COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

1979

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1979

Chairman.....PAUL E. WATERS

Member.....JOANNE R. DENWORTH

Member.....THOMAS M. BURKE

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1979 EHB 1

TABLE OF CASES REPORTED IN THIS VOLUME

ADJUDICATIONS

OPINIONS AND ORDERS

TABLE OF CASES REPORTED IN THIS VOLUME

OPINIONS AND ORDERS (CONTINUED)

FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1979.

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

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

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

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

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

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

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

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

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

Pennsylvania Public Utility Commission and Thomas M. Burke, Esquire of Pittsburgh, was appointed and confirmed on October 25, 1977, to fill the vacancy. Member Joanne R. Denworth resigned from the Board on May 23, 1979. Dennis J. Harnish, Esquire, of Harrisburg, was appointed to the vacancy and was confirmed May 13, 1980.

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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1979 OPINIONS AND ORDERS

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

DORIS J. BAUGHMAN, ET AL

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
& BRADFORD COAL COMPANY

Docket No. 77-180-B

Air Pollution Control Act
Article I, Section 27

ADJUDICATION

By Thomas M. Burke, Member, January 26, 1979:

Bradford Coal Company Inc., (Bradford) intervenor in this matter, owns and operates a coal cleaning and storage plant in the village of Bigler, Bradford Township, Clearfield County. Coal dust emissions from the plant have caused, since at least 1963, a general condition of air pollution to exist in the village of Bigler. After a period of negotiations the Department of Environmental Resources (DER) and Bradford, on October 13, 1977, entered into a consent order and agreement (consent order) which requires Bradford to cease the operation of its coal cleaning plant by July 1, 1979, and provides for the construction of a new coal cleaning plant, approximately 3,000 feet northwest of the existing plant in Bradford Township. The DER on October 14, 1977, issued plan approvals under Section 6.1 of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001, *et seq.*, (APCA), to construct the new coal cleaning plant.

Twenty-three separate appeals were filed by Bigler residents including one filed by counsel on behalf of twenty-five individuals. Nineteen of the appeals were dismissed prior to hearing for failure to comply with the rules of the board. The appeal of Edward A. and Dolores Antonuk was withdrawn by letter dated April 8, 1978, and the appeal of Clifford Welker is dismissed at this time for failure of Mr. Welker to appear at hearings. The remaining appeals are those of the twenty-five residents of Bradford represented by counsel and that of Mr. and Mrs. Donald C. Homman (jointly referred to herein as appellants).

Appellants aver that the DER abused its discretion by entering into an agreement with Bradford which permits the continued operation of the coal cleaning plant in noncompliance with the law and that the DER abused its discretion and violated its statutory and regulatory authority when it issued the plan approvals to Bradford to construct the new coal cleaning plant.

Four days of hearings were held in Pittsburgh. Appellants, the DER and intervenor, have filed proposed findings of fact and conclusions of law and briefs in support thereof. We now hereby enter the following:

FINDINGS OF FACT

1. Appellants are persons who own property and reside in the village of Bigler, Bradford Township, Clearfield County, Pennsylvania.

2. Appellee is the Department of Environmental Resources, the agency authorized to administer the provisions of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001 *et seq.*

3. Intervenor is Bradford Coal Company Inc., a Pennsylvania corporation with its principal place of business in the village of Bigler, Bradford Township, Clearfield County.

4. Bradford Coal Company Inc. (Bradford) owns and operates a coal cleaning and storage facility in the village of Bigler, Bradford Township, Clearfield County (existing plant).

5. The existing plant was constructed in 1954. Since that time its operation has continually grown and over the years the coal storage area has continually expanded. In 1962, 266,000 tons of coal were processed at the plant; in 1976, 428,000 tons of coal were processed.

6. Bradford increased the coal stockpile area at the existing plant without a permit from the DER required by Section 6.1 of the APCA.

7. The existing plant includes coal crushing operations, screens, conveyors, stacker, raw and finished coal stockpiles, coal loading and unloading facilities, a wet cleaning plant and a coal fired boiler for heating the plant during the winter season.

8. Coal dust emissions from the existing plant cause a general condition of air pollution, as that term is defined by Section 3(5) of the APCA, to exist in the village of Bigler.

9. Residents of the village of Bigler in the vicinity of the existing plant have been inundated with coal dust from the existing plant. The coal dust covers and soils the outsides of their houses and properties, prevents the opening of windows in the summertime, is tracked inside the houses and generally interferes with the comfortable enjoyment of life and property.

10. Coal dust emissions from the existing plant are caused by:

(a) dust arising from roadways because of the continuous pulverizing of coal by the movement of traffic;

(b) the loading of trucks and railroad cars by front-end loaders and high-lifts;

(c) the shaking and breaking of coal in the crushing and screening operation;

(d) the unloading of coal from trucks;

(e) the malfunctioning of the coal storage pile stacker causing coal to drop from top of stacker;

(f) transfer points on conveyors, i.e. where coal drops off one conveyor onto another;

(g) wind blowing dust from coal storage piles.

11. The coal dust emissions from the existing plant are fugitive emissions, that is, emissions emitted into the outdoor atmosphere in a manner other than by a flue.

12. State Route 970 runs between the stockpile area and the cleaning facility area of the existing plant.

13. Ambient air quality standards for suspended and settleable particulate matter set to protect the public health have been exceeded in the area surrounding the existing plant.

14. Tests by the DER from May 8, 1975, to June 1, 1975, of the air quality in the vicinity of the existing plant resulted in the following readings of suspended solids in micrograms/m^3.

			High	Low	Average
(a)	Marsh property	(approx. 50 feet north of plant)	497	34	195
(b)	Wisor property	(approx. 50 feet east of plant)	490	45	199
(c)	Lansberry property	(approx. 1,000 feet north of plant)	122	33	75
(d)	Dixon property	(approx. 50 feet south of plant)	381	46	200
(e)	Shaffer property	(approx. 1/3 mile east of plant)	163	66	115

15. The National Ambient Air Quality Standards for suspended solids promulgated by the administrator of the Environmental Protection Agency as necessary for the protection of the public health and incorporated as part of the standards of the DER at 25 Pa. Code §131.3 are: (a) 24 hour - 260 micrograms/meter^3; (b) yearly average - 75 micrograms/meter^3.

