the rationale of *Sierra Club v. Morton, supra,* on standing and the Pennsylvania cases on the subject do not differ widely. The difference seems to be that under Federal law, a "party aggrieved" need not suffer an "economic" injury to have standing. We think in light of Article I, Section 27 of the Pennsylvania Constitution[1] that citizens of Pennsylvania

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

who use and enjoy public lands maintained for their benefit and enjoyment have a legally protected interest sufficient to be "an aggrieved party" within the meaning of Section 41 of the Administrative Agency Law, Act of June 4, 1945, P. L. 1388, *as amended*, 71 P. S. §1710.1 *et seq.* Especially would this appear to be the case where the constitutional amendment has been held to be self-executing.[2] If under Federal law the zone of interests to be protected or regulated by an agency under statute may form the basis of standing to review agency action if a party alleges that the interest which he seeks to protect is arguably within that zone, surely a state constitutional amendment which confers upon the people of the Commonwealth certain rights in regard to the environment and mandates the Commonwealth as trustee to protect and conserve these resources can perform the same function with regard to standing to obtain review of agency action as does the statutory scheme under Federal law. Especially is this so in the case in which it is alleged that action taken by DER under one law threatens public park lands acquired by DER under other legislation. Surely, an organization whose membership utilizes these park lands for recreational and other activities should have standing to appeal the action complained of. We so rule in this case, realizing full well that this precise question has never arisen in the Commonwealth.

We believe that the "injury in fact" test that has been developed in the Federal courts should also apply to standing to appeal from actions of the Department of Environmental Resources. We do not understand the distinction that the Commonwealth Court makes between original actions and the administrative appeals. See discussion and case cited in 3 DAVIS, ADMINISTRATIVE LAW TREATISE, §§22.03, 22.04, 22.05; *id.* (1970 Supplement) §22.00 *et seq.*, wherein no distinction is made between standing to bring an original action and standing to appeal as a person aggrieved except under statutes that expressly limit persons aggrieved to a narrow class of persons. We would think that, if anything, the opportunity for interested and affected groups to be heard in review of administrative actions is more broad than the concept of standing for purposes of bringing an original action in court by virtue of a statute conferring a right of review in persons aggrieved. See, e.g., *Scenic Hudson Preservation Conf. v. Federal Power Comm.*, 354 F.2d 608 (2nd. Cir. 1965), cert. den. sub. nom. *Consolidated Edison of New York, Inc. v. Scenic Hudson Preservation Conf.*, 384 U. S. 941(1966).

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2. *Commonwealth v. Gettysburg Battlefield, Inc.*, 8 Pa. Commonwealth Ct. 231, 302 A.2d 886(1973); *Department of Environmental Resources v. Pennsylvania Public Utility Commission*, Pa. Commonwealth Ct. , 335 A.2d 860(1975), *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86(1973).

Moreover, we do not think that appellant should be driven to initiate proceedings in a court of first instance to seek to redress alleged violations of Article I, Section 27 of the Pennsylvania Constitution when the forum of the Board is already available to consider the matter. Granting intervention in this case, it appears to us, is the most expeditious manner in which the substantive issues raised by appellant can be addressed. Had appellant not appealed the consent adjudication in this matter, it ran the risk of not being able to attack it collaterally in an original action.

Appellant, Western Pennsylvania Conservancy, has standing only to have determined whether in making this settlement, DER has not acted in accordance with official standards. Moreover, it has the burden in this regard.[3] Section 21.42 of the Rules of Practice and Procedure before the Board. Finally, in determining whether Article I, Section 27 of the Pennsylvania Constitution has been breached, we must apply the threefold test set forth in *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86(1973). In *Payne*, the Court held:

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

Appellant claims that DER acted in violation of Article I, Section 27 of the Pennsylvania Constitution by agreeing that Sections D, E, F, G and H of Laurel Mountain Village shall be developed within four years of the issuance of the permit for the interceptor. This contention is directed toward paragraph 2(a) of the consent adjudication which provides:

> "2. The issuance of the aforementioned permit shall be conditioned upon the following:

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3. In its brief, the Conservancy acknowledges that we have held that it has the burden of proof in this matter. The Conservancy, however, argues that the burden should be upon the Department to justify its action. Rule 21.42 of the Rules of Practice and Procedure before the Board clearly states that in an appeal from a settlement, the appellant has the burden of proof and burden of going forward, unless otherwise ordered by the Board. At no time during the hearing on the Conservancy appeal or at any time prior thereto did the Conservancy ask the Board to order the shifting of the burden. In the absence of such a request, we think the raising of this issue in the post-hearing brief is not justified. Therefore, we rule that the burden of proof and the burden of proceeding in this matter are properly upon the appellant, Western Pennsylvania Conservancy.

(a) That Jenner Township shall adopt an Act 537 Plan revision for the sewering and development of Laurel Mountain Village including the construction of an interceptor line. The aforesaid plan shall set forth a schedule for completing the development of Sections D, E, H and G of the Laurel Mountain Development plans of lots within four (4) years after issuance of permit no. 5673408. In addition, the aforesaid plan shall provide for sewerage for a portion of Section C extending from the area where the swimming pool and the proposed club house are located. The plan shall also include the construction of a sewage collection system in the aforesaid sections which shall be built according to a schedule to be submitted to the Department all as more fully hereinafter set forth."

Appellant's supporting arguments regarding this contention are as follows:

(1) By agreeing to paragraph 2(a) in the consent adjudication, DER has made a decision that full development of Laurel Mountain Village within four years is permissable.

(2) Development of a large second home resort in the Laurel Hill threatens the water resources in the area, the wildlife and habitat, the natural amenities, the passive recreational areas, the pasture and the natural resources contained on the public lands.

(3) DER neither prepared nor required an environmental study of the effect of the Laurel Mountain Village Development on the park lands before consenting to the agreement resulting in the consent adjudication.

With regard to the first contention, we agree that DER made a decision that "full development" of Laurel Mountain Village within four years is permissable. The reason for the insertion of the four year period in the consent adjudication was to require that Sections D, E, F, G and H would be sewered within that period so as to preclude the use of holding tanks for the domestic sewage from each residence after the expiration of four years.

In order for this decision--to permit development of Laurel Mountain Village within four years--to have violated Article I, Section 27 of the Pennsylvania Constitution by DER, it must appear that the threefold standard set forth in *Payne v. Kassab, supra,* was not met. In this regard, appellant has not shown that any applicable statute or regulation relevant to the protection of the Commonwealth's public natural resources has been violated. In this connection, appellant has not directed our attention to any provision of the Pennsylvania Sewage Facilities Act or The Clean Streams Law or rules and regulations adopted pursuant thereto which have been breached by DER relative to the four year provision.

See *Community College of Delaware County v. Fox, supra.* Under the *Fox* rationale, we find that there is no provision of the Pennsylvania Sewage Facilities Act or The Clean Streams Law that is offended by this four year limitation. Thus, appellant has not shown lack of compliance with relevant statutory or regulatory mandates.

We are of the opinion that the four year limitation demonstrates a reasonable effort on the part of DER to reduce the environmental incursion to a minimum. In this regard, the four year limitation was intended to prevent the use of holding tanks beyond a four year period after the interceptor sewer permit was issued. The consent adjudication contemplates that within a four year period the interceptor will be built and the sections of the development sewered within a four year period so that holding tanks will no longer be necessary. We deem this to be essential compliance with the second of the *Payne* test.

With regard to the third part of the *Payne* test, it is important to note that it was set forth in a case in which alternative uses of *public property* were involved. We believe that the degree of discretion conferred upon a public agency in such a case is greater than the degree of discretion in DER in determining whether a proposed permit should be issued in connection with development of private property where compliance with statutory and regulatory standards are contemplated. Laurel Mountain Village, being private property, is not subject to the broad discretionary dispositions on the part of DER as is public land under DER's control. Thus, when considering the applicability of the third test, we are of the opinion that DER was not at liberty to determine whether Laural Mountain Village could be developed because it might have an adverse environmental impact upon the adjacent park lands, if the permits contemplated met the requirements of the aforementioned laws.

Appellant, therefore, has not met its burden, imposed upon it by §21.41 of the Rules of Practice and Procedure before the Board of showing that the four year limitation violates the constitutional provision. Moreover, inasmuch as it has not met its burden in this regard, it definitely has not shown that the four year limitation in paragraph 2(a) of the consent adjudication was arbitrary, capricious or unreasonable. It if had, there would have been a violation of the third part of the *Payne* test, and would necessarily have been a violation of Article I, Section 27 of the Pennsylvania Constitution.

One further observation. The Conservancy contends that the development within four years of Laurel Mountain Village will have an adverse environmental impact upon the adjacent state park lands and that, for that reason, DER should have included within the consent adjudication a condition for a site-specific environmental study. We cannot agree that either *Fox* or *Payne* compelled this result. This consent adjudication is nothing more or less than an agreement between DER and Laurel Mountain Development Corporation in which DER agrees that if certain conditions are met, it will issue an interceptor permit and will allow under certain specified conditions holding tanks to be utilized within a four year period after the interceptor permit is issued. Unless a site-specific environmental study would relate to basis upon which DER could predicate a disapproval of the plan set forth in the consent adjudication, such a study in our opinion would not be required by Article I, Section 27 of the Constitution of Pennsylvania as interpreted by *Payne* and *Fox*. Appellant has not shown how such a study could in any manner impinge upon whether an interceptor permit should issue or whether holding tanks should be permitted under the circumstances set forth in the consent adjudication. Inasmuch as appellant has failed to show that such an environmental study is legally required, it has not met its burden under the rules of the Board.

In *Community College of Delaware County v. Fox, supra,* the Court said:

> "It must be remembered, however, that the power of an administrative agency must be sculptured precisely so that its operational figure strictly resembles its legislative model. *Elias v. Environmental Hearing Board,* 10 Pa. Cmwlth. 489, 312 A.2d 486 (1973); *Zamantakis v. Pennsylvania Human Relations Commission,* 10 Pa. Cmwlth. 107, 308 A.2d 612 (1973). Thus, under the Sewage Facilities Act, the DER is entrusted with the responsibility to approve or disapprove official plans for sewage systems submitted by municipalities, but, while those plan must consider all aspects of planning, zoning and other factors of local, regional, and statewide concern, it is not a proper function of the DER to second-guess the propriety of decisions properly made by individual local agencies in the areas of planning, zoning, and such other concerns of local agencies, even though they obviously may be related to the plans approved. Moreover, impropriety related to matters determined by those agencies is the proper subject for an appeal from or a direct challenge to the actions of those agencies as the law provides, not for an indirect challenge through the DER. *As we read the Sewage Facilities Act, the function of the DER is merely to insure that proposed sewage systems are in conformity with local planning and consistent with statewide supervision of water quality management; it is the local government agencies, who are responsible for planning, zoning and other such functions."* (Emphasis added) 342 A.2d 478.

Clearly, if Jenner Township adopts a revision of its official plan in accordance with the provisions of the Pennsylvania Sewage Facilities Act, *supra,*

the action of DER in approving or disapproving such claim will satisfy the requirements of Article I, Section 27 of the Pennsylvania Constitution, if it meets the tests set forth in *Payne v. Kassab, supra.* Under the *Payne* test, the Department would be required to determine whether the provisions of the Pennsylvania Sewage Facilities Act, *supra*, and the rules and regulations relating thereto in connection with plan revision were met. However, as we read *Community College of Delaware County v. Fox, supra,* it is not required that DER must apply the *Payne* test as a condition precedent to entering into the consent adjudication. In the consent adjudication, DER has done nothing more than to agree with Laurel Mountain Development Corporation to issue it a permit for an interceptor sewer under specified conditions, one of which is the approval of an official sewage plan for Jenner Township, Somerset County.

By entering into this consent adjudication, DER is not requiring Jenner Township to require the development of Sections D, E, F, G and H within a four year period after the issuance of an interceptor permit by DER, but only indicating that the plan provide for the sewering of these areas within a four year period. The purpose of this provision is not to require Jenner Township, which is not a party to the consent adjudication, to allow the development at a predetermined rate, but merely to provide a time limit within which holding tanks would be permitted after the interceptor permit is granted.

We are of the opinion, therefore, that with regard to the official sewage plan revision of Jenner Township that may be submitted for approval to DER, DER's only obligation is to determine whether such a plan meets the requirement of the Pennsylvania Sewage Facilities Act, *supra*, the only relevant Act under the rationale of *Fox*.

We cannot say, under such circumstances that DER was required prior to agreeing to the consent adjudication to ascertain whether local agencies would incur important responsibilities with regard to Article I, Section 27 of the Pennsylvania Constitution. Such a requirement, if in fact it is imposed by law on DER, is more properly a consideration to be taken into account if Jenner Township files an official plan revision.

The underlying assumption of the Conservancy's case seems to be that inasmuch as DER owns and operates two state parks adjacent to Laurel Mountain Village, it may, in deciding whether to grant an interceptor permit to serve the Village, consider whether the development will injuriously affect the state parks under its control. The asserted legal basis for this conclusion is Article I, Section 27 of the

Pennsylvania Constitution. While we agree with the Conservancy that this provision of the Pennsylvania Constitution makes DER a trustee of state parks under its jurisdiction, the constitutional provision in the absence of more explicit statutory language, in our opinion, does not confer upon DER the right or authority to regulate development on private property adjacent to state park lands by denying permits otherwise proper under The Clean Streams Law or the Pennsylvania Sewage Facilities Act. If DER was concerned that the proposed development threatened its state parks, it could have exercised its power under §1906-A of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq.* *Peters v. Commonwealth, Department of Forest and Waters*, 12 Pa. Commonwealth Ct. 330, 314 A.2d 584(1974).

The Conservancy would support its positions by Federal cases such as *Sierra Club v. Department of Interior*, F. Supp. , 6 E.R.C. 1564(N.D. Cal., 1974) and its successor case, *Sierra Club v. Department of Interior*, F. Supp. , 8 E.R.C. 1013(N.D. Cal., 1975). Aside from the fact that these are Federal cases, the legislation of Congress upon which these cases are predicated is so much more stringent than state park legislation in Pennsylvania as to make their use in this matter highly debatable, to say the least.

Moreover, as we have indicated above, we are of the opinion that the four year limitation under the circumstances is not unreasonable. The only reason that limitation was inserted was because holding tanks were involved.

The Conservancy contends that DER acted arbitrarily and capriciously with respect to the following issues:

(1) It did not require construction of an interceptor for sections A, B and C of Laurel Mountain Village;

(2) By allowing development of sections D, E, F, G and H of Laurel Mountain Village and sanctioning the use of holding tanks in these sections;

(3) By permitting all the sewage from the fully developed Laurel Mountain Village ultimately to be conveyed to the Jenner Joint Area Authority Sewage Treatment Plant for the reason that said plant is not designed to take more than half the sewage from the sections of the village to be developed and also accomodate Lincoln Township sewage which the Authority has been ordered to treat by DER.

The answer to the first contention is that the consent adjudication expressly provides for the extension of sewage services to these remaining sections, but does not specify a time within which this is to be accomplished. Moreover, whether the Department could compel Laurel Mountain Development Corporation to sewer sections A, B and C cannot be readily ascertained from the record. At least with regard to the houses in these sections which are already sold, the sewering of these areas appears to be a responsibility which could be imposed only upon the proper public body responsible for the collection and treatment of sewage. With regard to sanctioning the use of holding tanks in Sections D, E, F, G and H of Laurel Mountain Village, the use of holding tanks is permitted under DER regulation which mandates certain requirements before their installation and use is allowed. The consent agreement embodies these requirements. The fact that appellant charges that holding tanks are the worst form of sewage facility is not sufficient to overcome provisions in a consent adjudication which are clearly within departmental rules and regulations.

We are concerned, however, with the indisputable fact that the proposed sewage treatment facilities of the Authority cannot accomodate the sewage from Lincoln Township and more than half the development of a fully developed Laurel Mountain Village. We are of the opinion that the consent adjudication should be modified to provide that there should be a numerical limitation upon the number of holding tanks that are permitted. This limitation should be related to the number of hook-ups in Laurel Mountain Village permitted to the sewage treatment facility that will not cause overloading of that facility. Such a provision would allow holding tanks only on those properties permitted to hook up to the Authority's plant under the condition of no overload of capacity.

## CONCLUSIONS OF LAW

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

2. An environmental organization whose members use and enjoy state parks has standing to appeal a consent adjudication where it appears that said adjudication may result in harm to the state parks in question.

3. Article I, Section 27 of the Pennsylvania Constitution does not require that DER conduct an environmental impact study before it settles a pending matter before the Environmental Hearing Board by which it agrees to grant an interceptor permit under certain specified conditions.

4. A provision in a consent adjudication that a permit for an interceptor will be issued only if there is submitted an official plan under the Sewage Facilities Act, *supra*, contemplating the sewering of specified sections of a subdivision within four years neither violates Article I, Section 27 of the Pennsylvania Constitution nor is arbitrary, capricious or unreasonable.

5. The decision to allow holding tanks in a realty subdivision under conditions authorized by DER regulations cannot be considered an abuse of discretion.

6. Where a proposed sewage treatment facility cannot accomodate more than half of the sewage from a proposed realty subdivision, it is error for DER to permit holding tanks in excess of that number of connections.

## O R D E R

AND NOW, this 7th day of May, 1976, the appeal of Western Pennsylvania Conservancy is hereby sustained and the consent of the Board is hereby withdrawn to the consent agreement of April 3, 1975, and the same is hereby remanded to the Department and the Intervenor, Laurel Mountain Development Corporation, for the purpose of determining the maximum number of holding tanks permissable under this adjudication. The parties shall determine how many proposed connections to the Jenner Joint Area Sewer Authority's sewage treatment plant may be made without overloading the same and restrict the number of holding tanks to said number.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: May 7, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

KRAFT FOODS DIVISION
KRAFTCO CORPORATION

Docket No. 75-104-W
The Clean Streams Law

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

# ADJUDICATION

By Paul E. Waters, Chairman, May 7, 1976

This matter comes before the Board as an appeal by Kraftco Corporation, hereinafter appellant, from the denial of a permit to discharge cooling water used at its processing plant in Upper Macungie Township, Lehigh County, Pennsylvania. The appellant proposes to discharge 60,000 gallons of water which is of drinking water quality, to a drainage ditch which leads by tributary to Iron Run some distance away from the plant. The Department of Environmental Resources, hereinafter DER, denied the application under The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1, *et seq.*, mainly because of its belief that the quantity of water would accumulate and then discharge pollutants from the farm land downstream of the plant thereby causing pollution to the underground water supply. Initially there were three reasons given for the permit denial, two of these problems were resolved by appellant prior to this adjudication.

## FINDINGS OF FACT

1. Appellant is Kraft Foods Division of Kraftco Corporation.

2. Kraft owns and operates a food processing plant, located in Upper Macungie Township, Lehigh County.

3. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources.

4. The present matter is an appeal from the denial of appellant's permit application for the discharge of 60,000 gallons a day of non-contact cooling water to an alleged tributary of Iron Run. The reasons set forth by DER in its letter

of Capital Zone:

"a. The discharge is to a ground water recharge area and the discharge would result in increased sink hole development.

"b. The excessive quantities of nitrate nitrogen in the discharge could pollute public and private drinking water supplies.

"c. The pollution incident prevention plan was grossly inadequate."

5. On December 5, 1974, Kraft submitted its application for a permit to discharge non-contact cooling water from its Wescoville food processing plant to an Industrial Boulevard drainage ditch. The drainage ditch was constructed by the Township of Upper Macungie as part of the improvement and surfacing of Industrial Boulevard. The drainage ditch connects with a pre-existing drainage swale approximately 1,500 feet in southwesterly direction from the edge of the Kraft property. The drainage swale services an area of approximately 3.1 miles and is tributary to Iron Run Creek.

6. Although some of the discharge from appellant's plant would be carried to Iron Run by an unnamed tributary, a portion not able to be determined on this record, would be recharged into the groundwater in the general area of the Zimmerman farm.

7. On August 21, 1975, after meetings with appellant and after hearing received a revised submission of their Pollution Incident Prevention Plan, DER approved appellant's revised Pollution Incident Prevention Plan.

8. The parties have stipulated that the ambiguity regarding nitrate nitrogen and nitrate nitrogen as nitrates has been resolved, and it has been determined that the quantity of nitrate nitrogen in the proposed effluent meets the standards set forth for a discharge to a watercourse. Thus, the basis set forth in the denial that the quantities of nitrate nitrogen in the discharge were excessive is no longer an issue.

9. The tributary into which drainage ditch flows and which proceeds into the Zimmerman field is a wet weather stream with no base flow, and is an influent stream. DER witnesses have described it as a totally dry ditch for carrying runoff, that the tributary does not normally carry water, and that there is no base flow. It is also clear from the photographs, that there are times when the tributary is dry. Appellant's witness, Dr. Warmkessel, who has been familiar with the area for many years, testified that it will flow only during a period of rain and a short while afterward.

10. The Township of Upper Macungie, hereinafter Township, contracted

with Kraft for the Township to provide for the disposal of storm water and cooling water. Appellant has complied with the contract, but the Township has not satisfactorily complied with the contract. The Township claims insufficient funds as the basis for non-compliance.

11. It is technically possible to extend the drainage ditch to Iron Run, although there is a problem with clearance at Route 100. It also appears to be possible for appellant to dispose of the water by spray irrigation or some other system.

12. Contamination of the groundwater could result in a public or private nuisance. It has been established that the Lehigh County Authority wells No. 3 and No. 4, which are in the vicinity of Kraft, take approximately two million gallons a day from the acquifer. It has also been established that there are private wells, industrial wells, and other public water supplies, including one third of the supply for the City of Allentown using the acquifer known as the Schantz Spring Basin. If contamination resulting from appellant's discharge reached the water supplies of any of the above users, and interfered with their present use of the water, a public or private nuisance could result.

13. The recharge area through which the water will flow has developed some sink holes.

DISCUSSION

The basic question which we are called upon to resolve in this proceeding has not previously been answered specifically by this Board. The parties have done no more than allude to it, without clearly coming to grips with it. Where a party seeks a permit under The Clean Streams Law, *supra*, for a discharge of water on his own land, which may become polluted on the land of another, and reach the groundwater there, is this sufficient reason for a denial of the permit, as a discharge to groundwater. The implications of this question are so far reaching that a proper solution requires one further step and a determination of the *quality* of the discharge. Where the discharge is of drinking water quality, it is our view that it should not be categorized as a discharge to groundwater for purposes of requiring DER's Module 5-A calling for detailed geologic data, as under the circumstances in this case.

It is undisputed that some of the water from almost any discharge will at some point recharge groundwater. The question of where to draw the line can become a pursuit for which the required tools of measurement are unavailable. We therefore adopt a more meaningful and precise test related to the quality of the water rather than the proportional division which goes into

the groundwater. When there is any measureable amount of water directly or indirectly discharged to groundwater, which discharge contains pollutants, DER may properly classify this as a discharge to groundwater for purposes of enforcement of its regulations and The Clean Streams Law, *supra*, even though the immediate discharge is to a drainage ditch as in this case.

The matter, of course, does not end here, because DER offered some evidence, but mostly speculation, that there will be pollutants getting into the water from appellant's drainage ditch coming from its parking area. Inasmuch as appellant must carry the burden of proof to show entitlement to a permit, this issue must be resolved before a permit can be granted. Because this was no more than a side issue prior to the filing of post-hearing briefs, we deem it in the interest of fairness and good administration to remand this matter for the issuance of a permit only when DER is satisfied that sufficient safeguards exist to insure no pollutants from appellant's parking area can find their way into the drainage ditch. Perhaps a monitoring system of some kind would be appropriate in this regard.

We have not overlooked the major contention of DER, to the effect that pollutants from the farm area, not owned by appellant, which is traversed by the unnamed tributary or swale leading eventually to Iron Run, will get into the groundwater and eventually pollute the acquifer which is an important water source for the area. This consideration properly caused DER much concern, as indeed it has the Board. The law, however, we believe, should look for solutions, to those who *cause* pollution problems, and who logically can be called upon to change the circumstances thereof. If a farmer is causing or may cause pollution to a water supply by using certain pesticides or fertilizers in or near recharge areas on his land, then DER must deal with that problem directly by taking steps to prevent such pollution. To prevent appellant from operating in the most efficient manner, which presumably entails the discharge from the plant of pure water, we believe to be unreasonable. This is especially true in this case because there is no doubt that heavy rain will cause much of the exact same results which DER fears will have dire consequences if the permit sought by appellant is

issued.[1]

Although we agree with DER that any pollution in the water coming from appellant's property would be cause to deny the permit, we do not extend this to cover pollutants originating in the Zimmerman farm area downstream from appellant's property. The same applies to sink holes which DER seeks to prevent on the farm.[2] This is a speculative result and although it may be the subject of private litigation between the owner of the farm and appellant, DER has no place in that dispute at this time. We reiterate that this follows, only because the water which appellant seeks to discharge is within drinking water standards. The result would no doubt be different if the quality of the discharge was itself in violation of The Clean Stream Law, *supra*.

DER contends that the proposed discharge will be in violation of Sections 97.71 and 97.74[3] of the Rules and Regulations (25 Pa. Code §§97.71 and 97.74) which provide:

> "§97.71 Potential pollution
>
> "The Department will, except as otherwise provided in this section, consider the disposal of wastes, including storm water runoff, into the underground as potential pollution unless the disposal is close enough to the surface so that the wastes will be absorbed in the soil mantle and be acted upon by the bacteria naturally present

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1. The testimony on this point was as follows: (N.T. Page 285 Lines 2 through 20)

> "Q Dr. Warmkessel, did you make any studies to support your opinion that the discharges from Kraft, or the discharges that occurred, did not cause any pollution of the groundwater?
>
> "A I made no formal study of any particular well. My opinion is based on the fact that the discharge is drinking water quality water and, as such, is being returned to the ground. That is what I am basing my opinion on.
>
> "Q Does that take into effect that the water could carry with it any possible chemical elements or earth lying on Zimmerman's field?
>
> "A In my opinion, it would carry less than the present storm water discharge because that already is carrying more into the ground.
>
> "Q But would it carry some?
>
> "A It obviously would carry some if it percolates through the ground."

2. Much of the technical testimony at hearing was presented to show that the Zimmerman farm property which adjoins appellant's plant, is prone to sink hole development and this along with the recharge characteristics of the land prevent water from flowing into Iron Run during periods of low flow as it goes into the groundwater.

3. DER has used these Regulations to support its requirement that appellant supply geological information.

in the mantle before reaching the underground or surface waters."

"§97.74 Disposal in underground horizons

"(a) Disposal of wastes into underground horizons shall only be accepted as an abatement of pollution when the applicant can show by the log of the strata penetrated and by the stratigraphic structure of the region that is improbable that the disposal would be prejudicial to the public interest. Acceptances shall be conditional and shall not relieve the applicant of responsibility for any pollution of the waters of this Commonwealth which may occur.

"(b) If any pollution occurs the disposal operations shall be stopped immediately."

The Regulations deal with the "disposal of wastes" and we, today, have decided that water of drinking quality does not properly fall within that category.

It is further argued that the concept of nuisance is incorporated into The Clean Streams Law, *supra*, which defines pollution as "...contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful..." (35 P. S. §691.1)[4] The problem with this argument is similar to that raised regarding the Regulations. There is no "contamination" where, as here, the water to be discharged is of such high quality. Therefore, the quoted paragraph has no relevance to the problem at hand.

We are in agreement with DER that our decision reached in *Concerned Citizens for Orderly Progress v. Commonwealth of Pennsylvania, Department of Environmental Resources and Emerald Enterprises, Limited, Intervenor*,[5] is directly in point to the extent that the proposed 60,000 gallon daily discharge, contains pollution from the parking area of appellant when it leaves the premises owned by Kraft Foods. It is for this reason that we are remanding this case, as we did there, for further action. It is the *potential* for pollution which requires this decision.[6]

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4. The following sections of The Clean Streams Law are also cited to support the proposition: 35 P. S. §691.3, 35 P. S. §691.401, 35 P. S. §691.402, §691.307.

5. EHB Docket No. 75-161, issued February 11, 1976. See also *Bader Brothers, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-019-W, issued February 27, 1976, where we held that the quantity of water may be a sufficient basis for denying a permit.

6. We also agree with DER that it does not carry the responsibility of determining the exact quantity of the pollutants, as appellant continues to carry the burden of showing its entitlement to a permit.

DER has raised a number of other questions[7] only one of which we believe now requires comment. Section 501 of The Clean Streams Law authorizes DER to issue orders to protect a public water supply.[8] It is immediately apparent from a reading of this section that the procedure therein outlined is to be followed by DER. Suffice it to say, that there has been no showing that it was followed in this case.

CONCLUSIONS OF LAW

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

2. A permit for the discharge of non-contact cooling water may not properly be denied by DER, under The Clean Streams Law, *supra*, where the proposed discharge is of drinking water standards when it leaves the property of the discharging party.

3. Where there is pollution to discharged water, coming from a parking area of appellant, DER may properly deny a permit for the discharge under The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1, *et seq.*, pending the receipt of additional information and safeguards concerning the same.

4. The responsibility to prevent further pollution of the waters of the Commonwealth should be placed upon those who are causing it.

---

7. Although appellant has an NPDES permit from the federal government, there is no serious dispute on the question of its need for the State permit for which it applied. We are also of the opinion that appellant does not rely upon the contract which was apparently breached by Upper Macungie Township when proper drainage directly to Iron Run was not provided for Kraft.

8. Section 691.501 provides:

> "In addition to the powers and authority hereinbefore granted, power and authority is hereby conferred upon the board, after due notice and public hearing, to make, adopt, promulgate, and enforce reasonable orders and regulations for the protection of any source of water, approved by the Commissioner of Health or the Department of Health, for present or future supply to the public, and prohibiting the pollution of any such source of water, so approved, rendering the same inimical or injurious to the public health or objectionable for public water supply purposes."

ORDER

AND NOW, this 7th day of May, 1976, after hearing and due consideration, the matter of *Kraft Foods Division, Kraftco Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, is hereby remanded to the Department of Environmental Resources for further action consistent with this adjudication.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: May 7, 1976

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

CHARLES FRIDAY

Docket No. 75-126-C

Surety Bond Forfeiture

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, May 14, 1976

This matter is before the Board on the appeal of Charles Friday of R. D. 1, Lemont Furnace, Pennsylvania, from the action of the Pennsylvania Department of Environmental Resources (hereinafter DER) in ordering the forfeiture of the Surety Bond No. 94-398181 in the amount of $5,000.00 executed on June 26, 1973. The surety on the bond was the Maryland Casualty Company. The stated reason for the forfeiture was that appellant failed to complete a reclamation project on the lands of Jack Taggart in North Union Township, Fayette County, Pennsylvania. Appellant received notice of the forfeiture of the aforesaid bond on April 22, 1975. Thereafter, on May 22, 1975, appellant mailed a notice of appeal to this Board. The said notice of appeal was received and docketed by the Secretary of the Board on May 23, 1975.

On March 12, 1976, DER filed a motion to quash alleging that appellant had filed an untimely notice of appeal. It is the disposition of this motion which is the subject matter of this adjudication.

FINDINGS OF FACT

1. Appellant is Charles Friday of R. D. 1, Lemont Furnace, Pennsylvania.

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

3. On April 18, 1975, DER, by W. E. Guckert, Director of DER's Bureau of Surface Mine Reclamation, wrote appellant to inform him that DER was forfeiting bond No. 94-398181 in the amount of $5,000.00 executed June 25, 1973, with Maryland Casualty Company as surety, stating as reason therefor that appellant failed to complete a reclamation project on the lands of Jack Taggart, North Union Township, Fayette County, Pennsylvania. Appellant received this notice on April 22, 1975.

4. On May 22, 1975, appellant mailed his notice of appeal to the Board, which received and docketed said notice on May 23, 1975. May 23, 1975, is 31 calendar days subsequent to April 22, 1975. Neither May 22 nor May 23, 1975, were officially declared holidays in the Commonwealth of Pennsylvania nor fell on a Saturday or Sunday.

DISCUSSION

This appeal was filed with the Board one day after the appeal period set forth in §21.2I(a) of the Rules of Practice and Procedure before the Board. This rule provides:

> "In cases where Appeals are authorized by statute or regulation of the Department, such Appeal shall be in writing and shall be filed with the board thirty (30) days from the date of receipt of written notice of an action of the Department or local agency, unless a different time is provided by statute."

In *Borough of Grove City v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 74-267-C (issued April 10, 1975), we held that failure to file an appeal with this Board within the time specified in the aforementioned section of the rules deprives us of jurisdiction to hear the merits of the appeal.

Appellant claims, *inter alia*, that since the appeal period is set forth in a regulation of the Environmental Quality Board, and not in a statute, the 30 day appeal period set forth in the regulations may be waived. We are of the opinion that this contention is contrary to Pennsylvania Law. *Herdelin v. Greenburg*, Pa. Commonwealth Ct. , 328 A.2d 562(1974). In *Herdelin*, the Court said:

> "Authorized regulations of an administrative agency have the force and effect of law and bind the agency equally with others *Good v. Wohlgemuth, Secretary of Welfare*, Pa. Cmwlth., 327 A.2d 397(1974). The Board's ten day rule is plainly a definition of the reasonable appeal period provided by the Code. It is not a requirement which the Board can waive at its discretion. . . ." 328 A.2d at 554-555.

Clearly, §21.21(a) of the Board's rules are authorized by §1921-A(e) of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq*. Thus, the holding of *Herdelin* falls squarely within the above cited language of Commonwealth Court.

Nor has appellant cited any valid grounds for granting an appeal, *nunc pro tunc*. As we said in *Joseph Rostosky v. Department of Environmental Resources*, EHB Docket No. 75-257-C(issued January 9, 1976):

> "The prevailing law regarding the timeliness of an appeal and the requirements of direct compliance with procedures to perfect an appeal is set forth in the *Delmont Borough Annexation Case*, 2 Pa. Commonwealth Ct. 496, 276 A.2d 549(1971). In light of this provision of the rules and the clear, unambiguous language of *Delmont Borough Annexation Case, supra*, it is clear that these appeals must be quashed."

Appellant's contention with regard to estoppel and laches are equally without merit. An untimely appeal deprives this Board of jurisdiction over the subject matter of the appeal. It is a well established principle of Pennsylvania law that jurisdiction over the subject matter may not be waived and may be raised at any time during the proceeding. 10 P. L. E., COURTS, §22, wherein it is stated:

> "Jurisdiction of a court over the subject matter or cause of action cannot be conferred or supplied by waiver, as by acquiescence in any litigation, or be based on laches or on the estoppel of a party to deny that it exists.
>
> "It is a well-settled principle that the question of subject-matter jurisdiction is always open. Thus, lack of jurisdiction over the subject matter may be raised at any stage of the proceedings, even when only collaterally involved, and such want of jurisdiction may be taken advantage of on appeal though not urged below. Such jurisdictional questions, however, should be determined as early as possible in a litigation." (Footnotes omitted) 10 P. L. E. at 27-28.

CONCLUSIONS OF LAW

1. Authorized regulations of an administrative agency have the force and effect of law.

2. Where regulations of administrative agencies are authorized by law, they bind the agencies as well as others.

3. Section 21.21(a) of the Rules and Regulations applicable to Practice and Procedure before the Board are authorized by §1921-A(e) of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq*.

4. Lack of compliance with §21.21(a) of the Rules of Practice and Procedure before the Board deprives the Board of jurisdiction over the subject matter of the appeal.

5. Lack of compliance with the aforesaid rule pertains to the jurisdiction over the subject matter of this appeal and, hence, cannot be waived. Moreover, the objection to the jurisdiction of the Board in such circumstances may be raised at any time during the proceedings.

O R D E R

AND NOW, this 14th day of May, 1976, the appeal of Charles Friday from the action of DER from forfeiting Surety Bond No. 94-398181, relating to Special Reclamation Project No. 58 on the land of Jack Taggart in North Union Township, Fayette County, Pennsylvania, is hereby quashed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: May 14, 1976

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

BOARD OF COMMISSIONERS OF THE TOWNSHIP OF UPPER DARBY

Docket No. 75-015-D

Solid Waste Management Permit

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

# ADJUDICATION

By: Joanne R. Denworth, Member, Issued May 28, 1976.

This is an appeal from the Department of Environmental Resources' (Department) denial of approval of the Solid Waste Management Plan submitted by the Township of Upper Darby pursuant to the requirements of the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001 *et seq.* The basis for the Department's denial was that the Township's Board of Commissioners adopted a resolution approving a solid waste management plan that was different from the solid waste management plans adopted by the other municipalities in Delaware County. The Department earlier moved to dismiss the appeal as a matter of law on the ground that the Department could not approve a plan that a municipality could not implement alone and that was inconsistent with the general plan for Delaware County. Although the Examiner agreed that if the Department's assertions were correct, it could not have exercised its discretion to approve an inconsistent solid waste management plan, the Board denied the Department's motion to dismiss because of the Township's assertion that a different solid waste management plan was not in fact "adopted" by the County Commissioners of Delaware County and "approved" by a majority Delaware County municipalities. A hearing was held to determine the circumstance surrounding the adoption of the Delaware County plan.

FINDINGS OF FACT

1. On March 16, 1971, the Board of Commissioners of the Township of Upper Darby adopted a Resolution entitled *Agreeing Solid Waste Management Should Be Accomplished at the County Level On A County-Wide Basis*, which Resolution provided:

> "NOW, THEREFORE, BE IT RESOLVED, That the Commissioners of the Township of Upper Darby hereby agree that the planning requirements of Act 241 should be accomplished at the County level on a County-wide basis and that the Commissioners of the Township of Upper Darby will cooperate in the preparation of such plan."

2. Delaware County through its Disposal Department is responsible for the receipt, processing and disposal of all incinerable solid waste generated in the County and operates three incinerator sites located in Chester Township, Darby Township and Marple Township, with the municipalities individually providing refuse collection services.

3. H. Gilroy Damon Associates, Inc., were retained as consultants by Delaware County to work through its technical consultant, the Delaware County Planning Commission, in the preparation of a solid waste management system for the County and its forty-nine (49) constituent municipalities.

4. The Consultants developed a preliminary report entitled the Delaware County Solid Waste Management Plan dated July 5, 1972, and a final report entitled Delaware County Solid Waste Management Study/Plan dated February, 1973, describing in the Study at page S-2 the three (3) best solid waste management systems available for the County:

> "...In *System No.* 1, Incinerators Nos. 2 and 3 would be phased out of operation. All waste in excess of the capacity of Incinerator No. 1 would be baled and landfilled. *System No. 2* called for continuation and upgrading of all the incinerators but without increasing incineration capacity. Waste in excess of the incinerator capacity could be disposed of in new County landfills. *System No. 3* called for the upgrading of all the existing incinerators and the addition of a new steam producing incinerator at an approved site...
>
> "...*System No. 3*, the all incineration system, required the least amount of additional landfill space." (emphasis added)

5. Prior to submitting its final report the consulting firm conducted a preference poll of the Delaware County municipalities in order to determine which of the three alternatives would be preferred. Forty-eight of the forty-nine municipalities responded to the preference questionaires. The breakdown of the first choices was as follows:

| "Municipalities | | Population | | System |
|---|---|---|---|---|
| No. of | Percent | No. of | Percent | Chosen |
| 22 | 46% | 237,556 | 39.6% | 3 |
| 12 | 25% | 139,408 | 23.2% | 2 |
| 11 | 23% | 202,135 | 33.7% | 1 |
| 3 | 6% | 20,781 | 3.5% | No Choice" |
| 48 | 100% | 599,880 | 100.0% | |

6. The Consultants recommended System No. 3 as the Official Plan, a recommendation concurred in by the County Staff.

7. Only System No. 3 was developed in detail in the Study.

8. By letter dated February 16, 1973, directed to the Executive Director of the Delaware County Planning Commission, the Department approved System No. 3 as set forth in the Delaware County Solid Waste Management Study/Plan.

9. At the regular meeting of the County Commissioners held on August 8, 1973, the County Commissioners accepted the Study.

10. Pursuant to its contract with the Delaware County Commissioners, the Department made a $59,000 grant to reimburse the County for one-half of its expense in preparation of the Study.

11. Subsequently, on receipt of letters from the Department informing them of their obligations to adopt solid waste management plans, thirty-eight (38) of the forty-five (45) municipalities required by the Pennsylvania Solid Waste Management Act to submit Official Plans have by Resolution adopted System No. 3 as their Official Plan. Those thirty-eight (38) municipalities comprise approximately seventy (70) percent of the County population.

12. By Resolution of June 18, 1974, the appellant adopted System No. 1 as its Official Plan, being the only municipality in Delaware County to do so.

13. System No. 1 would provide for the closing of Incinerator No. 2 and Incinerator No. 3, with the continuing operation of Incinerator No. 1 for the incineration of some wastes. All the remaining waste would be baled at a County baling plant built for that purpose, with the disposal of the baled waste at County landfills operated for that purpose.

14. The construction of a baling plant and the acquisition of additional landfill sites as disposal areas for the baled waste are set forth in the Study as County tasks that cannot be accomplished by the appellant alone.

15. Under the provisions of Alternate No. 1, the operation of County Incinerator No. 1, the construction of a baling plant and the acquisition of additional landfill disposal sites are to be undertaken by the County, yet the appellant has not contracted with the County to undertake such activities, nor has the County at anytime agreed to do so.

16. The Township submitted alternative Number 1 to the Department as its official solid waste management plan, which submission was disapproved by the Department in a letter dated December 13, 1974.

## DISCUSSION

Appellant has not succeeded in establishing its very difficult proposition--viz., that the Department abused its discretion by disapproving the solid waste management plan adopted by the Board of Commissioners of the Township of Upper Darby, even though that plan was inconsistent with the solid waste management plan developed by the Delaware County Planning Commission for the County as a whole and subsequently adopted by thirty-eight (38) of the forty-nine (49) Delaware County municipalities.

Section 5 of the Solid Waste Management Act provides in part:

> "(a) Each municipality with a population density of three hundred or more inhabitants per square mile shall submit to the department an officially adopted plan for a solid waste management system or systems serving areas within its jurisdiction, within two years of the effective date of this section, and shall, from time to time, submit such revisions of said plan as it deems necessary or as the department may require.
>
> "(b) When more than one municipality has authority over an existing or proposed solid waste management system or systems, or any part thereof, the required plan or any revision thereof may be submitted jointly by the municipalities concerned or by an authority or county or by one or more of the municipalities with the concurrence of the others.
>
> "(c) Every plan, and any revision thereof, shall delineate areas where solid waste management systems are in existence and areas where the solid waste management systems are planned to be available within a ten-year period.
>
> "(d) Every plan shall:
>
> "(1) Provide for the orderly extension of solid waste management systems in a manner consistent with the needs and plans of the whole area, and in a manner which will not create a pollution of the waters or air of the Commonwealth, nor constitute a public nuisance and shall otherwise provide for the safe and sanitary disposal of solid waste;" 35 P. S. §6005

We think that the thrust of these provisions is that where a municipality has chosen to develop a solid waste management plan on a coordinated regional basis, as is the case here, §6005 (d) (1) means that the plan adopted by the municipality must be consistent with the "need and plans" of the whole regional area and not just the "whole area" of the municipality itself. In this case Upper Darby did adopt a resolution agreeing to planning for solid waste management at a regional level. It does not like the results of the planning that was done by the Delaware County Planning Commission and its consulting firm and coordinated with the Department. If appellant has a remedy, it is through the political process in Delaware County. Nothing that appellant claims would have justified the Department, which has authority to approve or disapprove solid waste management plans under §6005 (f) of the Act, in approving a plan that is inconsistent with the plan arrived at through the regional planning process.