16. Tests by the DER for settleable particulate in the vicinity of the existing plant resulted in the following readings in tons per square mile.

	August 17-September 15, 1976	September-October, 1976
Marsh property	56	41
Wisor property	95	71
Lansberry property	17	40
Dixon property	void	143
Shaffer property	19	16

17. DER ambient air quality standards for settled solids are 42 tons/mile^2/month.

18. There are houses situated within 50-60 feet of the existing plant.

19. Because of its proximity to residents of the village of Bigler there is no reasonable way to repair the existing plant to prevent it from causing air pollution.

20. The only effective means of abatement of the nuisance caused by the existing plant is its closure.

21. The DER and Bradford entered into a consent order and agreement (consent order) on October 13, 1977, which provides for the closure of the existing plant and the construction of a new plant off Route 322 in Bradford Township approximately 3,000 feet northwest of the existing plant.

22. The consent order provides that the new plant is to be constructed by December 31, 1979, and that Bradford may operate the existing plant until July 1, 1979; however, Bradford may resume operation of the existing plant due to malfunctions which prevent operations of the new plant, but only during a period of six months from the issuance of a temporary operating permit. Both plants cannot be operated at the same time.

23. If Bradford operates the existing plant for any reason after July 1, 1979, it will forfeit a fifty thousand dollar ($50,000) bond and be subject to noncompliance penalties, if any, of §120 of the Federal Clean Air Act Amendments of 1977.

24. Bradford is required by the consent order to implement "interim" coal dust control measures at the existing plant such as limiting the size of stockpiles, cleaning roads and controlling coal spillage. However, these measures are not expected to significantly improve the conditions in Bigler.

25. The new plant will be a coal cleaning and storage operation.

26. The new plant is proposed to be constructed on a 230 acre site. The operation of the new plant will use only about 25 of the 230 acres.

27. There is no zoning ordinance in Bradford Township.

28. The nearest house is 1200 feet from the closest coal processing area proposed for the new plant.

29. The potential emission sources at the new plant will be controlled.

30. The DER did not attempt to determine the level of noise which will exist at the proposed site and whether the noise therefrom will be inimical to the public well-being.

31. Bradford submitted applications to the DER for plan approvals for the new plant.

32. On October 14, 1977, the DER issued to Bradford Plan Approval No. 17-302-00008 for a coal/oil fired boiler at the new plant, Plan Approval No. 17-305-00011 for a coal dryer, Plan Approval No. 17-305-00012 for a coal crushing and screening station and Plan Approval No. 17-305-00013 for various fugitive emission sources such as railroad loadout, coal stockpiles, roadways, truck dump area, truck loading area and conveyor transfer point.

33. The DER did not do any air sampling to determine the ambient air quality in the vicinity of the site of the proposed plant.

34. Best available control technology is a concept which can include a number of equivalent technologies for emission control.

35. The conveyors to transport coal from one area to another at the new plant will be enclosed on three sides; they will not be enclosed at the bottom. The use of tube conveyors which would provide complete enclosure would result in additional control of emissions.

36. The emissions from the coal/oil fired boiler at the new plant will comply with applicable emission limitation standards.

37. The crushing and screening operations which reduce in size and separate the coal will be hooded and ducted to a scrubber.

38. Within one year of the start up of the new plant, Bradford must pave all roads at the site including all access roads and all loading and unloading areas. Until the roads are paved, they must be maintained with dust suppressants.

39. The paving of roads constitutes best available technology for controlling emissions from roads.

40. DER did not require Bradford to pave the roads on the site of the new plant prior to the commencement of its operation in order to allow time to determine where the traffic areas would be located.

41. The location of at least some of the roads at the new plant site, including the access roads, were known at the time of issuance of plan approval.

42. The truck unloading area at the new plant will be enclosed on three sides and hooded and ducted to a scrubber.

43. At the new plant coal is to be transported from the truck unloading area and the raw coal stockpile by an underground conveyor system. The underground conveyor system eliminates the use of high-lifts to move the coal and thus the excessive agitation of dust producing coal.

44. At the new plant the raw coal stockpile will be built with a radial stacker which eliminates the free fall of coal onto the stockpile.

45. At the new plant there will be no truck traffic flow through the plant or around the coal storage area.

46. The point where coal drops from the conveyor belt into the preparation plant is covered with a hood ducted to a small scrubber.

47. There will be coal stockpiled at the new facility on an area the approximate size of one-half of a football field.

48. A 65-foot high dike will be constructed between the village of Bigler and the proposed operation. The dike will extend from the railroad on the east to a 170-foot highwall on the west of the property, a distance of approximately 300 feet.

49. Trees will be planted on top of the dike. A water line with outlets at every 100 feet will be run across the top of the dike to water down the raw coal stockpile.

50. Trees will be planted along the boundary line between Helen Peter's property and the new plant. Trees exist on all other sides of the property.

51. The proposed control devices for the coal stockpiles at the proposed plant, i.e. the radial stacker, underground conveyor system, earthen dam to inhibit the wind, tree line and water line to wet down the pile, if necessary, are as effective at controlling emissions as are silos.

52. The DER made no study of the possible adverse environmental effects which could result from allowing a coal cleaning and storage plant to locate at the proposed site.

53. The DER made no study of the social and economic benefits of the proposed plant.

54. On-site roadways produce most emissions from a coal cleaning plant.

55. The coal/oil fired space heater boiler proposed for the new coal cleaning plant by Bradford is a minor source of emissions.

56. The type of coal/oil fired boiler proposed by Bradford as a space heater constitutes best available technology for the control of emissions.

57. Appellants are disturbed, particularly at night, by unreasonable noise levels at the Bigler coal cleaning plant.

DISCUSSION

The purpose of Bradford's coal cleaning plant at Bigler is the cleaning or removal of sulfur and ash from coal. The operation basically involves the crushing of the coal into fines, and the transporting of the fines to a liquid media where the waste is separated from the coal because of the difference in their specific gravity. The plant's operation, although simple, involves a constant movement of coal; it is unloaded from trucks, moved by front end loaders and conveyor belts, and loaded onto trucks and railroad cars. This movement inevitably raises coal dust particles into the atmosphere. In particular, emissions of coal dust into the air from the Bigler coal cleaning plant are caused by: (a) dust arising from roadways because of the continuous pulverizing of coal by the movement of traffic; (b) loading of trucks and railroad cars by the front-end loaders and highlifts; (c) the shaking and breaking of coal in the crushing and screening operation; (d) the unloading of coal from trucks; (e) the dropping of coal onto the storage pile; (f) the transfer points on conveyors, i.e. the place where coal drops off one conveyor onto another; and (g) wind blowing coal dust from the storage piles.

The coal cleaning plant in Bigler was constructed by Bradford in 1954;[1] since that time, its operation has continually grown and its coal storage area has continually expanded. (The expansion has taken place, in part, without authorization from the DER.[2]) In 1962 Bradford processed 266,000 tons of coal at the plant; by 1976, it was processing 428,000 tons of coal per year. Residents of the village of Bigler have absorbed the brunt of the plant's growth as they have become inundated with coal dust from the coal cleaning plant. Houses and other properties have become soiled and covered with coal dust. The coal dust in the air discourages the opening of windows in the summertime and the use of yards for cook-outs and other recreations. It gets tracked into homes and generally interferes with the enjoyment of life and property in the vicinity of the plant. The testimony of Mrs. Donna Ellinger, who lives approximately 250 to 300 feet from the plant, is representative of the testimony of the 15 residents of Bigler who testified in this case. She described the coal dust emissions from the plant as follows:

> "I get coal dirt from the plant. I don't necessarily get dust. Sometimes it is more like ala chunky style. It is particles. I have heard it hit on the windows when the wind has blown it down, so it is big enough that I can hear it on the windows. It is in the house. You can go most anyplace in my house, even as soon as a half an hour after I have dusted, go like that (indicating), and you have coal dirt.
>
> "In the summertime, when we have to have the door open, our house is small and we can't afford air conditioning, so it is hot, and I open the doors, and before I prepare a meal, I must wash off the top of the stove, the sink and wipe off the table, and sometimes you have to dust the chairs, if you don't want your seat dirty."NOTES OF TESTIMONY p.294

Also, tests by the DER of the quality of the air in the vicinity of the plant show that the ambient air quality standards for suspended particulate matter and settleable particulate set to protect the public health have been exceeded.

Appellants' problems are caused by two factors; first, the unconscionable failure of Bradford to install air pollution controls and to implement pollution control practices at the plant and second, and of overriding importance, the location of this twenty-three acre operation directly contiguous to a residential area. On three sides of the plant, there are homes within fifty feet of the operation.

The DER has been aware of the problems that Bradford's coal cleaning plant cause the residents of Bigler. In fact, the DER has received more complaints

1. The present plant was erected in 1954; however, Bradford has operated a coal loading operation at the site since 1935.

2. 25 Pa. Code 127.11 prohibits the modification of an air contamination source without prior authorization by the DER. 25 Pa. Code 121.1 defines modification as a physical change which increases the amount of air contaminants emitted.

over a longer period of time about Bradford's plant than any other source of air pollution in the region.[3] It has in the past taken some enforcement actions, none of which were effective in abating or alleviating the problem.[4] Finally, on October 13, 1977, after a period of negotiations and apparently in settlement of a civil penalty action the DER had filed against Bradford fourteen months earlier, the DER entered into a consent order and agreement (consent order) which provides for the shutdown of the Bigler coal cleaning plant and the construction of a new coal cleaning and storage plant approximately 3,000 feet northwest of the present plant. Specifically, the consent order provides that the new plant is to be constructed by December 31, 1979, and that Bradford may continue to operate the present plant until July 1, 1979. It also provides that Bradford may resume operations at the existing plant after July 1, 1979, if malfunctions occur at the proposed plant which prevent its operation, but only during a period of six months from the date of issuance of a temporary operating permit. Both plants cannot be operated at the same time.

Appellants, because they do not wish to continue to be subjected to the coal dust from the existing plant, because they believe the new plant will also cause a nuisance to their community and because of an understandable lack of trust in the good faith of Bradford and the DER, have appealed from the October 13, 1977, consent order and the plan approvals issued by the DER to Bradford to construct the proposed coal cleaning plant.

Our review of the DER action is to determine whether the DER committed an abuse of discretion or an arbitrary exercise of its duties or functions. *Warren Sand and Gravel Co. Inc. v. Comm. of Pa., DER*, 341 A.2d 556, 20 Pa. Commonwealth Court Ct. 186 (1975); *Pennsbury Village Condominium v. Com. of Pa., DER*, EHB Docket No. 76-057 (issued July 22, 1977).

3. DER Region 6 is a 14-county area in the northwestern corner of the state.

4. The DER brought one criminal complaint before a magistrate which resulted in a $100.00 fine. On July 17, 1968, it issued an administrative order to Bradford requiring the abatement of emissions from the plant. On December 14, 1970, it filed a Complaint in Equity in the Court of Common Pleas of Clearfield County requesting the Court to enjoin the operation of the plant until it complied with the APCA. The complaint resulted in a consent decree before the Court of Common Pleas of Clearfield County dated May 14, 1971, requiring Bradford to perform certain acts to abate emissions from the plant.

CONSENT ORDER

Appellants object to the consent order for reason that the DER lacks the authority to agree to allow Bradford to operate the present coal cleaning plant in violation of the APCA.

Initially, it is true that conditions will not improve for the residents of Bigler under the consent order during the lifetime of the existing plant. Although paragraph 8 of the consent order requires Bradford to "take all reasonable interim measures at the existing site to keep fugitive emissions to a minimum" and lists specific operating practices which Bradford is required to perform such as limiting the size and height of stockpiles, cleaning and maintaining roadways with dust suppressant chemicals and tarping loaded trucks, the measures will not significantly alleviate appellants' coal dust problems.

It is clear that the DER has the authority to enter into a consent order. Section 4(4.1) of the APCA authorizes the DER to issue orders relating to air pollution. The fact that the terms of the order have, after negotiations, been agreed upon by the recipient prior to the order's issuance, does not alter the authority conferred by Section 4(4.1) *supra*. Also, the DER in its discretion has the authority to allow the operation of an air contamination source for a period of time while it achieves compliance. Section 4(4.1), *supra*, states in part that:

> "Such orders may specify a time for compliance, require submission of a proposed plan for compliance, and require submission of periodic reports concerning compliance."

Certainly it is within the DER's discretion to employ remedies for abating air pollution other than requiring the air pollution source to immediately shut down.