Appellant argues that System number 3 was never in fact formally adopted by the Delaware County Commissioners and therefore is not the regional plan for Delaware County. It is true that the consultant's report was "accepted" by the County Commissioners rather than "adopted" by them. However, under the Solid Waste Management Act it is the municipalities that have an obligation to "adopt" solid waste management plans, not the County. The function of a county agency under the Act, as well as in fact, is to coordinate planning for a region on a coherent basis. This function was delegated to and performed by the Delaware County Planning Commission. Resolutions approving the solid waste management system recommended by the Planning Commission and the consulting firm and approved by the Department were adopted by thirty-eight (38) of the Delaware County municipalities and presented in evidence at the hearing in this matter.

Appellant also suggests that these municipalities were somehow misled into adopting System number 3 by the Department's representations that the plan had been adopted by Delaware County. We do not find any merit in appellant's assertion. The Department's letter to appellant stated that the plan had been "accepted" by the Delaware County Commissioners. Furthermore, appellant did not produce any evidence that other municipalities considered themselves misled or that they would have acted differently had they not received letters from the Department asking them to adopt System 3 as their plan. It is true that System number 3 was preferred by only twenty-two (22) municipalities, or 46%, in the preference poll, and that later, after the receipt of the Department's letters, thirty-eight (38) of the municipalities adopted System 3 as their solid waste management plan. However, this fact, without more, is as consistent with a conclusion that the municipalities elected to go along with the most preferred solution, as it is with any suggestion that they were coerced into changing their preference.

Conceivably, a municipality might be entitled to adopt an inconsistent solid waste management plan of its own where it demonstrates the ability to carry out a satisfactory plan alone. That is not the situation here. Section 10 of the Solid Waste Management Act,35 P. S. §6010 (a), provides that every municipality shall be responsible "for implementating their approved plan as it relates to the storage, collection, transportation, and disposal of their solid wastes". The Department contends, and the Township does not deny, that under alternative number 1 the construction of a baling plant and the acquisition of landfill sites would have to be accomplished by the County. Consequently, as the Department points out, the Township would be incapable of implementing the solid waste management plan that it has adopted. In

view of that fact alone, the Department could hardly do other than disapprove the appellant's submission of an inconsistent solid waste management plan.

## CONCLUSIONS OF LAW

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

2. The Department did not abuse its discretion under §5 of the Solid Waste Management Act when it disapproved appellant's submission of a solid waste management plan that was inconsistent with the plan recommended and developed by the Delaware County Planning Commission and its consulting firm and adopted by thirty-eight (38) of the forty-nine (49) municipalities of Delaware County.

3. Where a municipality has by resolution agreed to the development of a solid waste management plan on a regional basis, §5 (d) (1) of the Solid Waste Management Act makes it imperative that a municipality adopt a plan that is consistent with the needs and plans of the whole region.

4. The Department could not approve a solid waste management plan knowing that the municpality would be unable to implement the plan in accordance with the requirements of §10 of the Solid Waste Management Act.

## O R D E R

AND NOW, this 28th day of May, 1976, the appeal of the Board of Commissioners of the Township of Upper Darby from the action of the Department of Environmental Resources denying approval of their submitted solid waste management plan is dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: May 28, 1976

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

In the Matter of:

JOHN T. RYAN

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 75-183-D

Solid Waste Management Closure Order

# ADJUDICATION

By: Joanne R. Denworth, Member, Issued, May 28, 1976.

This is an appeal from an order of the Department of Environmental Resources (Department) directing the appellant to take certain procedures to close a landfill that he operated from 1964 to January, 1975. Appellant claims that as he was only the leasee and not the owner of the property on which the landfill is located and is no longer in control of the premises, the Department has no authority to order him to correct conditions existing at the landfill site. He also asserts that he is financially unable to comply with the order. Appellant did not appear at the scheduled hearing on this matter. His testimony was later taken by deposition and submitted to the Board.

## FINDINGS OF FACT

1. Appellant is John T. Ryan of R. D. #3, Uniontown, Pennsylvania 15401.

2. Appellee is the Department of Environmental Resources, Commonwealth of Pennsylvania, which is authorized to administer the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001 *et seq.*

3. From sometime in 1964 until January, 1975, appellant leased property from Frank M. Miller and Emma M. Miller, owners of a tract of land situated in South Union Township, Westmoreland County, for the operation of a sanitary landfill.

4. There were several leases between appellant and the Millers, the first beginning in 1964 and the second beginning in 1969. Under the latter lease Ryan paid Miller $150.00 per month as rent for the landfill premises. Ryan covenented with Miller to conduct his operation "in compliance with the laws of the Commonwealth of Pennsylvania, and in compliance with all valid rules and orders of any legally con-

stituted commission, board or any like bureau of said Commonwealth or the United States of America now and hereinafter in force or effect."

5. Appellant never obtained a permit from the Department for the operation of his landfill.

6. At some point in January, 1975, because of a dispute with Mr. Miller over the amount of rental, the appellant stopped operating the landfill without complying with the closure procedures outlined in Chapter 75 of the Department's Rules and Regulations.

7. In January, 1975, prior to appellant's taking any action to close the landfill, Mr. Miller physically prevented appellant from coming on the land and continuing to dump trash at the site.

8. On July 16, 1975, the Department issued an order to appellant requiring him, *inter alia*, to implement a rodent and vector control program at the site, to reshape the existing uncovered slope, to compact, cover, and revegetate the landfill, and to construct and manage a surface water diversion system.

9. From 1971 until January of 1976, inspections of the landfill site were conducted by personnel from the Department of Environmental Resources on at least thirty separate occasions.

10. From October 20, 1971, through December 12, 1974, Charles Duritsa, an Environmental Protection Specialist for the Department's Division of Solid Waste Management, conducted at least twenty inspections at the appellant's landfill site while appellant operated that landfill. On each of these inspections Mr. Duritsa observed violations of many of the Department's Rules and Regulations governing the operation of landfills. Specifically, Mr. Duritsa observed on almost every occasion serious violations of the following standards set forth in the Regulations:

| | "Activity | Regulation |
|---|---|---|
| A. | Adequate Equipment | 75.91 |
| B. | Proper Working Face | 75.96 |
| C. | Control of Blowing Litter | 75.97 |
| D. | Spreading and Compacting of Solid Waste | 75.111 |
| E. | Thickness of Cells | 75.112 |
| F. | Daily Cover | 75.113 |
| G. | Intermediate Cover | 75.114 |
| H. | Suitable Standby Equipment | 75.92 |
| I. | Bulky Waste | 75.117 |
| J. | Drainage of Surface Water | 75.85 |
| K. | Prevention of Groundwater Pollution | 75.84" |

Photographs taken by Mr. Duritsa during his inspections graphically demonstrated the existence of many of these violations during the operation of the landfill.

11. On every occasion in which Mr. Duritsa inspected the site, he observed leachate--a liquid waste generated from the contact of either groundwater or pre-

cipitation with refuse containing aldehydes, soluble material generated from the organic wastes--flowing from the landfill.

12. Vectors--animals and insects that transmit infectious organisms--are found where a landfill has not been properly covered. Vectors, in the nature of a severe fly problem, were present at the appellant's site, particularly during one summer.

13. After appellant stopped operating the landfill, Mark Frederick, an Environmental Protection Specialist with the Department's Division of Solid Waste Management, conducted inspections at the site on at least sixteen separate occasions.

14. Mr. Frederick's initial inspection on April 3, 1975, revealed that Mr. Ryan had terminated the operations without covering an area approximately 500 feet by 300 feet, without compacting the outslope toe, and without utilizing any closure procedures. Mr. Frederick observed that the condition of the landfill resembled an open dump.

15. Mr. Frederick conducted subsequent inspections on April 18, 1975, June 2, 1975, July 29, 1975, August 5, 1975, August 11, 1975 and August 22, 1975, and he did not observe any improvement in the condition of the site until the inspection conducted on August 22, 1975.

16. Subsequent to August 22, 1975, Mr. Frederick conducted inspections on nine separate occasions, the most recent of which occurred on January 16, 1976.

17. On January 16, 1976, Mr. Frederick conducted an inspection at the site which revealed that the landfill was not properly covered; that the outslopes were not covered; that the attempts at revegation were inadequate; and that good agronomic practices, such as fertilization and straw mulch, were not evident at the site.

18. Photographs taken by Mr. Frederick during his inspections of the landfill site illustrated the violations he observed, particularly the lack of adequate cover, and the presence of leachate at the site.

19. Samples of the leachate were taken by Mr. Frederick on at least five occasions: June 2, 1975, August 26, 1975, September 11, 1975, December 9, 1975, and January 6, 1976, with Mr. Greg Shamitko of the Department's Bureau of Water Quality Management, accompanying Mr. Frederick on December 9, 1975.

20. On December 9, 1975, Mr. Gregory Shamitko of the Department's Bureau of Water Quality Management, took six water samples of various leachate discharges from the landfill, including a water sample of Jennings Run, a nearby stream into which some of the leachate discharges.

21. The appellant was never issued an industrial waste permit for the discharge of industrial wastes, to wit, leachate, from his landfill into waters of the Commonwealth.

22. Lynn Setright, a geologist for the Department, testified that she observed leachate emanating from the site and draining into a swamp.. She further testified that some leachate disappeared into the ground, and based upon her knowledge of the soils and perched water table in the area, the leachate was entering the groundwater.

23. The appellant introduced no evidence to contradict the evidence introduced by the Department with regard to the violations of the Solid Waste Management Act and Chapter 75 of the Department's Rules and Regulations.

24. On November 18, 1975, the Commonwealth entered into a consent order with the landowner, Mr. Miller, in which Mr. Miller agreed to permit appellant to enter the property for two years to comply with the Solid Waste Management Act, *supra*, The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.*, and the Rules and Regulations promulgated thereunder.

25. By affidavit appellant asserts that he estimates the cost of compliance with DER's order at $5,000, that he has an annual income of $10,000 and outstanding debts of $20,000.

## DISCUSSION

Appellant in this case does not deny that he made the mess that is the subject of the Department's order of July 19, 1975. His argument is that since he is no longer the tenant and operator of the landfill and since his funds are inadequate, he cannot or should not be ordered to clean it up. We cannot agree.

The Solid Waste Management Act, Act of January 12, 1970, P. L. (1969) 456, 35 P. S. §6001 *et seq.* gave the Department of Health[1] a number of powers including the powers to do the following:

> "(3) Adopt such rules, regulations, standards and procedures as shall be necessary to conserve the air, water and land resources of the Commonwealth, protect the public health, prevent public nuisances, and enable it to carry out the purposes and provisions of this act. (footnote omitted)
>
> "(9) Issue such permits and orders and conduct such inspections as may be necessary to implement the provisions of this act and the rules, regulations and standards adopted pursuant to the act."
>
> 35 P. S. §6006 (3) and (9)

Section 9 of the Act makes it unlawful for any person to:

> "(1) Dump or deposit, or permit the dumping or depositing of any solid wastes onto the surface of the ground or into the waters of the Commonwealth without having obtained a permit as required by section 7 . . .

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1. The powers and duties with regard to the enforcement of this Act were conferred upon the Department of Environmental Resources (Department) when the legislature amended the Administrative Code, the Act of April 9, 1929, P. L. 177 by the Act of December 3, 1970, P. L. 834, No. 275, 71 P. S. §510-1 *et seq.*

"(2)Construct, alter or operate a solid waste processing or disposal facility or area of a solid waste management system without a permit or other approval from the department or in violation of the rules, regulations, standards, or orders of the department.

. . .

"(4)Store, collect, transport, process or dispose of solid waste contrary to the rules, regulations, standards or orders of the department or in such a manner as to create a public nuisance."

In Section 6006 (3), *supra*, the legislature recognized that improper solid waste disposal may adversely affect a wide range of environmental resources. In response to this provision, the Environmental Quality Board promulgated Chapter 75 of the Department's regulations, 25 Pa. Code §75.1 *et seq.*, to specify standards for the management of solid waste. Specific sections are intended to protect various environmental interests: Sections 75.98 and 75.99 address potential air pollution problems (burning, dust control); Sections 75.84, 75.85, 75.116 and 75.118 address potential water pollution problems (prevention of groundwater pollution, drainage of surface water, sewage solids and placement in groundwater); Sections 75.41, 75.46, 75.49 and 75.50 address the area of public health hazards (general provisions, fire protection, salvage, and vector control); Sections 75.83, 75.111, 75.112, 75.113, 75.114, 75.115, 75.117 and 75.119 all address concerns related to land protection (material availability, spreading and compacting of solid waste, thickness of cells, daily cover, intermediate cover, final cover, bulky waste, and final grading and seeding). Section 75.121[2], requires continued maintenance of the landfill for one (1) year after operations have ceased.

Appellant has operated a landfill in violation of §9 of the Solid Waste Management Act, *supra*, and most of the Regulations cited above ever since those provisions became effective. However, appellant argues that since the Solid Waste Management Act does not expressly state that the Department has power to order one who operated a landfill as a tenant and is no longer in control of the premises to enter upon the land to take action so as to comply with the Act and the Regulations, such power does not exist. Appellant also argues that the Department's only power under the Act is in the nature of an *in rem* power to issue orders against the person who is in control of the premises at the time of the order. Appellant points to the absence of a provision in the Solid Waste Management Act comparable to §316 of The

---

2. §75.121. Continued maintenance after operations have ceased.

"(a) Provisions shall be made to maintain the site for at least one year after completion of operation to prevent health hazards or nuisances from occurring. Maintenance include, but is not limited to, repair of cracks of fissures, repair of repair of areas where settling occurs and control of problems which result from leachate or odors.

"(b) The Department may require provisions for monitoring gases which may be generated from landfill operations."

Clean Streams Law, 35 P. S. §691.316, which provides that the Department may order a landowner or occupier of property to correct a condition causing pollution or a danger of pollution or allow a mine operator or other person or agency access to the land to take such action.

We think that 35 P. S. §6006 (9) necessarily gives the Department the power to order one who has operated a landfill to take proper procedures to close the landfill. See, by analogy, *Monongahela and Ohio Dredging Company v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket Number 72-388-B, issued March 25, 1974, affirmed _____ Pa. Commonwealth ____,346 A.2d 879 (1975) in which this Board and the Commonwealth Court construed the similar "broad language" of the Water Obstructions Act, 32 P. S. 681 *et seq.*, as giving the Department power to issue a cease and desist order. We suppose that the Department could proceed against the landowner as appellant suggests, since the landowner did, by way of a lease, permit the dumping or depositing of solid waste upon his land without a permit; however, it is entirely proper and within the power of the Department to proceed against the person who as operator of the landfill was responsible for the creation of the unsatisfactory conditions existing at the site. The fact that there is no provision such as Section 316 of The Clean Streams Law in the Solid Waste Management Act does not in any way suggest to us that the Department may not proceed against an ex-operator of a landfill. That provision is directed at landowners or occupiers and could, in fact, serve as a basis for any procedure against the landowner here to correct,or allow Mr. Ryan to correct,the conditions at the landfill that result in the discharge of leachate into the waters of the Commonwealth. See *Charles Harmuth v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 72-333, issued February 5, 1973. The consent order between Mr. Miller and the Department accomplishes the result intended by Section 316 of The Clean Streams Law. We recognize that there could be a problem with enforcement of the order issued to Mr. Ryan if the Department were ordering him to trespass upon Mr. Miller's land. That was, in fact, the situation when the Department issued the order from which Mr. Ryan appealed. The Department has, however, obtained the consent of the landowner to Mr. Ryan's entrance upon the land to correct the conditions at the landfill site. In view of that consent order Mr. Ryan cannot be heard to object to the Department's order that rightfully holds him responsible for those conditions.

We find no merit either in appellant's argument that it is financially impossible to comply with the Department's order,and therefore, the Board should in its

discretion alter the order or direct the Department to proceed against the landowner. This Board as well as the courts of Pennsylvania have held in a number of instances that economic hardship is not a basis for invalidating an otherwise proper action or order under the environmental laws of the Commonwealth. *Ramey Borough v. Commonwealth of Pennsylvania, Department of Environmental Resources*, ____ Pa._____ , 351 A.2d 613 (1976); *Rochez Brothers, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, _____ Pa. Commonwealth _____, 334 A.2d 790 (1975); *In the Matter of the Borough of Zelienople*, EHB Docket No. 72-199; issued February 5, 1973; *Ferralli & Ferralli v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 73-419-W, issued December 26, 1974. Particularly must this be so where it was the appellant's own action that created the environmental problem that he now seeks to ignore on the grounds that he has no money to correct the situation. Appellant has asserted, but not substaniated that the cost of compliance with DER's order would be $5,000. There is no doubt that there will be expense involved in obtaining the materials necessary to properly close the landfill. Appellant must be held responsible for those costs until the landfill is properly closed. If the Department is unable to enforce a judgment against appellant, at the very least he should be compelled to expend his own labor to correct the problems he created.

Since we believe the Solid Waste Management Act gives the Department the power to issue the order appealed from here, it is not necessary to discuss at length the Department's contention that it has the power to issue the order under §1917-A of the Administrative Code, 71 P. S. §510-17, which gives the Department power to issue orders to remove and abate nuisances. We think that provision would support the Department's order insofar as it was directed to water pollution resulting from the discharge of leachate, since the discharge of any unpermitted polluting substance into the waters of the Commonwealth is declared to be a nuisance under The Clean Streams Law, *supra*, 35 P. S. §§691.401, 691.307, and leachate is clearly a polluting substance. See, *Charles Harmuth v. Commonwealth of Pennsylvania, Department of Environmental Resources, supra*. The Solid Waste Management Act, however, does not contain a similar provision stating that the acts prohibited by the Act are declared by law to be public nuisances. Therefore, to establish the existence of a public nuisance it would presumably be necessary to establish the elements of public nuisance at common law. There was no evidence presented in this case to establish that the conditions at the landfill, other than the discharge of leachate, had any public effect. See 28 P. L. E., Nuisance §63. We think however that the discharge

of leachate, which inevitably drains to the waters of the Commonwealth and may pollute the groundwater, may be sufficient to support the Department's order on the ground of public nuisance. See *Commonwealth v. Barnes and Tucker Company*, 455 Pa. 392, 319 A.2d 871, 880-883 (1974); *Commonwealth v. Ebersole*, 59 Lanc. L. Rev. 363 (Pa. C. P. 1965).

## CONCLUSIONS OF LAW

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

2. Section 6 (9) of the Solid Waste Management Act, which gives the Department of Environmental Resources power to issue such orders as are necessary to implement the provisions of the Act, authorizes the Department to order one who has operated a landfill in violation of the law and left it in an unsatisfactory condition to take proper procedures to close that landfill even though he leased the premises and is no longer the tenant of the landfill site.

3. Although the Department could proceed against the owner of the landfill site, it is entirely proper and within their power, especially where they have obtained the consent of the landowner to the operator's entrance upon the land, to proceed against the operator who was responsible for creating the illegal conditions.

4. One who operates a landfill site must be held responsible for the conditions he creates by that operation and cannot be excused from compliance with a valid order of the Department on the ground of financial hardship.

## O R D E R

AND NOW, this 28th day of May, 1976, it is hereby ordered that the appeal of John T. Ryan from the order of the Department of Environmental Resources directing the appellant to take certain procedures to properly close the landfill that he operated is dismissed and the Department's order is sustained.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: May 28, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

TOWNSHIP OF PENN, et al

Docket No. 75-317-C

Issuance of Strip Mine Permits

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and E & J CONTRACTING COMPANY

ADJUDICATION

By Joseph L. Cohen, Member, May 28, 1976

This matter is before the Board on the appeals of the Township of Penn and Mr. and Mrs. George Pekich, Jr., from the action of DER in granting E & J Contracting Company permission to operate a strip mine in Penn Township, Westmoreland County. The Township of Penn and Mr. and Mrs. George Pekich, Jr., filed separate appeals, but on February 9, 1976, the Board ordered the appeals consolidated under the caption Township of Penn, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources, EHB Docket No. 75-317-C.

A hearing in this matter was held on April 1, 1976. On the basis of the testimony produced at that hearing, we enter the following:

FINDINGS OF FACT

1. Appellants in this matter are the Township of Penn, Westmoreland County, and George Pekich, Jr. and Judith Ann Pekich, his wife, 16 Berlin Road, Jeannette, Westmoreland County, Pennsylvania.

2. Appellee is DER, the agency of the Commonwealth of Pennsylvania charged with the administration of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.*, and the Surface Mining Reclamation and Conservation Act, Act of May 31, 1945, P. L. 1198, *as amended*, 52 P. S. §1396.1 *et seq.*

3. Intervenor is E & J Contracting Company, lessee of a tract of land owned by Patrick J. DiCesare and Ralph DiCesare, situate in the Township of Penn, Westmoreland County, Pennsylvania.

4. Intervenor applied for and was issued permits by DER under The Clean Streams Law, *supra*, and the Surface Mining Reclamation and Conservation Act, *supra*. Both of these permits were issued on December 8, 1975. The permit issued pursuant to The Clean Streams Law bears the number 3475SM25, and the permit issued under the Surface Mining Reclamation and Conservation Act bears the number 1202-3.

5. Intervenor's proposed mining operation is located to the immediate southeast of a residential development in the Township of Penn, known as "Harrison City". The tract of land proposed to be mined is approximately 20.3 acres in area.

6. Although the area to be strip mined is approximately 300 feet from the north and west boundaries of the Pekich property, it is more than 300 feet from the Pekich residence.

7. Although appellants list several reasons for their appeal, most of the hearing was concerned with the flooding problem in the area of East Harrison City. The flooding that occurs in the area of Harrison City and East Harrison City occurs periodically during the year and would continue to exist even if no strip mining were contemplated in the area under permits.

8. The United States, Department of the Interior Geological Survey Map of the Irwin Quadrangle in which the proposed mining activity will take place, identifies a stream called "Bushey Run" which is to the west of Harrison City and East Harrison City. There is also identified on the survey map two unnamed tributaries of Bushey Run both of which originate in the vicinity of the proposed stripping operation and form a confluent east of East Harrison City, then flowing westward through East Harrison City to Bushey Run.

9. Although the survey map designates one of these water courses as a stream, it is apparent from the testimony adduced at the hearing that it is at most a "wet weather stream". The water course which runs through the proposed mining operation and then westerly through East Harrison City to Bushey Run exists as a stream only after rainfall. This water course runs through the residential properties of several residents of East Harrison City.

10. The water course which runs through East Harrison City is intercepted at three different places by a piping system which is designed to receive waters from the water course. Although the piping system is designed to accomodate the water from the water course, and thus prevent flooding, during periods of heavy rain the pipes are insufficient to prevent flooding.

11. Because of the nature of the proposed strip mining operation (a box-cut method of operation will be utilized), there is no likelihood that the operation will cause increased flooding in the area of Harrison City and East Harrison City during periods of heavy rainfall. As a matter of fact, the method of operation and the requirements of DER with respect to diversion ditches will inhibit the usual run-off from the land that occurs presently when there is rain. Moreover, there is no likelihood that after the strip mining is completed and the land restored as required by DER, that there will be increased flows of water from the stripped site into the water courses traveling through East Harrison City.

DISCUSSION

Appellants in this case have not sustained their burden of proof. The major issue in this case is related to whether the proposed strip mining activity of intervenor would aggravate the flooding situation which occurs in East Harrison City in the Township of West Penn whenever there is substantial rain. We are impressed by the testimony of intervenor's expert, John B. Brunot, Jr., a registered professional engineer in the Commonwealth of Pennsylvania, who testified that in his opinion there would be no increased flooding potential either during or after the stripping operation proposed by intervenor. His testimony was buttressed by that of Edward Steele, geologist for DER. It is apparent from their testimony that the contemplated stripping operation would not increase the flooding hazard to the area, but on the contrary, might actually reduce it. First of all, the diversion ditches and the stripping pits dug during the operation would actually inhibit the run-off from the land during stripping. Mr. Brunot testified:

> "Q. Mr. Brunot, in your professional opinion, will this strip mining operation result in any additional water being put into the area known as Harrison Park?
>
> "A. On the contrary, while this mining is in progress, there should be less water go into the Harrison Park area.
>
> "Q. Why would that be?
>
> "A. Because the amount of water that is going to come out of the strip mine is going to be controlled by the size of the pump.
>
> "Q. Will you explain what you mean?
>
> "A. Well, say you have a six inch pump. All you can get out of a six inch pump is what that six inch pump will pump out, and if there is any potential for more to collect in the mine itself, why, it will serve as a reservoir.
>
> But you won't get any more water out then the pump will handle.

"Q. Will, in your professional opinion, as a result of the proposed strip mining operation as you have described and proposed to be conducted, will there by any additional force behind the water going down towards Harrison Park?

"A. On, no. No, there won't be any force behind the water. The water will be pumped out of the mine workings, over to the treatment ponds, and will flow out of the treatment ponds by gravity into a natural drainage course, and on into the Harrison Park area, down through it.

"Q. What will be the strip mining operation, what will be done to the area that has been strip mined?

"A. The area that has been strip mined will be leveled off and restored to approximately the original contour. Then it will be planted at appropriate times in either crops or pasture grass and legumes.

"Q. What is this area grown over with at the present time?

"A. Well, at the present time some of it is free of any growth at all, some of it has scrub timber on it, and that is about it.

That is, free of any growth, I mean outside of grasses.

"Q. In your opinion, will following the strip mining operation and the recontouring and the restoring that you have just described, this operation create a greater runoff of water into the Harrison Park area than is presently there?

"A. I don't think so, because, in the first place, why, you will have a soil that will be more or less disturbed, and the runoff will be slowed because you will have percolation into the soil by water, because the soil and the rock and the structure will have been broken up.

"Q. In other words, you will have more absorbtion by the land following the strip mining than you have at the present time?" (R. 168-170)

Mr. Steele testified that the existence of holding basins of the capacity set forth in the application and the existence of the pits would retain water which would then not be flowing into the stream. All in all, we are satisfied that the stripping operation would not create additional flooding hazard to the area in question.

Appellants, Mr. and Mrs. Pekich, in addition to their concern about flooding raise issues regarding excessive noise during stripping operations, the fencing of settling ponds to protect children who may play in the area, and the general environmental degradation that will occur with stripping activity. Understandably, people living in residential communities are not anxious to have strip mining activity in close proximity to their residences. However, where the granting of the permits in question complies with DER requirements under the Surface Mining Reclamation and Conservation Act, *supra*, and The Clean Streams Law, *supra*, we have no alternative other than to uphold the issuance of these permits. Particularly

is that the case where the major concern of appellants is without factual foundation.

With regard to the absence of barriers around the settling ponds, perhaps DER should consider requiring them where surface mining occurs near residential areas, but it is apparent that they do not presently require such barriers. While this Board would personally encourage intervenor to take appropriate measures to prevent children from playing in the area of the stripping activities and the ponds, we do not feel that we can compel the erection of such barriers in the absence of a legal requirement in either the laws administered by DER relative to strip mining or the rules and regulations of DER promulgated thereunder. Needless to say, we think that the reasonably prudent person would wish to be assured that children were not exposed to an attractive nuisance on his land.

## CONCLUSIONS OF LAW

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

2. DER may not refuse to grant a permit to operate a strip mine for environmentally aesthetic reasons alone, where the permits requisite to operate such a mine have been granted pursuant to an application which meets the requirements of The Clean Streams Law, *supra*, the Surface Mining Reclamation and Conservation Act, *supra*, and the Rules and Regulations promulgated pursuant thereto.

3. In an area which is prone to flooding, the Environmental Hearing Board will not set aside the grant of permits to operate a strip mine where it appears that such operation will not increase the level of flooding normally occurring during the rainy season.

4. The Environmental Hearing Board will not require barriers to be placed around settling ponds used in connection with the strip mining operation near a residential area where neither the statutory law under which DER operates nor the Rules and Regulations promulgated pursuant thereto require such barriers.

5. Where the credible expert testimony based on engineering and geological principles, tends to show that neither the strip mining operation in progress nor the completion of such operation in accordance with legal requirements will increase the danger of flooding, the Environmental Hearing Board will not revoke the permits in question.

O R D E R

AND NOW, this 28th day of May , 1976, the appeals of the Township of Penn, Westmoreland County, Pennsylvania, and Mr. and Mrs. George Pekich, Jr., from the actions of DER in issuing permits to operate a strip mine to E & J Contracting Company, permits No. 1202-3 and 3475SM25 are hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: May 28, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

MRS. MERLE KOHL :

Docket No. 75-273-C

Grant of Landfill Permit

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and TOWNSHIP OF DERRY, Intervenor

ADJUDICATION

By Joseph L. Cohen, Member, June 10, 1976

This matter is before the Board on the appeal of Mrs. Merle Kohl from the actions of the Department of Environmental Resources (hereinafter DER) of October 1, 1975, by which it issued to the Township of Derry, Dauphin County, an industrial waste permit and a revision of an existing solid waste permit, issued pursuant to The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.*, and the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001 *et seq.* Appellant claims that the operation of the solid waste disposal facility by intervenor on property adjacent to appellant's farm constitutes a nuisance.

A hearing was held in this matter on March 24, 1976. Although this appeal is from the actions of DER, it did not participate in the appeal in an adversary manner. In line with its usual policy, DER made its personnel and records available to appellant and intervenor for the purpose of the hearing. The defense of DER action, in this case, was assumed by the permittee, Derry Township.

On the basis of the evidence produced at the aforementioned hearing, we enter the following:

FINDINGS OF FACT

1. Appellant is Mrs. Merle Kohl, an individual and owner of a property situate in Derry Township, Dauphin County, Pennsylvania, north of Legislative Route 22013. The property is adjacent to and east of the Derry Township landfill property, hereinafter identified.

2. Intervenor is the Township of Derry, Dauphin County, Pennsylvania.

3. Appellee is DER, the agency of the Commonwealth of Pennsylvania authorized to administer The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.*, and the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001 *et seq.*

4. On September 10, 1974, DER issued to intervenor, Solid Waste Permit No. 100130 allowing for the deposition and disposal of solid waste on a landfill site located in the Township, north of Legislative Route 20015. The site is in an area zoned agricultural and rural in nature.

5. During 1975 intervenor filed with DER revised plans and specifications relating to the landfill operation and requested an expansion of the operation by allowing the raising of the height of refuse cells to 20 feet above that previously allowed under the permit.

6. In connection with the request to expand the landfill, intervenor filed an application for a water quality management permit for treatment of leachate.

7. On September 19, 1975, DER scheduled and held an administrative conference with representatives of intervenor and with the appellant in order to hear and consider protests raised by appellant to the proposed issuance of permits.

8. The Department determined that all of appellant's objections would be satisfied by implementation of the proposed plans for operation of the landfill.

9. On October 1, 1975, DER issued Industrial Waste Permit No. 2275202 allowing for the proposed leachate treatment facility, and issued a letter revising Solid Waste Permit No. 100130 to incorporate new plans and specifications allowing for expansion of the facility.

10. The application, plans and modular reports, submitted by intervenor in support of its request and application, have set forth the necessary information

to have enabled DER to have ascertained whether the request and application conformed to the requirements of the Pennsylvania Solid Waste Management Act, *supra*, and The Clean Streams Law, *supra*; and to Department regulations regarding solid waste disposal facilities and industrial waste treatment.

11. DER has conditioned the operation of the new facility on the intervenor's submitting evidence of the efficiency and adequacy of the waste discharge treatment within six months, the leachate treatment providing an effluent prior to spraying of limited concentration of pollutants, standard conditions previously ennunciated, requirements as to the height of the sides of the settling basins, the drilling of a monitoring well between the landfill and a spring on appellant's property, requirements as to sample collections from monitoring wells, and requirements relating to excess leachate.

12. Samplings from monitoring wells, taken since the issuing of the permits up through a period of 13 days prior to the hearing, show acceptable levels of pollutants at all wells.

13. Intervenor has instituted improvements and procedures to minimize adverse effects of the landfill operation on adjacent properties. These improvements and procedures include monitoring wells, paving and seeding, daily compacting and covering, daily maintenance procedures and access control.

## DISCUSSION

Among the more intractable environmental problems is that of the rational management and disposal of society's solid wastes. The advent of throw-away beverage containers and nonbiodegradable plastic containers has added urgency to the need to find socially desirable methods of solid waste disposal. The Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001 *et seq.*, is a legislative attempt to deal in a rational manner with this burgeoning environmental problem. This Act contains provisions relating to statewide and local planning for solid waste management and provisions relating to the regulation of solid waste disposal facilities through a permit program administered by DER.

Under §7 of the Act, a permit is required from DER to operate a solid waste disposal facility. Intervenor received such a permit from DER in 1974 for the operation of its solid waste disposal facility in the township adjacent to

the farm of appellant. Thereafter, in 1975, intervenor made application to DER for a revised solid waste permit and for a permit under The Clean Streams Law, *supra*, to dispose of industrial waste produced by the leachate from the site. After holding an administrative conference with representatives of intervenor and with the appellant on September 19, 1975, in order to hear and consider the protests raised by appellants to the issuance of the permits, DER on October 1, 1975, issued intervenor Industrial Waste Permit No. 2275202, permitting the proposed leachate treatment facility set forth in intervenor's application therefor, and a revision of Solid Waste Permit No. 100130, previously granted in 1974, to incorporate new plans and specifications for the expansion of the facility previously permitted.

Appellant has appealed the issuance of the aforementioned permit for the following reasons:

(1) DER would not make a dye test;

(2) No one would guarantee that any new source of water on the Kohl property would not be contaminated by the leachate from intervenor's solid waste disposal facility;

(3) No one investigated the death of cattle in a nearby field;

(4) The dump is a nuisance;

(5) Heavy truck traffic causes danger to the appellant and causes unnecessary pollution;

(6) The permit allows the solid waste disposal facility to be augmented in height, thereby destroying appellant's view from her property;

(7) After the landfill is closed, parties discharge guns;

(8) The landfill causes mental anguish to appellant and her family;

(9) The noise from the compactor and truck is "cruel and inhuman punishment";

(10) The spray treatment of the leachate will cause noxious odors and disease.

In addition to the above stated reasons set forth in her notice of appeal, appellant in her pre-hearing memorandum additionally contends that the landfill is being operated at a loss, traffic is enfringing upon her private right-of-way and the operation of the landfill has lowered the value of her property.

Appellant's objection is to the operation of the landfill rather than the provisions of the industrial waste discharge permit or the revision to the landfill permit

itself. However, appellant offered no evidence tending to show that the industrial waste permit did not conform to DER regulations. As to the revision of the landfill permit, appellant complains that the extension of the landfill will worsen the problems of which she complains and will, by allowing the fill to be raised 20 feet, obstruct the view of the landscape from her premises.

Most of the evidence produced by appellant concerning the nuisance allegedly created by the operation of intervenor's landfill concerns the operation of the facility prior to the issuance of the permits in question. Although the operation of the landfill has been a source of annoyance to appellant, her son, Craig Kohl, testified that there has been some improvement in that regard over a period of time. The permits were designed in part to relieve conditions at the landfill site which admittedly were causing problems of odor and water pollution. None of appellant's evidence in any manner goes to the question of whether the grant of the permits violated any relevant laws or rules and regulations promulgated by DER. Clearly, in the absence of such evidence, appellant has failed to meet her burden to show that the permits were improperly issued.

Persons residing near proposed or existing landfills understandably object to their existence and operation. However, the interests of propery owners must be balanced against the social necessity for adequate and sound measures for the disposal of solid wastes. DER rules and regulations adopted pursuant to the Pennsylvania Solid Waste Management Act are designed to promote the public interest with regard to the public health and environmental protective measures that must be taken in the design and operation of solid waste disposal facilities.

Neither the Pennsylvania Solid Waste Management Act nor the regulations of DER are designed to cover the fullarray of public and private interests involved in the management of solid wastes. Local public officials have a significant decision-making responsibility in this area. They must decide, for example, in an appropriate case whether to join a regional system for the disposal of solid wastes generated in their community or to remain apart from such concerted effort and develop their own facilities for the disposal of such wastes. Such officials are also involved in the determination of whether the system for the disposal of solid wastes is to be predominantly a public undertaking or a private undertaking. That the local pressures to which public officials are subjected in this area often results in decision-making in which political expediency plays a large part should not be surprising. Aside

from the public decision-making process, issues arise with regard to the competing private interests which either result from or condition the public decision-making with regard to this problem.

This Board, while sensitive to the myriad interests and issues and emotions[1] which this subject engendered, is limited to reviewing the propriety of DER action. It is not our prerogative to decide whether Derry Township should maintain its own solid waste disposal facility or transfer its wastes to a facility in Dauphin County serving several political subdivisions. While we may have our private views on this matter, we have no jurisdiction to review a political decision of Derry Township.

Within the context of its responsibilities, we are of the opinion that the granting of the permits from which appellant appeals in this matter was in conformity with DER regulations and the underlying legislative authority pursuant to which DER acted. We also conclude that Article I, Section 27 of the Pennsylvania Constitution is satisfied by the issuance of these permits. See: *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86(1973); *Community College of Delaware County v. Fox*, Pa. Commonwealth Ct. , 342 A.2d 468(1975).

## CONCLUSIONS OF LAW

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

2. Where permits required for the operation of a solid waste disposal facility are sought and the information set forth in pertinent application material shows that the applicant will operate such facilities in conformity with DER rules and regulations promulgated pursuant to The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.*, and the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001 *et seq.*, the Board will uphold the issuance of such permits by DER.

3. Where DER grants permits to operator of solid waste disposal facility for the purpose of upgrading the operation of said facility, the Environmental Hearing Board will not set aside the issuance of such permits even though prior to their

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1. See, *Deake G. Porter, Appellant and Miss Clara Vanderslice for Concerned Taxpayers for Columbia County v. Commonwealth of Pennsylvania, Department of Environmental Resources, and Columbia County Solid Waste Authority, Intervenor*, EHB Docket No. 74-205-W (issued July 31, 1975).

issuance the operation of the facility created a nuisance.

4. Where past operation of a solid waste disposal facility constituted a nuisance, permits will not be denied the operator thereof where said permits are designed to remedy the nuisance situation.

5. Where DER issues permits for the operation of a solid waste disposal facility in conformity with appropriate regulations and statutory authority and the permits will reduce the adverse environmental impact of the operation of said facility, the issuance of said permits does not violate the provisions of Article I, Section 27 of the Pennsylvania Constitution.

## O R D E R

AND NOW, this 10th day of June, 1976, the appeal of Mrs. Merle Kohl, from the action of the Department of Environmental Resources in issuing to Derry Township, Dauphin County, Industrial Waste Permit No. 2275202 and a revision to Solid Waste Permit No. 100130 is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: June 10, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

GEORGE EREMIC :

Docket No. 75-283-C

Request for Landfill Permit Revocations

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CHAMBERS DEVELOPMENT COMPANY, INC.,
Intervenor

ADJUDICATION

By Joseph L. Cohen, Member, June 16, 1976

This matter is before the Board on the appeal of George Eremic from the refusal by the Pennsylvania Department of Environmental Resources (hereinafter DER) to take action to close a solid waste disposal facility in Monroeville Borough, Allegheny County, Pennsylvania, operated by Intervenor, Chambers Development Company, Inc. Intervenor filed a motion to quash the appeal alleging that the action from which appellant takes his appeal is not "an appealable action". The Board received the briefs of the parties on this issue and thereafter scheduled oral argument before the writer of this adjudication. Oral argument took place, as scheduled, on March 31, 1976. On the basis of the foregoing, we enter the following:

FINDINGS OF FACT

1. Appellant is George Eremic, a resident of Monroeville Borough, Allegheny County, who resides and conducts a business on a tract of land immediately adjacent to and directly below and downstream of the solid waste disposal facility operated by Intervenor, Chambers Development Company, Inc., in Monroeville Borough, Allegheny County.

2. Appellee is DER, the agency of the Commonwealth charged with the administration and 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 Clean Streams Law, Act of June 22, 1937, P. L. 1987 , *as amended*, 35 P. S. §690.1 *et seq.*

3. Intervenor is Chambers Development Company, Inc., operator of a solid waste disposal facility in the Borough of Monroeville, Allegheny County. The operation of the facility is authorized by permits granted by DER to intervenor pursuant to the provisions of the Pennsylvania Solid Waste Management Act, *supra*, and The Clean Streams Law, *supra*.

4. Intervenor operated its solid waste disposal facility in the Borough of Monroeville, Allegheny County, for many years, during which time appellant resided in and conducted his business on his property immediately adjacent to the property upon which intervenor conducted its solid waste disposal operation.

5. On or about April 28, 1975, appellant's counsel addressed a letter to the Honorable Maurice K. Goddard, Secretary of DER. In this letter appellant's counsel set forth the following:

> "I have been retained by Mr. George Eremic of Monroeville, Pennsylvania in connection with a number of serious problems being caused by the operation of a landfill which adjoins his property. The landfill, known as Chambers landfill, is operated by Chambers Development Corporation, and is located in the Borough of Monroeville, Allegheny County, Pennsylvania.
>
> "On Friday, April 18, 1975, at a conference called at my request, we formally presented evidence which we have gathered to several DER representatives including James Snyder of the Divison of Solid Waste Management and Douglas Blazey of the Office of Enforcement. The information which we presented at the conference included evidence of the following:
>
> "1. Leachate containing fecal coliform and other organic pollutants is continuously being discharged into the waters of the Commonwealth in substantial quantity in violation of the Pennsylvania Clean Streams Law and the Rules and Regulations promulgated thereunder. A leachate treatment facility has been constructed to solve this problem, but it is only collecting a very small percentage of the polluting discharge. The greatest part of the leachate is by-passing the treatment facility.
>
> "2. Hazardous liquid industrial wastes in large quantities and of many varieties are being disposed of on the landfill site even though the treatment facility is not treating the greatest part of the discharge from the landfill.
>
> "3. Hazardous liquid industrial wastes are being pumped into abandoned deep coal mines which exist under the surface of the landfill. This is a violation of Section 248 of the Bituminous Coal Mining Law as well as the Clean Streams Law.
>
> "4. Leachate contaminated groundwater enters old mine workings under the west side of the landfill either directly or through subsidence-induced fractures in rocks overlying the mine workings.

"5. Increased surface and subsurface water flow resulting from the clearing of over 60 acres has increased the possibility of landslides to the south of the landfill where numerous unstable old landslide masses exist.

"6. Methane gas is being created either by the decomposition of organic materials or from a confined underground pool of leachate in the old mine workings. Representatives of DER's Bureau of Deep Mine Safety collected a bottle of gas escaping from the broken rock strata above the mine workings on the edge of the landfill on January 14, 1975, that contained 5.8% methane and 14.4% oxygen, which is a highly explosive mixture. The possibility exists that this highly explosive gas will migrate throughout the underground mine workings and escape into the basements of occupied homes located above the mined-out coal areas.

"After presenting the foregoing evidence, we requested that DER revoke the present Solid Waste Permit issued to Chambers and close the landfill.

"The foregoing evidence demonstrates that the Chambers site is entirely unsuited for landfill operations and that a permit should never have been issued in the first place. Please consider this letter a formal request to your Department to revoke all permits granted for the operations of the landfill and to take all necessary action to close it down. Pursuant to Section 604 of the PennsylvaniaClean Streams Law, we also request that your Department take all necessary action to require the abatement of the many violations of the Clean Streams Law which are occurring.

"We would request that your Department take formal written action on our request within 30 days from the date of this letter."

6. On or about June 16, 1975, Secretary Goddard wrote the following letter to appellant's counsel:

"This will acknowledge receipt of your recent letter regarding the Chambers Development Corporation Landfill located in Monroeville, Allegheny County, Pennsylvania.

"As a result of the April 18, 1975, conference that you mention in your letter, the Department's technical staff has conducted an investigation of the site and collected a number of water samples to determine the efficiency of the leachate collection and treatment system. Because of the normal seasonal influx of water samples and the recent fire in the Kossman Building, we have not yet received the results of these samples. However, in the past month Chambers has undertaken the following corrective actions:

"1. Leachate collection system - improvements have been made to collect leachate seeps that have been getting into the surface water diversion ditches. French drains have been constructed below the seeps and directed toward the center collection pipe.

"2. Leachate treatment facility - a diver surveyed the pond to check for fractures in the concrete. The diver did find one joint that was separated and he used a special marine sealer on it. Plans are being made to monitor influent-effluent flows.