We find that appellants have not shown that DER has abused its discretion by allowing Bradford to operate the plant until July 1, 1979. Bradford during this period will be proceeding to construct a new plant further removed from Bigler and equipped with coal dust emission control equipment. Bradford has posted a $50,000 bond which it will forfeit if the plant is operated after July 1, 1979.[5]

PLAN APPROVALS FOR NEW PLANT

To install and operate an air contamination source in Pennsylvania, it is necessary to procure two permits from the DER; a plan approval permit prior to construction of the source and an operating permit after construction has been completed but prior to its operation. See Section 6.1 of the APCA.

5. See also 25 Pa. Code §141.4 wherein the DER is authorized to grant a variance from its air contaminant emission limitation regulations for a period of up to three years.

Bradford applied for and received from the DER four plan approvals to construct the new plant. Plan Approval No. 17-302-00008 was issued for a coal/oil fired boiler, No. 17-305-00011 for a coal dryer, No. 17-305-00012 for the crushing and screening station and No. 17-305-00013 was issued for various fugitive emission sources such as the stockpiles, roadways, loading and unloading areas. Appellants contend that the DER issued these plan approvals to Bradford even though the control devices or methods proposed by Bradford for controlling some of the emission points do not constitute the best available technology for minimizing emissions as required by 25 Pa. Code 127.12(a)(5). Section 127.12(a) states:

> "Applications for approval shall:
> ...
> (5) Show that the emissions from a new source will be the minimum attainable through the use of best available technology."

Larry Wonders, the regional air pollution control engineer, and Francis Higgins, a field inspector of air pollution sources for the DER, both testified that the primary source of coal dust emissions from a coal cleaning plant is the on-site roadways. These emissions are generated by continuous truck traffic that pulverizes the coal spillage into coal fines which are picked up by the wind. Bradford's Plan Approval Permit No. 17-305-00013 requires the prevention of roadway coal dust emissions by the paving of the roads within one year of the start-up of the plant. During the initial year of operation, the emissions are to be prevented by treating the roads with dust suppressants.

Appellants argue that since dust from roadways is a primary source of fugitive emissions from the coal cleaning plant and inasmuch as the DER has determined that paved roads maintained to prevent the accumulation of dust constitute the best available technology for thecontrol of the dust from roadways, the DER acted arbitrarily and contrary to law when it issued the plan approval permit to Bradford allowing Bradford to commence the operation of the plant and operate it for a year without the installation of best available technology, i.e. paved roads. The DER agrees that paved roads do constitute best available technology; however, it contends that it is justified in permitting Bradford to delay a year before paving the roads because until the plant is operating, the traffic flow, and thus the location of the roads will be unknown, as it takes a period of time to develop a traffic pattern at a coal cleaning plant. DER also points out that during the initial year the roadways will be maintained by dust suppressant chemicals. We

find the DER's contention to be reasonable insofar as the road plan is unknown. However, testimony showed that the locations of some of the roadways such as access roads to the site are now known, and were known, at the time of the issuance of plan approval. In those cases we find that the roads must be paved prior to start-up of the plant. The requirement of 25 Pa. Code 127.12 that an applicant must show that the emissions will be the minimum attainable through the use of best available technology, presupposes that the source will not be operated until and unless it is equipped with the best available technology. Plan Approval No. 17-305-00013, because it does not require Bradford to install the best available technology for controlling emissions from the roadways, the location of which are known, prior to the commencement of the plant's operation, does not comply with 25 Pa. Code 127.12(a)(5). We therefore remand Plan Approval Permit No. 17-305-00013 to the DER to require the paving of all roads at the proposed site the location of which are known, prior to the commencement of operation of the plant.

Appellants also contend that the DER has not required Bradford to use the best available technology to prevent the emissions of coal dust from the stockpiles. Appellants assert that the stockpiles must be enclosed to prevent windblown emissions therefrom. Their objection is based on their observations of coal dust being blown from the piles at the existing plant and a letter addressing the stockpile emission problem from William Charlton, the DER engineer responsible for reviewing plan approval applications, to C. Alan Walker, the President of Bradford, dated August 5, 1977. The letter stated that:

> "...It is the Department's position that windblown fugitive emissions from stockpiled materials are best controlled through the use of some type of enclosure which positively prevents contact between ambient winds and the stockpiled material. This represents the best available control technology. We appreciate the difficulty that would be encountered in applying this technology in conjunction with a radial stacker, however we are also bound by 25 PA Code 127.1(5), that new air contamination sources must 'control the emission of air pollutants to the maximum extent, consistent with the best available technology'. Bradford may elect to propose some other control strategy, however it must be affirmatively demonstrated in the application that the alternative technology is equivalent to enclosing the piles in terms of fugitive dust prevention."

The DER and Bradford contend that the Bradford plan is equivalent to an enclosure for preventing fugitive emissions and thus also constitutes best available technology.

The primary cause of fugitive emissions from stockpiles is agitation of the stockpile either through dumping coal onto the stockpile or removing coal

from the pile. Bradford's plan is designed to prevent the generation of dust during loading and unloading. The coal will be placed on the pile by a radial stacker which will be automatically lowered to the actual height of the coal pile, thereby preventing the free fall of coal and resulting fugitive emissions. (The radial stacker is also an improvement over the tube stacker which is inclined to clog up during the winter from the freezing of coal.) High-lifts and front-end loaders will not be used for removing coal from the stockpile; rather, the coal will be removed by a series of hoppers in the ground beneath the stockpiles which feed into an underground conveyor system, thus the agitation of the dust-producing coal will be eliminated.

To shield the stockpile from wind, Bradford is constructing a dike approximately 65 feet high and 300 feet long between Bigler and the stockpile. The dike will extend from the railroad on the east to a 170-foot highwall on the west of the property. Evergreen trees will be planted on top of the dike and a two-inch water line with outlets at every 100 feet will be run across the top of the dike to water down the stockpile, if needed. The stockpile, which is limited to a 55 foot height by the height of the radial stacker, will also be shielded from wind by a 170-foot highwall to the west and by the plant itself which is housed in a 73-foot building to the north.

The testimony presented on the issue of the effectiveness of this plan for preventing emissions from stockpiles as compared with an enclosure was from either DER or Bradford officials.[6] They testified that in their opinion Bradford's plan is as effective. Since we are unable to find that their opinions are in error, we find that in this case, the plan proposed by Bradford Coal constitutes best available technology for preventing emissions from the stockpiles.

Appellants also contend that the DER did not require the best available technology for control of emissions from the coal/oil fired space heating boiler. The boiler is a relatively minor source of emissions; the maximum particulate matter it is allowed to emit by DER regulation is 3.2 lbs./hour. The type of boiler proposed by Bradford has been recently developed for use without air pollution control equipment. The emissions are controlled by the adjustment of the combustion process to a level in compliance with the DER's regulations. Appellants argue that since the emissions can be reduced even further by the addition of air pollution control equipment, Bradford has not proposed best available technology.

6. The appellants called the DER officials as their witnesses.

The best available technology requirement does not require the addition of control devices in series, *ad infinitum*. The coal/oil boiler proposed by Bradford achieves emission control as well as a traditional boiler fitted with a control device. Thus, we believe that the DER did not abuse its discretion by denominating the boiler "best available technology", especially when the level of emissions will be less than 3.2 lb/hour.

Appellants also object to the use of a scrubber to control emissions from the crushing and screening station. Mr. Wonders testified that in his opinion a scrubber is less effective in reducing emissions than a bag house at the pressure drop proposed by Bradford, but that the scrubber can be made as efficient as a bag house if the pressure drop is increased, and that a bag house that is operated outdoors in the winter can have more maintenance problems than a scrubber. Based on Mr. Wonders' testimony, we find that the best available technology for control of emissions from the crusher and screening station is either a bag house or a scrubber with sufficient pressure drop to equal the bag house in removal efficiency. We, therefore, remand Plan Approval Permit No. 17-305-00012 to the DER to require either a bag house or a scrubber with a sufficient pressure drop to be as effective in the reduction of particulate matter emissions as a bag house.

Emissions from a conveyor belt are caused by wind blowing across the conveyor. Bradford proposes to prevent these emissions by installing a cover on the top side of the conveyor. Appellants contend that the best available technology for prevention of emissions from a conveyor constitutes total enclosure of the conveyor belts. The only testimony relevant to the issue is by Mr. Charlton, who testified that to his knowledge, one other coal cleaning plant uses a totally enclosed conveyor system and that, in his opinion, the fully enclosed system is more effective "to a very limited extent". Unfortunately, we do not know what Mr. Charlton means by "to a very limited extent" or how he applied it in his review of the application. Nor do we know whether such an enclosure "is available or can be made available" for this plant. Therefore, we remand Plan Approval Permit No. 17-305-00013 to the DER to determine the best available technology for control of emissions from the conveyor system taking into consideration Mr. Charlton's opinion that the enclosure is more effective. We also require the DER to explain the basis of its determination.

The DER, before it issues a plan approval for a new source, must determine that the new source will not prevent or adversely affect the attainment or

maintenance of ambient air quality standards. See 25 Pa. Code §127.1 which states in part:

> "It is intended that by the application of the provisions of this Article, air quality shall be maintained at existing levels in those areas where the existing ambient air quality is better than the applicable ambient air quality standards, and that air quality shall be improved to achieve the applicable ambient air quality standards in those areas where the existing air quality is worse than the applicable ambient air quality standards. In accordance with this intent it is the purpose of this Chapter to insure that all new sources shall conform to the applicable standards of this Article and that they shall not result in producing ambient air contaminant concentrations in excess of those specified in Chapter 131 of this Title (relating to ambient air quality standards)..."

25 Pa. Code §127.12 lists the contents of an application for plan approval. It states that: "When requested by the Department [an applicant must] show that the source will not prevent or adversely affect the attainment or maintenance of ambient air quality standards". See also Section 110 of the Federal Clean Air Act, 42 U.S.C.A. 7401 *et seq.*

Appellants contend that the DER could not have ascertained whether or not the proposed coal cleaning plant will adversely affect the attainment or maintenance of air quality standards because the DER did not conduct, or require Bradford to conduct, tests of the present quality of the air in the vicinity of the plant and without knowing the present air quality, it could not have determined what the quality of the air will be after installation and operation of the cleaning plant. The DER answers that it does not have to determine the affect of a new source on air quality at the plan approval stage but can wait until the review of the operating permit application. Here, DER has required Bradford to sample for air quality in the vicinity of the plant after it commences operations. A temporary operating permit will be issued to Bradford for the testing period. If the sampling shows that the emissions from the plant do not adversely affect the attainment or maintenance of air quality, Bradford will be issued an operating permit.[7] This air quality sampling program comports with the requirements of Section 6.1(b) of the APCA and 25 Pa. Code §127.22(a)(7) which require an applicant for the operating permit to show that the source is capable of being operated in a manner as not to cause a violation of the air quality standards. However, it ignores the requirements for plan approval and defeats the purpose of the permitting process. The *raison d'etre* of the permitting process is the avoidance of risk; the avoidance of risk to the community of air pollution as well as the avoidance of risk to the applicant of refusal of permission to operate after the construction of a source.

7. Assuming that Bradford has complied with all other provisions of the APCA and the applicable DER regulations.

The system may not be perfect, as a source for which a plan approval is granted may, nevertheless, cause air pollution and, thus, be denied an operating permit, however, pre-construction review is necessary to minimize the risk of such occurrences.

25 Pa. Code §127.12(a)(7) requires an applicant for a plan approval to show that the emissions from its source will not affect the attainment or maintenance of air quality when requested by the DER. We believe that the DER abuses its discretion when it has no way of knowing whether or not a source will affect the attainment or maintenance of air quality yet does not request the source to make a showing of same.

We do not know whether a determination of the affect of the emissions from the proposed plant on air quality can be made without sampling existing air quality, and thus, we do not hold that such a sampling program is necessary. We only hold that the DER did not attempt to determine the effect of the emissions from Bradford's proposed plant on the attainment or maintenance of ambient air quality prior to issuing to Bradford the plan approval to construct the plant and that the DER must make such a determination, upon a reasonable basis, prior to issuing a plan approval.[8] We remand all four plan approvals to the DER in order that the DER can require Bradford to show that the emissions from the source will not prevent or adversely affect the attainment or maintenance of ambient air quality standards.