"3. An intermediate cover has been applied to the upper fill area covering approximately 40 acres. This will be seeded with temporary type vegetation.

"4. Slopes in the lower ravine adjacent to the treatment facility have been dressed-up and will be hydro-seeded in the very near future.

"5. A slag base road has been constructed to the wet well and pump area for easy access.

"6. The sedimentation ponds have been dredged and needed repair work completed. Rip-rap is being placed on the stream banks in the area of the wet well. Several check dams have been constructed to retard the water flow. The effluent pipe will discharge into a rock splash pad.

"7. The industrial waste treatment lagoon has been constructed according to our guidelines. It appears to be working satisfactorily with the exception of minor operating problems such as the even distribution of the industrial waste throughout the lagoon.

"In addition, a recent inspection indicates that the daily landfill opeartions are in compliance.

"The Department has not concluded its investigation into your allegations and, therefore, is not in a position to determine what further action, if any, is necessary regarding the operation of this landfill.

"Ward Kelsey, Assistant Attorney General, Western Legal Office, has been assigned to the case and can advise you in the future on any action intended to be by the Department in this matter.

"I would suggest that you contact Attorney Kelsey, telephone number AC(412)645-5363, and/or our regional staff in the future for an update on the status of this case."

7. Thereafter, on or about August 5, 1975, appellant's counsel wrote to Assistant Attorney General Ward T. Kelsey as follows:

"I am enclosing my letter dated April 28, 1975 to Secretary Goddard requesting that the solid waste disposal permit granted to Chambers Landfill be revoked. I am also enclosing Dr. Goddard's response dated June 16, 1975 which requests me to get in touch with you if I want to pursue the matter. Since I do want to pursue the matter, I am now contacting you.

"Our basic position is that the leachate treatment facility constructed on the landfill site has never functioned properly and has been entirely unsuccessful in eliminating the continuous daily violations of the Clean Streams Law which are occurring as a result of a continuous discharge of leachate, oil and corrosive liquid wastes into the unnamed tributary which runs from the toe of the landfill site through my client's property and into Turtle Creek. The most recent incident occurred on August 3, 1975 when, as a result of heavy rains, an impoundment at the center of the landfill site either overflowed or was breached causing a great quantity of oil,

pickling liquor and other hazardous wastes to discharge down over the toe of the site through the unnamed tributary, through my client's property, and into Turtle Creek. The entire tributary ran black with oil and muck for at least an 8-hour period. We have pictures of the discharge and I believe some samples were taken by a representative of the Fish Commission. I am not sure whether any representative of DER inspected the site at the time of the incident.

"I would hope that at an absolute minimum you would be interested in prosecuting the operators of the landfill for a Clean Streams Law violation as a result of the massive discharge of hazardous liquid wastes onto and through my client's property. This is only the latest of a number of such incidents, and I am certain that as long as Chambers is permitted to continue to dispose of hazardous liquid wastes on its site, similar incidents will occur in the future.

"It is quite apparent that the steps that have been taken as outlined in Dr. Goddard's letter to me have been entirely inadequate to solve the many problems existing at the site. I therefore request that a complete re-evaluation be made and I renew my request to the Department that the permit granted to Chambers be immediately revoked.

"Please contact me to discuss this case at your earliest opportunity."

8. On or about October 7, 1975, Assistant Attorney General Kelsey wrote appellant's counsel as follows:

"I am writing in response to your letter of August 5, 1975, in which you requested that the Department revoke the above-referenced permits. First, let me apologize for my delay in responding. As you know, I had not worked on this matter previously, and it has taken me quite a while to assemble the information and decisions necessary to answer your letter.

"I have discussed this matter at some length with the appropriate personnel in our Divisions of Solid Waste Management and Industrial Wastes and Erosion Control. Both Divisions are of the opinion that the information in the Department's possession does not justify revocation of these permits. The Department has discovered some violations, of course, and it reserves the right to take other types of enforcement action, but, for the present, the Department has decided against revocation of the permits.

"Accordingly, this letter is to inform you that the Department has denied your August 5, 1975 request that 'the permit granted to Chambers be immediately revoked.'

"This decision of the Department may be appealed to the Environmental Hearing Board, First Floor Annex, Blackstone Building, 112 Market Street, Harrisburg, Pennsylvania (717-787-3483) by any aggrieved person, pursuant to the Act of December 3, 1970, P. L. 834, 71 P.S. Section 510-1 *et seq.* and the Administrative Agency Law, Act of June 4, 1945, P.L. 1388, as amended, 71 P.S. Section 1710.1 *et seq.* Appeals must be filed with the Environmental Hearing Board within thirty (30) days of receipt of this letter unless the appropriate statute provides a different time period. Copies of the appeal form and the Department's regulations governing practice before the Board may be obtained from the Board.

"Please feel free to call me if you have any questions."

9. On November 3, 1975, appellant filed with this Board a notice of appeal from the denial of his request to revoke intervenor's permit.

10. Thereafter, on November 10, 1975, Chambers Landfill Company, Inc. filed a petition to intervene in these proceedings. No objections having been filed to this petition, the Board granted it on December 1, 1975.

11. On January 12, 1976, intervenor filed preliminary objections and a motion to quash the appeal alleging, *inter alia*, that this Board lacked jurisdiction to entertain the appeal. In its answer to intervenor's motion, DER agreed that the Board lacks jurisdiction over the subject matter of this appeal and, hence, it joined in intervenor's request that the appeal be quashed.

## DISCUSSION

This appeal raises the question of what actions of DER are appealable to this Board. Appellant requested DER to revoke permits issued to intervenor which permitted it to operate a solid waste disposal facility in the Borough of Monroeville, Allegheny County, immediately adjacent to appellant's property. In his request, appellant alleged that intervenor, in its operation of the aforementioned solid waste disposal facility, was violating both the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *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. §690.1 *et seq.* DER denied appellant's request so to revoke intervenor's permit previously issued by DER. It is this action that appellant appeals to this Board.

Intervenor filed, *inter alia*, a motion to quash the appeal alleging that the denial of appellant's request to revoke intervenor's permit by DER was not an appealable action. DER, although asserting different reasons from intervenor, joined in its motion to quash. For the reason stated below, we grant the motion to quash the appeal for lack of jurisdiction.

Section 1921-A(a)-(c) of the Administrative Code of 1929 [71 P. S. §510-21(a)-(c)], Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq.*, 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 be final as to any person who has not perfected his appeal in the manner hereinafter specified."

* * *

71 P. S. §510-21(1975-76 Supp.)

Under this section of the Administrative Code of 1929, *supra* , we have the power to hold hearings and issue adjudications under the Administrative Agency Law, Act of June 4, 1945, P. L. 1388, *as amended*, 71 P. S. §1710.1 *et seq.*, on actions of DER. Section 2 of the Administrative Agency Law (71 P. S. §1710.2), *supra* , provides in relevant part:

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

In order for this Board to review the "action" of DER in refusing appellant's request to revoke intervenor's permit, this action of the Department must be an adjudication as defined in the Administrative Agency Laws, *supra*. Unless it were an adjudication, if this Board after hearing chose to affirm the DER action, the Board's action in so doing would not be an adjudication. Although it is true that this Board may substitute its discretion for that of DER where DER acts under its discretionary authority [*Warren Sand and Gravel Company, Inc. v. Commonwealth, Department of Environmental Resources*, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556(1975)], we believe that such authority presupposes the action to be appealable to this Board.

The refusal on the part of DER to grant appellant's request to revoke intervenor's permits is not an adjudication. While DER's action is discretionary in nature, not all discretionary acts on the part of administrative agencies are judicial or quasi-judicial. *Manheim Township School District v. State Board of Education*, 1 Pa. Commonwealth Ct. 627, 276 A.2d 561(1971); *La Camera v. Board of Probation and Parole*, 13 Pa. Commonwealth Ct. 85, 317 A.2d 925(1974).

In order for the exercise of administrative discretion to be adjudicatory in nature, it must affect personal or property rights. *McKinley v. Wackerman*, 5 Pa. Commonwealth Ct. 42, 288 A.2d 840(1972); See also *Newport Homes, et al v. Kassab, et al*, 17 Pa. Commonwealth Ct. 317, 332 A.2d 575(1975). While appellant may have a cause of action against intervenor for nuisance, the fact that DER refuses to revoke intervenor's permits has no substantial impact on appellant's rights *vis a vis* intervenor.

Not only is DER's action in this matter neither judicial nor quasi-judicial in nature, but it cannot be construed as "final action". The action is not final for the reason that nothing in law prevents DER from reconsidering the material appellant submitted to it and determining that it is now of the opinion that intervenor's permit should be revoked. In an appeal from such revocation, intervenor could not assert as a bar against the subsequent DER action that previously DER had refused appellant's request that it revoke intervenor's permits. Neither *res judicata* nor collateral estoppel could apply in such a case for the reason that the initial determination was made without intervenor being a party thereto. Moreover, with a special regard to collateral estoppel, there was no litigated determination of fact involved in DER's refusal to take revocation action against intervenor. Under such circumstances, we fail to see how this issue would affect any further proceedings with regard to intervenor's permit. Inasmuch as it would not preclude DER from reconsidering the information appellant supplied it and reaching a different determination from that which is the subject matter of this action, DER's refusal cannot constitute final action.

DER has reviewed the evidence in this case and determined that intervenor's permit should not have been revoked. Had it decided otherwise, it could have proceeded under 71 P. S. §1921-A(c) and revoked intervenor's permits without first granting intervenor a hearing. While this provision of the Administrative Code of 1929, *supra*, has been upheld[1], it is not mandatory upon DER to proceed in that manner. DER is free to exercise the option of proceeding according to the requirements of the Administrative Agency Law, *supra*, under which an adjudication is issued after reasonable notice and an opportunity to be heard. In either event, however, it is the duty of DER to

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1. *Commonwealth of Pennsylvania, Department of Environmental Resources v. Elizabeth Steward*, Pa. Commonwealth Ct. , A.2d , (No. 1279 C. D. 1975, issued February 3, 1976).

evaluate the information at its disposal and make the initial determination of the action to be taken.

## CONCLUSIONS OF LAW

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

2. The Board only has jurisdiction over actions of DER which are final and affect personal or property rights.

3. A refusal by DER to acquiesce in a request to revoke intervenor's permits permitting it to operate a solid waste disposal facility is not an adjudication for the reason that it is neither final nor affects personal or property rights.

## O R D E R

AND NOW, this 16th day of June, 1976, the appeal of George Eremic from the action of DER in declining to revoke permits of Chambers Development Company, Inc., authorizing it to operate a solid waste disposal facility in Monroeville Borough, Allegheny County, is hereby quashed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

## DISSENTING OPINION

By Joanne R. Denworth, Member

I dissent. I believe that a decision of the Department of Environmental Resources not to enforce the law may be as critical to the administration of the environmental laws as a decision to enforce; and that if such a decision is sufficiently final, it is an "action" of the Department that is reviewable by this Board on appeal by one "adversely affected" under §1921-A(c) of the Administrative Code. See DAVIS, DISCRETIONARY JUSTICE (1969) on the need for standards for the exercise of an agency's discretion to enforce and the need for review of the agency's exercise of that discretion. Appellant here, as an adjacent landowner, is in my view "adversely

affected" by the Department's decision to allow this landfill to continue operating as a permitted landfill, whether or not the Department's determination was correct.

I have some question about the finality of this action for purposes of appeal. The Department's letter of October 7, 1975, indicates that the Department may take some enforcement action in the future, but "for the present" it has decided not to revoke the permit. The Board cannot review every tentative denial by the Department of a citizen's request for enforcement action. However, where after an orderly procedure, including the presentation of evidence by a complainant and investigation by the Department (both of which occurred in this case), the Department makes a determination not to take a requested enforcement action, I believe that determination should be reviewable at least by this Board, which has a quasi-judicial responsibility for overseeing the actions of the Department. Although it would be desirable to have a formal citizen's complaint procedure for purposes of processing and reviewing enforcement requests, the informal procedure used in this case was in my view adequate to arrive at a final determination. The tenor of the Department's letter of October 7, was that it had made a final decision not to revoke on the basis of the evidence submitted by the appellant. That the decision proports to be a "final" action is indicated by the inclusion of the paragraph stating that this decision may be appealed to this Board. On the facts of this case, I think the Board is obligated to review the decision under §1921-A(c).

ENVIRONMENTAL HEARING BOARD

JOANNE R. DENWORTH
Member

DATED: June 16, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

PLYMOUTH EQUIPMENT COMPANY, INC.

Docket No. 75-184-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

# ADJUDICATION

By: Joanne R. Denworth, Member, Issued, July 1, 1976.

This is another appeal from an order of the Department of Environmental Resources (Department) directing the operator of two disposal sites to take certain steps to properly close the sites that had been operated in violation of the Rules and Regulations of the Department and without a permit as required by the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001 *et seq.* See *John T. Ryan v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket Number 75-183-D, issued May 28, 1976; *Joseph C. Delenick d/b/a St. Clair Sanitary Landfill v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket Number 75-066-D, issued September 30, 1975, affirmed Pa. Commonwealth Ct., Docket No. 1565 C. D. 1975, issued May 21, 1976; *Joseph Reedy v. Commonwealth of Pennsylvania, Department of Environmetal Resources*, EHB Docket Number 74-124-W, issued March 31, 1975; *Ronald Brown d/b/a Ron Brown Landfill v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket Number 73-370-C, issued December 30, 1974. In this case, as in the case of *John T. Ryan*, appellant is no longer operating the disposal sites but objects to being ordered to close the sites. There is no basis in law upon which this Board could sustain appellant's appeal.

## FINDINGS OF FACT

1. Appellant, Plymouth Equipment Company, was in the business of disposing of bottom ash and fly ash for Philadelphia Electric Company's Eddystone

Plant from at least 1973 through 1975.

2. Beginning in 1974 appellant secured permission from the owner to dump ash at a site along Tinicum Island Road, Tinicum Township, Delaware County.

3. After an inspection of the Tinicum Island Road site on June 11, 1974, conducted by Bruce Beitler, an Environmental Protection Specialist in the field of solid waste management for the Department, an enforcement conference was held by the Department with the appellant on June 13, 1974. At that conference the Department informed appellant of the unsatisfactory conditions at the site and of the necessity for obtaining a permit to operate a solid waste disposal site.

4. Subsequent inspections by Mr. Beitler on July 30, 1974, August 5, 1974, and August 22, 1974, showed that appellant was continuing to operate the site as before with numerous violations including inadequate compaction and cover, inadequate dust control and the placing of fill in standing water.

5. After another inspection on October 2, 1974, at which the same conditions were found to exist, the Department sent appellant a violation notice directing appellant to immediately stop the operation of the Tinicum Island Road site and to take steps to correct the conditions existing in violation of the Department's Rules and Regulations.

6. On November 13, 1974, the Department made an inspection of the Tinicum Island Road site and found that ash was no longer being deposited at that site. The ash previously deposited was eroding into the tidal stream on the site. Closure operations had not begun.

7. At a meeting with the appellant held November 27, 1974, the Department agreed that appellant could temporarily use a dispoal site north of Route 291 in Tinicum Township for the disposal of the fly ash. At that meeting the Department and appellant entered into a consent agreement in which appellant agreed not to dump at the Mayer Dump, which was a dump in Delaware County that the Department was attempting to close down. The Department told appellant that it should apply for a permit for the Route 291 site.

8. On December 5, 1974, and December 30, 1974, the Department made inspections of the site located north of Route 291 and found that appellant was depositing ash in much the same manner as done before on the Tinicum Island Road site, that is, that there was no grading, compacting or covering of the ash material.

9. By letter dated January 16, 1975, the Department directed the appellant to cease all dumping of solid waste on the site located north of Route 291 by January 21, 1975, and to continue further depositing of solid wastes only at a site approved and permitted by the Department.

10. By letter dated January 21, 1975, the Department returned appellant's application for a permit for the site located north of Route 291 because it was incomplete.

11. On January 23, 1975, the Department made an inspection of the site located north of Route 291 and found appellant depositing ash in the same manner as before. On the same date the Department made an inspection of the Tinicum Island Road site and found that no closure work had been done.

12. On February 6, 1975, February 24, 1975, March 6, 1975, April 21, 1975, May 29, 1975 and July 13, 1975 the Department made inspections of the Tinicum Island Road site and observed the discharge of leachate from the fill area into the tidal stream on the site. No closure work had been done.

13. On March 6, 1975, April 21, 1975, May 29, 1975 and July 3, 1975, the Department made inspections of the site located north of Route 291 and found that ash was no longer being deposited at the site. No closure work had been done and the filled areas were eroding.

14. By orders dated July 22, 1975, the Department directed the appellant to commence closure operations of both Tinicum Island Road site and the site located north of Route 291 in accordance with the provisions of Chapter 75 of the Department's Regulations and to abate the discharge of leachate on the Tinicum Island Road site. The within appeal was filed by the appellant from the Department's order.

15. On August 6, 1975, September 23, 1975, October 22, 1975, December 10, 1975, February 4, 1976 and February 27, 1976, the Department made further inspections of both the Tinicum Island Road site and site located north of Route 291 and found that no closure work had been done and that the conditions remained unchanged at both sites.

16. At no time has the Department issued a Solid Waste Permit to the appellant for either the site located north of Route 291 or the site located alongside Tinicum Island Road.

## DISCUSSION

Appellant has offered no satisfactory reason why it should not be required to comply with the provisions of the Department's closure order. It was appellant's operation that created the unsatisfactory conditions at both sites. As we have previously held, an operator must be held responsible for the conditions he creates. See *John T. Ryan v. Commonwealth of Pennsylvania, Department of Environmental Resoureces, supra.* The fact that appellant may have had permission from the owners

of both sites to dump fly ash does not affect its obligation to dispose of this material in accordance with the Solid Waste Management Act and the Rules and Regulations of the Department. Appellant argues that the Commonwealth did not show that any environmental harm resulted from appellant's dumping. Where the Department establishes as many violations of the law and regulations as were shown here, the Department is not required to show specific harm resulting from these conditions because the law and regulations are premised on the avoidance of that environmental harm. Water samples from the Tinicum Island Road site showed the presence of substances leached from the wastes deposited by appellant, which constitutes pollution under The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §§691.1, 691.401; see *Commonwealth v. Ebersole*, 59 Law. L. Rev. 363 (Pa. C. P. 1965); *Charles Harmuth v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket Number 72-333, issued February 5, 1973; *John T. Ryan v. Commonwealth of Pennsylvania, Department of Environmental Resources, supra*. Appellant's pleaded ignorance as to what it was supposed to do to conform to the regulations is certainly no justification for ignoring the closure order. Apparently, appellant was given a copy of the Department's regulations; but that is really immaterial since, from the time of the adoption of the Solid Waste Management Act and the rules and regulations thereunder, appellant had an obligation, that cannot be excused by ignorance to dispose of any waste material in accordance with the law. The Department's order must be upheld.

## CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties to this appeal, as well as over the subject matter of this appeal.

2. The appellant has deposited solid waste at both the Tinicum Island Road site and the site located north of Route 291 in violation of Section 9 of the Pennsylvania Solid Waste Management Act, 35 P. S.§6009 in that appellant has dumped or deposited solid waste onto the surface of the ground or into the waters of the Commonwealth without first having obtained a permit to operate a solid waste disposal facility pursuant to the provisions of the Act.

3. Appellant is in violation of Section 9 (4) of the Solid Waste Management Act in that the disposal of solid waste at the Tinicum Island Road site has been conducted contrary to the ules and egulations promulgated pursuant to the Act; specifically 25 Pa. Code §§75.41, 75.42, 75.47, 75.82, 75.115, 75.119.

4. Appellant is in violation of Section 9 (4) of the Solid Waste Management Act in that the disposal of solid waste at the Tinicum Island Road site has been

conducted contrary to the rules and regulations promulgated pursuant to the Act; specifically 25 Pa. Code §§75.41, 75.42, 75.82, 75.84, 75.115, 75.118, 75.119.

5. The discharge of leachate from the filled areas of the Tinicum Island Road site to the tidal stream on the site is a violation of Section 401 of The Clean Streams Law, *supra*.

6. The Department properly issued the July 22, 1975 Order directing the appellant to close the Tinicum Island Road site and the site located north of Route 291 and to abate the discharge of leachate on the Tinicum Island Road site.

ORDER

AND NOW, this 1st day of July, 1976, the appeal of Plymouth Equipment Company from an order of the Department of Environmental Resources is dismissed and appellant is directed to comply immediately with the Department's order of July 22, 1975.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: July 1, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

PLYMOUTH EQUIPMENT COMPANY, INC. :

Docket No. 75-184-D

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

AMENDING ORDER

On the petition of counsel for the Department of Environmental Resorces in the above matter, to which counsel for the appellant has no objection , the Board's adjudication of July 1, 1976, is amended to delete the words "Tinicum Island Road site" in Conclusionsof Law numbers 3 and 4, and to substitute therefor the words "site located north of Route 291".

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: August 4, 1976
vf

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

PLYMOUTH EQUIPMENT COMPANY, INC. :

Docket No. 75-184-D

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

AMENDING ORDER

On the petition of counsel for the Department of Environmental Resorces in the above matter, to which counsel for the appellant has no objection , the Board's adjudication of July 1, 1976, is amended to delete the words "Tinicum Island Road site" in Conclusion of Law numbers 3, and to substitute therefor the words "site located north of Route 291".

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Joseph L. Cohen

JOSEPH L. COHEN
Member

Joanne R. Denworth

BY: JOANNE R. DENWORTH
Member

DATED: August 6, 1976



vf

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

BOB GROVES - PLYMOUTH CO. : Docket No. 74-101-C

BOROUGH OF AMBLER : " 74-081-W

v. : Water Obstructions Act

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

BY: Paul E. Waters, Chairman, July 30, 1976

This matter comes before the Board as an appeal from an order issued by DER to Bob Groves and the Borough of Ambler under the Water Obstructions Act, 1913 June 25, P. L. 555, *as amended*, 32 P. S. §685, and The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.610 requiring them to, *inter alia*, clean and rebuild a culvert on Tanney Run. Each party, alleging the other was responsible, failed to act. A hearing was held at the conclusion of which, the parties agreed that they could resolve the matter between themselves. The agreement included the approval of plans for rebuilding the culvert to be approved by DER before construction. The plans were allegedly submitted to DER and no approval was forthcoming. DER then denied it received the plans so another set was submitted. After many months, the weakened culvert, which was the major concern giving rise to the order, collapsed and emergency repairs were necessary.[1] The Borough of Ambler made the repairs and now believes that appellant, Bob Groves, the abutting property owner, should pay all or a portion of the costs. DER is now satisfied that there has been substantial compliance with the original order and plans no further enforcement action. The appellant, Bob Groves, has now moved to

1. Some question as to the liability of DER was raised by correspondence with the Board, which expressed the view that the Board of Claims rather than the Environmental Hearing Board should review that matter.

have the appeal dismissed as moot. It is this motion to which we now turn.

The Water Obstructions Act, *supra*, authorizes DER to determine whether an unsafe dam or culvert exists and to order needed repairs be made by the owner.[2] If the owner fails or refuses to make the repairs, the Commonwealth may do so and . . . "thereafter recover, in the name of the Commonwealth, from the owner or owners, the said cost or expense, *in the same manner as debts are now by law recoverable*." In fact, the Commonwealth did not make the repairs as it could have, and therefore the above language does not strictly apply. However, it is our view that the legislative intent is that an ordinary assumpsit action in the Court of Common Pleas is the appropriate procedure. We believe the same construction would extend to the situation before us, when the parties disagree as to who should bear the financial responsibility for work already completed by one of them.

If, as we have suggested, the remedy now sought is beyond the jurisdiction or power of this Board to give, we must conclude that the case is moot as to the Board action, inasmuch as the work which was the subject of the order has been completed. In *Commonwealth ex rel Watson v. Montone*, 227 Pa. Super 541 (1974), the Court said: "If pending on appeal an event occurs which renders it impossible for the appellate court to grant any relief, the appeal will be dismissed." See also *Reichards License*, 45 Pa. Super 606.

This, of course, is not to say that appellant, the Borough of Ambler,

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2. Section 685 of the Water Obstructions Act provides:

> "...If the board shall determine that such dam or water obstruction is unsafe or needs repair, alteration or change in its structure or location, or should be removed as being unsafe and not susceptible of repair, or for any reason is derogatory to the regimen of the stream, the board shall, in writing, notify the owner or owners thereof to repair, alter, change its structure or location, or remove the same, as the exigencies of the case may require; such work to be commenced and proceeded with to completion within such reasonable time as may be prescribed in such notice by the board; and it shall thereupon be and become the duty of such owner or owners to comply with the provisions of such notice.
>
> "If said owner or owners, notified as aforesaid, shall neglect or refuse to make such repairs, alterations, change or changes in structure or location or to cause such removal, or if said owner or owners cannot be found or determined, then the Board may make such repairs, alterations, change or changes in structure or location or cause such removal; and the board may thereafter recover, in the name of the Commonwealth, from the owner or owners, the said cost or expense, in the same manner as debts are now by law recoverable."

has no remedy. We simply hold that this Board is no longer the tribunal which can properly grant the relief it now seeks,[3] which is primarily contribution for an expenditure of funds.[4]

ORDER

AND NOW, this 30th day of July, 1976, the motion of appellant, Bob Groves, to dismiss the appeal as moot is hereby granted.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: July 30, 1976
llj

3. Obviously the Board was equipped to grant the relief sought by appellant before the work was done—i.e. an order that it was not responsible for the work, but now that the work is done, we believe the law requires the same procedure it would require if the Commonwealth had done the emergency work, as previously indicated.

4. The cost of the project is alleged to have been $14,000.00.

COMMONWEALTH OF PENNSYLVANIA

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

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| PHILADELPHIA CHEWING GUM COMPANY, NATIONAL WOOD PRESERVERS, SHELL OIL COMPANY & CLIFFORD AND VIRGINIA ROGERS, | ) | Docket No. 73-253-D |
| | ) | 73-249-D |
| | ) | 73-256-D |
| vs. | ) | 73-346-D |
| | ) | |
| COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES | ) | |

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

BY THE BOARD: Issued, July 30, 1976.

This matter is before the Board on appeals filed by National Wood Preservers, Inc.[1] (Wood), Philadelphia Chewing Gum Corp.[2] (Gum), Shell Oil Company (Shell), and Clifford A. Rogers and Virginia M. Rogers, his wife (Rogers), from Orders issued to each said Appellant by the Commonwealth of Pennsylvania Department of Environmental Resources (D.E.R.).

In the Orders to Wood, Gum and Shell, each of which were issued on July 12, 1973, D.E.R. made three findings, which are set forth as follows:

> "WHEREAS, a serious problem of contamination exists in the ground waters and surface waters in the area of the intersection of Eagle Road and Penn Central Railroad in Haverford Township, Delaware County, Pennsylvania, more specifically described as on the Lansdowne, Pennsylvania seven and one half minute topographic quadrangle, 1967, 9.5 inches west and 19.5 inches north of lower right hand corner; and
>
> "WHEREAS, said contaminant consists of creosote containing pentachlorophenol. Said contaminant appears in both ground and surface water including waters of the Commonwealth locally known as Naylor's Run, a tributary of Cobbs Creek; and

[1] D.E.R. described this Appellant as National Wood Preservers

[2] D.E.R. described this Appellant as Philadelphia Chewing Gum Company

"WHEREAS, said contaminant degrades the quality of the waters of the Commonwealth. Said contaminant is therefore subject to the sanctions of the Clean Streams Law of the Commonwealth of Pennsylvania."

By these Orders Wood, Gum and Shell were directed to take concerted action with each other to submit a proposal to D.E.R., by August 6, 1973, which was to include:

a. A definition of the specific geographical area of said creosote contamination.

b. A profile of the groundwater table in such geographical area.

c. Engineering plans to remove the contaminants from the groundwater and surface water to a degree which will restore the above mentioned waters to their natural quality.

Wood, Gum and Shell were also directed to provide to D.E.R., by August 27, 1973, a final proposal of engineering plans for elimination and removal of such contamination and for restoration of said waters which was acceptable to D.E.R. This final proposal was to include a time schedule for the implementation thereof.

Each of said Appellants filed timely appeals to this Board from these Orders. On or about September 7, 1973, said Appellants and D.E.R. stipulated to a supersedeas with regard to compliance therewith, pending our determination of the various appeals.

In the Order issued to Rogers', on September 21, 1973, D.E.R. made three findings, the language of which was somewhat different from the language contained in the Orders which were issued to Wood, Gum and Shell. These findings are set forth as follows:

"WHEREAS, Clifford A. Rogers and Virginia M. Rogers, his wife, our (sic) certain land in the area of the intersection of Eagle Road and Penn Central Railroad in Haverford Township, Delaware County, Pennsylvania, more specifically described as on the Lansdowne, Pennsylvania seven and one half minute topographic quadrangle, 1967, 9.5 inches west and 19.5 inches north of lower right hand corner, and

"WHEREAS, the Department of Environmental Resources ("Department") of the Commonwealth of Pennsylvania ("Commonwealth") has found on the basis of its inspections, inter alia, September

26, 1972, August 21, 1973 and August 22, 1973, that a polluting substance containing pentachlorophenol fuel oil and creosote ("pollutant") is found in the groundwaters in the area, including the land owned by Clifford A. Rogers and Virginia M. Rogers, his wife; and leased to National Wood Preservers and Shell Oil Company, as well as the land owned by Philadelphia Chewing Gum; and in the surface waters, including Naylor's Run, a tributary to Cobb Creek ("waters"), and

"WHEREAS, National Wood Preservers, Philadelphia Chewing Gum, and Shell Oil Company, by Orders dated July 12, 1973 ("Orders") were directed to take concerted action to remove the pollutants and restore to the waters to their natural water quality in accordance with the specific directives contained in the Orders, appeals from which Orders have been taken to the Environmental Hearing Board by National Wood Preservers as Docket No. 73-249, Shell Oil Company as Docket No. 73-256, and Philadelphia Chewing Gum as Docket No. 73-213."

In this Order Rogers' were directed to, either individually or jointly with the other Appellants, submit a preliminary proposal, acceptable to D.E.R., by October 19, 1973, which was to include:

"(1) A definition of the specific geographical area in which the pollutant is found; and

"(2) A profile of the groundwater table in the area in which the pollutant is found; and

"(3) A proposal to remove the pollutant from the waters, restoring the waters to their natural quality."

Rogers' were also directed to provide to D.E.R., by November 9, 1973, a final proposal to remove said pollutant from said waters and to remove said waters to their natural quality which was acceptable to D.E.R. This final proposal was to include an acceptable time schedule for the implementation thereof.

Rogers' filed a timely appeal to this Board from this Order; on or about October 12, 1973, Rogers' and D.E.R. stipulated to a supersedeas with regard to compliance therewith, pending our determination of the appeal.

On or about October 15, 1973, Shell filed a petition wherein it sought to join Samuel Jacoby as an "additional

defendant" in these proceedings.[3] By our Opinion and Order dated January 17, 1974, this petition was denied.

On November 1, 1973, we entered an Order by which all appeals were consolidated for hearing.

On January 31, 1974, we entered an Order in which we granted the petition of the Township of Haverford (Township) to intervene.[4]

The hearing on these consolidated appeals, before Louis R. Salamon, Esquire, Hearing Examiner, was held on the following dates: November 20,21, 1974,; January 13,14,15,16,17, 1975; June 23,24,25,26,27,30, 1975.

During the course of the hearing, the parties entered into numerous stipulations, the most significant of which was that the sole basis for the issuance of each said Order was the language contained in Section 316 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.316.

The proposed adjudication submitted by Hearing Examiner Salamon is adopted by the Board with minor modifications.

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[3] Samuel Jacoby owned all of the stock issued by Wood until July 30, 1963. In the petition for joinder, it was alleged that if there was pollution of the waters of the Commonwealth in the relevant geographical area, Mr. Jacoby had caused it to occur.

[4] The relevant geographical area in these proceedings is situate in the Township.

## FINDINGS OF FACT

1. Rogers' have owned a parcel of land in the Township of Haverford, Delaware County, for more than thirty-four years. This parcel is more particularly described as follows:

ALL that certain lot or piece of ground with buildings thereon erected situate in Oakmont, Delaware County, Pennsylvania, on the northwest side of Eagle Road, beginning at a point approximately 150 feet northeast of Lawrence Road, containing 366 feet on Eagle Road, 415 feet on the north line, 300 feet on the west line and 200 feet on the south line.

2. On January 10, 1947, Rogers' leased this parcel of land to Samuel T. Jacoby and C. David Jacobs. These gentlemen assigned their rights under said lease to National Wood Preservers, Inc., a corporation which was controlled by Jacoby.

3. National Wood Preservers, Inc., by Jacoby, conducted a wood preservative business on this parcel of land between March 28, 1947 and July 30, 1963.

4. National Wood Preservers, Inc., by Jacoby, utilized a substance known as pentachlorophenol in this wood preservative business. During the course of the operation of this business, under Jacoby's ownership, waste liquids were discharged or permitted to be discharged from the surface of the land upon which said business was conducted to the ground water via a well on said premises. The Health Officer of the Township and representatives from the Pennsylvania Department of Health, the predecessor in duties to D.E.R., took enforcement action against Jacoby and/or against said corporation by reason of the discharges of these waste liquids to the gound water.

5. On July 30, 1963, Jacoby sold his entire interest in this corporation to the Goldstein family; this family has operated said wood preservative business, Wood, on, inter alia, the premises above described, at all times thereafter. Wood, under the owner-

ship of the Goldstein family, has not discharged or permitted the discharge of industrial waste to the waters of the Commonwealth.

6. On February 10, 1967, Wood released a portion of the above described premises from its leasehold. On that same date, Rogers' leased this portion to Shell. It is more particularly described as follows:

ALL THAT CERTAIN lot or piece of ground situate in Haverford Township, Delaware County, Pennsylvania, beginning at the point of intersection of the Easterly right-of-way line of Lawrence Road with the Northerly right-of-way line of Eagle Road; thence in a Northeasterly direction along the Easterly right-of-way line of Lawrence Road a distance of One Hundred Twenty-nine feet (129') more or less to a point; thence in a Northeasterly direction along a line perpendicular to the Easterly right-of-way line of Lawrence Road a distance of One Hundred Thirty feet (130') more or less to a point; thence in an Easterly direction along a line One Hundred Three feet (103') more or less to a point; thence in a Southeasterly direction along a line One Hundred Three feet (103') more or less to a point on the Northerly right-of-way line of Eagle Road a distance of One Hundred Sixty feet (160') more or less to the place of beginning.

7. Shell has operated and maintained a gasoline service station on said parcel of land at all times thereafter. Shell has not discharged or permitted the discharge of industrial waste to the waters of the Commonwealth.

8. Gum owns and occupies a parcel of land fronting along Eagle Road in the Township. This parcel is on the opposite side of Eagle Road from the parcels which are owned by Rogers' and occupied by Shell and Wood; this parcel is Southwest of the Wood parcel. Gum has not discharged or permitted the discharge of industrial waste to the waters of the Commonwealth.

9. Naylors Run, a stream, begins at a point which is northwest of the Rogers', Shell, Wood premises which have previously been described. Naylors Run flows in a general southerly direction under Woodleigh Road and Hillcrest Road which are northeast and east, respectively, of the Rogers' and Shell and Wood premises. Naylors Run then flows in a general southeasterly direction under Eagle Road via a culvert. This stream re-emerges at a point which is southeast of Eagle Road. It continues to flow in a general southeasterly direction at points which are east of the Gum premises. It is again culverted under railroad tracks which are southeast of the Gum premises, and re-emerges at a point southeast of the Gum premises. It flows in a general southeasterly direction until it is again culverted under portions of roads known as Rittenhouse Circle and Achille Road which are southeast of the Gum premises. It re-emerges at a point southeast of Rittenhouse Circle and continues to flow in a general southeasterly direction.

10. On June 12, 1972, Joseph A. Feola, who was then employed by D.E.R. as an environmental protection specialist, was requested to investigate complaints of the existence of an oily type material in Naylors Run. Feola was accompanied on this investigation by Ralph V. Zampogna, who was then employed by D.E.R. as a groundwater geologist.

11. During their investigation of Naylors Run on June 12, 1972, Feola and Zampogna observed a small pipe which was projecting out of the west bank of the stream and which was supported by a stone foundation or headwall. From this pipe, a dark colored material with a glossy sheen was being discharged to Naylors Run.

12. Feola obtained a sample of the discharge from this pipe as the discharge was flowing out of the pipe on June 12, 1972. On that same date, Feola and Zampogna collected other samples at the following points:

(a) 5-10 feet downstream from this pipe in Naylors Run.

(b) 155-160 feet downstream from this pipe in Naylors Run.

(c) Upstream from this pipe at the point where Naylors Run re-emerges from the culvert under Eagle Road.

(d) From a basement sump at 425 Rittenhouse Circle.

(e) From a basement sump at 429 Rittenhouse Circle.

13. On June 13, 1972, Feola visited the Gum premises. He went into an area where an addition to an existing building was being constructed and obtained samples from an area where sewage was being pumped (sewer injector) and from a hole which he dug in the earth inside said addition. Each sample was dark black in color, was iridescent and had an oily odor.

14. Feola placed a piece of tape on each bottle in which the samples obtained on June 12 and June 13 were contained. Upon this tape he wrote his sample number, the sample location, the date when the sample was obtained and the Township and County where the samples were obtained. He also recorded this information on a D.E.R. Water or Waste Quality Report Form (WQ report).

15. Feola placed these sample bottles and WQ reports in cardboard containers and on June 13, 1972, he delivered them to the D.E.R. chemistry laboratory in Harrisburg. Theodore Kekich, a D.E.R. laboratory technician, received the samples and the WQ reports. He removed them from the containers, matched each bottle with the corresponding WQ report, assigned laboratory numbers to each WQ report and placed these numbers in a log book. Since Feola had written on each WQ report that he wanted an analysis for oil and pentachlorophenol, Kekich delivered each sample bottle and each WQ report to John Maljevac, another D.E.R. laboratory technician, whose function it was to physically perform such analysis.

16. Michael Defilippo is and was, at all times relevant to this proceeding, a chemist employed by D.E.R. He is and was in charge of all non-routine analyses which are and were performed at the D.E.R. chemistry laboratory in Harrisburg. At the time when

these samples were delivered to Maljevac for such analyses, he was Maljevac's supervisor.

17. Defilippo told Maljevac to perform such analyses by employing a method of analysis known as ultraviolet spectroscopy.

18. Pursuant to instructions given by Defilippo on June 15, 1972, Maljevac prepared the samples obtained on June 12, 1972, for ultraviolet spectroscopic analysis for the presence of oil and pentachlorophenol by extracting each, first with sulphuric acid to make each sample acidic, and second, with iso-octane, a material which is transparent when subjected to ultraviolet radiation. Each sample, so extracted, was poured into a transparent quartz cell which, in turn, was placed into a machine known as a recording spectrophotometer for such ultraviolet testing.

19. Maljevac did not, on June 15, 1972, extract the samples obtained on June 13, 1972, with sulphuric acid. Otherwise, his manner of preparation of these samples was similar to the manner in which he prepared the samples obtained on June 12, 1972.

20. Maljevac operated the recording spectrophotometer so as to produce ultraviolet radiation, the wave lengths of which ranged from 220 to 350 millimicrons. This ultraviolet radiation was caused to pass through the cell containing each sample to determine at what wave lengths the material in each cell would absorb the ultraviolet radiation. Defilippo, whose task it was to interpret the written results of each test (a spectrum) knew in advance that pentachlorophenol extracted in iso-octane, when a sample has been made acidic, absorbs ultraviolet light at wave lengths of 248 and 320 millimicrons, that pentachlorophenol extracted only in iso-octane absorbs ultraviolet light at wave lengths of 292 and 302 millimicrons and that oil in iso-octane absorbs ultraviolet radiation at a wave length of 253 millimicrons.

21. Oil, which was similar to a fuel oil, was present in the following samples:

(a) The sample taken from the material flowing out of the small pipe projecting out of the west bank of Naylors Run.

(b) The sample taken 5-10 feet downstream from said pipe.

(c) The sample taken 155-160 feet downstream from said pipe.

(d) The sample taken from the sewer injector on Gum property.

(e) The sample taken from the hole which Feola dug on Gum property.

22. Pentachlorophenol was present in the following samples:

(a) The sample taken from the material flowing out of the small pipe projecting out of the west bank of Naylors Run.

(b) The sample taken 5-10 feet downstream from said pipe.

23. There was no conclusive finding of pentachlorophenol in any sample taken on June 13, 1972, from Gum property since the material in each sample, in solution only with iso-octane, did not absorb ultraviolet radiation at wave lengths of 302 and 292 millimicrons.

24. On September 26, 1972, Feola visited the property which Wood was leasing from Rogers'; he caused a well, 24 feet in depth, to be drilled at a point thereon behind the main building; he obtained samples of material found in that well in the following manner:

(a) By lowering a sampling tube to the bottom of the well (2 samples taken at this depth).

(b) By collecting liquid which was dripping from the drill.

(c) By collecting liquid which was on the ground and which was produced in the drilling operation.

(d) By lowering a sampling tube to a depth of 21.5 feet in the well.

25. Feola placed a piece of tape on each bottle in which the samples obtained on September 26, 1972 were contained. Upon this tape he wrote his sample number, the sample location, the date when the sample was obtained and the Township and County where the samples were obtained. He placed a piece of tape over the cap of each bottle to provide a "legal seal". He also recorded this information on a WQ report.

26. Feola placed these sample bottles and WQ reports in a cardboard container and on September 26, 1972, he sent the container to the D.E.R. chemistry laboratory in Harrisburg by bus. Kekich received these samples and these WQ reports on September 27, 1972. He removed them from the container, matched each bottle with the corresponding WQ report, assigned laboratory numbers to each WQ report and delivered each bottle and each WQ report to Maljevac for spectroscopic analysis for oil and pentachlorophenol.

27. Pursuant to instructions given by Defilippo, Maljevac mixed one of the samples collected from the bottom of the well with the sample collected at a depth of 21.5 feet in the well. Maljevac physically analyzed these samples for the presence of oil and pentachlorophenol by the method of ultraviolet spectroscopy. He also analyzed the second sample collected from the bottom of the well by the method of infrared spectroscopy, pursuant to instructions given by Defilippo. Maljevac prepared each sample, other than that used for infrared spectroscopy, in the same fashion as he had prepared the samples which were obtained on June 13, 1972. Defilippo interpreted each spectrum produced by virtue of these analyses.

28. Oil was present in each sample obtained on September 26, 1972.

29. Pentachlorophenol was present in the following samples:

(a) The combined samples obtained from the bottom of the well and from a depth of 21.5 feet in the well. These combined samples were also quantitatively analyzed by Defilippo by use of and by reference to a known standard of pentachlorophenol made by Defilippo. The pentachlorophenol content of these combined samples was 1,000 milligrams per liter (mg.l).

(b) The sample obtained by collecting liquid which was on the ground and which was produced in the drilling operation. Quantitative analyses of this sample indicated a pentachlorophenol content of 1,000 mg.l.

(c) The sample obtained from the bottom of the well which was not combined.

30. On August 21, 1973, Zampagna took the following action:

(a) He caused a well, at least 20 feet deep, to be drilled on the property which Shell was leasing from Rogers'. This well was situate at a point near to the southern boundary line of the property which Wood was leasing from Rogers'.

(b) He lowered a sample bottle into that well and obtained a sample of an oily, dark material.

(c) He traveled to an existing well on the property which Wood was leasing from Rogers'. This well was situate at a point which was slightly east of the main building of Wood.

(d) He lowered a sample bottle into that well and obtained a sample of an oily, dark material.

(e) He wrote his sample number, the sample location, the date when each sample was obtained and the Township and County where each sample was obtained on a tape which was placed on each sample bottle. He also recorded this information on a WQ report.

31. The oily, dark material which Zampogna found in the existing well on the property which Wood was leasing from Rogers' rose to a height of 4 1/2 feet above the water table at that point.

32. On August 22, 1973, Zampogna took the following action:

(a) He obtained a sample of an oily, dark material from the well which he had caused to be drilled on the property which Shell was leasing from Rogers'.

(b) He caused a well, approximately 20 feet deep, to be drilled on Gum property at a point on the southerly side of the newly constructed addition to Gum's existing building.

(c) He lowered a sample bottle into that well and obtained a sample.

(d) He wrote his sample number, the sample location, the date when each sample was obtained and the Township and County where each sample was obtained on a tape which was placed on each sample bottle. He also recorded this information on a WQ report.

33. Zampogna sent the samples which he obtained on August 21 and 22, 1973, to the D.E.R. chemistry laboratory in Harrisburg, by bus. These samples and the accompanying WQ reports were received at said laboratory on August 28, 1973, by a D.E.R. employee whose name is unknown. Each bottle was matched with the corresponding WQ report, laboratory numbers were assigned to each WQ report and each sample bottle and WQ report was delivered to Maljevac for spectroscopic analysis for oil and pentachlorophenol.

34. Pursuant to instructions given by Defilippo, on or about August 28, 1973, Maljevac performed an ultraviolet spectroscopic analysis on each such sample for the presence of oil and pentachlorophenol. However, he used water instead of iso-octane as a solvent in the extraction process. He also analyzed

all of these samples but the one which he obtained from the well on Gum property by the method of infrared spectroscopy. Defilippo interpreted each spectrum produced by virtue of these analyses.

35. Oil was present in each sample obtained on August 21 and 22, 1973.

36. Pentachlorophenol was present in the following samples:

(a) The sample obtained from the well on the property which Shell was leasing from Rogers'. This sample was also quantitatively analyzed by Defilippo by use of and by reference to a known standard of pentachlorophenol made by Defilippo. The pentachlorophenol content of this sample was 2,600 mg.1.

(b) The sample obtained on August 21, 1973, from the well on the property which Wood was leasing from Rogers'. A quantitative analysis of this sample, per such known standard, demonstrated a pentachlorophenol content of 10,000 mg.1.

(c) The sample obtained from the well on the property which Wood was leasing from Rogers'. A quantitative analysis of this sample, per such known standard, demonstrated a pentachlorophenol content of 4,000 mg.1.

37. On December 10, 1973, Feola and Zampogna obtained samples from the following points:

(a) In Naylors Run at Woodleigh Road.

(b) From the small pipe which was projecting out of the west bank of Naylors Run[5].

(c) Upstream from said small pipe at the point where

[5] See Findings of Fact Nos. 11 and 12 for same sampling point.

Naylors Run re-emerges from the culvert under Eagle Road[6].

(d) 155-160 feet downstream from this small pipe, in Naylors Run[7].

38. Feola placed a piece of tape on each bottle in which the samples obtained on December 10, 1973 were contained. Upon this tape he wrote his sample number, the sample location, the date when the sample was obtained and the Township and County where the samples were obtained. He placed a piece of tape over the cap of each bottle to provide a "legal seal". He also recorded this information on a WQ report.

39. Feola placed these sample bottles and WQ reports in a cardboard container and he sent the container to the D.E.R chemistry laboratory in Harrisburg by bus. Maljevac received these samples and these WQ reports on December 11, 1973. He removed them from the container, matched each bottle with the corresponding WQ report, assigned laboratory numbers to each WQ report and prepared for spectroscopic analysis of each sample for oil and pentachlorophenol.

40. Pursuant to instructions given by Defilippo, on or about December 11, 1973, Maljevac performed an ultraviolet spectroscopic analysis on each such sample for the presence of oil and pentachlorophenol. He used water instead of iso-octane as a solvent in the extraction process. He also analyzed the sample obtained from said small pipe by the method of infrared spectroscopy. Defilippo interpreted each spectrum produced by virtue of these analyses.

41. The following results were obtained by virtue of these analyses.

(a) In the sample obtained from Naylors Run at Woodleigh

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[6]See Finding of Fact No. 12 (d) for same sampling point.

[7]See Finding of Fact No. 12 (c) for same sampling point.

Road, only unidentifiable trace organics were present.

(c) In the sample obtained at a point upstream from said small pipe at the point where Naylors Run re-emerges from the culvert under Eagle Road, only unidentifiable trace organics were present.

(d) In the sample obtained at a point 155-160 feet downstream from said small pipe, in Naylors Run, oil and 6 mg.l. of pentachlorophenol were present.

42. On January 23, 1974, Feola obtained samples from the following points:

(a) From the small pipe which was projecting out of the west bank of Naylors Run.

(b) Upstream from said small pipe at the point where Naylors Run re-emerges from the culvert under Eagle Road.

(c) In Naylors Run behind 429 Rittenhouse Circle.

43. Feola placed a piece of tape on each bottle in which the samples obtained on January 23, 1974 were contained. Upon this tape he wrote his sample number, the sample location, the date when the sample was obtained and the Township and County where the samples were obtained. He also recorded this information on a D.E.R. Water or Waste Quality Report Form (WQ report).

44. Feola placed these sample bottles and WQ reports in a cardboard container and on or about January 24, 1974, he delivered this container to the D.E.R. chemistry laboratory in Harrisburg. These samples and the accompanying WQ reports were received at said laboratory by a D.E.R. employee whose name is unknown. Each bottle was matached with the corresponding WQ report, laboratory numbers were assigned to each WQ report and each sample bottle and each WQ report was delivered to Maljevac for spectroscopic analysis for oil and pentachlorophenol.

45. Pursuant to instructions given by Defilippo, on or about January 28, 1974, Maljevac performed an ultraviolet spectroscopic analysis on each such sample for the presence of oil and pentachlorophenol. He used water instead of iso-octane as a solvent in the extraction process. He also analyzed the sample obtained in Naylors Run behind 429 Rittenhouse Circle by the method of infrared spectroscopy. Defilippo interpreted each spectrum produced by virtue of these analyses.

46. The following results were obtained by virtue of these analyses:

(a) In the sample obtained from the flow from said small pipe, oil was present and pentachlorophenol was present.

(b) In the sample obtained at a point upstream from said small pipe at the point where Naylors Run re-emerges from the culvert under Eagle Road, only unidentifiable trace organics were present.

(c) In the sample obtained in Naylors Run behind 429 Rittenhouse Circle, oil and 4 mg.l. of pentachlorophenol were present.

47. In the general area of the Township in which the land owned and/or occupied by the Appellants is situate, there are two observable divides. A "divide" is a point on the ground at which the land on either side thereof slopes away in opposite directions.

48. The first such divide runs in a general northerly and southerly direction. On the easterly side of this divide, the slope of the land is in a general southeasterly direction towards the property owned by Rogers' and occupied by Shell and Wood and towards the property owned by Gum.

49. The second such divide runs in a general easterly and westerly direction. On the northerly side of this divide, the slope of the land is in a general northeasterly direction

towards the property owned by Gum.

50. The point where the Shell gasoline is situate is at an elevation of 310 feet above sea level. The property which Wood occupies is at an elevation of 305 feet above sea level. The Gum property is at an elevation of 305 feet above sea level. Naylors Run, at a point where it is nearest to the main building of Gum, is at an elevation of 300 feet above sea level.

51. The highest point below the surface of the ground at which ground water completely fills or saturates soil and other materials at any given point is called the water table.

52. Naylors Run is the surface expression of the water table in this area. It is actually ground water which flows at the surface.

53. Immediately below the surface of the land which is owned and/or occupied by Appellants there is approximately twelve feet of man made material. Beneath this man made material there is approximately eighteen feet of natural, unconsolidated material consisting of silty sands and gravel. Below this natural, unconsolidated material there is bedrock.

54. As a general proposition, where there is unconsolidated material, the water table is a subtle reflection of the surface topography. This means that the flow of ground water will be in the same direction as the slope of the surface land.

55. In respect to the land owned and/or occupied by Appellants, ground water flows from the north-south divide, by gravity, in a southeasterly direction towards this land and towards Naylors Run at various points in Naylors Run which are northeast, east and southeast of this land.

56. In respect to the land owned by Gum, ground water flows from the east-west divide, by gravity, in a northeasterly direction towards this land and towards Naylors Run at various points in Naylors Run which are southeast of this land.

57. Although the natural topography of the surface of the land owned and/or occupied by Appellants has been altered by activities such as construction, this has little effect on the direction of the flow of ground water.

58. The water table at the point where the well was drilled on the property which Shell leases from Rogers' and at the points where the two wells were drilled on the property which Wood leases from Rogers' is between twenty and twenty-five feet below the surface of the ground.

59. Pentachlorophenol mixed with oil is, for the most part, insoluble in water. This means that this mixture exists and flows on top of the water table.

60. Pentachlorophenol mixed with oil is present under the surface of the property owned by Rogers' and leased, in part, to Shell and, in part, to Wood.

61. The small pipe which Feola observed on June 12, 1972, which was projecting out of the west bank of Naylors Run is the terminus for a thirty-inch storm sewer which is maintained by the Township or by an Authority of which the Township is a member. At the point where material flowing in this pipe enters Naylors Run, the pipe which comprises this storm sewer is not under property owned by Gum. From this point of termination, this storm sewer is laid in a southwesterly direction, and is, in part, under property owned by Gum. The storm sewer is joined by a twelve inch sewer pipe which comes from the direction of a building on property owned by Gum at a manhole, designated as No. 9. The pipe continues to be laid in a southwesterly direction, and is, in part, under property owned by Gum. At a manhole, designated as No. 8, which is on Gum property, the pipe is laid, for a short distance in a northwesterly direction on Gum property at points which are immediately adjacent to a Gum building. At a manhole, designated as No. 7, which is on Gum property, the placement of the pipe is in a general westerly direction, under property of various owners.

The pipe continues westerly under Lawrence Road and it is then located in various directions in and around Achille Road and Eagle Road.

62. On April 11, 1975, employees of the Radnor Haverford Marple Sewer Authority caused the following portions of this storm sewer to be examined by means of a television camera which was pulled through these portions via a cable:

(a) From a manhole at Lawrence Road to manhole No. 7.

(b) From manhole No. 9 to manhole No. 8.

(c) From manhole No. 8 to manhole No. 10[8].

63. From the video tape of the inside of this storm sewer a significant flow thereto was visualized from the twelve inch sewer line which joins this storm sewer at manhole No. 9.

64. There were leaks in the pipe which comprises this storm sewer beginning at a point which is four feet from manhole No. 9 and ending at a point which is one hundred eighty feet from manhole No. 9 as it is laid towards manhole No. 8.

65. C. R. Pennoni, a Registered Professional Engineer in Pennsylvania, is the engineer for the Township. He has a great deal of experience in obtaining samples of water to determine whether there are contaminants therein.

66. On May 12, 1975, Pennoni entered manhole No. 9 and he observed an oily, slippery black material present in the storm sewer pipe at this point. He also observed a flow in the twelve inch pipe which joins manhole No. 9. He observed solid material at the bottom of this twelve inch pipe which was not oily and slippery.

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[8] Mr. Dunn, an employee of the Radnor Haverford Marple Sewer Authority testified that manhole No. 10 was the small pipe which projected out of the west bank of Naylors Run.

67. On May 27, 1975, Pennoni sampled in the following manner at manhole No. 9:

(a) He filled three sample jars with liquid from the flow in the bottom of the storm sewer pipe.

(b) He scraped material from the concrete surface of the storm sewer pipe and placed this material into another sample jar.

(c) He filled three additional sample jars with liquid from the flow in the twelve inch pipe.

(d) He scraped material from the vitrified clay surface of the twelve inch pipe and placed this material into another sample jar.

68. On May 12, 1975, Pennoni entered manhole No. 8 and he sampled at manhole No. 8 by filling three sample jars with liquid from the flow at the manhole invert.

69. Pennoni placed a piece of tape on each sample jar in which the samples obtained on May 12, 1975, were contained. Upon this tape he wrote the date when each sample was obtained, the location where each sample was obtained, the manhole number, the size of the pipe, and he indicated that these were liquid samples. He sealed the cap of each sample jar with another piece of tape, placed each jar in a box and gave the box to Osgood, who was with him when he sampled.

70. Osgood drove to Harrisburg with the box in which these sample jars were contained and on May 13, 1975, he delivered the box to the D.E.R. chemistry laboratory. The samples were refrigerated at the laboratory until May 15, 1975. On that date Osgood copied the information which Pennoni had placed on the sample jars onto five WQ reports. Only five WQ reports were needed because the contents of the three sample jars from the flow in the bottom of the storm sewer pipe at manhole No. 9 were poured into one container, because the contents of the three sample jars from

the liquid from the flow in the twelve inch pipe were poured into one container, and because the contents of the three sample jars from the flow at the invert at manhole No. 8 were poured into one container.

71. On May 15, 1975, Defilippo placed laboratory numbers on the five WQ reports, prepared each of the five samples for ultraviolet spectroscopic analysis for the presence of pentachlorophenol, utilized the recording spectrophotometer and obtained the following results:

(a) In the combined sample of the liquid from the flow in the twelve inch pipe, no pentachlorophenol was detected.

(b) In the sample of the material scraped from the surface of the twelve inch pipe, no pentachlorophenol was detected.

(c) In the combined sample of the liquid from the flow in the bottom of the storm sewer pipe at manhole No. 9, 8 mg.l. of pentachlorophenol were present.

(d) In the sample of the material scraped from the surface of the storm sewer pipe at manhole No. 9, pentachlorophenol was detected.

(e) In the combined sample of the liquid from the flow at the invert at manhole No. 8, .01 mg.l. of pentachlorophenol was present.

72. Pentachlorophenol mixed with oil flows, mostly on top of the water table, under the surface of the property of Rogers' and leased, in part to Shell and in part to Wood. This material then flows in a southwesterly direction under Eagle Road, a highway owned and maintained by the Commonwealth of Pennsylvania. Pentachlorophenol mixed with oil flows, mostly on top of the water table, under the surface of the property of Gum. This material then infiltrates the storm sewer pipe which is maintained by the Township, or by an Authority of which the Township is a member, at points between manhole No. 8 and manhole No. 9. Pentachlorophenol mixed with oil travels in this storm sewer pipe and is discharged to Naylors Run at the terminus of this pipe.

73. Although it appears that the major amount of pentachlorophenol mixed with oil is pooled under the surface of the property of Rogers' and leased, in part to Shell and in part to Wood, there has not been sufficient testing performed to determine:

(a) The total volume of this material under the surface of the property which is owned by and/or leased to Appellants.

(b) How widely this material is dispersed under the surface of the property which is owned by and/or leased to Appellants.

74. There has been sufficient testing performed to determine:

(a) That this material is not present in Naylors Run upstream from the terminus of the storm sewer pipe at the west bank thereof.

(b) That this material is present under property owned and/or maintained by the Commonwealth of Pennsylvania, the Township or an Authority of which the Township is a member, and by landowners or occupiers, the identities of whom or which have not been disclosed in this proceeding.

75. Pentachlorophenol is a solid organic material which is acidic in nature. It is a fungicide, a herbicide and a wood preservative. It is a toxic substance and it is lethal to aquatic organisms in certain concentrations.

76. In order to determine the volume of pentachlorophenol under the surface of the property which is owned by and/or leased to Appellants and in order to determine how widely this material is dispersed thereunder, many more wells must be drilled on said property, to the water table, and additional sampling from these wells must be performed.

77. At the conclusion of this additional drilling and sampling program, a program designed to remove this material could

be instituted. This removal program could consist of pumping the major concentration of this material from below the surface of the property owned by Rogers' and leased, in part to Shell and in part to Wood, and properly disposing of it. The second aspect of this removal program could consist of the construction of a trench, which is at least as deep as the depth of the excavation for said storm sewer, from the west bank of Naylors Run to manhole No. 8. This trench should be constructed above, or to the northwest of the storm sewer, in order that it can capture this material as it flows toward the storm sewer. At the terminus of this trench a collecting device could be installed so that the material flowing in this trench can be collected and properly disposed of before it reaches Naylors Run.

78. It is impossible to assess the cost of such a removal program until the further drilling, testing and sampling is completed.

79. The participation of landowners and occupiers, in addition to Appellants, is necessary in order to complete this further drilling, testing, sampling and removal program.

80. Wood, by its present management, has been aware of the pollution problems which have been described above for a number of years. Wood, by its present management, has cooperated with D.E.R. and its predecessor entity, the Pennsylvania Department of Health, in the earlier efforts to remedy these pollution problems on and off the property which Wood occupies.

## D I S C U S S I O N

As we stated earlier in this Adjudication, the parties stipulated that the sole authority for the issuance of the Orders from which these consolidated appeals have been taken is Section 316 of The Clean Streams Law, supra.

Section 316 provides as follows:

> "§691.316 Responsibilities of landowners and land occupiers.
>
> "Whenever the Sanitary Water Board finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the board may order the landowner or occupier to correct the condition in a manner satisfactory to the board or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.
>
> "For the purpose of collecting or recovering the expense involved in correcting the condition, the board may assess the amount due in the same manner as civil penalties are assessed under the provisions of section 605 of this act: Provided, however, That if the board finds that the condition causing pollution or a danger of pollution resulted from mining operations conducted prior to January 1, 1966, or, if subsequent to January 1, 1966, under circumstances which did not require a permit from the Sanitary Water Board under the provisions of section 315(b) of this act as it existed under the amendatory act of August 23, 1965 (P.L. 372), then the amount assessed shall be limited to the increase in the value of the property as a result of the correction of the condition.
>
> "If the board finds that the pollution or danger of pollution results from an act of God in the form of sediment from land for which a complete conservation plan has been developed by the local soil and water conservation district and the Soil Conservation Service, U.S.D.A. and the plan has been fully implemented and maintained, the landowner shall be excluded from the penalties of this act."[9] (footnotes omitted)

All Appellants have taken the position that Section 316 is unconstitutional because, as to them, it imposes responsibilities to correct a condition when they neither caused or created such condition nor were at fault as to its continued existence.

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[9]These powers were transferred to D.E.R. by the Act of December 3, 1970, No. 275, P.L. 834, 71 P.S. §510-1 (22).

Several of the Appellants submit that Section 316 is unconstitutionally vague, that Section 316 is void because it constitutes a taking without due process of law and that it is invalid ex post facto legislation.

We are aware that the constitutionality of Section 316 has been questioned. See Commonwealth of Pennsylvania vs. Barnes & Tucker Company, 9 Pa. Cmwlth. 1, 303 A.2d 544, 564 (1973) reversed on other grounds, 455 Pa. 392, 319 A.2d 871 (1974); Acid Mine Drainage and The Pennsylvania Courts, 11 Duquesne Law Review, 495, 511 (1973).

Although this Board has, in the past, ruled on the constitutionality of other sections of The Clean Streams Law, see e.g. City of Uniontown vs. Commonwealth of Pennsylvania Department of Environmental Resources, EHB Docket No. 72-203, issued June 18, 1973, we must be mindful of the statement made by Judge Bowman, speaking for the Commonwealth Court of Pennsylvania in St. Joe Minerals Corporation vs. Goddard, 14 Pa. Cmwlth. 624, 324 A.2d 800, 802 (1974), that this Board does not have the authority to pass upon the constitutionality of a statute.

For purposes of this Adjudication, we will presume that Section 316 is constitutional. We will leave to the Courts the task of engaging in the indepth analysis which is required to finally decide these questions. We suggest, however, that the Courts should be guided by the following language of the Supreme Court of Pennsylvania in Commonwealth of Pennsylvania vs. Harmar Coal Company, 452 Pa. 77, 306 A.2d 308, 316-317 (1973), appeal dismissed, 415 U.S. 903 (1974):

> . . . A state in the exercise of its police power may, within constitutional limitations, not only suppress what is offensive, disorderly or unsanitary, but enact regulations to promote the public health, morals or safety and the general well-being of the community. Bacon v. Walker, 204 U.S. 311, 27 S.Ct. 289, 51 L.Ed. 499 (1907). This power has been used to prevent industrial practices in the use of private property which were injurious to the public. The Slaughter House Cases, 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394 (1873). The police power may even be exercised over property and current business operations, requiring the destruction of existing property, Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928), or the imposition of new costs,

Queenside Hills Realty Co., Inc. v. Saxl, 328 U.S. 80, 66 S.Ct. 850, 90 L.Ed. 1096 (1946); The Slaughter House Cases, 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394 (1873). Regulations maintaining the state's water resources have also been held to be within the scope of the police power. Hudson County Water Co. v. McCarter, 209 U.S. 349, 28 S.Ct. 529, 52 L.Ed. 828 (1908); Commonwealth v. Emmers, 33 Pa. Super. 151 (1907), aff'd, 221 Pa. 298, 70 A. 762 (1908).

"[9,10] The constitutional standards to apply in determining whether the police power was properly exercised were set forth in Lawton v. Steele, 152 U.S. 133, 137, 14 S.Ct. 499, 501, 38 L.Ed. 385 (1894):

"'To justify the state in . . . interposing its authority in behalf of the public, it must appear—First, that the interest of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'

"In applying these standards a regulation must be measured by its "reasonableness," Goldblatt v. Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962). Debatable questions as to "reasonableness" are not for the courts but for the legislature and therefore the presumption of reasonableness is with the state. Id. at 595-596, 82 S.Ct. 987 (citations omitted)."

Each of the Appellants contends that Section 316 is inapplicable in these consolidated appeals for the reason that Section 316 applies only to the correction of a condition which exists because of pollution from mine drainage. In support of this contention Appellants state that the legislative history of the 1970 amendments to The Clean Streams Law, one of which amendments is to Section 316, clearly indicates that these amendments are directed solely at the regulation of the coal mining industry. Appellants also point to the fact that the mention of Section 315 of The Clean Streams Law, supra, 35 P.S. §691.315,[10] in the language of Section 316, clearly shows that the Legislature intended that Section 316 was to apply solely to coal mining situations.

We disagree with this contention. In the first place, the 1970 amendments to The Clean Streams Law are major revisions to that statute in which the Legislature includes new language as

[10] This section deals exclusively with the operation of and the discharges from a mine.

to the discharge of sewage and all industrial wastes to the waters of the Commonwealth and in which, inter alia, the Legislature provides a definition of the term "pollution" which is so sufficiently broad that even a most cursory observation of that definition would clearly reveal that "pollution" can be from contaminants other than acid mine drainage.

The legislative history of these amendments demonstrates that they were not directed solely at the mining industry. This is illustrated by the comments of Rep. Wilt contained in I Pa. Legislative Journal-House, p.p. 1728-1729, as follows:

> "As you are aware, H.B. 1353 will further regulate discharge and industrial waste, at the same time giving the Water Board greater leverage in dealing with potential pollution in coal mining .
>
> . . .
>
> Under H.B. 1353 the Water Board will also be better equipped to deal with other industries and communities that contribute to the degradation of our streams. None should be permitted to escape the duty of helping to keep our waters clean. If the coal industry, during an era of tremendous pressures that exact ever rising operating expense has been able to meet its environmental obligations with expediency, then there is no reason why any segment of our industry or society should lag in the effort that is so vital to the preservation of an essential natural resource." (Emphasis supplied)

While we cannot disagree that Section 316 was intended to be an effective tool which could be utilized by D.E.R. to seek relief from a situation where, for instance, mine drainage created as the result of mining operations long since abandoned is present on land and is causing pollution or a danger of pollution, we would not limit its applicability to such a situation.[11]

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[11] This Board has never placed such limitation on the applicability of Section 316. See Gossett v. Commonwealth of Pennsylvania Department of Environmental Resources, E.H.B. Docket No. 71-125, issued July 25, 1972, (Section 316 applied to situation where gasoline was found on land); Harmuth v. Commonwealth of Pennsylvania Department of Environmental Resources E.H.B. Docket No. 72-333, issued February , 1973, (Section 316 applied to situation where lechate from land fill was causing pollution); Sibley et al. v. Commonwealth of Pennsylvania Department of Environmental Resources, E.H.B. Docket No. 73-160-C, issued October 21, 1975 (Section 316 applied to situation where untreated sewage existed on land.)

In order for Section 316 to be applicable to Appellants in these matters, we must determine whether D.E.R. has produced competent evidence to prove that pollution or a danger of pollution is resulting from a condition which exists on land which is owned and/or occupied by Appellants.

In order for this burden to be sustained, it is necessary for D.E.R. to prove that a polluting substance (the "condition") existed on land which is so owned and/or occupied and that this "condition" has reached or threatens to reach the waters of the Commonwealth.

At various times between June 12, 1972 and May 12, 1975, D.E.R. personnel and, in one case, the Township engineer, obtained samples of material at points on the water table below the surface of land owned by Gum and below the surface of land owned by Rogers' and leased by Rogers' in part to Shell and in part to Wood.

At various times between June 12, 1972 and January 23, 1974, D.E.R. personnel obtained samples of material from Naylors Run at points near to the land which is owned and/or occupied by Appellants.

D.E.R. contends that these samples were analyzed at its chemistry laboratory in Harrisburg and that from the results of these analyses it is clear that pollution or a danger of pollution to the waters of the Commonwealth is resulting from a "condition" which exists on each parcel of land which is owned and/or occupied by these Appellants.

Appellants contend that D.E.R. failed to present evidence which is sufficient to connect the testimony of the analyses of these samples with these samples as obtained in the field. They contend that D.E.R. has not established a "chain of custody" of these samples.

Each person who obtained a sample the analysis of which was sought to be introduced in this matter has testified as to the manner in which he obtained it and as to the manner in which he identified it. Each such sample was analyzed by Maljevac who gave a lucid explanation of his method of analysis. If the

results of these analyses are to be inadmissible, as contended by Appellants, we must find that there is a fatal gap in the chain of custody between the time when each such sample was obtained and the time when each such sample was analyzed. See Commonwealth v. Williams 458 Pa. 319, 326 A.2d 300,302 (1974).

As to the samples which were obtained by Feola and Zampogna on June 12 and June 13, 1972, there is no chain of custody problem. Each person who handled these samples between the time they were obtained and the time they were analyzed was identified and presented competent testimony with regard to the particular function which each performed.

As to the samples which were obtained by Feola on September 26, 1972, the only "gap" in the "chain of custody" is that these samples were shipped to said laboratory by bus. We have held, in Commonwealth of Pennsylvania Department of Environmental Resources v. Rushton Mining Company, et al. E.H.B. Docket No. 72-361-CP-D, issued March 12, 1976, that the fact that samples were shipped to said laboratory by bus did not preclude D.E.R. from introducing the analyses of those samples into evidence where there was no evidence offered to indicate that the samples had been tampered with. No such evidence has been introduced in this consolidated matter.

As to the samples which Zampogna obtained on August 21 and August 22, 1973, we find that these samples were also shipped to said laboratory by bus and that no testimony was presented as to which D.E.R. employee received these samples and delivered them to Maljevac for analysis.

In Commonwealth v. Jenkins, 231 Pa. Superior Ct. 490, 332 A.2d 490 (1974), a criminal case, the Court held that there was no rule requiring the prosecution to produce as witnesses all persons who were in a position to come into contact with the article sought to be introduced into evidence. The Court also held that physical evidence could be property admitted despite gaps in testimony regarding custody.

Although we believe that D.E.R. was "sloppy" in the handling of these samples, we hold that the failure to identify

the person who received these samples is not a fatal gap in the chain of custody. See United States v. Clark, 425 F.2d 827, 832-833 (3rd Cir., 1970).

As to the samples which Feola obtained on December 10, 1973, and on January 23, 1974, and as to the samples which Pennoni obtained on May 12, 1975, we find that there are no new or different chain of custody problems from those which we have already determined to be non-fatal to the admissibility of the results of analyses of earlier obtained samples.

We reject the contention that D.E.R. has failed to establish a chain of custody as to these samples.

To the extent that Appellants, or some of them, contend that the actual samples and/or the actual sample bottles should have been brought to the hearing, such contention is also rejected. The material which comprised each sample was used in the analysis and the bottles were cleaned and used in other D.E.R. activities. Appellants certainly could have obtained their own samples at each and every D.E.R-Township sampling point and caused an analysis to be made of them.

The next contention advanced by Appellants as to these samples is that they were not analyzed according to the methods and procedures described in the current edition of "Standard Methods for the Examination of Water and Waste Wastewater." Appellants contend that this failure to adhere to the methods and procedures described in said publication is fatal to the admissibility of the analyses of these samples because such adherence is required by virtue of 25 Pa. Code §91.42, a regulation governing D.E.R.

Defilippo, the D.E.R. chemist who supervised these analyses, did not know whether the methods and procedures described in said publication were followed in whole or in part. This Board does not know the answer to this question either, since Appellants presented no evidence that those methods and procedures were not followed. We will presume that these analyses were performed in conformity with the mandate of 25 Pa. Code §91.42 in the absence of evidence to the contrary.

The final contention advanced by Appellants as to the admissibility of the results of the analyses of these samples is that all of them were not quantitatively analyzed. We find no requirement that quantitative analysis of every such sample must be made, although we do not doubt, in context of this particular matter, that additional quantitative analyses would have been helpful in gaining more insight into the solution of the problems which gave rise to the issuance of these Orders.

We have found that pentachlorophenol mixed with oil is present under the surface of the property owned and/or occupied by each Appellant. These substances constitute the "condition which exists on land in the Commonwealth" which must be found by D.E.R. to trigger the application of Section 316.[12] Such "condition" must, however, be found to be causing pollution or a danger of pollution to further justify the application of Section 316.

In Section 1 of The Clean Streams Law, supra, 35 P.S. §691.1, the term "pollution" is defined as follows:

> " 'Pollution' shall be construed to mean contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commerical industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters. The board shall determine when a discharge constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined."

We have found that pentachlorophenol is a solid organic material which is acidic in nature, which is a fungicide and a herbicide, which is used as a wood preservative, which is toxic

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[12] See Gosset v. Commonwealth of Pennsylvania Department of Environmental Resources, supra.

and which is lethal to aquatic organisms in certain concentrations. We have found that pentachlorophenol mixed with oil changed the color of Naylors Run at the point in that stream to which it was first discharged. We have found that this material was present in the ground water and in Naylors Run, both of which constitute "waters of the Commonwealth."

We have no difficulty in holding that pentachlorophenol mixed with oil in the waters of the Commonwealth constitutes pollution within the meaning of Section 316. Pollution is resulting from a condition which exists on land which is owned and/or occupied by Appellants.

We reach the point where it is necessary to examine the directives contained in the Orders to Appellants in light of the facts which have developed during the course of the 13 days of hearings in this consolidated matter.

We have found that pollution is resulting from a condition which exists on land which is owned and/or occupied by Appellants.

This finding, standing alone, imposes upon these Appellants the responsibility to correct such condition, notwithstanding the fact that this condition was neither created nor actively maintained by any of them.

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[13] The relative liability of the various appellants is a question that must be taken up, if at all, in private litigation among the parties. See our prior opinion in this case on the issue of joinder, 64 D & C 2.d 78 (1974). Section 316 is not predicated upon fault but upon the existence of pollution or a danger of pollution on an owner or occupier's land. We would think that under common law tort principles, any liability to be assigned for the pollution condition here would fall first on the Jacoby, who was responsible for the creation of the condition; and second, depending to some extent on questions of corporate succession that were not raised in this proceeding, on National Wood Preservers, which succeeded Jacoby in the business; and third, or perhaps jointly with National Wood Preservers, on the owners of the property from which the pollution was generated. We doubt that Shell as a tenant of property that has a ground water pollution problem that it did not cause, or Gum as the owner of property that received ground water pollution from other property could be held liable for that pollution on any common law theory of responsibility. However, Section 316 clearly authorizes the Department to ignore the issue of fault, as it is done here, and proceed against whoever owns or occupies land so as to remedy a pollution problem as quickly as possible. We might perfer a more delicate balancing of responsibility in the Department's action, but we cannot say that their approach is unauthorized.

As applied to these Appellants, Section 316 is a declaration of their strict liability to correct a condition based upon the mere fact that they own and/or occupy the land under which this condition exists.

If Section 316 is to withstand a constitutional challenge, it must be declared to be a valid exercise of the police power. Commonwealth of Pennsylvania vs. Harmar Coal Company, supra. It must be noted that a valid exercise of the police power is one which is restricted by the parameters of reason. Commonwealth of Pennsylvania vs. Barnes and Tucker, 455 Pa. 392, 319 A.2d 871, 886 (1974).

We have found that this same condition which exists on land which is owned and/or occupied by Appellants also exists on land which is owned and/or occupied by persons or entities who or which have not been subjected to D.E.R. action. We have found that this condition and the pollution which results therefrom cannot be abated without the participation of these other landowners and/or occupiers.

D.E.R. has directed these Appellants to institute and implement a correction program which would, of necessity, require all of them to take action outside the geographical boundary of the land which they own and/or occupy.

Although such directives would be a proper exercise of the authority of D.E.R. if these Appellants were found to be in violation of other sections of The Clean Streams Law in which, inter alia, certain activities are declared to be a nuisance, we take the position that Section 316 provides the authority to D.E.R. to require a landowner or occupier to correct a condition only on the land which is owned or occupied by such person or entity.

Any other construction of the authority which is granted to D.E.R. under Section 316 would, in our view, unreasonably penalize a person or entity who or which has the misfortune of having a pollution problem under land which he or it owns and/or occupies, which he or it neither created nor actively maintained.

Any other intrepretation of the authority which is granted to D.E.R. under Section 316 would, in our view, provide further grounds for claims that this Section is unconstitutional and that enforcement of this Section, insofar as that enforcement required a landowner or occupier to take action outside his or its land, would be discriminatory.

Since it is presumed that the General Assembly in the enactment of a statute does not intend a result which is either unreasonable or unconstitutional, See Section 3 of the Statutory Construction Act of 1972, the Act of November 25, 1970, P.L. 707, 1 Pa. C.S.A §1922 (1) (3), our interpretation of Section 316 is consistent with the intention of the General Assembly.

Since we have found that Section 316 applies to these Appellants to the extent that they can be required to take corrective action on land which is owned and/or occupied by them, it would be logical for the directives contained in these Orders to be amended to require that Appellants take action which is consistent with our interpretation of the responsibilities of each of them under Section 316.

Although this Board has the authority to substitute our discretion for that of D.E.R. by amending these directives,[14] we must first deal with the contention of Appellants that upon the state of the record in this matter no orders to them are justified.

Appellants direct our attention, in this regard, to the decision of the Commonwealth Court of Pennsylvania in Commonwealth of Pennsylvania vs. Wyeth Laboratories, Division of American Home Products Corporation, 12 Pa. Cmwlth. 227, 315 A.2d 648 (1974). In Wyeth, the Court held that where an entity is held in violation of Section 401 of The Clean Streams Law, supra, 35 P.S. §691.401;[15]

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[14] See Warren Sand & Gravel Co., Inc., et. al. v. Commonwealth of Pennsylvania Department of Environmental Resources, Pa. Cmwlth. 341 A.2d 556, 565-566 (1975); East Pennsboro Township Authority v. Commonwealth of Pennsylvania Department of Environmental Resources, 18 Pa. Cmwlth. 58, 334 A.2d 798. 804 (1975).

[15] Section 401 of The Clean Streams Law provides that "It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.

simply because of its ownership of land and for conditions created long prior to its ownership, the burden of proving that abatement is possible, without being practically prohibitive, rests upon the Commonwealth. (Through D.E.R.)

Appellants argue that Wyeth applies here and that D.E.R. has completely failed to meet its burden of proof of such feasibility.

We are not persuaded that the holding in Wyeth is applicable to a case arising under Section 316. Although the facts in a Section 316 case may be quite similar to the facts in Wyeth, the language of Section 316 is such that we believe that the Legislature clearly intended the responsible party to have the primary burden as to all phases of correction, including the primary burden to show that correction was not feasible.

We need not decide the issue of whether the holding in Wyeth is applicable to these consolidated matters because we are going to issue an Order which contains directives which are different from those which D.E.R. made. These new directives will require these Appellants to take action which, based upon our reading of all the testimony in this record, is feasible. Furthermore, we are going to retain jurisdiction in these consolidated appeals to decide any questions of feasibility which may arise.

There is a final contention to be determined. Appellants, or some of them, believe that D.E.R is estopped from requiring them to correct this condition because of the failure of D.E.R. and its predecessor, the Pennsylvania Department of Health to take appropriate enforcement action to cause abatement of this pollution problem which has existed for many years.

We dismiss this contention. In the first place, we have not received sufficient information as to the extent of prior enforcement activities to be able to decide whether they were patently insufficient under The Clean Streams Law as it existed during the period when Samuel Jacoby operated National Wood Preservers, Inc. In the second place, where the state police

power is found to exist, it is not lost by non-exercise, but remains to be exerted as local exigencies may demand. See Commonwealth of Pennsylvania vs. Barnes & Tucker Company, 455 Pa. 392, 319 A.2d 871,884 (1974).

## CONCLUSIONS OF LAW

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

2. Section 316 of The Clean Streams Law is constitutional.

3. Section 316 of The Clean Streams Law is applicable to conditions which exist on land in the Commonwealth of Pennsylvania which result in pollution or a danger of pollution even if such conditions are unrelated to coal mining operations.

4. A condition, the presence of pentachlorophenol mixed with oil, exists on land which is owned by Rogers' and occupied by Shell and by Wood and on other land which is owned by Gum. This condition results in pollution within the meaning of Sections 1 and 316 of The Clean Streams Law.

5. A landowner and/or a tenant may be ordered, by virtue of the authority given to D.E.R. under Section 316 of The Clean Streams Law to correct a condition which exists on land which they own or occupy. A landowner and/or a tenant may not be ordered, pursuant to Section 316 of The Clean Streams Law, to correct a condition on land which they neither own nor occupy.

6. Where D.E.R. issues orders pursuant to the exercise of its discretion, this Board, based upon the record before us on appeal from such orders, may substitute its discretion for that of D.E.R. and modify or amend such orders.

7. Neither D.E.R. nor this Board is estopped from exercising the authority given under Section 316 of The Clean Streams Law in these consolidated appeals.

## O R D E R

AND NOW, this 30th day of July , 1976, the appeals of National Wood Preservers, Inc., Philadelphia Chewing Gum Corp., Clifford A. Rogers and Virginia M. Rogers, his wife, and Shell Oil Company from Orders dated July 12, 1973, and September 21, 1973, issued by the Commonwealth of Pennsylvania, Department of Environmental Resources are sustained in part and are dismissed in part.

It is further Ordered that said Orders are hereby modified to provide as follows:

IA. Within thirty (30) days from the date of this Order Rogers and Shell (as to property leased to Shell) and Rogers and Wood (as to property leased to Wood) and Gum shall submit to D.E.R. a map and all other necessary supportive data in which there is set forth all points on and under the land that each appellant owns or occupies upon which wells should be drilled and samples obtained and analyzed for the presence of pentachlorophenol mixed with oil.

B. D.E.R. shall promptly study said maps and supportive data and shall promptly inform appellant as to whether D.E.R. is satisfied with the drilling and sampling points set forth therein.

C. Within thirty (30) days from the date when D.E.R. notifies appellant the D.E.R. has accepted the drilling and sampling points set forth in said maps and said supportive data, Rogers' and Shell (as to property leased to Shell), Rogers' and Wood (as to property leased to Wood), and Gum (as to property it owns) shall complete such well drilling and sampling to determine:

(1) The geographical area under each said parcel where a significant concentration of pentachlorophenol mixed with oil is present.

(2) The geographical area under each said parcel where any pentachlorophenol mixed with oil is present.

(3) The profile of the groundwater table at all such points where wells are drilled and sampling is performed.

(4) Whether the pentachlorophenol mixed with oil which is found is largely insoluble in water.

Within five (5) days from the date when such well drilling, sampling and analyses are completed, Appellants shall submit the written findings and results obtained thereby to D.E.R.

D. Within sixty (60) days from the date when D.E.R. provides written authorization for the work to be hereinafter described, Rogers' and Shell (as to property leased to Shell) and Rogers' and Wood (as to property leased to Wood) shall remove as much pentachlorophenol mixed with oil as is technically feasible by pumping such material from below the surface of the ground and by transporting said material to a suitable disposal site.

E. Within twenty (20) days from the date when D.E.R. notifies Gum that the Commonwealth of Pennsylvania (as to relevant portions of Eagle Road) and other landowners or occupiers of land (at points between the terminus of the thirty inch storm sewer at Naylors Run and manhole No. 8) have completed a drilling and sampling program on their land, as described in A, B and C above, Gum shall submit to D.E.R. a written proposal as to the most feasible method to remove and/or to collect and capture pentachlorophenol mixed with oil which exists on land owned by Gum.

F. Within twenty (20) days from the date when D.E.R. has approved proposals from Gum, from the Commonwealth of Pennsylvania and from said other landowners or occupiers of land as to the most feasible method to remove and/or to collect and capture pentachlorophenol mixed with oil which exists on all such land, Gum shall begin to implement its said proposal as it relates to actions which must be taken on Gum property. Gum shall continue to implement its said proposal as it relates to actions that must be taken on Gum property until as much pentachlorophenol mixed with oil is removed there from and/or is collected and captured as is technically feasible.

IIA. In the alternative, it is Ordered that D.E.R. may direct Appellants, or any of them, to allow D.E.R., or other person or entity, or other agency of the Commonwealth of Pennsylvania, access to land which is owned and/or occupied by Appellants, or any of them, to correct the pollution conditions existing under their lands.

B. D.E.R. may make such election within ten (10) days from the date of this order or within ten (10) days from the date when Appellants have submitted their well drillings and sampling points map and supportive data to D.E.R.

C. If such election is made by D.E.R., D.E.R. may assess the amount due by reason of such corrective action against each appellant in the same manner as civil penalties are assessed under the provisions of §605 of The Clean Streams Law. No Appellant shall be required to bear the costs of any such corrective action other than to the extent that such costs relate to corrective action taken on land which is owned and/or occupied by each of them.

III. It is further Ordered that this Board retains jurisdiction in these consolidated matters for the purpose of deciding any disputes which may arise by and among the parties hereto with regard to the duties and responsibilities of any of them under this Order.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member



DATED: July 30, 1976

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

LLOYD THOMPSON

Docket No. 75-177-C

Sewerage Permit Issuance

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and MOTOR LODGE DEVELOPMENT COMPANY

ADJUDICATION

By Joseph L. Cohen, Member, August 5, 1976

This matter is before us on the appeal of Lloyd Thompson of Rostraver Township, Westmoreland County, Pennsylvania, from the actions of the Pennsylvania Department of Environmental Resources (DER) in granting intervenor, Motor Lodge Development Company, permits No. 6570424 (issued August 14, 1970), No. 6571420 (issued September 24, 1971) and permit No. 6575410 (issued July 9, 1975) for a sewage treatment facility to accommodate intervenor's mobile home park in Rostraver Township, Westmoreland County.

On January 22, 1976, intervenor filed a motion to quash the appeal, alleging therein the following reasons:

> "1. The appeal should be quashed because it was not filed and perfected within the time required by Section 21.21 of the Rules of Practice and Procedure.
>
> "2. The appeal should be quashed because Appellant has failed to file and serve a pre-hearing memorandum as required by prior Order entered in this proceeding.
>
> "3. The appeal should be quashed because it fails to aver any valid reason which would justify refusal to grant Permit No. 6575410 issued July 9, 1975, the gist of the complaint being limited to allegations concerning operation of the sewage treatment plant constructed under Permit No. 6570424, issued August 14, 1970, which plant will be improved by the facilities authorized under Permit No. 6575410."

In an Opinion and Order in this matter, dated June 4, 1976, we denied intervenor's motion to quash. However, in that same Opinion and Order we limited appellant to the offering of evidence in this matter to the question of the impropriety of the action of DER in issuing intervenor permit No. 6575410. The reason for the Board action in so limiting appellant's case is that the first two actions of DER in issuing permits to intervenor occurred in 1970 and 1971; hence, the appeal period with regard to those permits having long passed, the present appeal is untimely with regard to those actions.

On June 15, 1976, the Board sent hearing notices to all of the parties informing them that a hearing would be held at 10:00 a.m. on July 26, 1976, in the 8th Floor Conference Room of the Kossman Building, Forbes Avenue and Stanwix Streets, Pittsburgh, Pennsylvania.