ARTICLE I, SECTION 27

Appellants contend that the DER acted contrary to Article I, Section 27 of the Pennsylvania Constitution because it entered into the consent order and issued the plan approvals without considering the adverse environmental effects of those actions. Article I, Section 27 of the Pennsylvania Constitution states:

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

The courts have held that Article I, Section 27 is self-executing[9] and that its provisions require the DER, as trustee of the Commonwealth's public

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8. The fact that the existing coal cleaning plant causes ambient air quality violations in the immediate vicinity of the plant shows that such a condition can result from emissions from a coal cleaning plant.

9. *Comm. of PA, DER v. Gettysburg Battlefield Tower Inc.*, 8 Pa. Commonwealth Court 231, 302 A.2d 886 (1973), aff'd. ___Pa.___, 311 A.2d 588 (1973).

natural resources, to address the environmental impact of its actions by balancing their social and economic benefit with the environmental harm they cause. *Concerned Citizens for Orderly Progress, et al v. Comm. of PA, DER and Emerald Enterprises Limited*, ___Pa. Commonwealth Court___, 387 A.2d 989 (1978). The Commonwealth Court in *Payne v. Kassab*, 11 Pa. Commonwealth Court 14, 312 A.2d 86 (1973) aff'd by the Pa. Supreme Court at 468 Pa. 226, 351 A.2d 263 (1976), set forth a three-standard test to be applied in the review of an administrative decision to determine if the agency properly addressed the environmental impact of its act.

The first standard requires compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources. The record shows, as we have stated herein, that the DER did not comply with 25 Pa. Code §127.12, relating to plan approval requirements. There has not been any showing by appellants that any other pertinent statute or regulation has not been complied with by the DER. We note that these plan approvals have been reviewed by the Bureau of Water Quality Management and Solid Waste Management for compliance with the statutes and regulations they enforce. (The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *ds amended*, 35 P.S. §691.1, *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 second standard of the *Payne* test asks whether the record demonstrates a reasonable effort to reduce the environmental incursion to a minimum. The record shows that the DER action of entering into the consent order constitutes a reasonable effort to abate the air pollution from Bradford's Bigler coal cleaning plant. DER's primary thrust in this matter, at least since the day it filed the civil penalty action, has been to cause Bradford to cease operating the coal cleaning plant in Bigler. The DER adamantly refused to agree to any resolution of this matter which did not entail Bradford's shutdown of the Bigler coal cleaning plant.[10] DER's insistance upon the relocation of the coal cleaning

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10. Charles Allen Walker, President of Bradford Coal Co. testified that:

> "Their [DER] objective was to get us to build a new plant. They didn't particularly care where it was, so they knew the problem and I don't think they particularly cared whether we stayed in business or went out of business, either, because at one time, they gave us the alternative, 'You are either going to build a new plant, or go out of business, because we are not going to let you operate the old plant.'" Notes of testimony, pages 699, 700

plant, as required by the consent order represents a reasonable effort at the abatement of the air pollution problem.

DER's action in issuing the plan approvals does not demonstrate a reasonable effort to reduce the environmental incursion to a minimum because of the previously discussed failure of the DER and Bradford to comply with 25 Pa. Code §127.12(a)(5) and (6). However, if the DER and Bradford, after remand, comply with the requirements of 25 Pa. Code §127.12, it would appear that the likelihood of the residents of Bigler being affected by emissions of coal dust from the proposed plant is minimal, as §127.12 requires that Bradford must demonstrate to the DER that the emissions from the new plant will: (a) comply with all DER regulations governing emission limitations. (We note that the DER regulation governing fugitive emissions, prohibits emissions past appellants' property line); (b) not cause air pollution; (c) not prevent or adversely affect the prevention or maintenance of ambient air quality standards; and (d) be controlled through the use of best available technology.

Appellants contend that the DER violated its duty as the trustee of Pennsylvania's public natural resources because it issued the plan approvals to Bradford without determining the effect of noise from the proposed plant on the surrounding community. Appellants testified that they are disturbed, particularly at night, by unreasonably loud noise levels emanating from the present plant and, more significantly, that noise generated by a coal loading and unloading operation conducted by Bradford at the site of the proposed plant in the spring of 1978 was annoying and excessive. They assert that an awareness of these problems by DER should have prompted the DER during its review of the plan approval applications to evaluate the levels of noise which will be generated by the operation of the proposed plant and, if necessary, to place a limitation thereon. Although people must bear in their everyday lives some annoyance from noise, levels of noise which materially interfere with the ordinary comforts of life and impair the reasonable enjoyment of habitation, constitute a nuisance. *Firth vs. Scherzberg*, 366 Pa. 443, 77 A.2d 443, (1951). The Pennsylvania Supreme Court in *Township of Bedminster vs. Vargo Dragway, Inc.*, 434 Pa. 100, 253 A.2d 659, (1969), stated that, "...Every person has a right to require a degree of quietude which is consistent with the standard of comfort prevailing in the locality where he lives."

Although there is no Pennsylvania statute or regulation which expressly limits noise levels, the DER's power to abate nuisances under Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17, (by which the DER has in the past regulated noise[11]), must include the power to prevent nuisances from occurring. It would be absurd for DER to permit the construction and operation of an expensive facility that might create a nuisance — which DER could then be called upon to abate — without any consideration in the permitting process as to the likelihood of creating a nuisance.

Article I, Section 27, of the Pennsylvania Constitution requires that when the DER is made aware of an activity for which a party is seeking from the DER a permit has the potential to cause a nuisance or an environmental incursion, the DER must at least determine the likelihood of its occurrence, and if need be, take steps to require the applicant to prevent or minimize the incursion. C.f. *Concerned Citizens for Orderly Progress, et al, supra,* and, *David Beitman v. Comm. of PA, DER,* 67 D & C 499 (1974).[12]

We find that the noise from the existing plant and from the site of the proposed plant show that there is a real potential for the proposed plant to cause a nuisance from the generation of noise.[13] Therefore, in order for the DER to minimize the environmental incursion caused by its actions of issuing the plan approvals as required by Article I, Section 27, the DER must consider the noise levels from the proposed plant to determine whether its operation will interfere with the reasonable enjoyment by others of their homes.