Although appellant had notice of the time and place for the hearing in the above captioned matter, he failed to appear either in person or by counsel. When it appeared that appellant was not likely to appear, the writer of this adjudication called a recess in the proceedings and placed a phone call to appellant. Appellant said that he would not attend the hearing for the reason that the Board order of June 4, 1976, limited the evidence which appellant could present to such evidence as would bear on the question of whether permit No. 6575410 granted intervenor by DER was properly issued. Appellant wished to present evidence with regard to matters relating to permits issued intervenor in 1970 and 1971, and to present evidence as to the alleged problems attendant to the operation of intervenor's sewage treatment facility under the previously issued permits. Inasmuch as appellant was precluded by our previous order from offering evidence to these matters, he was of the opinion that the hearing would be a "waste of time" as far as he was concerned.

It is apparent from the foregoing and from the material appellant filed with the Board in support of his appeal that he desired a review of the propriety of the actions of DER in permitting intervenor to continue to operate its sewage treatment facility. This Board, however, does not have the general jurisdiction to review the operation of facilities for which DER issued permits. It may review the grant of permits if a timely appeal therefrom is made; but where no timely appeal has been taken, this Board is without jurisdiction to review the propriety of such action. Thus, we could not review the propriety of the grant of permits to intervenor which had been made in 1970 and 1971.

Furthermore, the jurisdiction of this Board extends only to review "actions" of DER. *Commonwealth v. Pennsylvania, Department of Environmental Resources v. New Enterprise Stone and Lime Co., Inc.*, No. 1017 C. D. 1975 (issued July 2, 1976). Inasmuch as the continued operation of the facilities does not constitute an action of DER, this Board cannot review that matter. It can only, in the present matter, review the propriety of the grant of permit No. 6575410.

Inasmuch as appellant declined of his own volition to appear at the scheduled hearing, we have no alternative other than to dismiss his appeal. Clearly, his decision not to present evidence amounts to an abandonment of the matter before us.

ORDER

AND NOW, this 5th day of August, 1976, the appeal of Lloyd Thompson from the action of the Department in granting Motor Lodge Development Company permit No. 6575410 to construct and operate a sewage treatment facility to accommodate its mobile home park in Rostraver Township, Westmoreland County, Pennsylvania, is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member



DATED: August 5, 1976

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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In the Matter of:

MUCKINIPATES WATERSHED ASSOCIATION

Docket No. 75-309-W

Clean Streams Law

v.

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

# ADJUDICATION

By PAUL E. WATERS, Chairman, August 5, 1976

This matter comes before the Board as an appeal from the modification of a sewer ban order issued by DER on July 28, 1975, pursuant to The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1, *et seq*. A sewer ban was imposed on the Muckinipates Authority Sewage Treatment Plant on July 24, 1973, and prior thereto, Grange Construction Company, intervenor, had taken steps for approval to construct an apartment complex in Folcroft Borough which was served by the treatment plant. The effort to obtain a building permit was unsuccessful for various reasons, and although it continued the effort after the ban was issued, the permit was not obtained. The modification order here in question provided for additional sewage treatment capacity for the Authority plant. The order also provided that as to projects other than individual dwellings, requests for connection would be considered by DER on a case by case basis to ascertain that the request was not for a new project filed with the municipality after the date of the original sewer ban. The intention was to limit such projects to those that were pending prior to the ban. In October, 1975, DER granted a connection exception to intervenor as within the terms of the modified order. It is this decision which the Muckinipates Watershed Association has appealed.

Although various grounds for the appeal have been urged at different times, appellant's final position is that, inasmuch as there was no pending appeal

of intervenor, Grange Construction Company, before the Folcroft Borough Council on July 24, 1973, the modification order of July 28, 1975, could not, by its own terms, be applied to intervenor.

## FINDINGS OF FACT

1. Appellant is the Muckinipates Watershed Association, Mrs. Jean R. Diehl, Chairman, whose address is 2126 Valley View Drive, Folcroft, Pennsylvania.

2. Intervenor, Grange Construction Company, hereinafter Grange, is a Pennsylvania corporation with address c/o Lord & Mulligan, Front & Lemon Streets, Media, Pennsylvania.

3. Defendant, is the Department of Environmental Resources, hereinafter DER.

4. The Borough of Folcroft, Borough Council rezoned an area along Grant Road with the intersection of Delmar Drive in the Borough to a "B" business district after a hearing held May 10, 1972, pursuant to an application of Grange.

5. The Folcroft Zoning Hearing Board, on April 16, 1973, approved Grange's application for a permit to construct apartments on the tract, as a special exception, subject to compliance with certain conditions within a six-month period. The conditions were not all met. The six-month period was to begin when the sewer ban was lifted.

6. On June 27, 1973, Grange made application for a building permit.

7. On July 23, 1973, at a regularly scheduled meeting of Borough Council, Grange requested an ordinance which in effect would have obviated compliance with the Zoning Board's conditions. Council failed to pass the ordinance.

8. On July 24, 1973, DER issued a sewer ban order which prohibited any further sewer connections to the sewage treatment plant operated by the Muckinipates Authority under Sewerage Permit No. 763821.

9. On July 25, 1973, by complaint in mandamus, Grange appealed the refusal of the Folcroft Borough to issue a building permit to the Court of Common Pleas of Delaware County.

10. On March 24, 1974, Grange requested DER grant it an exception from the sewer ban order dated July 24, 1973. DER denied the said request for an exception. On April 19, 1974, Grange filed an appeal with the Environmental Hearing Board from the said action of DER. On November 6, 1974, the Environmental Hearing Board sustained the action of DER and dismissed the appeal of Grange.

11. On July 28, 1975, DER granted a modification to the Muckinipates sewer ban order of July 24, 1973. No appeal was ever taken from that modification.

12. In a letter dated October 2, 1975, Grange requested permission to connect to the Muckinipates Authority, which permission was granted by letter received by Grange on October 21, 1975, pursuant to the modified order of July 28, 1975.

DISCUSSION

This case resolves itself into a simple question of interpretation of the language of an order of DER. To be more specific, the question is--What do the words "pending appeals" mean in the context of the following sentence?

> "...Whereas, connectionsother than individual dwelling units for which there were pending appeals to a municipality at the time of the Department's Order dated July 24, 1973, the Department shall consider such requests for connection on a case by case basis to ascertain such requests are not for new projects filed with the municipality for a building permit after July 24, 1973; ..."

Appellant argues that inasmuch as the action in mandamus to the Court of Common Pleas was not filed by Grange until July 25, 1973, one day after the issuance of the sewer ban, there was no "pending appeal" on the 24th day of July. We believe this argument, as logical as it may appear at first blush, fails to give any consideration to the context in which the phrase is found. Appellant would have us overlook or attach no significance to the words "new projects" for which building permits are filed after July 24, 1973. It is clear to us that this is the other side of the coin. On the one hand, you have requests for connections other than individual dwelling units, which were made prior to July 24, 1973, and on the other hand, "such requests" made for the first time after that date. This, standing alone, would be sufficient to convince us that the words "pending appeals" were not used in any strictly techinical legal sense. However, the words following those in question, should remove all doubt from the minds of even the most skeptical. The order refers to "pending appeals to a municipality at the time of the Department's Order dated July 24, 1973..." It is obvious then, that the order was referring not to an appeal to the Court of Common Pleas, as appellant would have us conclude, but rather--"...to a municipality", in this case the Borough of Folcroft. If it is suggested that the request for a permit had been refused, and was therefore not "pending," we need only observe that Grange nevertheless still desired a permit and did continue to seek one, based on its previous request. At no time prior to the order did it abandon its efforts to obtain the issuance of a permit. In our view, the request was on going and "pending".

## CONCLUSIONS OF LAW

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

2. The term "pending appeals" as used in the modification order issued by DER on July 28, 1975, refers to requests for permits made to the Borough of Folcroft prior to July 24, 1973, which have not been withdrawn.

3. DER has the authority to determine, and properly determined, that the application of intervenor, Grange, for a sewer connection exception was within the terms of its modified order issued July 28, 1975.

## O R D E R

AND NOW, this 5th day of August, 1976, the appeal of Muckinipates Watershed Association is hereby dismissed, and the action of DER from which the appeal was taken is sustained.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: August 5, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

CITY OF HAZLETON :

: Docket No. 75-157-C
: Order Directing Closure of Landfill Site

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

# ADJUDICATION

By Joseph L. Cohen, Member, November 9, 1976

This matter is before the board on the appeal of the City of Hazleton from an order of the Pennsylvania Department of Environmental Resources (hereinafter DER) of June 26, 1975, directing the City of Hazleton and the Hazleton Solid Waste Authority immediately to terminate operation of the landfill and to take closure measures in conformity with regulations of the DER. The Hazleton Solid Waste Authority, being defunct, has not appealed the order.

The DER filed a motion for summary judgment in this matter, but withdrew the same at the time of hearing. At the hearing in this matter on August 20, 1976, the parties stipulated to certain matters and authorized the board in its adjudication to incorporate the stipulated matters therein as part of the board's order. Subsequent to the entry of the stipulation, testimony was taken to enable the board to determine a reasonable time within which appellant could be expected to secure a solid waste disposal site likely to meet the requirements of the Pennsylvania Solid Waste Management Act and the rules and regulations adopted by the Environmental Quality Board pursuant thereto.

On the basis of the evidence presented at the hearing and other facts of record deemed to be admitted by appellant's failure to respond to the requests for admissions filed by the DER, we enter the following:

## FINDINGS OF FACT

1. Appellant is the City of Hazleton, a political subdivision of the Commonwealth situate in Luzerne County, Pennsylvania.

2. Appellee is the DER, the agency of the Commonwealth authorized to administer and enforce the provisions of the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001 *et seq.*

3. On or about June 26, 1975, appellant began operation of a solid waste disposal facility which had previously been operated by the Solid Waste Authority of the City of Hazleton. From that time on to the present, appellant has continued to operate the said facility.

4. Neither appellant nor the Hazleton Waste Authority acquired the necessary permits to operate a solid waste disposal facility. The operation of the facility by appellant is continuing without permits from the DER.

5. On or about April 30, 1974, the Solid Waste Authority of the City of Hazleton submitted an application for a permit to operate the solid waste disposal facility.

6. On or about July 5, 1974, the DER submitted to the Hazleton Solid Waste Authority its evaluation of the application submitted by the authority.

7. On August 29, 1974, the Hazleton Solid Waste Authority was informed that the DER had discovered two occasions on which the authority had excepted hazardous industrial wastes consisting of acids, heavy metals and methyl ethyl ketone.

8. On or about January 27, 1975, the DER notified the authority for a second time of certain deficiencies in its application.

9. On or about April 15, 1975, the DER denied the application of the Hazleton Solid Waste Authority to operate a solid waste disposal facility.

10. On June 26, 1975, the DER issued an order to the City of Hazleton and the Hazleton Solid Waste Authority providing, *inter alia*:

> "NOW, THEREFORE, pursuant to Sections 6, 7, 9 of the Pennsylvania Solid Waste Management Act, 35 P. S. §6006, 6007 and 6009, it is ordered that:
>
> "1. Hazleton Solid Waste Authority and the City of Hazleton shall immediately upon receipt of this Order cease all operations of said landfill and shall terminate the operation in accordance with Title 25, Chapter 75, Rules and Regulations of the Department. The termination procedure shall include but not be limited to:
>
> "a) Limiting access to the site to prevent dumping of wastes.
>
> b) The drums of industrial waste that were deposited illegally at the landfill will have to be removed and disposed of in a manner acceptable to the Department.

"c) Spreading, compacting, and covering of all exposed solid wastes.

"d) Placing a final layer of clean cover soil, compacted to a minimum uniform depth of two (2') feet over the entire surface of the landfill.

"e) Implementing a vector control program for the eradication of rodents, flies, and mosquitoes prior to placing final cover.

"f) Grading all slopes on the landfill to not less than one (1%) percent grade nor more than fifteen (15%) percent grade; and graded so as to minimize the ponding of surface waters.

"g) Diverting surface waters so as to prevent flow over the surface of the landfilled area.

"h) Planting with rapid-growing vegetation as soon as grading is completed.

"2. The requirements of paragraph 1 (a) through 1 (g) shall be fulfilled no later than (60) sixty days of the receipt of this Order.

"3. Within fifteen (15) days of the date of this Order, the Hazleton Solid Waste Authority and the City of Hazleton shall provide the Department with preliminary plans of actions taken and intended to be taken to comply with this Order."

11. Appellant filed its notice of appeal in this matter on July 14, 1975.

12. Since the filing of the appeal in this matter, the DER and the appellant have endeavored to reach an agreement whereby appellant would take affirmative steps to acquire a suitable alternative site for the operation of a solid waste disposal facility under permit from the DER.

13. There are four sites under consideration by appellant as potential alternate sites for a solid waste disposal facility operated by appellant. Of the sites under consideration all but one are located outside of the corporate limits of the City of Hazleton.

14. The site within the City of Hazleton is owned by Pagnotti Enterprises. Negotiations between appellant and Pagnotti Enterprises were first initiated in July of 1976, approximately one month prior to the hearing in this matter.

15. Of the three sites under consideration, not within the corporate limits of the City of Hazleton, one site is owned by John Gentle, who may be contemplating making application to the DER for a permit to operate a solid waste disposal facility upon his property.

16. Since the end of June, 1975, appellant has taken the following steps to comply with the order of the DER:

(a) Officials of appellant met with the technical staff of the DER on December 19, 1975;

(b) Officials of appellant inspected the Gentle site in March of 1976;

(c) Appellant rehired the engineering of Nassaux-Hemsley in April of 1976;

(d) Officials of appellant inspected the Pagnotti Enterprises property in June of 1976;

(e) Officials of appellant contacted Pagnotti Enterprises for the first time relative to its property in July of 1976.

17. Except for the actions set forth in finding of fact No. 16, appellant took no significant measures to acquire an alternate site for a solid waste disposal facility or to have its engineering consultant study the feasibility of existing sites which might be acquired by appellant as an alternate site.

## DISCUSSION

The facts of this matter are relatively simple. Sometime in 1971 appellant filed an application with the DER for the construction and the operation of a solid waste disposal facility on the site in question in this proceeding. Appellant never actively pursued this application for the reason that it had formed in December of 1972 the Hazleton Solid Waste Authority, which in April of 1974, made application to the DER for a permit to construct and operate a solid waste disposal facility at the same site. On July 5, 1974, the DER advised the Chairman of the Solid Waste Authority that the site was unsuitable for use as a solid waste disposal facility. Thereafter, on January 27, 1975, the DER advised the Chairman of the Solid Waste Authority that the technical staff of the DER reviewed the application of the authority and concluded that the site was unsuitable for the use of the site as a solid waste disposal facility using natural renovation of leachate to protect the waters of the Commonwealth. Finally, on April 15, 1975, the DER denied the authority's permit application, setting forth in writing the reasons therefor. The authority never appealed this denial. Instead, the entire authority board resigned in May of 1975. It is now defunct.

Thereafter, in May of 1975, appellant assumed the operation of the landfill site that is the subject matter of this appeal. On June 26, 1975, the DER issued the contested order in this matter to both appellant and the authority. The appellant took a timely appeal, but the defunct authority did not.

In its appeal, appellant stated as a reason therefor:

> "The City was without knowledge that the Authority was operating without a permit or pending application therefor. Prior to formation of an Authority (which is now non-functioning since all members resigned), the City had preliminary engineering work done which demonstrated that this was an adequate landfill site. The City, as a public service, became obliged to be a 'de facto' landfill about a month ago and requests

the opportunity to bring this site up to D.E.R. standards and to apply for permit."

Subsequent to the filing of the appeal, appellant and the DER attempted to negotiate a settlement of this matter, but were unsuccessful in that effort. Pending these negotiations, the board granted continuances to the parties for the filing of their pre-hearing memoranda pursuant to Pre-Hearing Order No. 1, issued to the parties after the filing of the appeal. The DER, in the course of these proceedings, filed a motion for summary judgment alleging that no genuine issue of material facts exists in regard to this matter and that the DER is entitled to judgment as a matter of law. The DER then filed its brief in support of its motion and appellant filed an affidavit and a brief in opposition to the motion.

At the hearing in this matter, the undersigned heard argument regarding the DER motion for summary judgment. After argument, we acted upon a motion for a conference for settlement purposes filed by appellant by recessing the hearing to allow the parties to discuss settlement proposals. At the reconvening of the hearing, the parties offered a stipulation of all but one of the outstanding issues in the appeal. At that time, the DER withdrew its motion for summary judgment.

The stipulation provided, in effect, a time schedule within which appellant would take the necessary measures to acquire a permit for an alternate disposal site and to close the present unpermitted site, the stipulation is contingent upon the acquisition of an alternate disposal site. The parties could not agree as to the time within which appellant would be required to obtain a new site. We received evidence on this issue, but are not convinced that this evidence is helpful in making a rational decision in this matter.

Had the DER not withdrawn its motion for summary judgment, we would have granted that motion for the reason that appellant has stated no legally cognizable reason which would affect the validity of the DER order. It is clear that the filing of the appeal was a dilatory tactic on the part of appellant and that there was no real basis for an appeal set forth in its notice of appeal. However, inasmuch as the motion has been withdrawn, we will address the question of the period of time which appellant should be afforded within which to "acquire" the new site. The controversy regarding the time within which a new site is to be acquired is really a controversy relating to the time the stipulation and the schedule set forth therein is to take affect. Unless appellant secures a site within a reasonable time, there is a possibility of an indefinite postponement of the requirements of the Pennsylvania Solid Waste Management Act, *supra*, a clearly unacceptable state of affairs.

Part of the controversy centers around the reluctance of appellant to commit itself to the acquisition of an alternate disposal site and thereafter find that the site is unsuitable for a solid waste disposal facility. Appellant does not wish to spend taxpayer's money to acquire a site which cannot be used for a landfill. However, we cannot believe that the city is unable to negotiate with a prospective vendor of land to the effect that the purchase thereof will be contingent upon approval of the site by the DER for landfill purposes. The DER is not demanding that appellant spend funds to acquire a landfill site without regard to whether DER will approve the site for landfill purposes, but rather it is demanding that appellant obligate itself in the near future to the purchase of a site which will be approved by the DER. This is not an unreasonable demand under the circumstances of this case.

Inasmuch as appellant's notice of appeal does not state any valid reason why the DER order should not go into effect, we could merely affirm the DER order. However, we have acquiesced in the request of the parties to establish a time limitation within which appellant shall either acquire a suitable site to be utilized as a solid waste disposal facility under permit by the DER or, in the alternative, to take immediate measures to close the existing unpermitted landfill without regard to the acquisition of an alternative site.

## CONCLUSIONS OF LAW

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

2. Appellant, City of Hazleton, is currently operating a solid waste disposal facility in violation of the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001 *et seq.*

3. A three-month's period of time within which appellant shall acquire a site which meets the requirements for a sanitary landfill established by the DER regulations is not unreasonable.

## O R D E R

AND NOW, this 9th day of November, 1976, the City of Hazleton, Luzerne County, shall either take immediate steps to comply with the DER order of June 26, 1975, including the time limitation set forth therein computed from the date of this adjudication, or in the alternative, on or before November 19, 1976, file with this board a written statement of its intentions to comply with the following provisions of this order and thereafter shall:

(1) On or before December 24, 1976, cause to be prepared an economic feasibility study of alternate solid waste disposal sites considered for acquisition by the city, and within five working days thereafter shall transmit to Ralph E. Kates, III, Esquire, Chief, Northeastern Region, Bureau of Litigation, Department of Environmental Resources, 90 East Union Street, Wilkes-Barre, Pennsylvania 18701, three copies of said feasibility study.

(2) On or before February 7, 1977, file with this board a copy of a duly executed legal document between the City of Hazleton and a third party evidencing that the City of Hazleton has acquired such a possessory interest in an alternate waste disposal site that will enable it to utilize the site as a landfill under permit from the DER.

(3) On or before March 14, 1977, submit to Frederick J. Carl, Solid Waste Director, Department of Environmental Resources, 90 East Union Street, Wilkes-Barre, Pennsylvania 18701, a completed Phase I application for a solid waste disposal site. Said application shall be in conformity with the requirements of the rules and regulations of the DER as set forth in 25 Pa. Code, Chapter 75.

(4) Within 60 days after the DER shall have approved the Phase I application of the City of Hazleton, submit to the DER a completed Phase II application, together with a construction schedule on forms supplied by the DER. Said application shall be in conformity with 25 Pa. Code, Chapter 75.

(5) Within 30 days of the submission of the Phase II application or within 30 days of the cessation of utilization of the existing landfill site by the City of Hazleton whichever first occurs, file with the board a copy of a duly executed agreement between the City of Hazleton and a consultant, evidencing that the consultant has been engaged by the city to prepare a plan to close the existing solid waste site that is the subject matter of this proceeding. No consultant contract with the City of Hazleton shall be deemed filed according to this paragraph unless it contains specific undertakings by the consultant to submit on behalf of the city a plan of closure to the DER within [illegible] days of the execution

contract, and further that the closure plan so submitted is in conformity with 25 Pa. Code Chapter 75. The said closure plan shall include a construction schedule on forms supplied by the DER.

(6) Within 60 days of notice by the DER to the city that the DER has issued to any person a permit for any solid waste disposal or processing facility within the corporate limits of the City of Hazleton, cease utilization of its present site and begin utilization of the permitted facility; provided, however, that the charge to the city for the utilization of the permitted facility shall not be in excess of 15% of the average charge to all other users of said facility. Nothing in this paragraph shall be construed to preclude the City of Hazleton from continuing in efforts to obtain a permit for a solid waste disposal site to be operated by it or to be used as justification by the DER in refusing to grant the city such a permit, if its application is otherwise in order.

(7) Forthwith operate its existing facility in strict compliance with 25 Pa. Code Chapter 75. Nothing in this paragraph shall authorize the City of Hazleton to operate its existing facility beyond the time specified in the foregoing provisions of this order for the cessation of its operation.

(8) This board shall retain jurisdiction of the parties and the subject matter herein to supervise the implementation of this order. Whenever it appears to this board after having afforded the City of Hazleton reasonable notice and an opportunity to be heard that the city has not complied with the mandates of this order and lacks legal justification for such noncompliance, the board may, in its discretion, order immediate cessation of the operations of the existing landfill by the City of Hazleton and invoke the termination procedures of 25 Pa. Code Chapter 75 within such time as the board deems appropriate.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

D: November 9, 1

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

GEORGE EREMIC

Docket No. 75-283-C

Request for Landfill Permit Revocations

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CHAMBERS DEVELOPMENT COMPANY, INC., Intervenor

# ADJUDICATION

By Joseph L. Cohen, Member, December 2, 1976

On June 16, 1976, we entered an adjudication in this matter quashing the appeal for lack of jurisdiction. The adjudication was not unanimous (the Honorable Joanne R. Denworth filed a dissenting opinion). Thereafter, on June 28, 1976, appellant filed a motion for reconsideration. On July 6, 1976, we granted the petition. Because of the fact that no timely date for oral argument could be arranged convenient to the parties and the members of the board, the parties agreed that oral argument would not be necessary. Thus, on the basis of written briefs and reply briefs filed by the parties herein, we enter the following:

## FINDINGS OF FACT

1. On June 16, 1976, the board entered an adjudication in this matter containing the following order:

> "AND NOW, this 16th day of June, 1976, the appeal of George Eremic from the action of DER in declining to revoke permits of Chambers Development Company, Inc., authorizing it to operate a solid waste disposal facility in Monroeville Borough, Allegheny County, is hereby quashed for lack of jurisdiction."

2. On June 28, 1976, appellant filed a petition for reconsideration. On July 6, 1976, after receiving intervenor's objection to the petition filed on the same date, the board granted the petition.

3. The findings of fact in the adjudication of the board dated June 16, 1976, are hereby incorporated as findings of fact in this adjudication as if they had been specifically set forth herein.

DISCUSSION

In our previous adjudication we quashed the appeal for the reason that the action of the DER in refusing to revoke intervenor's permits issued pursuant to the provisions of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.*, and the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001 *et seq.*, did not constitute an "adjudication". Our basis for so holding was that the DER action neither affected appellant's personal or property rights nor was a "final action". We see no reason to reverse our ruling.

The basic assumption of our previous adjudication is that an appeal to this board from the action of the DER, in order that the appeal be a viable one, must be from an action that, if unappealed, would constitute an adjudication under the provisions of the Administrative Agency Law, Act of June 4, 1945, P. L. 1388, *as amended*, 71 P. S. §1710.1 *et seq* This, in our opinion, is a necessary inference from §1921-A(c) of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq*. Our analysis of the DER action in this case convinces us that it did not constitute an adjudication.

We are of the opinion that *Commonwealth of Pennsylvania, Department of Environmental Resources v. New Enterprise Stone & Lime Company, Inc.*, No. 1017 C. D. 1975 (issued July 2, 1976) is dispositive of the issues raised by appellant. In *New Enterprise*, appellant sought an extension of time for compliance with the terms of an agreement entered into by it and the DER. The DER, however, refused appellant's request, whereupon appellant filed an appeal with this board. We quashed the appeal for lack of jurisdiction, ruling that we had no jurisdiction to review a dispute arising out of a "contract". Commonwealth Court affirmed our adjudication insofar as it denied the appeal; however, the basis upon which the court affirmed our adjudication was that the refusal by the DER to modify the agreement was not appealable.

The court in *New Enterprise* held that the refusal to modify the agreement did not constitute a "decision" appealable to this board for the reason that it did not result in any action being taken against appellant and did not, therefore, affect its property rights, privileges, liabilities and other obligations. It construed

the term "decision" in §1921-A(a) of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq.*, as meaning a determination which can be "classified as quasi-judicial in nature and which affects rights or duties".

We think that, following *New Enterprise*, to be appealable an action of the DER regarding a permit must also be a determination quasi-judicial in nature and affecting rights and duties. We do not think that the refusal by DER to revoke intervenor's permits to operate a solid waste disposal facility constitutes an action of a quasi-judicial nature, affecting appellant's rights or duties.

In *Finkle v. Commonwealth of Pennsylvania Real Estate Commission*, 17 Pa. Commonwealth Ct. 221, 331 A.2d 250 (1975) cited by appellant, the court refused to quash an appeal from the action of the Pennsylvania Real Estate Commission in reprimanding a real estate broker for false advertising, but taking no further action. In *Finkle*, the court rejected arguments that the action of the Real Estate Commission was not an adjudication and that appellant lacked standing. Clearly, a determination after hearing, that the broker had violated the Pennsylvania Real Estate Broker's Law and that a reprimand should issue therefor constitutes an adjudication of the Real Estate Commission. Appellant, a property owner in the neighborhood affected by the false advertising, was held to have the requisite standing to appeal the adjudication. It is difficult to understand how *Finkle* helps appellant inasmuch as the action of the Real Estate Commission constituted an adjudication. It was a final order affecting the rights of the broker. The principles of res judicata would have precluded the commission from taking sterner action against the broker for the same violation had there been no appeal from its action within the requisite appeal period.

In the matter before us, however, there was no adjudication with regard to the intervenor or appellant. The action of the DER in refusing to revoke intervenor's permit did not affect its rights. Neither did it affect the rights of appellant. Thus, the mere fact that appellant has standing in this matter is not sufficient for us to review the action of the DER in this case.

In his brief, appellant cites *Pittsburgh v. Insurance Commissioner, et al*, 4 Pa. Commonwealth Ct. 262, 286 A.2d 475 (1971), rev'd on other grounds, 448 Pa. 466, 294 A.2d 892 (1972). The issue in that case was whether the action of the insurance commissioner was adjudicatory or legislative in character. As between the two options facing the court, the action of the insurance commissioner was denominated "an adjudication". Surely, the terms "adjudication" and "regulation" do not exhaust the categories of action which the DER may take with regard to particular matters coming to its attention. Action of the DER which cannot be characterized as falling within the definition of "adjudication" as defined in §2 of the Administrative Agency Law, *supra*, may not be appealed to this board.

In the course of our prior adjudication, we said:

> "The refusal on the part of DER to grant appellant's request to revoke intervenor's permits is not an adjudication. While DER's action is discretionary in nature, not all discretionary acts on the part of administrative agencies are judicial or quasi-judicial. *Manheim Township School District v. State Board of Education,* 1 Pa. Commonwealth Ct. 627, 276 A.2d 561 (1971); *La Camera v. Board of Probation and Parole,* 13 Pa. Commonwealth Ct. 85, 317 A.2d 925 (1974).
>
> "In order for the exercise of administrative discretion to be adjudicatory in nature, it must affect personal or property rights. *McKinley v. Wackerman,* 5 Pa. Commonwealth Ct. 42, 288 A.2d 840 (1972); See also *Newport Homes, et al v. Kassab, et al,* 17 Pa. Commonwealth Ct. 317, 332 A.2d 575 (1975). While appellant may have a cause of action against intervenor for nuisance, the fact that DER refuses to revoke intervenor's permits has no substantial impact on appellant's rights *vis a vis* intervenor."

Appellant claims that we somehow cited *Manheim Township School District v. State Board of Education,* 1 Pa. Commonwealth Ct. 627, 276 A.2d 561 (1971) and *La Camera v. Board of Probation and Parole,* 13 Pa. Commonwealth Ct. 85, 317 A.2d 925 (1974) in support of principles for which they did not stand. In particular, with regard to *La Camera*, appellant stated on page 9 of its brief in support of a reconsideration of our previous adjudication:

> "In *La Camera*, the court held that the action appealed from was not an Adjudication because it was *expressly excluded* from the definition of Adjudication. The *La Camera* court, therefore, did not hold that a parole decision did not affect rights in the sense intended in the definition of Adjudication."

Clearly, *La Camera* decided that the denial of a parole is neither an adjudication as defined in the Administrative Agency Law, *supra*, nor action of a quasi-judicial nature affecting rights. In the course of its decision, the court in *La Camera* stated:

> ". . . If the determination should be dependent entirely upon the definition of an adjudication in the Administrative Agency Law, there can be no doubt that the action is not an adjudication, because that definition expressly excludes 'any final order, decree, decision, determination or ruling . . . which involves paroles or pardons.' Since, however, a constitutional right is asserted and it might be argued that the legislature's definition of an adjudication should not for this purpose be controlling, we advert to the recent case of *Commonwealth v. Brittingham,* 442 Pa. 241, 275 A.2d 83 (1971), where Justice Roberts explores the nature of parole in the following terms:
>
> 'Furthermore, the granting of parole is not a right, but a matter of administrative discretion. As we observed in *Commonwealth ex rel. Henrickson v. State Board of Parole,* 409 Pa. 204, 185 A.2d 581 (1962): "The parole of a prisoner at the expiration of his minimum term is not a matter of right. Rather, it is a matter of grace and mercy, and the granting, reinstatement and revocation of parole is within the exclusive jurisdiction of the Board. Parole is first and foremost a penological measure for the disciplinary treatment of prisoners who seem capable of rehabilitation outside of prison walls. The prisoner on parole is still in the legal custody of the state through the warden of the institution from which he was paroled, and is under the control of the warden and of other agents of the

> Commonwealth until expiration of the term of his sentence. . . ." Id. at 207-08, 185 A.2d at 584 (citation omitted). See also *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 28 A.2d 897 (1942).'
>
> "'Parole is an administrative rather than a judicial determination that the applicant is sufficiently rehabilitated to serve the remainder of his sentence outside prison walls.' 442 Pa. at 246, 275 A.2d at 85.
>
> "Parole, being a matter of administrative discretion and determination, is nonjudicial and not subject to judicial review under the law of Pennsylvania as now existing.' 13 Pa. Commonwealth Court at 88-90.

Appellant contends that the *Manheim* decision determined that the actions of the Department of Education in that case was legislative in character rather than judicial. Neither the *Manheim* decision nor the precedents upon which it relied either expressly or by implication characterized the action of the Department of Education as legislative in nature.

Irrespective of how those cases are characterized, however, the fact remains that, as we stated in our previous adjudication, not all discretionary acts of an administrative agency are judicial or quasi-judicial in nature. Appellant has cited us no authority which would persuade us to alter our previous adjudication.

Appellant claims that the principles applied in *McKinley v. Wackerman*, 5 Pa. Commonwealth Ct. 42, 288 A.2d 840 (1972) and *Commonwealth of Pennsylvania, Department of Environmental Resources v. New Enterprise Stone & Lime Company, Inc.*, *supra*, do not apply to the facts of this case. The basis for appellant's claim in this regard is that in *McKinley* and *New Enterprise*, the actions from which appeals were taken were not ripe for judicial review. Appellant makes the argument that in both of those cases a "regulated company" took an appeal from actions where no adverse consequences in the form of penalties or sanctions were actually being sought against the appellants in those cases. Since, according to appellant, this appeal does not involve a regulated company, the principles of these cases do not apply in this matter. We think this analysis is incorrect. Regardless of whether *McKinley* or *New Enterprise* are chacterized as "ripeness cases," the fact remains that the acts appealed from did not constitute adjudications. We have examined appellant's brief in detail and can find no case cited by him which establishes whether there can be an adjudication within the meaning of the Administrative Agency Law where no person's rights are affected. This is the bottom line issue in this matter; we are unpersuaded by appellant that the action of the DER in refusing to revoke the permits of intervenor in this matter affected appellant's rights.

In *Judith Frawley, L.P.N. et al and Nancy Fragassi v. Michael J. Downing*, No. 1476 C. D. 1975 (issued October 8, 1976) Commonwealth Court held that an agency's exercise of prosecutorial discretion in deciding whether to press charges against persons it regulates is not adjudicatory in nature. In our opinion, *Frawley* undermines appellant's proported distinction be made with regard to *New Enterprise* and *McKinley*. We quote from the opening paragraph of *Frawley* to indicate the basis similarity between the facts of that case and the matter before us. In *Frawley*, the court recited the facts as follows:

> "On or about July 2, 1974, Michael J. Downing filed a sworn complaint with the Bureau of Professional and Occupational Affairs (Bureau) demanding the revocation of the professional licenses of a doctor, two physical therapists and various nurses all of whom Downing alleges were grossly unprofessional in treating him during a hospitalization in 1973. On October 2, 1975, after having investigated his complaint, the Bureau directed a letter to Downing on behalf of the Medical Education and Licensure Board and the State Board of Nurse Examiners (Professional Boards), the agencies within the Bureau directly concerned with regulation of the professions here involved, and informed him that evidence did not warrant further proceedings against any of the above Professional Boards. Said appeals, having been consolidated for disposition before the Court, are now the subject of motions to quash filed by the Professional Boards concerned."

This board is not a tribunal of general jurisdiction. We can only review actions of the DER which, if unappealed, would become adjudications. This presupposes that the actions are final actions affecting personal or property rights, etc. We have concluded that the DER actions in this case did not affect appellant's rights and therefore are not adjudicatory in nature.

FINDINGS OF FACT

1. The board has jurisdiction over the parties in this matter.

2. The board can only review actions of the DER which are adjudicatory in nature.

3. Refusal to revoke permits at the request of a person on the basis of proper evidence by that person to the DER does not constitute adjudicatory action by the DER.

ORDER

AND NOW, this 2nd day of December, 1976, upon reconsideration of our adjudication under date of June 16, 1976, we hereby affirm that adjudication and quash the appeal of George Eremic from the action of DER in refusing to revoke permits previously granted to Chambers Development Company, Inc. to operate a solid waste disposal facility in Monroeville Borough, Allegheny County, Pennsylvania.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

CONCURRING OPINION

By Joanne R. Denworth, Member

I am reluctantly converted to my colleagues' view of this matter in light of the recent Commonwealth Court decisions in *New Enterprise Stone & Lime Company, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, No. 1017 C. D. 1975 (issued July 2, 1976) and *Frawley et al v. Downing*, No. 1476 C. D. 1975 (issued October 8, 1976). I still believe that there should be review of certain negative enforcement decisions made by the department; however, I do not see how this review could be had under the present law without the enactment of regulations providing for a complaint procedure resulting in a final decision by the department.

The three recent Commonwealth Court decisions discussed in the majority opinion do not appear to be entirely consistent; however, they clearly require the conclusion upon one principle or another that the department's decision not to revoke the permit here is not reviewable. The decision in *New Enterprise* articulates the general principle that there is no reviewable "action" by the department unless a person's personal or property rights, duties, obligations or privileges are affected. I agree that in *New Enterprise*, where the company asked the department to revise its consent agreement with the company and the department declined, there was no statutory or other basis upon which it could be said that the company had a right to have its contract revised or that the department had any duty to revise it. However, I cannot accept as a general principle the formalistic notion that a person who has standing in that he is affected by a pollution problem (e.g., as an adjacent landowner) is

not legally "affected" in his rights, duties, privileges or obligations by a department decision not to act on his complaint. The fact that a citizen may theoretically have available some probably lengthy and expensive remedy in the form of a private cause of action should not insulate the department from review of enforcement decisions. Under specific provisions of environmental statutes relevant to this case, the department has the duty to protect the people of this Commonwealth from nuisances and various forms of pollution. See, e.g., 71 P. S. §510-17 (1) (3) (nuisances); 35 P. S. §691.5 (The Clean Streams Law, which in §691.5(d) (2) specifically authorizes the department to "receive and act on complaints"). Where a person's property is affected, as is alleged there, it seems to me that his rights are affected--if only by removing an important remedy--if the department is not exercising its statutory duty to protect him against pollution.

Whether or not *New Enterprise* may be distinguished from this case, there does not appear to be any basis for distinguishing this case from the recent *Frawley* opinion by Judge Blatt. That opinion appears to give a blanket exemption from review to all negative enforcement decisions made by enforcement agencies on the basis of prosecutorial discretion. This seems to me an unfortunate principle, since it means that government agencies are not accountable for much of what they do--which is to decide what not to do. Although Professor Davis in his ADMINISTRATIVE LAW TREATISE does indicate that prosecutorial discretion is "ordinarily" not reviewable, see 1 DAVIS ADMINISTRATIVE LAW TREATISE, §4.07 (1958), he clearly does not approve of blanket exemption from review for prosecutorial discretion, and has, in fact, recently advocated both in the supplement to his treatise and in a separate treatise, some judicial control of agency enforcement decisions. ADMINISTRATIVE LAW TREATISE, 1970 Supplement §§4.07, 4.08 and 28.16 and DAVIS, DISCRETIONARY JUSTICE (1969). The problem of unchecked prosecutorial discretion is succinctly described by DAVIS in the opening paragraph of §4.08 of the 1970 Supplement:

> "American studies of the administrative process have tended to focus on judicial review, and on formal adjudication and rule making. Yet some of the most vital determinations by agencies are made in the exercise of the prosecuting power. Probably abuse of the prosecuting power by the regulatory agencies is ten or twenty times as common as abuse of the combined powers of adjudication and rule making. Yet hardly any attention is given to the prosecuting power. The exercise of the power not to prosecute may involve the most flagrant discrimination, but it is customarily unprotected by procedural safeguards, unprotected by openness, unprotected from political or other extraneous influence, unprotected by a requirement of systematic statement of findings and reasons, unprotected by a system of precedents, unprotected by administrative review, and unprotected by judicial review."

I do not suggest that the department flagrantly abuses or abused its prosecutorial discretion. In fact, it seems to me that from a procedural point of view the department acted very responsibly in following a complaint and investigation procedure in this case without being required to do so by any specific statute or regulation. But as a matter of general principle I believe a review procedure is desirable to guard against abuses of discretion and to assure that the department is carrying out its statutory duties to protect the resources of the Commonwealth and to protect citizens of the Commonwealth from pollution.

The board recently decided Commonwealth Court case, *Finkle v. Real Estate Commission*, 17 Pa. Commonwealth Court 221, 331 A.2d 593 (1975) does not seem consistent with the decision in *Frawley*. There a complaint before the Real Estate Commission was initiated by a property owner affected by a broker's allegedly false advertising. The Commission, after investigating the complaint, issued a letter reprimanding the company but did not take any further action. The appellants appealed to the Commonwealth Court from the Commission's action in issuing only a reprimand. The realty company filed a motion to quash the appeal contending that the appellants were not "persons aggrieved" and that the letter was not an "adjudication" under the Administrative Agency Law. The court denied the motion to quash the appeal. In deciding that the appellants were persons aggrieved the court stated:

> ". . . Both Appellants do have a 'direct interest' in frustrating misleading real estate advertising practices in their area because their real property rights are affected. When misleading real estate practices occur in an area in which a person lives, notwithstanding the fact that that person's land is not subject to the deceptive practice, the value and desirability of his property can be affected. Under such circumstances, that person is most definitely aggrieved. ..." 17 Pa. Commonwealth Ct. at 224.

In holding that the letter appealed from constituted an adjudication, the court stated:

> ". . . The letter or reprimand sent by the Commission was in response to a formal complaint and followed a hearing on that complaint. ...Clearly, the January 4, 1974, letter sent by the Commission was meant as a final determination of Appellants' complaint. ...
>
> "The import is unmistakable. If Appellants are not able to appeal the Commission's action at this point there will be no review of this final administrative decision. Rights and privileges have been affected and therefore review must be allowed."

In *Finkle*, as in this case, the appellants had standing because their property was directly affected by the problem complained of. The second question that the Court considered was whether there had been an "adjudication" by the Commission, and there the critical consideration seemed to be one of finality or ripeness--i.e., whether there had been final action by the Commission after a formal decision-making process.[1]

1. The *Frawley* opinion raises the possibility that the Court would say that if the Real Estate Commission had decided to take no action against the broker instead of reprimanding the broker, no appeal would lie from that decision. Surely that cannot be the import of these decisions. Thus, it seems to me that what is really at issue is related to the question of finality.

As I said in my earlier dissenting opinion I believe that the department's action in this case, which involved an investigation and decision as a result of that investigation, was as final a decision as could be rendered by the department. It should be noted that a hearing on the complaint would have to be held before this board, which would stand in the same position as the Real Estate Commission in *Finkle*. However, in veiw of *Finkle*, *Frawley* and *New Enterprise*, as well as cases cited by DAVIS, *supra*, where reviewability was found, it appears to me that no specific regulatory procedure is necessary before there can be review of negative enforcement decisions. Such a procedure could be adopted by regulation under the general statutory provisions cited above as well as provisions of the Solid Waste Management Act and The Clean Streams Law (and other environmental laws), which give the Enviornmental Quality Board the power to adopt such rules and regulations as are necessary to implement the provisions of those acts. 35 P. S. §691.5(b)(1); 35 P. S. §6006(3). Conceivably, such a procedure could be initiated by a rule to show cause issued by the Board, which after investigation would result in a hearing on whether or not some negative enforcement action such as the revocation of a permit should have been taken. A procedure of this sort would weed out casual complaints where the complainant is not prepared to follow up his complaint with the presentation of evidence, and would make it possible to determine when the department had arrived at a final determination. Without some formal complaint procedure, I am compelled to agree that under the present law there can be no review of the department's decision not to revoke intervenor's permit.

ENVIRONMENTAL HEARING BOARD

Joanne R. Denworth

JOANNE R. DENWORTH
Member

DATED: December 2, 1976

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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ROBERT L. ANTHONY : Docket No. 76-112-D
: 76-151-D
: 76-152-D

v. : Stream Encasement
Erosion and Sedimentation Control

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Joanne R. Denworth, Member, Issued December 10, 1976.

These are three separate appeals brought by the same individual, Robert L. Anthony, of Nether Providence, Delaware County, Pennsylvania. They are treated collectively here because they are related, and because they are being dismissed by the board on the same ground—namely, that the appellant lacks standing to appeal from the various actions of the Department of Environmental Resources (Department) of which he complains.

Through these appeals appellant seeks to oppose the encasement of an unnamed tributary of Ridley Creek for a distance of approximately 700 feet and to challenge the adequacy of erosion and sedimentation control plans in connection with two developments on Brookhaven Road in Nether Providence Township, Delaware County. The appeals docketed at 76-112 and 76-151 relate to a development of town houses being constructed by Wallingford Associates. The appeal docketed at 76-152 relates to another housing development being constructed by Winterloch Corporation on the same stream, but separated by an intervening property.