The third *Payne* standard asks whether the environmental harm resulting from the DER's actions of entering into the consent order and issuing the plan approvals so outweigh the benefits to be derived therefrom that they constitute an abuse of discretion. The Commonwealth Court in the case of *Concerned Citizens for Orderly Progress, et al, supra,* recently resolved an ambiguity over whether this third standard of *Payne* applied to the DER by holding, unequivocally, that it does. The court stated:

> "The third standard enunciated in *Payne* requires balancing the environmental harm against the benefits to determine whether permitting the application would be an abuse of discretion. The Board, however, refused to apply this standard based upon its interpretation of *Community College of Delaware County v. Fox,* 20 Pa. Commonwealth 335, 342 A.2d 468 (1975). The Board construed *Fox* to require that the Commonwealth refrain from balancing the benefits and harm of a project when local decisions are involved.

11. In fact, until this past year, the Bureau of Air Quality was titled the Bureau of Air Quality and Noise Control.

12. We believe that such a determination, using known decibel levels and distances to surrounding residences, is easily within DER's and the applicant's competence.

13. This is not a case as in *Township of Salford, et al., supra,* where the potential for noise was mere speculation.

Fox. The DER's issuance of the sewage permit in *Fox* was approved since, among other reasons, 'our own review of the record, [indicates] 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 . . .' 20 Pa. Commonwealth at 357, 342 A.2d at 481. While it is the responsibility of local governmental agencies to deal with planning, zoning and other related functions, it is incumbent upon DER to insure that a proposed project is in conformity with local planning and consistent with statewide supervision of water quality management. Thus, the DER, as trustee of the Commonwealth's public natural resources by virtue of Article I, Section 27 of the Constitution of Pennsylvania, must address the direct impact of issuing such a permit." Id. 387 A.2d 989 at 993.

The DER did not undertake the inquiry necessary to perform the required balancing; however, the DER and Bradford request that this board, based on the record before it, find that the environmental impact will be minimal while the social and economic benefits will be significant, and thus, that it was not an abuse of discretion for the DER to perform the challenged actions. Although the board's primary function is to review determinations made by the DER, it may be appropriate in some circumstances, where the DER has failed to do so, for the board to balance the environmental incursion against the social and economic benefits. However, in this case, we are unable to evaluate the environmental harm caused by the plan approvals until the DER makes some initial determinations. We need to know the affect of the proposed plant on ambient air quality and the amount of noise pollution from the plant, questions that the DER is required to answer on remand.

Since the DER has not performed the required balancing of harm and benefits and because the record before us is not sufficient to enable the board to perform the balancing, we remand the four plan approvals to the DER to balance the environmental harm from their issuance against the social and economic benefits of the proposed plant.

In regard to the DER's action of entering into the consent order, we determine that the environmental harm caused by permitting Bradford to operate the plant until July 1, 1979, during which time Bradford will be constructing a new replacement plant, does not so clearly outweigh the economic and social benefits, that the consent order constitutes an abuse of discretion. Our conclusion is based not only on the economic benefits such as employment and the production of clean coal, but on the difficulty of second guessing this settlement. The DER's object has been to cause the shutdown of the existing plant. Without a settlement, the DER would have had to pursue litigation. It is difficult to judge DER's estimate of success; whether or not it believed that it could get a final judicial determination by July 1, 1979, which would require the cessation of the plant's operation. Since we are uncertain that the DER could have caused the plant to shut down prior to July 1, 1979, and since the consent order is not prohibited by the APCA, we hold that the DER did not contravene Article I, Section 27 of the Pennsylvania Constitution when it signed the consent order.

CONCLUSIONS OF LAW

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

2. The burden of proof in an appeal of the issuance of a plan approval by a party who is not the holder of the plan approval is on the appellant.

3. The burden of proof in an appeal by a party who objects to a consent order and agreement between the DER and a private party is on the appellant.

4. The board's review of a DER action is to determine whether the DER committed an abuse of discretion or an arbitrary exercise of its duties or functions.

5. The DER has the authority to enter into a consent order and agreement which allows the operation of an air contamination source for a limited period of time while it achieves compliance.

6. The requirement of 25 Pa. Code 127.12(a)(5) that an application for a plan approval must show that the emissions from a new source will be the minimum attainable through the use of best available technology presupposes that the source will not be operated until and unless it is equipped with the best available control technology.

7. The requirement that the emissions from a new source be the minimum attainable by best available technology does not require the addition of control devices in series, *ad infinitum*.

8. The DER, before it issues a plan approval for a new source, must determine that the new source will not prevent or adversely affect the attainment or maintenance of ambient air quality standards.

9. Article I, Section 27 of the Pennsylvania Constitution requires that the DER, as trustee of the Commonwealth's public natural resources, must address the environmental impact of its actions by balancing their social and economic benefits against their environmental harm.

10. Compliance by the DER with 25 Pa. Code §127.12 would constitute a reasonable effort to reduce environmental incursion from air pollution to a minimum as Section 127.12 requires an applicant for a plan approval to demonstrate that the emissions from a new source will comply with all the DER emission regulations, will not cause air pollution, will not prevent or adversely affect

the attainment or maintenance of ambient air quality standards and will be controlled through the use of the best available control technology.

11. When the DER was made aware that noise from the proposed coal cleaning plant could be inimical to the public well-being, it was required by Article I, Section 27, to determine the likelihood of its occurrence and, if necessary, to require Bradford to prevent or minimize noise from the plant.

12. The DER did not balance the environmental harm of its actions of issuing the plan approvals for the coal cleaning plant with their social and economic benefits.

13. The DER did not balance the environmental harm of its action of entering into the consent order and agreement with its social and economic benefit; however, the board determines, based on the record before us, that the environmental harm caused by permitting Bradford to operate the Bigler coal cleaning plant until July 1, 1979, during which time Bradford will be constructing a new coal cleaning plant, does not so clearly outweigh the economic and social benefits that the consent order and agreement constitutes an abuse of discretion.

14. The DER abused its discretion when it issued Plan Approval Permit No. 17-305-00013 to Bradford without requiring Bradford to install the best available technology for controlling coal dust emissions from the roadways, the location of which are known, prior to commencement of operation of the plant.

15. Appellants have not, by the preponderance of the evidence, shown that the plan proposed by Bradford for preventing emissions from stockpiles is not equivalent to enclosing the piles in terms of fugitive dust prevention.

16. The coal/oil fired space heating boiler proposed by Bradford for the new coal cleaning plant constitutes best available technology.