Docket No. 76-112, filed by appellant on August 23, 1976, is an appeal from a letter dated December 4, 1973, sent by Vaden Butler, Chief of the Department of Dams and Encroachments to the owner of Wallingford Associates, stating that plans for a retention basin and erosion and sedimentation control were satisfactory and stating that the letter "shall constitute the only permit necessary provided the project is constructed according to the plan submitted". Appellant claims to have received notice of this "permit" by observing construction, including

installation of a sewer line, which he argues was not covered by the approval, in July of 1976; and consequently, to be justified in filing his appeal in August, 1976, at least two and a half years after the "permit" was issued. In docket No. 76-151 appellant has appealed a new permit issued by the department on November 1, 1976, to Nether Providence Township approving installation of a sanitary sewer extension (now largely installed apparently) and in conjunction therewith, the erosion and sedimentation control plan filed by Wallingford Associates.

In docket No. 76-152 appellant appealed from the issuance of a letter dated November 1, 1976, from Christian Beechwood, Regional Sanitary Engineer for the department's Region 1, to Daniel Miller, president of Winterloch Corporation informing him that Winterloch Corporation's proposed encasement of the stream above the Wallingford Valley development was an encasement of a purely private stream and would not require a permit.

Appellant has asked the board to enter an immediate supersedeas in all three of these appeals to prevent work from proceeding on these sites as permitted, or not permitted, as the case may be. After some difficulty in locating all of the parties, the board, in a conference call held on November 18, 1976, tentatively set a hearing date on the supersedeas petitions for November 29, 1976. However, at that time certain preliminary issues were raised by the board and the parties—primarily the question of whether appellant has standing to take these appeals. The parties were asked to submit motions and briefs on this question to the board by November 23, 1976. Wallingford Associates has filed a motion to dismiss the appeal at 76-112 on the ground of untimeliness and mootness, as well as appellant's lack of capacity to appeal, and to dismiss the appeal at 76-151 on the ground that appellant has no standing to appeal. Winterloch Corporation, the developer in 76-152, has also filed a motion to dismiss that appeal on the ground that appellant lacks standing. Both developers have (belatedly) filed petitions to intervene, which the board routinely grants where the petitioner is the permittee or the developer affected by a permit or action of the department. After reviewing the briefs the board informed the parties on November 26, 1976, that the appeals would be dismissed and consequently no supersedes hearings would be held.

Appellant is an environmentally active individual, who is a citizen and taxpayer of Nether Providence Township. He is not represented by counsel. He lives at 103 Vernon Lane, Moylan, which is approximately two miles from the site

of these developments. In his affidavit and brief submitted to the board in support of his standing, he asserts that his interest is as a resident and taxpayer of Nether Providence Township who "enjoys the open space and small streams and major creeks, Ridley and Crum Creek, which are within the Township's borders".

Upon review of the briefs and the Pennsylvania law on standing, we are forced to conclude that appellant has no standing to appeal the actions of the department here, if indeed they are appealable. The courts of Pennsylvania have held that to be a "person aggrieved" entitled to appeal an administrative agency decision under statutes such as the one applicable to appeals to this board, 71 P. S. §510-21, a person must have a direct and immediate interest that is adversely affected by the action appealed from. *Delaware County Community College v. Fox*, 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975); *Louden Hill Farm, Inc. v. Milk Control Commission*, 428 Pa. 548, 217 A.2d 735 (1966); *Committee to Preserve Mill Creek v. Secretary of Health*, 3 Pa. Commonwealth Ct. 200, 281 A.2d 468 (1971). In those cases the courts have found standing in adjacent property owners who are directly affected by the actions complained of, but have denied standing to citizens and groups who simply have a general interest in protecting and preserving the environment. The Commonwealth Court has in fact suggested in both the *Fox* and *Mill Creek* cases that a person must have a direct *pecuniary* interest in order to be entitled to appeal. This board has in two recent decisions, *Western Pennsylvania Conservancy v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 74-028-C, issued May 7, 1976; *PA Council of Trout Unlimited, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-044-D, issued May 7, 1976, expanded somewhat on the concept of direct interest to include, in keeping with the federal law on standing to assert environmental injuries, groups whose members can establish an "injury in fact" in that the public lands which they use and enjoy may be adversely affected by a proposed activity. See *Sierra Club v. Morton*, 405 U. S. 727, 31 L. Ed. 2d 636 (1972). All of these cases, including the board's recent decision, see *Muriel K. Becker v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-118-C, issued January 23, 1976, recognize that it is not enough for purposes of standing to appeal an agency decision to have an interest as a resident and taxpayer in protecting certain environmental values. As the United States Supreme Court said in *Sierra Club v. Morton*:

> "...But a mere 'interest in a problem,' no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA. ...if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization, however small or short-lived. And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.
>
> "The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process." (Footnotes omitted) 405 U. S. at 739-40.

Mr. Anthony is clearly not within any of the categories outlined in the cases cited that would enable him to appeal these actions of the department. He is not an adjacent property owner, nor is his own property in any way affected by the development activities complained of. In the numerous papers he has filed with the board he asserts that the intervening property owner did not consent to the encasements of the stream. However, she is not an appellant in these cases. Mr. Anthony is appealing as an individual. He belongs to no group that includes affected property owners who might have standing to assert these injuries. Appellant does claim that there are several parks downstream from these developments that he uses and enjoys and that standing should be found on that ground, since the encasement of this stream and the erosion and sedimentation measures taken by the developers may have an affect on Ridley Creek downstream. It is not possible to establish from any of the documents in the record just how far these parks are from the properties being developed. However, we believe that to grant appellant standing on this basis would indeed, as counsel in 76-152 asserts, "stretch the rationale of the *Western Pennsylvania Conservancy* and *PA Council of Trout Unlimited* adjudications beyond their breaking point". Those cases involved organizations seeking to protect adjacent public park lands from damage that was asserted on behalf of many users. Here appellant's interest is simply too remote to grant him standing on the principles articulated in those opinions.[1]

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1. Perhaps one day the environment will have standing to sue on its own behalf through a guardian appointed as trustee. See "Should Trees Have Standing? Toward Legal Rights for Natural Objects", 45 S. Cal. L. Rev. 450 (1972); and a recent article, Steinhart, "The Laws of Nature", *Harper's*, November, 1976. However the Pennsylvania Courts by which we are bound, and for that matter, the federal courts, are a long way from recognizing that concept of standing.

It should be noted that the fact that the department has listened to Mr. Anthony's complaints and included him in administrative conferences held to consider the questions he raised relating to both of these developments, cannot confer standing on Mr. Anthony to appeal to this board. The department may be commended for its consideration of Mr. Anthony's complaints and point of view. Apparently Mr. Anthony was responsible for bringing to the department's and the parties' attention, the fact that a sewer extension was not covered by the 1973 permit. He also made a well-articulated, if somewhat general presentation, as to the likely environmental damage from the developer's proposed actions here.[2] While it may be appropriate for the department to take account of a citizen's complaints or opinions in making a decision in a particular case, the department's consideration of those views does not confer standing upon every citizen for purposes of appealing to this board.

Under the present law we can see no possible basis upon which appellant could be said to have standing to take these appeals. Consequently, the appeals must be dismissed. It may be noted that there are other grounds--certainly in the case of Docket No. 76-112, untimeliness and mootness--upon which these appeals might be dismissed. However, as the issue of standing is dispositive, it is unnecessary to reach those issues.

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2. It appears from some of the papers he has submitted that what appellant really desires is that there be no encasement of the stream and that the developers preserve a certain area adjacent to the stream as natural land. In the absence of a duly adopted regulation imposing it, such a development requirement, however desirable, is not a proper matter for the department to consider. Without a state law on the subject, such a requirement would be a local planning decision appropriately made by a local planning agency under *Delaware County Community College v. Fox*, *supra*, and should not enter into the department's decision as to whether or not to grant a sewer extension permit or approve an erosion and sedimentation control plan.

## O R D E R

AND NOW, this 10th day of December, 1976, the petitions to intervene filed by Wallingford Associates and Winterloch Corporation are granted. The appeals of Robert L. Anthony at Docket Nos. 76-112-D, 76-151-D, 76-152-D are hereby dismissed for lack of standing.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: December 10, 1976
vf

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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PENNSYLVANIA COUNCIL OF TROUT UNLIMITED, *et al* : Docket No. 75-044-D

: Mine Drainage Permit

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and KERRY COAL COMPANY, Intervenor

ADJUDICATION

By: Joanne R. Denworth, Member, Issued December 17, 1976

This is an appeal by five organizations--Pennsylvania Council of Trout Unlimited, Arrowhead Chapter of Trout Unlimited, Moshannic Chapter of Trout Unlimited, Penns Wood Chapter of Trout Unlimited, and Do-Fly Fishers Club from the issuance by the Department of Environmental Resources (department) of a strip mining permit to intervenor, Kerry Coal Company, permitting intervenor to strip mine on some 28 acres adjacent to McConnell's Mill State Park. The primary purpose and interest of these organizations is the protection and enhancement of cold water streams in the Commonwealth for fishing and other forms of recreation. In a partial adjudication, opinion and order dated May 7, 1976, the Board denied the appellants' motion for summary judgment, in which they claimed that intervenor's application was deficient as a matter of law under *Compass Coal Company v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 72-312-C, issued August 26, 1975. The Board also ruled in response to intervenor's motion for summary judgment that the appeal of these five appellants would not be dismissed for lack of standing, but did dismiss the appeal as to two other organizations for lack of standing. In June of 1976, intervenor accepted its mine drainage permit and began mining operations. Appellants filed a petition for supersedeas, and a supersedeas hearing was held on June 29, 1976. After that hearing the board issued a limited supersedeas confining the intervenor's mining operations to four acres in the southwest corner of the strip mine site. A hearing on the merits of the appeal was held on July 20, 1976. Further orders

extending the permissable area of Kerry's operation to a total of seven acres were entered by the board on July 30, 1976, and November 9, 1976.

FINDINGS OF FACT

1. By application dated March 29, 1974, Kerry Coal Company of Portersville, Pennsylvania applied for a mine drainage permit (Application No.3174SM3) to discharge mine drainage to an unnamed tributary of Slippery Rock Creek from a bituminous coal open pit mining operation to be conducted on 141.5 acres of ground in Slippery Rock Township, Lawrence County, Pennsylvania, for proposed mining of the Middle Kittanning and Lower Freeport seams of coal.

2. After field meetings on August 23, 1974, and October 18, 1974, conducted by Jack C. Sheffler, Hearing Examiner for the Department of Environmental Resources, at which representatives of the appellants were present, the application as filed was determined to be unacceptable unless the acreage to be mined was reduced to thirty (30) acres, the length of the cuts was limited to 600 ft. rather than 1500 ft. with immediate reclamation, and auger mining was prohibited.

3. On December 13, 1974, Kerry Coal Company submitted a revised application under the same number limited to 28.9 of the original 141.5 acres with mining on the Middle Kittanning seam only.

4. On January 20, 1975, the Bureau of Surface Mine Reclamation, Department of Environmental Resources, issued to Kerry Coal Company mine drainage permit No. 3174SM3 for Kerry No. 21 StripMine in Slippery Rock Township, Lawrence County, for 28.9 acres with drainage to an unnamed tributary to Slippery Rock Creek, to Connoquenessing Creek to Beaver River to Ohio River, subject to additional special conditions which prohibited auger mining, limited cuts to 600 ft., one cut at a time with immediate reclamation, and required blasting to be kept to a minimum and utilized only upon prior approval of the District Mine Inspector.

5. On February 21, 1975, appellants filed the instant appeal to the Environmental Hearing Board from the issuance of the mine drainage permit.

6. Kerry Coal accepted the special conditions of mine drainage permit No. 3174SM3 on June 11, 1976, and began surface mining operations. Based upon the evidence presented at a supersedeas hearing and a further hearing on the merits of this appeal, the board issued orders limiting intervenor's operations to seven acres in the southwest corner of the mining site pending a final adjudication.

7. Kerry Coal's mine No. 21 is within approximately 1,000 feet of the boundary of McConnell's Mill State Park, which is a unique natural area and popular outdoor recreation area serving metropolitian Pittsburgh and western

Pennsylvania. The park, which had 362,739 visitors in 1975, is used extensively for outdoor activities, including picnicking, fishing, boating, nature hikes, climbing, sledding and tobogganning, hunting and bicycling.

8. The area known as Hell's Hollow, the greater part of which falls within the boundary of McConnell's Mill State Park, is a prime natural area that is favored by hikers. It lies north of the Kerry mining site, but is separated from it by a ridge, a valley containing an unnamed tributary, and another ridge.

9. Mine water drainage from the Kerry 21 Mine is to an unnamed tributary of Slippery Rock Creek. The unnamed tributary drains into Slippery Rock Creek at the upper end of an area that has been designated a "Fish for Fun" area by the Pennsylvania Fish Commission. The designation "Fish for Fun" means an area set aside for year-round fishing for hold-over and stream-breed trout in prime water with artificial flies on a catch and release basis with the rule that one trophy-size fish may be taken per day.

10. The area surrounding McConnell's Mill State Park has been extensively and continually mined for coal by the underground process and by the surface mining process for the past fifty years. It has been the site of nearly fifty (50) coal mining operations.

11. Starting in 1971 and continuing up to 1976, Kerry Coal operated three surface mining sites immediately adjacent to the eastern boundary of McConnell's Mill State Park.

12. Sechan Limestone, Inc. has operated and continues to operate several surface mining operations covering hundreds of acres both near and immediately adjacent to the eastern boundary of McConnell's Mill State Park.

13. The Miller-McKnight Coal Company began a surface mining operation in 1976 immediately adjacent to the northwest boundary of McConnell's Mill State Park.

14. Carlson Mining Company has operated and continues to operate a surface mining site, which includes auger mining, near the western boundary of McConnell's Mill State Park with Skunk Run as the receiving stream. The auger mining on the Carlson Mining Company site is being conducted near the head of an unnamed tributary less than 2000 feet from the "Fish for Fun" area in Slippery Rock Creek gorge and within 21 feet of McConnell's Mill State Park.

15. All of the surface mining operations identified above, the prior surface mining operations, and the old deep mining operations, recovered coal from the Middle Kittanning coal seam--the same seam to be mined by Kerry's operation. The Sechan Limestone Company is also quarrying limestone from the Vanport Limestone Seam.

16. In spite of the extensive surface mining done in the area around McConnell's Mill State Park, including surface mining conducted under the environmentally deficient pre-1966 legal standards, all of the affected streams including Skunk Run, have remained distinctly alkaline in their quality.

17. The Kerry Coal operation as limited by the permit granted cannot be seen from any location within the boundaries of McConnell's Mill State Park.

18. In May of 1974, the contiguous portion of McConnell's Mill State Park, upon acceptance of the special commitment of the Commonwealth of Pennsylvania to protect and preserve its natural integrity made by the Governor on March 19, 1973, was granted National Natural Landmark status by the United States Department of the Interior.

19. The Pennsylvania Fish Commission, the Bureau of State Parks and Mr. James R. Zinck of the National Park Service informed the department that they were opposed to the grant of this permit.

20. In its application, intervenor set forth the required information as to the overburden from nine test borings. No chemical analysis of the overburden was required by the application, nor was any made by either the intervenor or the department.

21. The application did not require and intervenor did not set forth information with regard to the amount of surface runoff and soil runoff expected to be discharged from the area of operation, nor information with regard to specific erosion control measures such as the width, length, size and shape of diversion ditches and the grade in which the bottom of diversion ditches would be constructed.

22. The pertinent questions and answers pertaining to erosion and sedimentation control are found in Supplemental "B" of the application as follows:

> "(d) How will surface water be handled in order to prevent its entrance into the pit?
>
> "Answer: By constructing adequate diversion ditches above the high wall with outlets to natural drainage courses outside the area of operation.
>
> "(e) If siltation from the spoil area becomes a problem, how will this be corrected?
>
> "Answer: By construction of an adequate retaining ditch below the toe of spoil capable of reducing the velocity of the flow encountered and providing adequate detention to permit settlement of silt and absorption of water. The ditch shall be constructed to prevent discharge."

23. In connection with Kerry Coal's application, a field engineer's report was prepared on May 29, and May 30, 1974, containing numerous water samples taken from streams, springs and wells on the Kerry Coal site and at

locations surrounding the site including sites within McConnell's Mill State Park. All but one of the samples taken showed a pH above 6.0.

24. In a memorandum in support of his conclusion that Kerry's proposed operation under the revised application would not cause pollution, the department's geologist, Thomas R. Whitcomb, expressed the following opinions, which were reiterated in his testimony:

> "1. The quality of Skunk Run which is adjacent to this area has remained strongly alkaline even though the watershed has been extensively stripped on the same coal seam (Middle Kittanning) as the proposed Kerry operation. Much of this stripping is old-law backfilling which would be completely unacceptable by today's standards. If extensive old-law stripping has not caused Skunk Run to become acid, a small area of stripping with present standards on the same coal seam should cause no acid problems.
>
> "2. The Vanport Limestone lies at a lower stratagraphic level than the proposed operation. In this area, the Vanport is recorded to be approximately 15 to 20 feet in thickness which would make the Vanport the major aquifer in the area. Herb Strum noted that the Vanport outcrops along the streams in this area. Thus if ground water would seep through the underclay and reach the Vanport, it would be neutralized if it were of an acidic nature. This limestone is not likely to be coated over with the small amount of water which could come from the proposed Kerry operation. Extensive stripping on Skunk Run has not caused a problem with the limestone.
>
> "3. There should be no siltation problem since there will be several hundred feet between the proposed operation and the headwaters of the only stream which can receive drainage from this area. This area is vegetated and would stop any siltation which might result if the applicant's anti-siltation control would fail. The use of proper siltation control methods should result in less siltation than would be caused with the present use of this land (farming).
>
> "4. If there is no blasting noise on the operation, noise will be kept to a minimum. This will be on the opposite side of the hill from the State Park and, thus, will not be greatly obvious."

25. The department's hearing examiner, Jack C. Sheffler, included the following statements in his memorandum recommending a limited mine drainage permit:

> "The conclusion was that the only way this area could be mined safely was to place the following restrictions on the application.
>
> "Cut the acreage to thirty, said acreage will then be located in a small hollow isolated completely from all park boundaries and completely eliminating any chance for any discharges to reach Hell's Run or any part of the Park.
>
> "The length of the cuts will be 600 feet rather than 1500 feet with reclamation to start immediately.
>
> "Auger mining to be eliminated completely from the application.
>
> "If blasting is necessary it will be kept at a minimum, and the size of the charge to be controlled by the department.

. . .

"Mining is presently being done in this area. There are no known violations from acid or siltation discharge at the present operations in the area. Under the new application the operator is not mining adjacent to or within 800 feet at the closest point to Park property and all precautions as required by the department in regards to acid or silt will be taken."

26. The bedrock under the Kerry Coal site lies near the crust of the Homewood Anticline and the bedrock dips distinctly toward the west and southwest in a direction directly opposite from Hell's Run and Hell's Hollow.

27. Groundwater flow almost invariably follows the direction of surface water flow and the dip and strike of and structure and attitude of the bedrock. The surface water flow on the Kerry Coal site will be in a southerly and southwesterly direction towards the headwaters of the receiving stream, the unnamed tributary, and directly away from Hell's Run and Hell's Hollow.

28. Since actual operations have begun at Kerry Coal's site, water samples taken from the pit on July 13 and 14, 1976, and analyzed within 24 hours at the DER's laboratory in Harrisburg indicates that the water prior to any treatment is alkaline.

29. The Kerry Coal site contains 80,000 tons of mineable coal which if sold on the market at current market prices will return $1,360,000 in revenues to Kerry Coal. Kerry Coal's operation will provide employment to 14 employees.

30. Mining operations at Kerry Coal Company's No. 21 mine under the permit as limited by the department are not likely to cause pollution of Slippery Rock Creek or to interfere with the use and enjoyment of McConnell's Mill State Park and Hell's Hollow.

DISCUSSION

Appellants in this case make some well-presented arguments that under the board's decisions in *Compass Coal Company, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 72-312, issued August 26, 1975, and *Creel Brothers v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 73-071-B, issued March 24, 1975, the department abused its discretion in issuing the strip mining permit issued to Kerry Coal Company; and further that the department abused its constitutional duty as trustee under Article I, Section 27 of the Pennsylvania constitution within the meaning of *Payne v. Kassab*, 11 Pa. Comm. Ct. 14 (1973) affirmed, ____ Pa. ____, 361 A.2d 263 (1976).

Our problem with appellant's arguments under *Compass Coal Company, supra,* and *Creel Brothers, supra,* is that those cases as literally applied by appellants would make the issuance of any mine drainage permit by the department an abuse of discretion since the import of those decisions was that the department did not require sufficient information from the applicant from which to determine whether or not pollution would be likely. The situation is the same here. The difference is that the permit here was granted rather than denied as it was in *Compass Coal* and *Creel Brothers, supra.* Another difference is that the department in this case had a considerable amount of experiential information to rely on in evaluating the application because of the extensive mining in the area in which intervenor proposed to mine.

While we wish that the department would require more specific information in its application forms as to the nature of the overburden and the plans for control of siltation, we are not prepared to invalidate every strip mining permit issued by the department because it does not require this information. In *Compass Coal Company, supra,* the board sustained the department's denial of a permit on the grounds such information was not provided as well as on other grounds, such as the proximity to a public water supply and the unacknowledged intent of the operator to alter an adjacent water course. In *Creel Brothers, supra,* the board remanded the case to the department with directions that the department should conduct a test of the overburden to determine whether the materials therein would be likely to cause acid mine drainage that might pollute Lake Arthur in Moraine State Park.

In the present case, intervenor provided the information that was requested on the application form furnished him by the department. The evaluation by the department did include analysis of water samples from nearby wells, springs and streams and a geological analysis of the area based primarily on a visual survey of the area and information available from other mining operations. The applicable regulations are not much help in determining whether or not a particular strip mining permit should or should not have been granted. Section 99.11 provides:

> "Applications for mine drainage permits shall be submitted on forms provided by the Department and shall include such information that would enable the Department to determine whether or not the proposed mining operation would be conducted in a manner which would prevent pollution to waters of this Commonwealth."

Section 99.12(2) provides:

". . .

"(2) *Test borings*. For a proposed strip mine, sufficient test borings of the overburden shall be given to ascertain its nature and acid forming potential, unless the applicant can provide such information in some other reliable manner."

Section 99.37 (a) provides:

"Surface water which might otherwise drain into the stripping pit shall be effectively intercepted on the uphill side of the high-wall by suitable and adequate diversion ditches and conveyed by adequate channels or other suitable means for discharge to natural water courses outside the entire stripping operation."

In view of the generality of these requirements, the position in which the board finds itself in most of these mine drainage permit cases is that of evaluating on an *ad hoc* basis the evidence developed at the hearing before the board, as to whether or not the department abused its discretion in granting or refusing to grant a permit in a particular case. We believe, however, that until more specific regulations and/or applications are developed by the department, the board should conduct such an *ad hoc* revue rather than invalidate the department's action on the wholesale basis.

Before turning to appellant's specific objections and arguments, we must consider the issue raised by both parties as to who has the burden of proof. In our opinion, we said that appellant had the burden of proof and the burden of proceeding in accordance with the board's Rule 21.42, which provides in part:

"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. ...

. . .

"A private party appealing an action of the Commonwealth acting through the Department of Environmental Resources shall have the burden of proof and burden of proceeding in the following cases unless otherwise ordered by the board:

. . .

"(c) Where a party who is not the applicant or holder of a license or permit from the Commonwealth protests its issuance or continuation."

Appellants argue that the Commonwealth and intervenor should be assigned the burden of proof in this case because of the high quality of the stream here and the likelihood of environmental harm. See *Concerned Citizens for Orderly Progress, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources,*

EHB Docket No. 75-161-W, issued February 11, 1976. That case involved a discharge from a package treatment plant directly into a stream and the board concluded that it was appropriate to use its discretion to assign the burden of proof to the permittee. Here we are not convinced that the probability of environmental harm is so obvious and consequently, consistent with the board's rule quoted above, that appellants should have the burden of proof at least to establish that there will be significant environmental harm from intervenor's operation. In our opinion they did not succeed.

At the outset it must be noted that neither the Pennsylvania legislature by statute, nor the Environmental Quality Board by regulation has prohibited strip mining in areas adjacent to state parks. As we have said in other opinions, *Creel Bothers v. Commonwealth of Pennsylvania, Department of Environmental Resources, supra,* and *Doraville Enterprises v. Commonwealth of Pennsylvania, Department of Environmental Resources,* EHB Docket No. 73-433-C (issued October 21, 1975) proximity to a state park or a recreation area cannot under the present law be the basis of the department's denial of a strip mining permit. Since the law allows strip mining on a permitted and controlled basis in prime natural areas as well as not so prime natural areas, the proper questions for the department to consider in deciding whether or not to issue a particular permit are questions as to whether the application meets the requirements of the regulations and, on the technical data presented, is not likely to cause pollution.

Some of the considerations that appellants urge upon the board and the department are not grounds upon which the department could reject an application. For example, the fact that there are one billion tons of strippable coal reserves in the Commonwealth of Pennsylvania so that strip mining on this particular site is unnecessary, or the fact that the Western Pennsylvania Conservancy might have purchased property that includes this site if the strip mining permit had not been issued, are not facts that the department is obligated to consider in issuing or denying a strip mining permit. On the other hand, the board previously held in *Creel Bothers, supra,* that under §§4 and 5 of The Clean Streams Law, Act of June 22, 1937,P. L. 1987, *as amended,* 35 P. S. §691.4 and §691.5, the department is required to consider and protect downstream uses, and particularly recreational uses, in issuing strip mining permits, but that it must access the *particular* risks in each case and not simply deny a permit on the ground that downstream uses might be adversely affected as a general proposition.

In accessing the particular risk in this case, it appears to us that the department made a fairly careful judgment and limited the permit in such a way as to reduce encroachment upon the recreational uses of McConnell's Mill Park, Slippery Rock Creek and Hell's Hollow to a minimum.

The significant questions that appellants raise relate to the possibility of groundwater pollution and the adequacy of the measures for erosion and sedimentation control. As stated in Finding of Fact number 20, the application did not require, and neither intervenor nor the department performed, any chemical analysis of the overburden. The purpose of such an analysis would be to determine the pyritic content of the overburden, which when exposed to air and water, could create acid mine drainage. Since the adoption of regulations under the 1966 amendment to The Clean Streams Law, which made that law applicable to mine drainage, any acid water encountered in the pit is under the terms of the permit required to be treated prior to discharge so that it has an acceptable pH (above 6.0) and an iron content of no more than 7 miligrams per liter. However, appellant's question whether groundwater pollution might occur if acid water is created and seeps into the groundwater. Chemical tests of the overburden, rather than simple identification of the strata as provided in the application, would be helpful for determining whether or not acid water might be created.

The department's geologist testified that a consultant had been engaged by the department to perform chemical analyses of the overburden in a watershed where there had been little mining, and consequently there was no information upon which to base a judgment of the potential for acid mine drainage. Here, however, the extensive mining in the area, much of it done under old laws that did not require backfilling measures to prevent pollution, makes the judgment that there will not be acid mine drainage a sound empirical judgment. The conclusion is not dependent on knowing the exact pyritic content of the overburden, but on the fact that the Vanport Limestone seam underlies the Middle Kittaning seam where Kerry is mining, and is the major aquifer in the area. From experience, it can be concluded that the limestone will neutralize any acid materials that might be formed before they reach the groundwater table.[1] The department also reasons that if for some reason water did not penetrate the underclay and pass through the Van Port limestone to the groundwater, a perched water table would be created, which would mean that any pyritic material would be covered by water and hence, without the presence of air, acid would not be produced. Whether or not the department's

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[1] 1. The fact that the water in the pit as analyzed from the samples taken July 13 and 14, 1976, was alkaline suggests that the overburden does not contain significant acid-producing materials.

rather logical prediction on this point would prove true, it does appear to us that there was a reasonable basis for the department's conclusion that groundwater pollution from acid mine drainage is unlikely in this watershed.

Similarly, intervenor demonstrated quite conclusively that groundwater pollution to Hell's Run was not only unlikely but almost an impossibility. Intervenor's witness, Thomas Angerman, an experienced geologist, did an extensive survey of the area. His testimony confirmed what the U. S. G. S. Topigraphical map shows--that the watershed in which the Kerry operation is located drains in a south-southwesterly direction away from Hell's Run and Hell's Hollow. Furthermore, this watershed is separated from the Hell's Run watershed by a ridge, a valley and another ridge. Appellants urge that elaborate tests to determine groundwater flow involving the drilling of many wells, should have been performed. In view of the quite well accepted proposition that groundwater flow follows the direction of the surface water flow unless there are some unusual *rock* strata, which were not discovered here, we believe that it is safe to conclude there will be no groundwater pollution to Hell's Run; and that expensive tests to prove that water does not flow uphill as one witness remarked, are simply unnecessary.

Appellant's other evidence on the likelihood of acid mine drainage was likewise unpersuasive. Appellant's witness, James Strong, had analyzed two samples from two treatment ponds at the Carlson mining site, both of which were acidic. Mr. Whitcomb, the department's witness, testified that he had seen several reports from water in the pit of the Carlson mine where the water was alkaline. Apparently, it is possible for water in a treatment pond to become acidic by virtue of contact with the particular strata that forms the pond. Such water is required to be treated before it is discharged; and, in fact, the sample of Carlson's discharge on the same day had an acceptable pH. Again, an acid sample taken from an abandoned pond below a landfill near the Carlson mining site is inconclusive since completely unexplained and possibly unrelated to Carlson's operation. The appellants' argument concerning a fish kill caused by acid mine pollution that occurred in July, 1964, prior to any control of mine drainage and approximately 15 miles upstream on Slippery Rock Creek, is completely unrelated to the possibility of acid mine drainage in this watershed.

We are more concerned with appellants' objections as to Kerry's siltation control measures and the adequacy of the department's assessment of possible siltation problems. In *Compass Coal Company, supra*, the board ruled that the same information provided by the applicant there as to erosion control as provided by

Kerry was inadequate. We continue to believe that the apparently routine answer that is given to the questions in Supplemental B (see Finding of Fact number 22) concerning control of siltation is insufficient to enable the department to assess the actual potential for erosion and the adequacy of erosion control plans. The department's geologist, Mr. Whitcomb, concluded that in this case, if there was any siltation that was not adequately handled by ditches it would be stopped by the extensive intervening vegetation before reaching the stream. It may be that the exact shape and size and grading of diversion ditches and ditches below the spoiled pile cannot be known until the magnitude of the problem is observed and the bulldozers actually set to work. We do not wish to create unreasonable paperwork for applicants for mine drainage permits. However, we question whether the department could not require some more specific information as to the likely amount of runoff and the placement and grading of diversion ditches so that some determination as to the likelihood of siltation problems could be made. We are not perpared to overturn the department on this point in this case because of the limited area of operation under the permit. However, we would urge that there be vigorous supervision of this operation to assure adequate siltation control measures.

We are also unable to accept appellants' arguments that the natural landmark status of McConnell's Mill Park is threatened by this strip mine, and that consequently the economy of the surrounding communities may also be adversely affected. We believe that the department does have an obligation to consider such facts as the natural landmark status of the park in determining whether or not to grant a particular strip mining permit. However, it appears here that the department did take account of the adverse comments of Mr. Zinck for the National Park Service and representatives of the Bureau of State Parks and the Pennsylvania Fish Commission in acting upon this permit. It seems that the department concluded that with the permit limited as it was, the dangers foreseen by these commentators were unreal. Mr. Zinck of the National Park Service testified that he had been to this area only once and he was unaware of the other mining activities surrounding the park. Apparently those activities had no affect on the park's obtaining national landmark status in 1974 and have not been any threat to the continued landmark status of the park. Similarly, there did not appear to be any real threat to the "Fish for Fun" program instituted by the Fish Commission. There was extensive testimony that the buffering capacity of Slippery Rock Creek was made possibile by a mine acid treatment plant on the north branch of the creek, which was built after the 1964 fish kill by the Commonwealth and is

maintained at a cost to the Commonwealth of approximately $5,000 a month. That plant, however, treats water coming from northern watersheds, which are unrelated to this one. The witness for the Fish Commission conceded that there had been no determination of adverse affect on Skunk Run or Slippery Rock Creek from Carlson's operation or other nearby operations. From the evidence it did not appear that acid mine drainage would be likely to result from the strip mining of this site in this particular watershed. Consequently, it is unlikely that the"Fish for Fun" program will be adversely affected.

In sum, we believe the department here did not abuse its discretion in granting this permit and that it met the tests set forth in *Payne v. Kassab, supra,* in carrying out its duties as trustee of the resources of the Commonwealth under article 1 §27 of the Pennsylvania Constitution. Although we are not completely satisfied with the information that is required or provided by an applicant for a strip mining permit, we must conclude that the department was justified in deciding that the requirements of the statutes and regulations were met in this case. The department clearly made an effort to reduce the environmental incursion to a minimum by limiting the permit in such a way as to assure that the operation would have a minimal effect on the recreational uses of the McConnell's Mill Park, Hell's Hollow and Slippery Rock Creek. We cannot say that the environmental harm which will result from the challenged decision in this case so clearly outweighs the benefits to be derived therefrom that.to proceed further would be an abuse of discretion. *Payne v. Kassab, supra.*

CONCLUSIONS OF LAW

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

2. Appellants appealing the grant of a strip mining permit by the Department of Environmental Resources have the burden of proof under the board's Rule 21.42 at least to establish that there will be significant environmental harm from the permittee's operation.

3. In view of the generality of the statutory and regulatory provisions relating to mine drainage permits, the board must conduct an *ad hoc* review in each case in order to determine whether the department abused its discretion in acting on a particular permit.

4. The department cannot deny surface mine drainage permits solely because the proposed surface mining area is near a state park or a national landmark in the absence of a duly adopted statutory provision or regulation so providing

however, in considering any particular mine drainage application, the department is required under §§4 and 5 of The Clean Streams Law to take account of the possible affect on downstream uses, particularly recreational uses, and to assess the particular risk of harm to those uses in each case.

5. In view of the evidence in this case as to the actual potential for pollution and the fact that the department attempted to minimize any risk of environmental harm in this case by reducing the acreage to be mined, reducing the length of cuts prohibiting auger mining and imposing other special conditions, we conclude that the department did not abuse its discretion in issuing this permit and that it satisfied its constitutional duties under article 1, §27 of the Pennsylvania Constitution.*

ORDER

AND NOW, this 17th day of December, 1976, the appeals of Pennsylvania Council of Trout Unlimited, Arrowhead Chapter of Trout Unlimited, Moshannic Chapter of Trout Unlimited, Penns Wood Chapter of Trout Unlimited, and Do-Fly Fishers Club are hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

CONCURRING OPINION

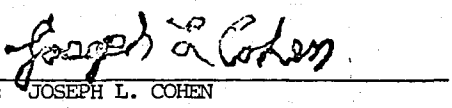
By: Joseph L. Cohen, Member

I concur with the adjudication in this matter, but only wish to indicate that the arguments relating to the burden of proof, unless the board otherwise orders a different allocation of the burden, is as stated in Rule 21.42. Inasmuch as the board obviously did not order a different allocation of the burden, 21.42 governs irrespective of the alleged high quality of the stream and the likelihood of environmental harm. Such issues as this should, in all fairness, be determined prior

*It is unnecessary to rule upon appellants' motion to strike the proposed findings of fact and conclusions of law filed December 8, 1976, by William E. Guckert on behalf of the Bureau of Mine Reclamation of the department, as this adjudication was written prior to the receipt of Mr. Guckert's submission.

to the taking of testimony in any given board proceeding. A party has an obligation, in this regard, to raise the issue before testimony is presented.

ENVIRONMENTAL HEARING BOARD



BY: JOSEPH L. COHEN
Member

DATED: December 17, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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In the Matter of:

BETHLEHEM STEEL CORPORATION :

: Docket No. 75-154-D
: &
: 75-155-D

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

The Commonwealth seeks to discover emission data from an experimental coke oven battery of Great Lakes Carbon Corporation (GLC) that appellant, Bethlehem Steel Corporation, obtained under a joint venture agreement with GLC. Appellant argues that this information is protected because of a confidentiality agreement between it and GLC, and because Rule 4011 (c) of the Pennsylvania Rules of Civil Procedure prohibits discovery of any matter that "would require the disclosure of any secret process, development or research".

It is true, as appellant argues, that the Pennsylvania rule, unlike the Federal rule, see Moore, Federal Practice, Vol. 4, §26.75, has been applied as an absolute bar to the discovery of material falling within these categories. See Prinscott v. Henry Campbell Sons' Corp., 16 D & C 2d 650 (C. P. Phila. 1950); Allen Electronics v. Flock, 31 Leh. Co. L. J. 228 (1965). However, it appears that the information the Commonwealth is seeking here is simply data concerning the emissions in the coke-side shed prior to the application of any cleaning device. The Department argues that this information may be relevant to show differing emission factors at different batteries--particularly asappellant is allegedly basing its case on emission data collected at its own experimental coke-side shed at its Burns Harbor, Indiana plant.

In view of appellant's apparent reliance on similar data from another experimental battery, the emission data from GLC maybe relevant and should be produced. While the Pennsylvania Rule would appear to preclude the production of any information about the design or development of GLC'a air pollution control process,

data concerning the character of emission into a coke-side shed prior to any treatment is not, in my view, the kind of information that is intended to be protected under §4011(c). Although the shed itself may involve special technology or know-how, records of what was emitted into the shed would not reveal any secret process or development or research resulting from the expertise of either of the parties to these agreements.

As there is no special privilege for emission data and the particular emission data sought may be relevant to the case, the information cannot be protected from discovery by the state simply by the parties' agreement that it is confidential. However, because the parties do have such an agreement and because it pertains to a plant in Missouri rather than Pennsylvania, the Department can and should be ordered to keep the information confidential as provided for trade secrets and similar information in Section 13.2 of the Air Pollution Control Act, 35 P.S. §4013.2.

ORDER

AND NOW, this 2nd day of January, 1976, it is hereby ordered that appellant shall produce for the Commonwealth's inspection, the emission data obtained under its agreements of February and August, 1973, with Great Lakes Carbon Corporation, but shall not be required to produce any portion of the study performed under those agreements dealing with the technology of the air pollution control system in which the data was collected. Any copy of the emission data that is given to the Department pursuant to this order shall be kept in a file of the Department's counsel in this matter, shall be marked confidential and shall not be used by the Department except in this case. The material required to be produced shall be produced on or before January 12, 1976.

Further, upon consideration of the Commonwealth's motion for clarification of appellant's pre-hearing memorandum, it is ordered that on or before January 12, 1976, both parties shall produce and serve upon the other, a list of the documents that each intends to introduce as evidence at the hearing in this matter, and to the extent possible, copies of all such documents that are not presently in the possession of the party served. Copies shall also be provided to the Board.

ENVIRONMENTAL HEARING BOARD

Joanne R. Denworth

JOANNE R. DENWORTH
Member

cc: Bureau of Administrative Enforcement
Robert E. Yuhnke, Esquire
Blair S. McMillin, Esquire

DATED: January 2, 1976
vf

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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In the Matter of:

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 72-397-CP-D

v.

U. S. STEEL CORPORATION

OPINION AND ORDER

The Department of Environmental Resources (Department) seeks to file a second amended complaint in this civil penalty action involving a number of outfalls at various United States Steel plants. The Department filed its initial complaint in November of 1972, alleging 94 separate counts for violations of The Clean Streams Law by the respondent, U. S. Steel Corporation (USS). By order of October 30, 1973, the Board authorized the filing of the Commonwealth's first amended complaint, which contains the same 94 violations alleged in the first complaint, but added 53 additional violations based on a sampling program conducted by the citizens group, Environment: Pittsburgh and made available to the Commonwealth. Each of the 147 individual discharges listed as separate counts in the second complaint were alleged to be "continuous". The Department now seeks to file another amended complaint adding 88 new or different counts. The new complaint seeks to delete 27 violations that are alleged to have occurred in 1971 and 1972, add 88 counts that state different dates or new dates for alleged violations, and renumber the remaining 106 allegations of the first amended complaint. Fifty-five of the new or substituted allegations occurred prior to September 8, 1973, which was two years prior to the date upon which the Commonwealth filed its second amended complaint.

In general, a party is allowed to amend his complaint at any time during a proceeding to correct allegations to conform with facts that have been discovered, and/or to add a new cause of action, where that action is not barred by a statute of limitations. Rule 1033 of the Pennsylvania Rules of Civil Procedure; 2 B Anderson Civil Practice, §§ 1033.18, 1033.27, 1033.33; Goodrich-Amram §1033-5, pp. 234-6.

The major question to be considered here, therefore, is whether the 55 counts that the Commonwealth seeks to add or substitute, which occurred prior to September 8, 1973, are barred by the following statute of limitations found at 12 P.S. §44:

> "When actions for forfeiture may be brought (:)
> All actions, suits, bills, indictments or informations, which shall be brought for any forfeiture, upon any penal act of assembly made or to be made, whereby the forfeiture is or shall be limited to the Commonwealth only, shall hereafter be brought within two years after the offense was committed, and at no time afterwards; and that all actions, suits, bills or informations, which shall be brought for any forfeiture, upon any penal act of assembly made or to be made, the benefit and suit whereof is or shall be by the said act limited to the Commonwealth, and to any person or persons that shall prosecute in that behalf, shall be brought by any person or persons that may lawfully sue for the same, within one year next after the offense was committed; and in default of such pursuit, that then the same shall be brought for the Commonwealth, any time within one year after that year ended; and if any action, suit, bill, indictment or information shall be brought after the time so limited, the same shall be void, and where a shorter time is limited by any act of assembly, the prosecution shall be within that time."

We have concluded in our opinion in Rushton Mining Company, EHB Docket No. 72-361-CP-D, issued on this day, that this statute does not apply to a civil penalty action brought by the Commonwealth under The Clean Streams Law because such actions are not "for any forfeiture upon any penal act of assembly...". Hence, the Commonwealth's requested amendments are not barred by 12 P.S. §42.

In view of the liberal policy of permitting amendments, the only question remaining is whether there will be substantial prejudice to U.S. Steel Corporation by the allowing of these amendments. See Cucinotti v. Ortman, 399 Pa. 26, 30 (1960); 2 B Anderson Pa. Civil Practice §1033.41. Although we are not pleased at enlarging this already cumbersome and lengthy litigation (and have indeed considered whether or not that alone might be grounds for denying this amendment), we think that it may in fact be simpler to allow the Commonwealth to amend its complaint to add additional counts to this action rather than to require the Commonwealth to bring a separate action alleging violations that are related to those that will be litigated here. It is also true, as the Commonwealth argues, that any prejudice to U.S. Steel that results from the allowance of this second amended complaint can be remedied by giving respondent more time to complete its discovery and preparation for hearing relating to the newly alleged violations. In view of the enormity of this matter, and the fact that the Commonwealth has apparently not yet produced information concerning the 53 counts added by the second amended complaint, a further extension of 90 days will be given to the parties to complete discovery.

ORDER

AND NOW, this 12th day of March, 1976, the rules to show cause why leave should not be granted to file a second amended complaint is discharged and the Commonwealth's petition for leave to file that complaint is granted. The parties shall have until June 11, 1976, to complete discovery in this matter.

ENVIRONMENTAL HEARING BOARD

JOANNE R. DENWORTH
Member

cc: Bureau of Administrative Enforcement
David T. Buente, Esquire
Howard Wein, Esquire
David McNeil Olds, Esquire
John A. Hammerschmidt, Esquire
Mr. David Marshall
Carolyn Mitchell, Esquire
Peter D. Jacobson, Esquire



DATED: March 12, 1976

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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In the Matter of:

PENNSYLVANIA COUNCIL OF TROUT UNLIMITED, et al

Docket No. 75-044-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
& KERRY COAL COMPANY, INTERVENOR

PARTIAL ADJUDICATION,
OPINION AND ORDER

Both parties in this matter have filed motions for summary judgment. Appellants ask for summary judgment on the basis of the Board's decision in *Compass Coal Company v. Commonwealth of Pennsylvania, Department of Environemntal Resources*, EHB Docket 72-312-C, issued August 26, 1975. In that case the Board upheld the Department's denial of a strip mining permit in part on the grounds that the information provided in the Company's application--specifically information as to the acid forming potential of the over burden, information as to the amount of surface water runoff and soil runoff that would be anticipated, and information with regard to erosion control measures--was insufficient. Appellants argue that Kerry Coal Company's application upon which the grant of a permit in this case was based was as a matter of law insufficient in these respects, and therefore the permit should not have been granted. Intervenor's motion for summary judgement is based on standing. It claims that appellants, seven organizations interested in conservation and the protection of streams for fishing as well as other recreational uses, have no standing to appeal from the grant of this permit.

Appellant's motion for summary judgment must be denied. The Board in the *Compass Coal Company* case held that the appellant's application was insufficient *after* a hearing in which the Board reviewed the evidence upon which the Department acted. Here the intervenor claims that it did provide sufficient information to the Department upon which the decision granting the permit could be made. Thus, there is a dispute as to material facts on the issue of the adequacy of the application (which, it must be noted, is not yet in the record before the Board). The law is

clear that summary judgment may not be granted where there is any issue as to material fact. *Borough of Monroeville v. Effie's Ups and Downs*, 12 Pa. Commonwealth Ct. 279, 315 A.2d 342 (1974); *Prince v. Pavoni*, 225 Pa. Super. 286, 288, 302 A.2d 452, 454 (1973); *accord: Kotwasinski v. Ratner*, 436 Pa. 32, 258 A.2d 865 (1969). Furthermore, it is significant that in the *Compass Coal Company* case the appellant had been denied a permit, and therefore had the burden of proof in that case. In this case the appellants are appealing from the grant of a permit to intervenor and appellants have the burden of showing that the Department abused its discretion in granting the permit. We believe that although there might be a case where an application could be held to be insufficient as a matter of law, most cases will require an *ad hoc* appraisal of the Department's action in accepting or rejecting an application. Here for instance, the Department, after public hearings held to consider the objections of appellants and others to the strip mining in question, issued a permit for 28 acres with maximum cuts of 600 feet instead of the 140 acres with 1500 foot cuts that the intervenor proposed, and also prohibited auger mining. In view of the apparently careful consideration that the Department gave the grant of this permit, we certainly could not hold, without a careful review of the evidence, that the Department abused its discretion as a matter of law.

The issue of standing raised by the intervenor presents a more difficult question, which was made even more difficult by the fact that the appellants did not submit any brief on this issue to the Board. The mine drainage permit for strip mining which was issued in this case was issued under the authority of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.*, which gives the right of appeal to the Environmental Hearing Board to "any person...who shall be aggrieved by any action of the Department under this act", 35 P. S. §691.7 (a). The Pennsylvania courts have generally been quite strict in defining a "person aggrieved" by an administrative action as one who has a direct precuniary interest that is affected by the action appealed from. See *Community College of Delaware County v. Fox*, Pa. Commonwealth Ct. , 342 A.2d 468 (1975); *Committee to Preserve Mill Creek v. Secretary of Health*, 3 Pa. Commonwealth Ct. 200, 281 A.2d 468 (1971); *Enuden Hill Farm, Inc. v. Milk Control Commission*, 420 Pa. 548, 217 A.2d 735 (1966). Although the court's opinion in the *Fox* case suggests that the Commonwealth Court might not find standing here, the facts in that case (and in the *Mill Creek* case) did not require the Court to consider whether there might be an "injury in fact" to an organization's members that would give the association standing to sue under the recently evolved law on standing to assert environmental injuries.

The issue of standing has come up many times in the rapidly expanding environmental law in federal court cases. There the courts in the last several years have recognized an "injury in fact" test, which includes, injury to aesthetic and environmental well-being as well as economic well-being, as grounds for standing. *Flast v. Cohen,* 392 U. S. 83 (1968); *Barlow v. Collins,* 397 U. S. 159 (1970); *Data Processing Service v. Camp,* 397 U. S. 150 (1970); *Sierra Club v. Morton,* 405 U. S. 727 (1972).[1] In the cases that follow *Sierra Club v. Morton* the federal courts have clearly established the proposition that a user of public lands has standing to challenge governmental action that will affect his use of those lands, and that an association, some of whose members are users of a particular public facility, may sue on behalf of its members. See, e.g., *Sierra Club v. Mason,* 351 F. Supp. 419, 4 ERC 1686 (DC Conn. 1972); *Friends of the Earth v. Armstrong,* 360 F. Supp. 165, 5 ERC 1481 (DC Utah 1973) revd on other grounds 485 Ed. 2nd 11, 5 ERC 1694 (10th Cir. 1973); cert den. sub. nom; *Friends of the Earth v. Stamm,* 414 U. S. 11 71 (1974); *Montgomery Environmental Coalition v. Fri,* 366 F. Supp. 261 (DC DC 1973); *Environmental Defense Funds v. TVA,* 468 F.2d 1164, 4 ERC 1850 (5th Cir. 1972); *Viavant v. Trans-Delta Oil and Gas Company,* F.2d , 7 ERC 1423 (10th Cir. 1974); *National Forest Preservation Group v. Butz,* 485 F.2d 408 (9th Cir. 1973); *Minnesota Public Interest Research Group v. Butz,* 498 F.2d 1314, 6 ERC 1694 (8th Cir. 1974); *Sierra Club v. Train,* F. Supp. , 7 ERC 2030 (DC Neb. 1975); *Committee for Green Foothills v. Froehlke,* F. Supp. , 5 ERC 1849 (N. D. Cal. 1973). The breadth of the injury in fact test as applied to associations whose members use public lands is demonstrated by *U. S. v. SCRAP,* 412 U. S. 669 (1973). There the Court found that an unincorporated association had standing to challenge a railroad rate increase that the association claimed could lead to higher recycling costs, which would result in more litter in the local parks that its members used and enjoyed. The Court said that a significant injury to the members was not required so long as they suffered some perceptible harm. See also *Pa. Environmental Council*

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1. In *Sierra Club* the "injury in fact" test that was developed in the earlier cases listed was extended to non-economic injury. The Court said:

> "...Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." 405 U. S. at 734-35

In that case, "The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development" so the Court affirmed the Court of Appeals decision that the Sierra Club did not have standing.

*v. Bartlett*, 315 F. Supp. 238 (M.D. Pa. 1970).

The Supreme Court has also recently ruled in a non-environmental context that an association has standing to sue on behalf of its members if only some of them are directly affected by the action sued upon. In *Warth v. Sheldon*, 422 U. S. 490 (1975), the Court said at p. 511:

> "Even in the absence of injury to itself, an association may have standing solely as the representative of its members. E.g., *National Motor Freight Traffic Assn. v. United States* 372 U. S. 246 (1963). The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy. See *Sierra Club v. Morton*, 405 U. S. 727 (1972). The association must allege that its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit... So long as this can be established...the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." (Emphasis supplied)

The Commonwealth Court in *Community College of Delaware County v. Fox*, *supra*, said in commenting on the test to be applied for standing to appeal an administrative decision:

> "...We do not rule that a more broad standard might not apply to standing in an *original action* as a direct challenge to an administrative agency for a violation of its duties as trustee of public natural resources.[6] But here the challenge is being made, not directly by means of an original action against the agency but on appeal from an agency decision to the EHB and then, of course, to this Court for review. And the challengers in an appeal must clearly be persons aggrieved."

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> "[6] *See*, for example, *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973)."

We believe that the "injury in fact" test that has been developed in the federal courts should also apply to standing to appeal from actions of the Department of Environmental Resources.[2] We do not understand the distinction that the Commonwealth

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2. In *Sierra Club v. Morton* the Sierra Club invoked §10 of the federal Administrative Procedure Act, 5 U. S. C. §702, as the basis for its standing to sue for review of the United States Forest Service's action approving the Mineral King development. That section, which contains the same "person...aggrieved" language as The Clean Streams Law, provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review."

Similarly, a number of the federal standing cases establishing the "injury in fact" test arose under the Administrative Procedure Act. See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U. S. 470 (1940); *Data-Processing v. Camp*, *supra*; *Barlow v. Collins*, *supra*; *Associates Industries v. Ickes*, 134 F.2d 694 (2nd Cir. 1943); *Scanwell Laboratories v. Schaffer*, U. S. App. D.C. 424 F.2d 859 (1970). In those cases the injury in fact was economic, but the courts concluded in rejecting the old legal right test that even though the parties seeking review of agency action had no legal right or interest, for instance, to be protected from competition, their potential injury in fact entitled them to represent the public interest in seeking review of agency action. The same rationale seems appropriate for persons aggrieved by non-economic injuries in fact.

Court makes between original actions and administrative appeals. See discussion and case cited in Davis, *Administrative Law Treatise*, Vol. 3 §§22.03, 22.04, 22.05, 1970 Supplement, §22.0 *et seq.*, wherein no distinction is made between standing to bring an original action and standing to appeal as a person aggrieved except under statutes that expressly limit persons aggrieved to a narrow class of persons. We would think that, if anything, the opportunity for interested and affected groups to be heard in review of administrative actions is more broad than the concept of standing for purposes of bringing an original action in court by virtue of a statute conferring a right of review in persons aggrieved. See, e.g., *Scenic Hudson Preservation Conf. v. Federal Power Comm.*, 354 F.2d 608 (2nd Cir. 1965), cert. den. sub. nom. *Consolidated Edison of New York, Inc. v. Scenic Hudson Preservation Conf.*, 384 U. S. 941 (1966). We also believe that the adoption of Article I Section 27 of the Constitution,[3] means that any action taken by administrative agencies of the state that affects these environmental concerns should be reviewable on appeal by members of the public who can establish that they would be affected in some unsatisfactory way by the alleged harm they seek to protest. While the Commonwealth Court has clearly ruled that an organization does not have standing as a "person aggrieved" based simply on its interest in protecting certain public values or natural resources, the Court has not specifically ruled on any case where there is an assertion of non economic injury in fact to an organization's members. Hence we do not feel constrained to deny standing because of the lack of any showing of economic harm. In an adjudication in *Western Pennsylvania Conservancy v. Commonwealth of Pennsylvania, Department of Environmental Resources*, issued today, we are recognizing standing in the appellant there, and we apply the same rule here.

Applying the "injury in fact" test as developed by the federal courts to this case, it appears to us that some, but not all, of the appellants have standing to appeal from the grant of the permit appealed from. Appellants claimed in their appeal that their members use and enjoy McConnell's Mill State Park and Slippery Rock Creek for fishing and/or recreation and that use is related to their claim that the intervenor's strip mining 600 feet from McConnell's Mill State Park with drainage to a stream that they allege is a unique and valuable fishery will damage the stream and affect the use and value of the Park. In response to the Board's order to produce information concerning appellants' membership and their use of the Park and the Creek, appellants have produced membership lists for intervenor's

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3. "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."

inspection that also show the results of membership surveys indicating use of the parks by some members of some of the organizations. Unlike appellants' answers to interrogatories, those lists are not in the record before the Board; however, from affidavits filed by attorneys for appellants and intervenor, it appears that the Pennsylvania Council of Trout Unlimited and its Arrowhead, Meshannock and Penns Wood Chapters and the Do Flyfishers Club of New Castle have standing to appeal in this case, but that the appeal must be dismissed as to Slippery Rock Creek Watershed Association and the Ellwood City Chamber of Commerce for lack of standing since no specific showing of injury in fact to the members of those organizations has been made.

A prompt hearing in this matter will be scheduled. We might note that one of the sub rosa objections that courts as well as administrative forums may have to standing for associations appealing to protect the public interest is the delay that seems to characterize this type of appeal and may perhaps be one purpose of it. (which is not to say that appellants with more traditional grounds for standing are totally guiltless in this regard). In this case appellants have had numerous extensions for purposes of responding to discovery and filing a pre-hearing memorandum. While we think that as a matter of principle some of the appellants must be recognized as having standing, we also think that appellants have an obligation to pursue their appeal with more diligence.

ORDER

AND NOW, this 7th day of May, 1976, appellants' motion for summary judgment is denied. Intervenor's motion for summary judgment is denied as to appellants, Pennsylvania Council of Trout Unlimited and its Arrowhead, Meshannock and Penns Wood Chapters and the Do Flyfishers Club of New Castle, but granted as to appellants, Slippery Rock Creek Watershed Association and Ellwood City Chamber of Commerce. The appeal of the latter two organizations is dismissed for lack of standing.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: May 7, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

KRAFT FOODS DIVISION
KRAFTCO CORPORATION

Docket No. 75-104-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

SUR MOTION FOR REARGUMENT

On May 7, 1976, the Board issued an adjudication remanding the above matter to DER for further action. The major issues were resolved in favor of appellant, Kraft Foods, but an issue was raised at the hearing upon which DER had not passed when it denied the permit. But for the question raised concerning run-off from a parking area, the Board would have sustained the appeal and ordered the permit to issue.

If DER now takes the position that there is no violation of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1, *et seq.*, or any regulation due to parking area run-off, then the permit should be issued forthwith. If, on the other hand, DER believes that there is reason to deny the permit based on this limited issue, it must do so and advise Kraft Foods of the law or regulation of which it is in violation. The Board then will have the issue, now being raised by the parties, properly before it. The previous adjudication referred to the fact that DER should satisfy itself that "no pollutants" from the parking area would go into the drainage ditch. More precisely, and we thought implicit, the language should have been--"no pollutants which in violation of the law or regulations of the Department" can find their way into the drainage ditch, some of which, of course, the facts indicate will go to groundwater.

The very question regarding what constitutes "pollutants" which DER has raised by its motion for reargument is the one which caused the Board to remand the case rather than sustain the appeal. It is, after all, the *initial* re-

sponsibility of DER to grant or withhold a permit based on its interpretation of the law and its regulations. See *Precision Tube Co., Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources, and PA Department of Transportation, Intervenor*, ____ Pa. Commonwealth Court ____, issued May 28, 1976.

DER has alleged that the test requiring simply that any measurable amount of a discharge going to groundwater is to be considered a discharge to groundwater if it contains pollutants, is unmanageable. We disagree. It is the quality of the discharge which is the area of concern under The Clean Streams Law. Obviously there must be a measurable amount of discharge going to groundwater before one can prove there is any discharge to groundwater. It is the numbers game *beyond that minimum* which the test is designed to avoid, so long as there is *some* discharge to groundwater.

Finally the issue is raised, as a basis for reargument, that it is just as reasonable for DER to control the discharge coming onto farm land as to control the chemicals used on the farm land. While this may or may not be true, in the absence of regulations on the matter, this Board has decided under the facts of this case, the discharge of water of drinking quality is not a sufficient basis for the denial of a permit.

For the above reason, we enter the following:

ORDER

AND NOW, this 7th day of June, 1976, the motions for reargument filed by DER and appellant, Kraft Foods, are hereby denied. DER shall issue the permit or within twenty (20) days deny the same with the reasons therefore. The Board will retain jurisdiction.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: June 7, 1976
llj

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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Harrisburg, Pennsylvania 17101
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In the Matter of:

PENNSBURY VILLAGE CONDOMINIUM : Docket No. 76-028-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR

APPELLANT'S MOTION FOR DISCOVERY

On May 10, 1976, appellant filed an extensive petition for discovery seeking to depose approximately 21 persons, requesting that DER and Robinson Township Municipal Authority answer certain interrogatories and that certain documents be produced by DER. DER raised certain objections to the petition and appellant responded to these objections on June 21, 1976. This opinion and order will dispose of the issues raised by appellant and DER.

The scope of discovery before the Board is controlled by PRCP 4007(a) which provides:

> "Any party may take the testimony of any person, including a party, for the purpose of discovery by deposition upon oral examination or written interrogatories of the identity and whereabouts of witnesses. Subject to the limitations provided by Rule 4011, the deponent may also be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the action and will substantially aid in the preparation of the pleadings or the preparation or trial of the case." (Emphasis added)

DER's objections, while mainly concerned with issues of relevancy, also raise issues with regard to privilege. In disposing of DER's objections to the discovery petition, we are mindful of the fact that in 1954 the Pennsylvania Rules of Civil Procedure had been amended to liberalize greatly the rules of discovery and to make it more readily available. 5 ANDERSON PENNSYLVANIA CIVIL PRACTICE, §4001.2.

The courts have defined the term "relevant" in regard to discovery proceedings in an expansive manner. In *Yoffee v. Golan*, 45 D. & C.2d 318, 90 Dauph. 39(1968), it was stated that discovery should be allowed if there is any possible relevance to the matters to be discovered where the matter will aid a preparation of pleadings or the trial of the case of the party seeking discovery. To the same effect, see *Groce v. Hile*, 46 D. & C.2d 89, 8 Mercer Co. L. J. 326(1969). However, 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. With these broad principles in mind, the matters raised by appellant's discovery petition and DER's objections thereto can be addressed in a meaningful manner.

In the examination of appellant's notice of appeal, we have concluded that the reasons for the appeal can be characterized as follows:

(1) The order from which the appeal is taken is premature for the reason that on the date of the order, no facilities were available for conveying sewage from Pennsbury Village Condominium to and treating it at a more suitable location in conformity with Special Condition B of the Pennsbury Village sewerage permit (No. 464S95);

(2) The Campbells Run sewage treatment plant is not a more suitable location than the Pennsbury Village treatment plant;

(3) The order is arbitrary, capricious and an abuse of discretion and, is generally unlawful and violative of the constitutional rights of the residents of Pennsbury Village Condominium.

The scope of the discovery, therefore, under the principles set forth above, is defined, in terms of relevancy, by appellant's notice of appeal. Appellant does not seek discovery with regard to the issue of whether the order was premature. However, it does seek discovery with regard to whether the Campbells Run treatment facility is a more suitable place than the Pennsbury treatment facility for the transportation and treatment of sewage. Also discovery is sought by appellant for the purpose of preparing its case relative to its allegations regarding the impropriety of the order generally.

With regard to the issue of the relative suitability of Campbells Run treatment plant as agaisnt the Pennsbury Village treatment facility, matters relating to the design and proposed operation of the Campbells Run treatment facility are

generally irrelevant to this proceeding, except for the limited purpose of showing whether the treatment facility can accommodate the present and future sewage from appellant. Therefore, only such discovery is allowed with regard to the Campbells Run treatment facility which will permit appellant to determine whether its design can accommodate the present and future sewage from Pennsbury Village Condominium.

Appellant seeks to discover matters relating to the design and construction of the Pennsbury Village sewage treatment facility. The only relevance which such matter could have to the present proceeding is that the order in some manner was predicated upon either faulty design or faulty construction of the Pennsbury Village sewage treatment facility. Inasmuch as the order is not predicated upon such a basis, facts pertaining to the design or construction of the Pennsbury sewage treatment plant are irrelevant to these proceedings. Thus, discovery will not be permitted with regard to matters relating to the design and construction of the Pennsbury facility.

Discovery on the issue of whether permit No. 464S95 issued to appellant's predecessor is "permanent" or "temporary" in nature will not be permitted. Insofar as discovery in this regard is predicated upon the question of the present and future adequacy of the Pennsbury treatment facility, we have already declined to permit discovery for this purpose. Moreover, whether Special Condition B set forth in the permit renders the facilities permitted thereunder "temporary" or "permanent" is of no legal significance in this appeal and, therefore, is not discoverable.

The financing of the sewerage facilities of Robinson Township, Allegheny County, are not properly relevant to this proceeding. Whether the Township or its authority can support its sewerage facilities without the revenue generated from a tie-in with Pennsbury Village Condominium, is not a proper consideration either of the DER or the Board in this matter. Whether DER was motivated in issuing the order to appellant by concern for the financial viability of the Robinson Township facilities is of no consequence. The sole issue is, in this connection, whether the order of DER is supported by The Clean Streams Law and the applicable rules and regulations adopted thereunder. Therefore, discovery with regard to Robinson Township's financing

of its treatment facilities is of no consequence and will not be permitted.

Finally, interrogatory No. 4 addressed to DER will not be permitted for the reason that it seeks to elicit from DER the legal basis for its action. Clearly, this is not discoverable.

All other items for which discovery is sought than those specifically excluded from the above are properly relevant to appellant's case. The objections of DER thereto are, therefore, overruled. The question, for example, of whether the Pennsbury Village treatment facility was deleted from the Campbells Run treatment system is arguably relevant to this appeal if DER had knowledge of this fact at the time it issued the order in this matter, regardless of whether DER took part in any litigation or settlement pertinent thereto.

With regard to items (4) and (7) set forth on page 3 of appellant's discovery petition, the objections of DER thereto must, likewise, be overruled. Appellant is not seeking to elicit either a contention or legal opinion of DER, but seeks only to ascertain facts which may be relevant to its legal contentions.

## O R D E R

AND NOW, this 12th day of July, 1976, it is hereby ordered:

(1) No discovery shall be permitted, either by oral deposition, interrogatory or by the production of documents pertaining to:

(a) the design or construction of the Pennsbury sewage treatment facility authorized by permit No. 464S95;

(b) any matter relating to the issue of whether permit No. 464S95 is "temporary" or "permanent" in nature or whether the Pennsbury treatment facility, permitted thereunder, is "temporary" or "permanent";

(c) matters relating to the design and proposed operation of the Campbells Run treatment facility which are not related to determining whether said facility can accommodate the present and future sewage from Pennsbury Village Condominium;

(d) matters relating to the financing of the sewerage facilities of Robinson Township, Allegheny County.

(2) DER shall not be required to answer interrogatory No. 4 addressed to it by appellant.

(3) DER shall not be required to produce any of the following documents:

(a) any document pertaining to the financing of the Campbells Run sewage treatment plant or its collection system, including the Baldwin Road extension to such system;

(b) any sewerage permit issued by DER or its predecessor, the Sanitary Water Board, which does not pertain to either the Pennsbury Village sewage treatment facility, or the Campbells Run treatment facility and its collection system.

(4) DER shall, on or before August 16, 1976, produce for inspection and copying at its Pittsburgh Regional office all documents requested in appellant's discovery petition, except those specifically excluded from discovery by this order.

(5) All interrogatories, except any specifically excluded by this order, shall be answered on or before August 16, 1976.

(6) Appellant shall file on or before August 31, 1976, a list of proposed persons the oral deposition of whom it wishes to take and a proposed schedule for the taking of such deposition. No oral deposition shall be taken with regard to any matter for which discovery has been disallowed by this order.

ENVIRONMENTAL HEARING BOARD

Joseph L. Cohen

JOSEPH L. COHEN
Member

cc: Bureau of Administrative Enforcement
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DATED: July 12, 1976

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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In the Matter of:

BETHLEHEM STEEL CORPORATION

Docket No. 75-154-D
&
75-155-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

The Commonwealth has filed a motion to compel one of appellant's witnesses, David Anderson, to answer certain questions that were not answered because of the objections of counsel at Dr. Anderson's deposition on May 19, 1976, and to compel appellant to produce documents and information relating to tests of the fog-spray device at Bethlehem's Burns Harbor plant in February, March and April of 1976. The Commonwealth has also asked for sanctions on the ground that the information sought should have been produced under the Board's prior opinion and order issued October 29, 1975. There is a dispute between the parties concerning when Bethlehem conducted tests for benzo(a)pyrene in pushing emissions and the proper production of those test results. At his deposition on May 19, 1976, Dr. Anderson indicated that although he could not remember exactly when such tests were conducted, there were some tests performed in 1975. Bethlehem now says in its memorandum that Dr. Anderson was mistaken, that no tests were conducted in 1975 and that all test results prior to the 1976 tests have been supplied to the Department. As we have concluded that the Department is entitled to the data resulting from the 1976 tests, this matter will best be resolved be scheduling a further deposition of Dr. Anderson at which time he can clarify, or correct, if that is appropriate, his statement concerning the tests conducted for benzo(a)pyrene as well as answer questions about the 1976 tests of the fog-spray device.

We specifically overrule Bethlehem's objection to the production of the 1976 test results based on anticipation of litigation. Although tests of the fog-spray device will clearly be important in this as well as other litigation, such

tests go to the heart of the matter, which is broader than this litigation--viz., whether the fog-spray device will work to control pushing emissions. We believe that the Department is entitled to have such information under section 4 (2) of the Air Pollution Control Act, 35 P. S. §4004 (2)[1], particularly where appellant has taken no steps to comply with a 1972 consent order deadline of July 1, 1977, for the implementation of a final control technology because of its contention that the Department should accept its proffered substituted technology.

At the deposition to be scheduled Dr. Anderson shall answer all questions relating to test results for benzo(a)pyrene as well as questions relating to his participation in meetings of the National Air Quality Advisory Committee when benzo(a)pyrene was discussed. Also, he shall identify relevant data of which he has knowledge that is in the possession of others, and testify as to his own role in preparing, reviewing or evaluating the testimony of Dr. Moffett at the OSHA hearings. Dr. Anderson shall not, however, be required to answer questions as to his ultimate opinions and conclusions--such as whether, in his opinion, the fog-spray will be effective to control benzo(a)pyrene.

## O R D E R

AND NOW, this 14th day of July, 1976, it is hereby ordered that the Department's motion to compel is granted. The parties shall arrange for the deposition of Dr. David Anderson before July 30, 1976, in accordance with this opinion.

Appellant shall produce all information and data resulting from the 1976 tests of the fog-spray device at its Burns Harbor plant.

The parties shall also schedule the deposition of Robert M. Harvey prior to July 30, 1976, for the purpose of taking his testimony concerning the 1976 tests and the discovery material produced by Bethlehem on May 24, 1976.

Bethlehem shall not bear the costs of these depositions unless it appears from the depositions that Bethlehem did not produce information from 1975 tests that should have been produced under the Board's prior order.

ENVIRONMENTAL HEARING BOARD

Joanne L. Denworth

JOANNE R. DENWORTH
Member

cc: Bureau of Admin. Enforce.
Robert E. Yuhnke, Esquire
Blair S. McMillin, Esquire

1. Section 4 (2), 35 P. S. §4004 (2) provides:

"The department shall have power and its duty shall be to. . .

"2. Have access to, and require the production of, books and papers pertinent to any matter under investigation."

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
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In the Matter of:

ALAN WOOD STEEL COMPANY

Docket No. 76-075-D
&
73-416-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER OF CONSOLIDATION

On June 2, 1976, Alan Wood Steel Company (Alan Wood) filed an appeal from a letter of the Department of Environmental Resources dated May 20, 1976, directing Alan Wood to make certain plant modifications and take certain operating procedures in order to facilitate the conducting of stack tests by the Department at Alan Wood's sinter plant in Conshohocken, Pennsylvania, on June 7 and 8, 1976. The Department sought to perform these tests in connection with its civil penalty action against Alan Wood, which is pending before the Board at docket number 73-416-D. Alan Wood's position was that while it did not object to the Department's performance of stack tests at its sinter plant, it did not believe that it should be required to make some of the modifications to its equipment and procedures that the Department requested. Specifically, Alan Wood objected in its appeal to:

> "(a) the requirement that it replace a portion of the fixed safety railing in front of each sampling port at the scrubber smoke stack with a removable safety chain;
>
> "(b) the requirement that it install sampling ports on each of two 'dilution' air ducts appurtenant to the sinter plant scrubber stack;
>
> "(c) the requirement that it close the covered ports or hatches in the main air vents from the sinter plant windbox to the scrubber; and
>
> "(d) the requirement that Alan Wood operate only two sinter strands, rather than the normal three strands, on one of the testing dates."[1]

1. The letter of May 20, 1976, incorporated requirements of an earlier letter of March 31, 1976. The requirements of both letters to which Alan Wood did not object included a requirement that it repair and close-up all damage holes in the windbox duct work. On June 8, 1976, the Department sent Alan Wood a further letter directing
(continued page 2)

In addition to its appeal, Alan Wood filed a Petition for Supersedeas, requesting that the Board stay the obligation of Alan Wood to comply with the Department's requirements pending a determination of their validity. The Department filed a Motion to Strike, a Petition for Intermediate Hearing and an Order requiring Alan Wood to Comply with the Sinter Stack Notice, and a Motion to Consolidate this appeal with the civil penalty action. A prompt hearing was held on June 10, 1976, at which it was agreed that the Board would determine the merits of the appeal rather than the issue of whether or not to grant a supersedeas. Hence, the supersedeas issue became moot and does not require action by the Board. The Department's Motion to Strike was based on the lack of verification of Alan Wood's pleadings, which was remedied by the filing of affidavits; and the Department has subsequently withdrawn its Motion to Strike. The Department did not pursue its Motion for Consolidation at the hearing; however, in its subsequent memorandum, it maintains that it has not abandoned its contention that this matter should be consolidated with the action at 73-416-D.

At the outset of the hearing in this matter, the Department indicated it had discovered that it would be able to conduct the stack tests without the need for removing the fixed safety railing at the sinter plant hydro-clean smoke stack. Hence, that issue has also been removed from the Board's consideration. At the hearing the Department, primarily through its witness, Frank J. Willard, Air Pollution Control Engineer IV in Region I, Norristown, Pennsylvania for the Department, gave its reasons for requiring the modifications in operations and equipment for the stack test period. Mr. Willard explained the Department's hypothesis that the unusually large number of openings in Alan Wood's duct system (more than 70 possibile air entry points) were drawing in "dilution" air. The significance of this dilution, if it in fact occurs, is related to the allowable emission standard for particulate matter under Section 123.13 of the Department's Regulations. According to that Section, the particulate matter that may be emitted into the outdoor atmosphere from any air contamination source shall not exceed whichever of the following results in a greater allowable standard: a mass emission rate based on a process weight factor, or a specified concentration based or the volume of effluent gas. Since the latter concentration is the limit most likely to apply to the operation of Alan Wood's sinter plant, an increase in the gas measured for purposes of the stack test could result in a high calculation of the allowable

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continued

it to install sampling ports on the exhaust duct from the pug mills. At the hearing the Department indicated that it could accept either sampling ports or closing off that duct. Alan Wood has entered no objection to these alternative procedures.

emission rate, thereby, the Department contends, concealing or diluting an emission of air contaminants that would otherwise be in violation of Section 123.13. The Department also contends that such dilution may be a violation of Section 121.9 of the Department's Regulations which prohibits "the use of any device or technique which, without resulting in reduction the total amount of air contaminants emitted, conceals or dilutes an emission of air contaminants which would otherwise be in violation of the provisions of this article..."

Subsequent to the hearing, on June 28, 1976, Alan Wood filed a Motion for Amendment of Appeal and Entry of Final Order. In that document Alan Wood, without conceding the propriety of the DER's order, agrees to two of the three remaining conditions for the Department's stack tests. Specifically, Alan Wood agrees to close the covered ports or hatches in the main air vents from the sinter plant windbox to the scrubber for a period not to exceed eight hours for the purpose of testing by the Department. With respect to the requirement that Alan Wood install sampling ports on each of two so-called dilution air ducts pertinent to the sinter plant scrubber stack, the testimony indicated that these ducts were generally closed during the sintering operation. Therefore, the parties agree there is no need to install sampling ports, unless it becomes necessary to open the ducts during the testing, and Alan Wood is willing to install such ports if necessary. Alan Wood points out that it has agreed to comply voluntarily with these conditions because the Department has indicated that it cannot proceed with the civil penalty litigation tentatively scheduled for intial hearings in the week of July 27, 1976, until the stack testing is complete; and Alan Wood wishes to have that litigation begin as soon as possible so that it will not be exposed to further liability for civil penalties.

Out of this welter of procedure there remain only two issues for the Board to decide at this point:

1. Whether the Department can require Alan Wood to operate two strands rather than three strands during one day of the Department's testing, and ,

2. Whether this procedure should be consolidated with the civil penalty action at 73-416-D.

## DISCUSSION

The legal basis for the Department's Order to Alan Wood regarding the stack tests is Section 4 of the Air Pollution Control Act, 35 P. S. §4004 (2.2, 2.3, 3), which has a number of material provisions:

"The department shall have power and its duty shall be to--

"(2.2) Require the owner or operator of any air contamination source to install, use and maintain such air contaminant monitoring equipment or methods as the department may reasonably prescribe.

"(2.3) Require the owner or operator of any air contamination source to sample the emissions thereof in accordance with such methods and procedures and at such locations and intervals of time as the department may reasonably prescribe and to provide the department with the results thereof.

"(3) Enter upon any property on which an air contamination source may be located and made such tests upon the source as are necessary to determine whether the air contaminants being emitted from such air contaminiation source are being emitted at a rate in excess of a rate provided for by board rule or regulation or otherwise causing air pollution. Whenever the department determines that a source test is necessary, it shall give reasonable written notice to the person owning, operating, or otherwise in control of such source, that it will conduct a test on such source. Thereafter, the person to whom such notice is given shall provide such reasonably safe access to the testing area, and such sampling holes, facilities, electrical power and water as the department shall specify in its notice.

. . .

"(4.1) Issue orders to any person owning or operating an air contamination source, or owning or possessing land on which such source is located, if such source is introducing or is likely to introduce air contaminiants into the outdoor atmosphere in excess of any board rule or regulation, or any permit requirement applicable to such source, or at such a level so as to cause air pollution. Any such order may require the cessation of any operation or activity which is introducing air contaminants into the outdoor atmosphere so as to cause air pollution, the reduction of emissions from such air contamination source, modification or repair of such source or air pollution control device or equipment or certain operating and maintenance procedures with respect to such source or air pollution control device or equipment, institution of a process change, installation of air pollution control devices or equipment, or any or all of said requirements as the department deems necessary. Such orders may specify a time for compliance, require submission of a proposed plan for compliance, and require submission of periodic reports concerning compliance. If a time for compliance is given, the department may, in its discretion, require the posting of a bond in the amount of twice the money to be expended in reaching compliance.

. . .

"(11) Determine by means of field studies and sampling the degree of air pollution existing in any part of the Commonwealth.

. . .

"(14) Encourage voluntary efforts and cooperation by all persons concerned in controlling, preventing, abating and reducing air pollution and air contamination.

. . .

"(20) Do any and all other acts and things not inconsistent with any provision of this act, which it may deem necessary or proper for the effective enforcement of this act and the rules or regulations which have been promulgated thereunder."

The Department based its request that Alan Wood operate two sintering strands, rather than the normal three sintering strands, for one day of the two-day testing procedure on a survey of Alan Wood's operating records that were provided to the Department under Interrogatory 20 of the interrogatories propounded to Alan Wood in the civil penalty action. This survey showed that over the period from 1973 to 1976, one sinter strand was down and two operating on an average of 31 hours a month, or approximately 5% of operating time. The Department appears to have two reasons for wishing to perform a test with only two strands operating: first, there will presumably be a lower volume of gas when two strands are operating and it believes that the permissible particulate emission rate should, therefore, be lower under those conditions; and second, that the hydro-clean scrubber, which is the pollution control device at Alan Wood's sinter plant, apparently requires a large volume of air in order to be efficient, and it may therefore be that the efficiency of this unit is decreased when the plan is operating only two strands. Alan Wood objects to its being required to operate two strands rather than three on the grounds that this is an unreasonable deviation from their normal operating procedures. Alan Wood contends that Section 4 of the Air Pollution Control Act only allows the Department to make "reasonable" requirements for testing and that unreasonable requirements constitute an unconstitutional search and seizure of Alan Wood's property.

The issue here is whether the Department's requirement that Alan Wood operate two strands rather than three strands is a reasonable requirement. It is clear under the provisions of Section 4 of the Air Pollution Control Act that the Department has considerable power to test for air pollution contaminants and to require an air contaminant source to adopt procedures and/or make modifications in equipment necessary for such testing. We would agree with Alan Wood that these provisions do not entitle the Department to make unreasonable demands, and that such unreasonable demands might amount to an unconstitutional search and seizure under certain circumstances. See *Camara v. Municipal Court*, 387 U. S. 523 (1967); *United States v. Stanack Sales Co.*, 387 F.2d 849 (3rd Cir. 1968). We do not agree that the Department's requirement amounts to an unreasonable search and seizure in this case, however, While we make no ruling on the ultimate significance of such tests, and have in fact have some doubt about the operability of the Department's first premise for the test, we do not think it is unreasonable for the Department to attempt to discover what the emission conditions are when one of the sinter strands is down. This is particularly plausible if this condition does in fact affect the efficiency of the air pollution control equipment. Alan Wood did not establish that compliance with the Department's request would impose any vary material burden on it.

Alan Wood's contention is that the Department is essentially trying to create conditions that will establish violations of the Regulations. This proposition answers itself. Since Alan Wood does not normally operate with two strands, there would be no such violations except when it was operating with two strands; and if there were violations occurring at those times, it would appear to us that the Department would be entitled to know that. The procedures used by the Department may be subject to question in terms of determining whether or not violations have occurred. But those questions can more appropriately be considered in the context of the civil penalty action.

Although we do not view the Department's requirement as sufficiently unreasonabl to be objectionable, we believe that the significance of the procedures requested by the Department can only be determined in the larger proceedings to which these stack tests relate. Consequently, we think it is appropriate to consolidate this action with that proceeding, as the stack tests are integral to it, and the testimony at the hearing on Alan Wood's appeal should be incorporated into the record of that action so that there is no need to duplicate any of the testimony taken at that hearing. The stack test order, though technically constituting an appealable action of the Department, was really in the nature of a discovery request in the civil penalty procedure. See Rule 21.15 (c) of the Rules and Regulations of the Environmental Hearing Board, and Rule 4009 (2) of the Rules of Civil Procedure. Since the issues here are so clearly related to the larger proceeding, the Board is justified in consolidating the two actions under its Rule 21.32 (b). See also Rule 213 (a) of the Rules of Civil Procedure. Although this means that Alan Wood cannot immediately appeal the stack test issue, that issue will be preserved and perhaps more fully amplified for any appeal from a final order in the civil penalty action.

We reject the Department's contention that the Board should, at this point, rule on the relevancy and materiality of the stack tests that the Department has ordered here. While we believe the Department has established a reasonable basis for taking the tests, we make no judgment as to the significance of those tests and cannot do so until we have had an opportunity to consider fully the questions of violation for which the stack tests are in part preparatory.

## O R D E R

AND NOW, this 16th day of July, 1976, it is hereby ordered that:

The appeal of Alan Wood Steel Company, EHB Docket No. 76-075-D is hereby consolidated with the civil penalty action, Department of Environmental Resources, Commonwealth of Pennsylvania v. Alan Wood Steel Company, EHB Docket No. 73-416-D, and shall henceforth bear the EHB Docket No. 73-416-D.

As soon as possible, the parties shall arrange for stack tests to be conducted in accordance with the terms of the Department's letters of March 31, 1976, and May 20, 1976, with the exceptions that:

(a) Alan Wood shall not be required to remove any portion of the safety railing at the sinter plant scrubber smoke stack, and

(b) Alan Wood shall not be required to install sampling ports on the two so-called dilution air ducts, provided that the same kept closed during the testing and that Alan Wood install sampling ports at such ducts to enable the DER to measure air flow if, due to operating considerations, it becomes necessary to open the ducts.

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Member

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DATED: July 16, 1976

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In the Matter of:

BETHLEHEM STEEL CORPORATION

Docket No. 76-003-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Appellant, Bethlehem Steel Corporation (Bethlehem), has filed a petition to amend its original appeal in this case, which was filed January 8, 1976, to add as grounds for appeal arguments that regulations 123.13 and 123.41 of the Rules and Regulations of the Department of Environmental Resources (Department) are invalid as applied to appellant's sintering operation here, and that the Air Pollution Control Act is unconstitutional. Bethlehem originally appealed from a letter of the Department dated December 9, 1975, the first paragraph of which was as follows:

> "Gentlemen:
>
> "I believe our Department has already communicated with you, if not in writing at least verbally, that we cannot grant the ten-year variance for your sintering machine requested in your May 1, 1974 petition. Section 13.5 Variances (a) states ... 'Such rules and regulations shall not authorize the grant of a variance which will prevent or interfere with the attainment or maintenance of any ambient air quality standard imposed by federal law within the time prescribed by such law for the attainment of such standard.'"

The rest of the Department's letter discussed the results of stack tests taken at the sintering facility, and asked that Bethlehem submit a proposal for new control facilities as soon as possible. The letter did not contain any indication of finality, such as a statement that an appeal could be taken to this Board. Nonetheless, Bethlehem did file an appeal from this letter on January 8, 1976. That appeal simply asked for review of the Department's conclusions that Bethlehem's request for a variance could not be granted under the terms of special provision

for variances where there has been a recent substantial investment in air pollution control equipment, 35 P. S. §4013.5(b). Subsequently, on February 17, 1976, the Department sent a letter to the general manager of Bethlehem, which stated the following:

> "The Department hereby amends Mr. Jack McGrogan's December 9, 1975 letter which denied Bethlehem's variance request for the sinter plant precipitator stack at the Bethlehem Plant, Bethlehem in order to clarify the reasons for that denial. Section 13.5 of the State's Air Pollution Control Act prohibits the Department from granting any variance since the ambient air quality standard for particulate matter is being exceeded in the vicinity of the Bethlehem Plant. Furthermore, Bethlehem has failed to demonstrate that the electrostatic precipitator at the Bethlehem Sinter Plant meets the requirements of Section 13.5(b)(4) of the Act for a ten year variance."

On March 18, 1976, Bethlehem filed a petition for leave to amend its appeal to include challenges to the validity and constitutionality of the law and regulations. The petition to amend Bethlehem's appeal was in part based upon the Department's letter amending its letter denying Bethlehem's request for a variance. Bethlehem also filed an appeal from the letter of February 17, 1976, which was docketed with this Board as 76-030-W and consolidated with this matter by order dated April 7, 1976. In its appeal in 76-030-W, appellant raised all the arguments concerning the validity and constitutionality of the law and regulations that it seeks to raise in its petition to amend the appeal in docket number 76-003-D.

The Commonwealth objects to appellant's petition to amend its appeal on the ground that the Board's Rule 21.21(c) specifies that any objection not raised in an appeal shall be deemed waived. The Department argues that since Bethlehem did not raise these issues in its appeal in a timely fashion, it cannot add them at a later date, even though the Department later "amended" its original letter by a "clarifying" letter. The Department likens Rule 21.21(c) to a statute of limitations for purposes of applying the rule that a party may not amend its complaint to add a new cause of action where an applicable statute of limitations would bar a new cause of action on the proposed amendment. See *Shenandoah Borough v. Philadelphia*, 367 Pa. 180, 79 A.2d 433 (1951). Bethlehem argues, on the other hand, that under the Pennsylvania Rules of Civil Procedure, a party is allowed to amend his pleadings freely, and to the extent the Board's Rule 21.21 is inconsistent with that rule, it denies appellant due process.

In some circumstances we would agree with the Department that an issue not raised on appeal cannot be later added to the appeal by a petition to amend.

Adding a new issue to an appeal is not the same as amending a complaint, as appellant contends, since the premise for allowing amendments to complaints is that a separate action could be begun on the cause of action that the amending party seeks to add to its complaint. This is not true in the case of administrative appeals where an appeal must be timely filed in order to be heard. See *Wheeling-Pittsburgh Steel Corporation v. Department of Environmental Resources*, EHB Docket No. 74-279-C; *U. S. Steel Corporation v. Department of Environmental Resources*, EHB Docket No. 75-167-W. In this case, however, the Department's method of informing Bethlehem of its denial of a variance was sufficiently inexact to require us equitably to allow Bethlehem to raise the issues that it raised within thirty days of the Department's amending letter. The Department's initial letter did not conform with the requirements of §141.58 of the Rules and Regulations. Nor, for that matter, did the second letter since neither letter contained "a written statement of any appeal procedures that may be available to any person who may be affected by such action". Although it is true that the Department's February letter did not expand the ground for the Department's denial of the variance, we conclude that the Department's action from which an appeal could be taken was in fact completed on February 17, 1976, and that Bethlehem's appeal taken thereafter raised the constitutional issues that Bethlehem seeks to litigate in a timely fashion.

We must note, however, consistent with our concurrent ruling in *Bethlehem Steel Corporation v. Department of Environmental Resources, Commonwealth of Pennsylvania*, EHB Docket No. 75-107-D, that insofar as the Pennsylvania regulations that Bethlehem wishes to attack are necessary to implement the national ambient air quality standards, we believe Bethlehem may only attack their validity through the procedures provided in the Federal Clean Air Act. Therefore, in order to attack the validity of the regulations before this Board, Bethlehem must first establish that the standards applied to its sintering plant operation are more stringent than necessary to meet national ambient air quality standards.

## O R D E R

AND NOW, this 2nd day of August, 1976, it is hereby ordered that appellant has successfully raised the issues of the validity of Regulations 123.11 and 123.41 and the constitutionality of the Air Pollution Control Act as applied to its sintering

operation through its appeal from the Department's letter of February 17, 1976, setting forth reasons for the denial of appellant's requested variance.

ENVIRONMENTAL HEARING BOARD

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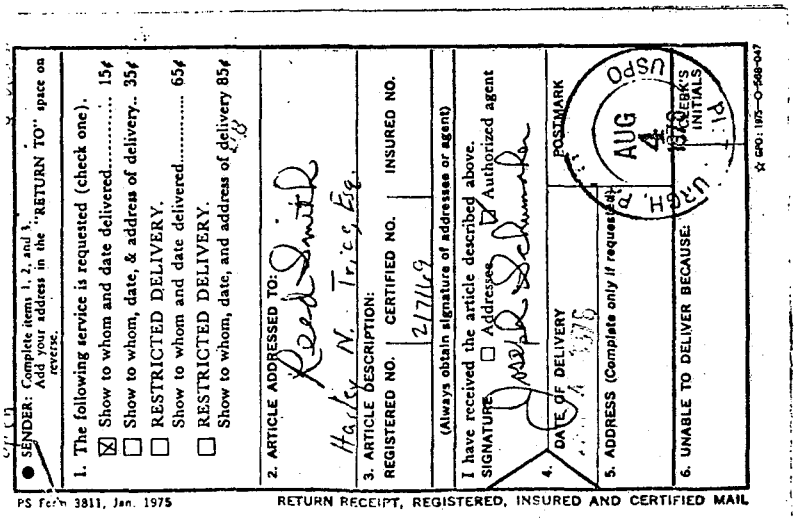

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In the Matter of:

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES, : Docket No. 75-205-CP-D

v. :

UNITED STATES STEEL CORPORATION

OPINION AND ORDER

United States Steel (USS) has filed objections to the Commonwealth's petition for discovery requesting USS to answer certain interrogatories and produce certain documents relating to its Fairless Works sinter plant operation, which is the subject of this consolidated action. The proceedings consolidated here are a civil penalty action initiated by the Department of Environmental Resources (Department), and an appeal by USS from the Department's denial of USS' application for a variance for its sinter plant operation.

USS objected to each of the Commonwealth's interrogatories on the basis that they would require the disclosure of information prepared in anticipation of litigation in violation of the limitation on discovery set forth in Rule 4011 (d) of the Rules of Civil Procedure.[1] USS' objections on this ground must be largely overruled. We cannot accept USS' contention that tests and other documents prepared by it after September 18, 1972, the date upon which USS applied for a variance were prepared in anticipation of litigation within the meaning of Rule 4011 (d). The Board has previously used the date of the start of litigation, (which in this case was September 17, 1975, the date upon which the Department initiated its civil penalty action), as an indication of the time after which materials may have been prepared in anticipation of litigation. See *Alan Wood Steel Company*, EHB Docket No. 73-416-D, opinion and order issued June 3, 1975; *West Penn Power*, EHB Docket No. 73-161-B, opinion and order issued November 5, 1973. The significance of that date, however, is only in

1. Board Rule §21.15 (d) provides the discovery of the proceedings before the Board shall be consistent with the rules of practice in Common Pleas Court.

relation to determining what materials were prepared *solely* for litigation, and are hence protected under 4011 (d). We view this limitation as a very narrow one that applies only to material that is specifically and solely gathered and prepared for trial. See 5A Anderson Pennsylvania Court Practice §4011.186. In other cases we have ruled that material prepared after the date of the start of litigation is discoverable where the information would have to be collected or developed regardless of the particular litigation before the Board. See, e.g., *Bethlehem Steel Corporation*, EHB Docket No. 75-154 and 75-155, opinions issued October 29, 1975, and July 14, 1976. We concede that it would be possible, as USS argues, for information to be gathered solely in anticipation of litigation prior the actual date of the start of litigation. See *Lumberman's Merchandising Corp. v. Insurance Company of North America*, 43 D & C 2nd 715 (Del. Cty. C. P. 1968); *Holowis v. Philadelphia Electric Company*, 38 D & C 2nd 260 (Chester Cty. C. P. 1966), but we certainly cannot accept USS' contention that materials collected by it in preparation for and support of its variance petition were prepared in anticipation of litigation. Since the enactment of the Air Pollution Control Act, every source has had an obligation to comply with that law and the Regulations adopted under it; and, either by specific direction or as a consequence of that obligation, to perform tests that measure its degree of compliance and that look toward solutions to its problems. All these tests could in USS' view of it be said to be in "anticipation of litigation" since there is always the possibility that a source will sue or be sued over the state of its compliance. We could not possibly apply the "anticipation of litigation" objection to cover all these tests without frustrating the goal of the Air Pollution Control Act to eliminate air pollution as rapidly as possible, since that goal depends upon the Commonwealth's (via the Department) having information as to the nature and extent of the pollution problems that exist.

The Department has argued here that the anticipation of litigation objection raised by USS is prohibited by §4 of the Air Pollution Control Act, 35 P. S. §4004, which provides in relevant part:

> "The department shall have power and its duty shall be to—
>
> * * *
>
> "(2) Have access to, and require the production of, books and papers pertinent to any matter under investigation.
>
> "(2.1) Require the owner or operator of any air contamination source to establish and maintain such records and make such reports and furnish such information as the department may reasonably prescribe."

"(2.2) Require the owner or operator of any air contamination source to install, use and maintain such air contaminant monitoring equipment or methods as the department may reasonably prescribe.

"(2.3) Require the owner or operator of any air contamination source to sample the emissions thereof in accordance with such methods and procedures and at such locations and intervals of time as the department may reasonably prescribe and to provide the department with the results thereof."

USS argues that it would be deprived of due process if the Board were to construe the provision of the Act as depriving it of the anticipation of litigation objection, while leaving the Department free to raise such an objection to material sought by a respondent or appellant. We do not construe §4 to eliminate the objection based on anticipation of litigation. However, these provisions of Section 4 do mean that a source has an obligation to conduct regular tests and keep records that measure its performance. See, e.g. Regulation §127.22 (4) of the Rules and Regulations of the Department of Environmental Resources. That obligation does not stop with the start of litigation. Any tests that a source performs in accordance with its general obligation to comply with the law are discoverable after the start of litigation even though such tests are also performed, at that point, partially in preparation for litigation. Similarly, the Department must produce the results of any tests that it performs or should perform in the regular exercise of its statutory function. Section 4 of the Act cannot in our view operate to erase a party's right not to disclose "work product" preparatory to litigation, or even test results, for example, of a hypothetical experiment run at the request of an attorney just for the purpose of trial. Neither party is required to disclose materials such as memoranda of counsel regarding trial preparation, or statements containing the conclusions of expert witnesses or analyses of test results, if these materials were prepared *solely* for the litigation at hand. But both parties must produce any test results of source emissions or other records that would or should be conducted or kept in the normal course of determining whether a source is in compliance with the law.

Since the application of this ruling is somewhat difficult without knowledge of the precise information that may be at issue, we will require USS to compile a list of all the emission data and other records from its Fairless Works sinter plant that are responsive to the Department's interrogatories (whether gathered before or after the start of litigation), and to indicate thereon, any test data that it believes is non-discoverable within the meaning of the Board's ruling. If there is any disputes remaining as to whether particular tests were performed solely in anticipation of litigation, the Board can then resolve them.

USS has objected to Interrogatories 1, 2 and 11 on the grounds that they require irrelevant information from other sinter plant operations that are outside the Board's jurisdiction and outside the steel-making industry. It cites this Board Member's opinion in *Alan Wood Steel Corporation, supra*, where I ruled that Alan Wood was not entitled to have the Department assemble and produce data relating to all sinter plants in the Commonwealth, but could avail itself of its right as a member of the public to inspect emission records. Alan Wood sought the information in order to sustain its defense to a civil penalties action that the standard applied to it was not being met by other plants and that its action was, therefore, not wilful. Here, USS is asserting in the consolidated action that "the standards imposed on U. S. Steel's sinter plant are not achievable under any available technology by any reasonable means", that the standard is unconstitutional and that the Department has abused its discretion in applying the standard. Where a party raises these issues, the other party is entitled to learn the basis for those assertions through discovery. The difference between the ruling in *Alan Wood* and this situation is that there the party raising the issue of the performance of other sources was seeking to have the Department undertake the burdensome task of assembling the data in support of its position. Here the party that raised these issues is being asked to give the bases for its assertions, and that, we think, is proper.

We do not think however, that USS can be required to produce every test or document relating to the control of emissions from sinter plant operations at every USS plant in the United States. But where such tests, particularly if they are experimental in nature, relate to the control of sinter plant emissions and have in fact affected or should affect USS' conclusions and assertions with regard to the possibility or impossibility of control technology, these tests, analyses, evaluations or studies should be produced. Since, again these arguments on discovery are quite general, it is difficult to envision just which precise documents should be produced and need not be produced. It may be that a specific ruling on a particular document will be required. However, in general, we think that the Interrogatories 1, 2 and 11 are fairly clear in requiring material that might form the basis of the conclusion on control technology and that the information requested should be produced. So far as USS' objection based on "over breadth" is concerned, we think that USS should identify general information on the subject of control technology of which it is aware, which may or may not be in its possession. See *Alan Wood Steel Company, supra*. Whether or not its "awareness" will ultimately bear on the wilfulness of the alleged violations, USS must identify the general information, be it technical literature or studies from other plants or even other industries, that provides the basis for its own action and conclusions.

## O R D E R

AND NOW, this 13th day of August, 1976, it is hereby ordered that USS' objections to the Department's petition for discovery are overruled except to the extent that the Department's request would require the identification or production of documents:

1). That were prepared by USS or its attorneys solely in preparation for this litigation within the meaning of the preceding opinion. If USS wishes to make this claim as to any responsive material prepared or gathered prior to September 17, 1975, or any emission data or other records, not including "work product", gathered after that date, it shall furnish a list of such material to the Department and the Board on the same date that it is required to answer the Department's discovery.

2). Any test data from other sinter plants that is not clearly related to an analysis, evaluation or study of the control technology for sinter plants emissions.

USS shall answer the interrogatories and produce the documents requested by the Department's petition for discovery on or before September 30, 1976, at a place convenient to USS as the parties may agree.

ENVIRONMENTAL HEARING BOARD

Joanne L Denworth

JOANNE R. DENWORTH
Member

cc: Bureau of Administrative Enforcement
Thomas J. Oravetz, Esquire
Henry T. Reath, Esquire

DATED: August 13, 1976
vf

*COMMONWEALTH OF PENNSYLVANIA*

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In the Matter of:

JONES & LAUGHLIN STEEL CORPORATION :

Docket No. 74-272-C

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR APPELLEE'S PETITION FOR DISCOVERY
FILED MARCH 5, 1976

On December 18, 1974, Jones and Laughlin Steel Corporation filed an appeal from the action of the Department of Environmental Resources (hereinafter DER) taken on or about November 15, 1974, certifying to the Federal Environmental Protection Agency (hereinafter EPA) certain effluent limitations to be attached as conditions to a National Pollution Discharge Elimination System (hereinafter NPDES) permit, issued pursuant to the provisions of §401 of the Federal Water Pollution Control Act (hereinafter FWPCA), 33 U.S.C. §1251 *et seq.* After appellant and appellee filed their respective pre-hearing memoranda, appellant filed its first petition for discovery on April 15, 1975. On May 1, 1975, the DER filed a petition for discovery.

With regard to the DER's first discovery petition, appellant on July 10, 1975, filed a motion to extend the time within which discovery proceedings were to take place. The board, on July 15, 1975, granted appellant's motion. On August 11, 1975, DER filed a motion for sanctions against appellant for failure to comply with the time requirement for discovery. The board denied this motion on August 14, 1975. Appellant was directed by the board to answer the DER's interrogatories and to supply requested documents on or before September 2, 1975. On November 7, 1975, DER filed another motion for sanctions against appellant predicated upon the fact that, although appellant had not objected to the DER's discovery petition,

appellant nevertheless neither fully answered the DER's interrogatories nor supplied all the documents requested by the DER in its discovery petition. Instead, appellant had asserted certain objections to some interrogatories and requested documents at the time the interrogatories were answered. This motion was denied.

Thereafter, on March 5, 1976, the DER filed its second petition for discovery, which is the subject matter of this opinion and order. On March 8, 1976, the board notified appellant in writing of the filing of the DER's second discovery petition and notified appellant that if it wished to respond thereto, such response must be filed on or before March 18, 1976. Thereafter, on March 19, 1976, appellant filed a motion for an extension of time within which to respond to the petition, requesting therein that the time be extended to March 25, 1976. On the same day, the DER filed an answer to appellant's motion, opposing any grant of an extension of time within which to answer its discovery petition, other than such an extension of time within which appellant would answer interrogatories and supply requested documents pursuant to the DER's discovery petition. The DER was unwilling to grant appellant a time extension which would enable it to raise objections to the DER discovery petition for the reason that the DER construed the raising of such objections as a dilatory tactic on the part of appellant.

After considering the legitimate interests of the parties, the board entered an order on March 19, 1976, granting the extension of time requested by appellant but limiting the type of objections which appellant could make to matters of relevancy and to those based on PRCP 4011(d) and (f). Thereafter on March 25, 1976, appellant filed exceptions to the discovery petition and a motion for a protective order. The DER filed responses to both these documents. Appellant on April 26, 1976, filed a reply to the DER's answer to appellant's motion for a protective order. On May 5, 1976, the DER filed a response to appellant's reply to the DER's answer to appellant's motion for a protective order. In addition, counsel for appellant and the DER exchanged letters relating to these issues, copies of which were sent to the board.

In order to give this matter due consideration in a logical manner, we will first treat the issues raised by the discovery petition, appellant's exceptions thereto and the DER's answer to appellant's exception. Then, the matter of the protective order will be addressed.

In its exceptions to the DER's discovery petition, appellant refers to a conference call between counsel for the parties and the undersigned. During the

conference call the undersigned informed counsel for the parties that although appellant could make objections on the basis of relevancy, as a matter of policy, the board would probably overrule such objections. To avoid any misunderstanding on this issue, some clarification of this point is in order.

Properly made and timely objections with regard to relevancy in discovery proceedings before the board must be seriously considered. The board cannot disregard such objections. However, for the purposes of discovery, the criteria for determining relevancy are more liberal than those for determining the admissability of evidence at the time of trial. 5 ANDERSON, PENNSYLVANIA CIVIL PRACTICE, §4001.94, §4001.95. See also *Groce v. Hile*, 46 D. & C.2d 89, 8 Mercer Co. L.J. 326 (1969). It should also be noted that:

> "Relevance may have a greater flexibility in connection with discovery for equity proceedings in view of the fact that the court in shaping its decree may take into consideration a variety of factors not directly bearing on the cause of action or defense involved." 5 ANDERSON, PENNSYLVANIA CIVIL PRACTICE, §4001.96 (Footnote omitted).

While this board is an administrative agency and not a court of equity, nevertheless, the scope of our power to review actions of the DER and to modify them, as indicated below, suggests that the above quoted passage from ANDERSON may also, by analogy, be relevant to discovery proceedings in connection with appeals before the board.

Relevancy, insofar as matters within this board's jurisdiction are concerned, depends upon the issues raised by the appeal and the discretionary authority of the board to amend, modify or revise actions of the DER. Appellant has raised the issue that the DER did not consider the economic impact of its certification or the present and future water uses of the waters involved in issuing the certification in question. If the issue were only whether the DER did or did not consider the economic and water use factors in issuing the certification, then appellant would be correct in its restricted view of the relevancy issue in these regards. However, we must consider whether in issuing this certification the DER was exercising a mandatory duty imposed upon it in terms of the standards it applied, or whether it issued the certification in the manner it did in the exercise of its discretionary authority. If the latter is the case, then *Warren Sand and Gravel Company v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975), confers upon the board the authority to substitute its discretion for that of the DER whenever the evidence warrants it. The court in *Warren Sand and Gravel* said, in this regard:

"We should also highlight at this point another incorrect contention of DER. DER seems to argue that this Court should review DER's actions for abuse of discretion or error of law rather than review the adjudication of the Board. This is incorrect. The Administrative Agency Law clearly indicates that we must review the adjudication of the Board rather than the administrative action which was reviewed by the Board. *See* section 44 of the Administrative Agency Law, 71 P.S. § 1710.44. In cases such as this, we are not required to review an administrative decision by DER which was rendered without a due process hearing, because as we view the Administrative Agency Law and section 1921-A of the Code, when an appeal is taken from DER to the Board, the Board is required to conduct a hearing *de novo* in accordance with the provisions of the Administrative Agency Law. In cases such as this, the Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board. If DER acts pursuant to a mandatory provision of a statute or regulation, then the only question before the Board is whether to uphold or vacate DER's action. If, however, DER acts with discretionary authority, then the Board, based upon the record made before it, may substitute its discretion for that of DER. *See East Pennsboro Township Authority v. Commonwealth of Pennsylvania, Department of Environmental Resources,* ___ Pa. Cmwlth. ___, 334 A.2d 798 (1975) and *Rochez Bros., Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources,* ___ Pa. Cmwlth. ___, 334 A.2d 790 (1975). DER's authority to attach terms and conditions to the permit in the instant case was obviously discretionary and, therefore, the Board could properly substitute its discretion concerning the terms and conditions for that of DER. In carrying out its function, the Board properly called for a balancing of the adverse environmental impact of dredging against the economic impact of DER's terms and conditions. Whether we agree with the quantitive basis for the balance used by the Board is of no moment. What is important is that there is substantial evidence in the record to support the Board's balancing in this case, especially in view of the fact that the extension of dredging allowed by the Board was temporary in time and reasonable in extent." 341 A.2d at 565-566.

Whenever the DER exercises a discretionary power under The Clean Streams Law, it must take economic factors into consideration. *East Pennsboro Township Auth. v. Department of Environmental Resources,* 18 Pa. Commonwealth Ct. 58, 334 A.2d 798 (1975); cf. *Rochez Bros., Inc. v. Department of Enviornmental Resources,* 18 Pa. Commonwealth Ct. 137, 334 A.2d 790 (1975). As to what constitutes consideration of economic factors, see *Community College of Delaware County v. Fox,* ___ Pa. Commonwealth Ct. ___, 342 A.2d 468 (1975). Thus, matters relating to the impact of the certification in question upon the financial condition of appellant are certainly relevant to these proceedings. Likewise, questions relating to the present and future uses of the waters in question are also relevant. See §5 of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended,* 35 P. S. §690.1 *et seq.*

In its exceptions to the DER's second petition for discovery, appellant has set forth certain of its points of view in a subpart entitled "Explanatory notes". We have already addressed the issue set forth in paragraph 1 thereof in the preceeding part of this opinion regarding the general issue of relevancy. In paragraph 2 of appellant's explanatory notes part of its exceptions, appellant indicated that it intended to request the DER to clarify certain information sought in specific numbered interrogatories (2, 4, 9-57 and 62-73) and to advise the DER that the documents requested in paragraphs 3(f)-(h) of the DER's request for documents and in connection with interrogatories numbers 10-57 and 62-73 have already been supplied to the DER. Appellant proceeds to indicate its understanding that if the parties are unable to resolve the differences concerning the above information that such differences would be resolved by the board and that appellant would be permitted to raise appropriate objections at that time. This raises the substantial issue of whether appellant may raise certain objections at the time it answers interrogatories or supplies information, not before raised in its response to the DER's petition for discovery.

Discovery before the board is governed, in the first instance, by §21.15 of the rules of practice and procedure before the board. Section 21.15(a) requires that discovery be initiated by a petition for discovery. Section 21.15(c) of the rules confers upon this board discretion to permit discovery upon a determination that such discovery will best prepare the parties for a hearing on the merits of the matter or aid in its settlement, or both. Section 21.15(d) provides that the scope of discovery shall be consistent with the rules of practice in the courts of common pleas of the Commonwealth. This latter provision requires us to adopt as discovery norms the Pennsylvania Rules of Civil Procedures relating to discovery (PRCP 4001 *et seq.*) insofar as they relate to the "scope" of discovery.

There is somewhat of a problem in attempting to adjust the practice of the board regarding discovery with the provisions of PRCP 4011 *et seq.* Under the present Pennsylvania Rules of Civil Procedure, leave of court is required, *inter alia*, in the following instances:

(1) When interrogatories are served upon the adverse party under PRCP 4055 within 20 days after the commencement of an action.

(2) When discovery by deposition is contemplated if the notice of the taking is served upon the plaintiff within 20 days after the commencement of the action. PRCP 4007(d).

(3) When inspection and examination of physical things is contemplated pursuant to PRCP 4009.

The rules of the board, on the other hand, require leave of the board prior to the grant of discovery. In this regard, the practice of the board is much more analogous to the discovery proceedings required prior to the 1954 amendments to the Pennsylvania Rules of Civil Procedure.[1]

Under the pre-1954 Rules of Civil Procedure, objections to the allowance of a discovery petition or for inspection must have been made at the time the petition was presented to the court for approval. 5A ANDERSON, *supra*, 746. We are of the opinion, however, that even though the procedure authorized by §21.15(a) of our rules authorize a procedure similar to that existing under the Pennsylvania Rules of Civil Procedure prior to 1954, nevertheless, we are obliged to follow the current rules insofar as they concern matters of substance. Furthermore, on the issue of whether failure to file objections to the petition within the specified time waives any and all objections that could be raised with regard to attached interrogatories or request for documents, we feel bound to follow the interpretation set forth in *Rush v. Butler Fair and Agricultural Association (No. 2)*, 17 D. & C.2d 250, 106 Pitts. 410 (1958); 5 ANDERSON, *supra*, §4005.49; 4 GOODRICH-AMRAM, STANDARD PENNSYLVANIA PRACTICE §4005(b)-2. The consensus of these authorities appears to be that the failure to file objections to interrogatories submitted to the adverse party under PRCP 4005 waives only objections to the form of such interrogatories and to their late filing. 5 ANDERSON, *supra*, §4005.50 *citing Rush*. From this it would follow that with respect to interrogatories and requests for documents, the objections, unless they relate to form or time of filing, may be raised at the time that the interrogatories are to be answered or the requests for documents are to be satisfied. If at that time the objections that are otherwise nonwaivable are made, a motion for sanctions will be the appropriate vehicle for determining whether the objections are valid; likewise, with regard to objections which have been made and are overruled. However, it seems to us that with regard to the latter case, a party in jeopardy of sanctions has a much more significant burden than in the former case. This would seem proper for the reason that a ruling on objections once made should not be overturned but for cogent reasons and manifest error.

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1. The discovery practice under the Rules of Civil Procedure prior to the 1954 amendments thereof is set forth in 5A ANDERSON, PENNSYLVANIA CIVIL PRACTICE, Appendix 2.

It is clear from the foregoing that there can be no waiver of objections pertaining to PRCP 4007 and 4011 based upon the failure to file objections. Inasmuch as this seems to be the case under the present Pennsylvania Rules of Civil Procedure, it would be presumptuous of this board to adopt an interpretation clearly at variance with these rules unless the rules of the board clearly mandated a contrary result. Therefore, we cannot at this time foreclose appellant from raising nonwaivable objections at the time discovery is to take place. However, the board will not hesitate to invoke sanctions if the information sought is either not given or only incompletely supplied and the failure to supply such information is not justified.

With regard to paragraph 3 of appellant's explanatory notes, we note that PRCP 4005(a) is applicable. See also 5 ANDERSON, *supra*, §4006.3 wherein it is stated:

> "The moving party cannot object that the answers were not made by the particular person or by one of a class of persons whom he desired to make the answer. For if the moving party desires answers from a particular person, he should seek discovery under Rule 4007 which permits discovery by depositions directed to named third persons as well as parties." (Footnote omitted).

It would thus appear that the DER cannot validly complain that Earl F. Young, Jr., an officer of appellant, will respond on behalf of appellant to the DER's interrogatories. However, the sufficiency of Mr. Young's answers may be raised by a motion for sanctions.

We agree generally with the DER that appellant's exceptions to interrogatory No. 1 with regard to the absence of a time limitation and relevancy should be overruled. However, we regard appellant's exception with regard to overbreadth as possibly having merit. That an interrogatory may be overly broad is an objection relating to its scope. Questions relating to scope of interrogatories are largely questions of relevance. 5 ANDERSON, *supra*, §4004.23. We cannot at this time rule on this issue for the reason that whether the interrogatory is sufficiently answered depends upon the nature of the response to it. Thus, while we rule that this interrogatory must be answered, the sufficiency of appellant's answer may have to be determined at a later date.

Appellant's exceptions to interrogatory No. 3 are hereby overruled. Any document relating to water pollution abatement facilities or programs in or with regard to appellant's Pittsburgh Works is a proper matter for discovery in

these proceedings. In our opinion, this interrogatory is not unlimited with respect to time for the reasons stated in our discussion of interrogatory No. 1.

The exceptions to interrogatories Nos. 4, 5 and 75 are hereby overruled. As has been stated above, insamuch as appellant has raised a question of whether the DER has considered the economic impact of its certification, and to the extent to which this involves a discretionary action on the part of the DER, matters relating to the financial aspects of appellant are properly before the board. Therefore, the exceptions with regard to the relevancy of these financial materials is overruled. With regard to interrogatory No. 5, appellant indicates that it is unable to answer this interrogatory in the form requested. This objection is one relating to the form of the interrogatory and must be considered as having been waived for the reason that it was not made within the time period set forth by the board for answering the DER's petition and on the basis of *Rush v. Butler Fair and Agricultural Association (No. 2), supra.* The board at this time has nothing but an allegation by appellant that it is unable to answer this interrogatory in the form requested. Whether, in fact, appellant is able to answer the interrogatory in the form requested may ultimately be determined by the board, if the DER is unsatisfied with the response of appellant and requests the board to invoke sanctions.

Exceptions to interrogatories No. 8 and 9(e) are hereby overruled. Given the nature of these proceedings, we are of the opinion that these interrogatories are not overly broad. Furthermore, contrary to appellant's assertions, there is a time limit--January 1, 1970, to the present. With specific regard to interrogatory No. 9, it is to be answered consistent with the clarification thereof set forth in Mr. Ehmann's letter of April 12, 1976, addressed to Mr. Demase.

In his letter of March 26, 1976, to Mr. Ehmann, Mr. Demase makes the following statements:

> "Interrogatories 10-57 and 62-73 each utilize the term 'waste contaminated water,' or 'waste contaminating water' or 'contaminated waste water,' either directly or by reference to a prior interrogatory. The DER has in turn defined the term 'waste contaminated water' to mean*:
>
> "'...any water, which when used in any manufacturing or production process becomes water containing contaminants or pollutants described in and, or limited by any existing or proposed water pollution control statute, rule, regulation or permit of any Commonwealth or federal governmental agency in excess of that amount it contained prior to use in such a process, providing, however, that temperature changes in this water shall not be considered as pollutional or contaminating for the purpose of answering these interrogatories.' (Emphasis added.)

"The DER's reference to 'proposed' water pollution control statutes, rules, regulations and permits of both the state and federal government, makes it impossible for Jones & Laughlin to answer interrogatories 10-57 and 62-73. First, because Jones & Laughlin does not know what is included within the term 'proposed.' For example, does it include regulations, etc., which have been proposed, but rejected pending the proposal of new regulations, or just regulations, etc., which are pending before an agency's rule-making body. Second, because Jones & Laughlin does not and could not be expected to have knowledge of every proposed water pollution control statute, rule or regulation. If the present definition of waste contaminated waters is retained, Jones & Laughlin would have to state that it cannot answer interrogatories 10-57 and 62-73."

*We assume this definition also covers the terms 'waste contaminating water' and 'contaminated waste water.'

We regard the above statements not as an attempt to clarify the meaning of the term "waste contaminated water", but to raise issues of relevancy. While we are of the opinion that, as stated, the definition of "waste contaminated water" may be relevant to these proceedings, this issue would be moot if appellant had no knowledge of whether its effluents exceeded proposed standards. To the extent appellant has such knowledge, it must repond to the interrogatories. To the extent that it has no such knowledge, it cannot be expected to supply answers to the interrogatories in question. Therefore, interrogatories Nos. 10 to 57 and 62 to 73, insofar as the definition of "waste contaminated water" is relevant thereto, shall be answered in accordance with the definition as set forth in the DER's interrogatories.

The exceptions of appellant to interrogatories Nos. 58, 59 and 60 are hereby overruled. Inasmuch as appellant has raised the issue of whether the DER considered the present and possible future uses of parts of the Monongahela and Ohio Rivers, evidence with regard to whether the certification can be upheld considering the present and possible future uses thereof is relevant to this proceeding. Any information in appellant's possession relevant thereto is therefore discoverable. With specific regard to interrogatory No. 59, if appellant can identify information within its possession which has no bearing whatsoever on the effluent parameters in this appeal, it need not provide such information. However, unless appellant is able to segregate such information from the otherwise relevant information, it shall make such information available to the DER. With regard to appellant's exceptions to interrogatories No. 62 to 73, appellant need not answer any part of said interrogatories that pertains to information gathered or that relates to events prior to January 1, 1970.

Appellant objects to interrogatories Nos. 62(g), 64(g), 66(g), 68(g), 70(g) and 72(g) as requiring affiant to give an expert opinion over his objection. While the said interrogatories might have been more clearly framed, it is clear that the DER is requesting information regarding the degree of treatment the proposed facility would have effected with regard to the outfalls in question. To that extent, appellant's objections thereto are overruled.

With regard to interrogatories Nos. 74 and 75, appellant will not be required to supply the DER with any information secured in anticipation of litigation or in preparation for trial. Without more, however, the Board cannot determine with respect to interrogatories Nos. 74 and 75 what information comes within the prohibition of PRCP 411(d).

In regard to appellant's objections to paragraphs 3(b), (c) and (e) to the DER's petition for discovery, the said objections are hereby overruled, consistent with our rulings on interrogatories Nos. 4, 5 and 75.

We must now be concerned with appellant's motion for protective order filed March 25, 1976. In its motion for a protective order, appellant claims, *inter alia*, that certain information sought is of a highly confidential nature and, if made public, might cause Jones & Laughlin substantial competitive harm. Appellant makes this claim with regard to paragraphs 3(a), (b), (c) and (e) of the DER's petition for discovery and to interrogatories Nos. 4, 5 and 75. On the issue of confidentiality, the parties are in substantial agreement that some form of protection is due appellant, but cannot agree as to the nature of that protection.

We agree with appellant that confidential material supplied pursuant to the DER's discovery petition should only be used in connection with settlement negotiations, the trial or preparation for trial of the above captioned matter. We reject the DER's contention that would, in essence, allow the processes of this board to be used as a vehicle to obtain information to supply to other agencies, albeit pollution control agencies. The discovery processes of the board are only available to carry out the functions of the board. Thus, with regard to confidential information, such only may be used in connection with settlement negotiations, the trial or preparation for trial of this matter.

Inasmuch as we have ruled on relevancy in connection with appellant's objections to the DER's discovery petition we will not reiterate our rulings at this time.

With regard to PRCP 411(d) and (f), we take this occasion to note that these limitations upon discovery must be observed. PRCP 4011 has been interpreted by the various courts of common pleas of Pennsylvania as a prohibition against discovery which contravenes its limitations. Therefore, inasmuch as it is impossible to determine at this time what matters fall within PRCP 4011(d) and (f), we will await until the issue presents itself in more concrete form to rule on such objections.

While the issue of the place of examination is properly a matter that can be raised by appellant's request for a protective order, inasmuch as nothing in the DER's second petition for discovery speaks to that issue, we are of the opinion that the place of examination should be the DER's Office of Enforcement, 1200 Kossman Building, Forbes at Stanwix, Pittsburgh, Pennsylvania. We have already, in response to appellant's discovery petition, directed that the place for examination of documents supplied by the DER should be the offices of appellant's counsel. We think fairness demands that the place of examination with regard to the DER's discovery petition should be the offices of its counsel.

## O R D E R

AND NOW, this 10th day of September, 1976, it is hereby orderd as follows:

(1) Subject to the limitations of PRCP 4011(d) and (f) the DER's petition for discovery, filed March 5, 1976, is hereby granted; provided, however, that interrogatories Nos. 5, 9 and 59 shall be answered as indicated in the foregoing opinion.

(2) Discovery shall take place at such time as is agreeable to the parties; if the parties are unable to agree as to time, either party may request the board to set a time for discovery.

(3) The place of examination of all documents which are the subject matter of this order shall be 1200 Kossman Building, Forbes at Stanwix, Pittsburgh, Pennsylvania.

(4) No documents marked "CONFIDENTIAL INFORMATION" by appellants shall be filed with this board prior to hearing except when such document or documents are sought to be declassified.

(5) The persons authorized to inspect or participate in the inspection of any documents, answers to interrogatories, data or any other material resulting from discovery and received or obtained from appellant, whether on a formal or informal basis, and designated by appellant as "CONFIDENTIAL INFORMATION", shall be limited to attorney members of the DER's Office of Enforcement and such other employees and independent consultants of the DER as the DER shall indicate in writing to appellant as persons intended to have access to such information. Said written notice shall be provided appellant as soon as possible but no later than five days after such confidential information shall have been supplied to counsel for the DER. Such notice shall contain a list of employees and independent consultants by name, address and position.

(6) Any information designated as confidential shall remain such in accordance with the provisions of this protective order and shall not be used or disclosed to any employee or independent contractor of the DER for any purpose or in any manner except in connection with settlement negotiations, the trial or the preparation for trial of the above captioned matter.

(7) Jones & Laughlin shall, in the first instance, determine whether information produced is confidential and covered by this protective order and shall designate appropriate documents, data and the like, or any part thereof, as "CONFIDENTIAL INFORMATION". Should the DER object to such designation, it may appeal to this board to classify or otherwise classify the designated information; provided however, that the information which is the subject of such dispute shall be treated as confidential pending further order of the board.

(8) Information designated as confidential shall not be disclosed directly or indirectly, in any form, by any authorized representative of the DER to any person not authorized to receive disclosure of the same, except with the consent of appellant or upon further order of the board. No copy of any document, data or other information shall be made by any person, other than the express direction of counsel for the DER. However, nothing in this order shall limit or restrict Jones & Laughlin or its counsel with respect to the use and/or disclosure of its own documents.

(9) Copies of all documents or other materials which have been designated as "CONFIDENTIAL INFORMATION" and which are filed with or submitted to the board will be filed or submitted *in camera* and, unless otherwise ordered by the board, sealed until such time as the trial of this case begins.

(10) At the conclusion of the above captioned proceedings, all the documents and information subject to this order, including all copies, extracts or summaries thereof, or any documents containing information taken therefrom, shall

either, at the option of appellant, be returned to appellant's counsel for evidence of their destruction, shall be furnished by all persons to whom they have been furnished.

(11) The provisions of this order may be modified by subsequent agreement of the parties or by Board order.

ENVIRONMENTAL HEARING BOARD

Joseph L Cohen

JOSEPH L. COHEN
Member

cc: Bureau of Administrative Enforcement
505 Executive House
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For the Commonwealth:

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For Appellant/Respondent/Defendant:

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DATED: September 10, 1976

ma

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

BETHLEHEM STEEL CORPORATION

Docket No. 75-107-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

The Commonwealth has filed a Petition for an Amended Order to Allow an Interlocutory Appeal, and a Petition for Reconsideration, or in the Alternative, a Motion for Clarification, in response to the Board's opinion in this matter issued August 2, 1976. That opinion dealt with the Commonwealth's motion to dismiss appellant, Bethlehem Steel Corporation's appeal from the Department of Environmental Resources' compliance order directing Bethlehem to take certain steps to control emissions from its blast furnace casting operation. The first ground on which the Commonwealth rested its motion for dismissal was Bethlehem's failure to appeal the Department's denial of a variance for its cast house emissions. The Department believes the Commonwealth Court's decision in *Commonwealth of Pennsylvania, Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corporation,* Pa. Comm. Ct. , No. 529 C. D. 1975, issued December 1, 1975, is controlling, and requires that most of the issues that Bethlehem raises in its appeal from the compliance order be summarily dismissed. We have given careful consideration to the *Wheeling-Pittsburgh* case and concluded that it is not controlling. However, it may be that the Commonwealth Court would interpret the doctrine of exhaustion of remedies as articulated in *Wheeling-Pittsburgh* to preclude Bethlehem's challenge on some of the issues raised. Consequently, we will grant the Commonwealth's petition to amend the order to allow an interlocutory appeal so that the lengthy hearing that will be necessary on all of the issues Bethlehem raises may be avoided if the Commonwealth Court's opinion on the effect of the variance denial differs from that of the Board. Such an interlocutory appeal, which may or may not be granted in the discretion of the Commonwealth Court, is specifically provided for in the Appellant Court Jurisdiction Act, 17 P. S. §211.501 (b).

The Department's motion for reconsideration or clarification will be denied. Most of the arguments raised by the Department strike us as either missing the meaning of our opinion or finding significances in it that are premature. We did not say that a standard imposed by a state regulation that is more stringent than may be necessary to meet ambient air quality standards is necessarily invalid, but only that if a source establishes that extra stringency, it may then challenge the validity of the state regulation. Presumably, one who is subject to the state's laws and regulations is always free to challenge the validity of those laws and regulations as applied to him, if he is not bound by any prior determination of their validity. The import of our opinion was that we believe the Clean Air Act, as interpreted by the United States Supreme Court opinions, has removed that freedom insofar as the state standards are necessary to implement the federal standards and are federally approved. But we do not believe that the federal act can constitutionally be read to preclude any challenge to state standards that are not necessary to satisfy the federal standards. It may be that those standards are perfectly justifiable to achieve the state's goals with regard to the public health and welfare, but a party cannot be denied the right to challenge their validity under state law in terms of economic and technological feasibility.[1] If this means that there may be some state standards that are in the federally approved SIP that may be challenged in a state forum but not in a federal forum, so be it. Presumably, a federal forum would look to the state law as well as the federal law on any question of validity of the state's standards where they are in excess of the federal requirements.

So far as the problems of proof alluded to by the Department are concerned, we are well aware of them, as the Department might have realized from the sentence of the opinion it chose to ignore:

> "...We are mindful of the difficulties of proof that this approach may entail since the relationship of ambient air quality to its components is an elusive and complex concept. ..."

We believe however that the Department's "parade of unanswered questions" must be answered in the process of wrestling with actual evidence and cannot be answered in a hypothetical vacuum. Consistent with the foregoing, we enter the following:

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1. "Impossibility" was used in the Board's opinion as shorthand for the grounds upon which Bethlehem is seeking to invalidate the regulations as unreasonable and hence unconstitutional. We were not creating a new ground for challenging the regulations.

ORDER

The Commonwealth's petition for reconsideration and, or in the alternative, motion for clarification is denied. The Commonwealth's petition for amended order to allow interlocutory appeal is granted. The Board's order of August 2, 1976, is hereby replaced with the following:

AMENDED ORDER

AND NOW, this 30th day of September, 1976, the Commonwealth's motion to dismiss this appeal is denied. However, as this order involves a controlling question of law--namely, the effect under the Commonwealth Court's decision in *Commonwealth of Pennsylvania, Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corporation,* Pa. Comm. Ct. , No. 529 C. D. 1975, of the failure of appellant to appeal the Department's denial of its variance request--as to which there is substantial ground for difference of opinion, and an immediate appeal from this interlocutory order may materially advance the termination of the matter, we believe an interlocutory appeal to the Commonwealth Court is appropriate.

In the further proceedings to be held before the Board in this matter, the Board will not consider a challenge to the validity of the regulations based on technologic or economic infeasibility unless appellant first establishes that the standards as applied to it are more stringent than necessary to meet national ambient air quality standards.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

cc: Bureau of Administrative Enforcement
Robert E. Yuhnke, Esquire
Louis A. Naugle, Esquire
Blair S. McMillin, Esquire

DATED: September 30, 1976
vf

*COMMONWEALTH OF PENNSYLVANIA*

ENVIRONMENTAL HEARING BOARD

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

EAST GOSHEN TOWNSHIP : Docket No. 75-303-D

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

F. C. & C., Inc. has petitioned to intervene in this matter, which is an appeal by East Goshen Township from an order of the Department of Environmental Resources revoking approval of revision No. 1 to its official sewage plan and ordering submission of a new revision to the township's Official Sewage Plan based upon certain required studies and determinations. Earlier intervenors in this matter are the Estate of Charles B. Grace and the Concerned Citizens of Upper Ridley Creek Watershed Association. Although this matter was ready for hearing last June, it has been continued a number of times at the request of the parties to pursue settlement negotiations. The parties represent that they are close to an agreement that would be in the form of a stipulation, one term of which would be the withdrawal of this appeal. These parties, or at least the department and the township, are opposed to granting F. C. & C's petition to intervene on the ground that another party's intervention at this late date in the proceedings might preclude settlement of the appeal, and is inequitable in view of the fact that F. C. & C. knew of this appeal from the beginning but did not elect to intervene until now.

For its part F. C. & C. represents that it is the owner and developer of an approved sub-division in East Goshen Township that has an immediate need for sewerage--a fact that all the parties concede. F. C. & C. asserts that it is entitled to intervene because its interest may be affected by the agreement between these parties as to an official sewage plan that may not adequately provide for its needs. F. C. & C's attorney, Mr. Mikolaitis, explains the delay in

filing this petition by the fact that he was not involved in the matter until August of 1976, at which point he recognized that intervention might be appropriate. He filed a petition to intervene on October 25, 1976. F. C. & C. points out that the board's Rule 21.14 provides that a petition to intervene "shall be filed prior to initial presentation of evidence in such proceeding..." and consequently that its petition is certainly timely. The department and the township argue that intervention is discretionary with the board and should be denied here because of untimeliness.

The petitioner makes, in our view, a valid claim that its interest is clearly affected by whatever action the township, department and other intervenors may agree to in this case, and that if petitioner is not made a party to this action, privy to the negotiations between the parties, it will simply be forced to await a later action by the department pursuant to whatever agreement is formulated from which it will probably have to appeal. We are persuaded that the interest of time and justice are best served by allowing petitioner to intervene in this matter. However, we must reserve judgment on the question of whether after petitioner has become a party, appellant may still withdraw its appeal pursuant to a stipulation between the other parties. Since petitioner is intervening on the side of the Commonwealth, appellee, it may be that such a withdrawal would be possibile. See *Girard Trust - Upper Ridley Creek v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 74-195-C, opinion issued September 18, 1975, where one member of the board recognized that an appellant is always entitled to withdraw its appeal. Whether or not the board would enter an order recognizing such a withdrawal where there were unresolved issues outstanding as to an intervenor is a question that will have to await the occasion.

## O R D E R

AND NOW, this 10th day of December, 1976, the petition to intervene filed by attorney Joseph F. Mikolaitis, on behalf of F. C. & C, Inc. is hereby granted. Intervenor shall file a pre-hearing memorandum on or before December 27, 1976.

ENVIRONMENTAL HEARING BOARD

Joanne R. Denworth

JOANNE R. DENWORTH
Member

cc: Bureau of Administrative Enforcement
Dennis M. Coyne, Esquire
Robert F. Adams, Esquire
Robert J. Sugarman, Esquire
Joseph F. Mikolaitis, Esquire



DATED: December 10, 1976