O R D E R

AND NOW, this 26th day of January, 1979, it is hereby ordered that:

(1) the action of the DER in entering into the October 13, 1977, Consent Order and Agreement with Bradford Coal Company is sustained and the appeals therefrom are dismissed.

(2) Plan Approval Permit Nos. 17-302-00008, 17-305-00011, 17-305-00012, and 17-305-00013 are set aside and remanded to the DER to:

(a) require Bradford Coal Company to show that the emissions from the proposed cleaning plant will not affect the attainment or maintenance of ambient air quality standards;

(b) determine whether the environmental harm which will result from the issuance to Bradford Coal Company of the plan approvals will outweigh the social and economic benefits to be derived therefrom; and

(c) insure that the noise from the proposed plant will not be inimical to the public.

(3) Plan Approval Permit No. 17-305-00013 is also remanded to the DER to:

(a) require Bradford to pave all roads the location of which are known prior to the commencement of operation of the coal cleaning plant; and

(b) determine the best available technology for prevention of emissions from the conveyor belt.

(4) Plan Approval Permit No. 17-305-00012 is also remanded to the DER to require either a bag house or a scrubber with sufficient pressure drop to equal the bag house in particulate matter removal efficiency for control of emissions from the crusting and screening station.

ENVIRONMENTAL HEARING BOARD

Joanne R. Denworth

JOANNE R. DENWORTH
Member

Thomas M. Burke

BY: THOMAS M. BURKE
Member

DATED: January 26, 1979

DISSENTING OPINION

BY: Paul E. Waters, Chairman

Although I agree with much of the decision, I must nevertheless dissent.

The majority indicates that appellants "...are disturbed, particularly at night, by unreasonably loud noise levels emanating from the present plant and, more significantly, that noise generated by a coal loading and unloading operation conducted by Bradford at the site of the proposed plant in the spring of 1978 was annoying and excessive." Based on this information, the board would remand the four plan approvals to the DER for consideration of the noise levels from the proposed plant and its effect on the surrounding community. It seems clear to me that this approach is improper and ill-advised on both its factual and legal premises.

As a practical matter, there is no way the DER can accurately, i.e. within decibels, determine the amount of noise which will emanate from a plant which is only now under construction. The distances alone should be enough to convince one that the DER certainly does not have the expertise to now know exactly what will be heard on this 230 acre site and beyond at some future undetermined date. As formidable as these obstacles are, I believe, in addition, that the legal underpinnings are just not there. The board cites Article I, Section 27 for the proposition that the DER has an obligation to determine the likelihood that noise from the plant will be inimical to the public well-being and to require Bradford to prevent or minimize it. As desirable and reasonable as this might be, I cannot help but note that Article I, Section 27 says nothing even remotely similar. I do not believe the framers of that article or the voters intended it to broadly authorize DER to "go forth into the world and do good". If the majority is concerned about a public nuisance, this law is well developed and can be appropriately employed when and if it is violated. There are other reasons why I dissent, but since the above was not sufficient to turn the board from its new path, I am sure further discussion would not do so.

PAUL E. WATERS
Chairman

DATED: January 26, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

BOROUGH OF SAYRE

Docket No. 78-063-W

v.

Pennsylvania Sewage Facilities Act

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and DAVID T. and MARY SHEILA HENRY, Intervenors

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

BY: PAUL E. WATERS, Chairman, January 31, 1979

This matter comes before the board as an appeal by the Borough of Sayre from an order issued by the DER pursuant to the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.1, *et seq.* requiring appellant to amend its sewage plan to allow intervenor, David Henry, *et ux*, to install an on-lot sewage disposal system. The intervenors own a large lot on which they desire to construct a multi-family residential dwelling. Although soil samples and tests indicate the lot to be suitable, the appellant nevertheless does not want the new sewage system installed allegedly because of a nearby pond. Great effort has thus far been expended on all sides to bring this matter finally before the board for resolution.

FINDINGS OF FACT

1. The intervenors are David T. and Mary Sheila Henry of 119 Brock Street, Sayre, Pennsylvania. They are the owners and developers of the proposed Brock Street Apartments in Sayre, Pennsylvania.

2. The appellant is the Borough of Sayre, a Pennsylvania municipal corporation situated in Bradford County, Pennsylvania.

3. The appellee is the Department of Environmental Resources.

4. The official plan for Bradford County, prepared by the Northern Tier Regional Planning and Development Commission, was adopted by Sayre Borough on February 12, 1973.

5. The official plan does not presently address the sewage [illegible] needs of the Brock Street development.

6. The intervenors requested the Borough of Sayre informally and formally through a private request with the Department of Environmental Resources to amend or supplement its official plan on November 12, 1977.

7. An independent field investigation was conducted by the Department of Environmental Resources on the proposed site in which approximately three test holes were dug on January 24, 1978. Said test holes were made at locations selected by the DER in the area where the on-lot sewage system was planned to be constructed.

8. The DER evaluated the soil profiles taken during the independent investigation and determined that the soils on the development site were suitable for alternate subsurface disposal systems and that proper installation of such a system would pose no danger to groundwater contamination or corresponding pollution to Packer Pond.

9. The existing sewer lines on streets adjacent to Brock Street are over 200 feet away from the proposed project.

10. To tap into the existing sewer system would require a pumping station to pump sewage up from Brock Street and it appears that the sewer system on said streets are overloaded at this time.

11. The development proposal for the on-lot alternate sewage system proposed by the Henrys is consistent with the long range objectives of the Sayre official plan and regional and state plans.

12. The Borough of Sayre does not plan to sewer Brock Street because of financial inability.

13. The Borough of Sayre was ordered to issue a building permit to the Henrys on May 27, 1977, by the Court of Common Pleas of Bradford County. Said permit was issued August 10, 1977, by William Lynch, the Sayre Borough Zoning Officer.

14. Sayre was requested to revise its official plan to incorporate the Brock Street Apartments by letter from David Lamereaux of the Department of Environmental Resources dated March 6, 1978, which they refused to do.

15. The Borough of Sayre was thereafter ordered to revise its official plan by the DER on May 4, 1978.

16. The intervening developers plan to construct an alternate type on-lot sewage disposal system utilizing a sand type leachate collection system which is designed in accordance with the state of the art and acceptable engineering practices.

17. The Packer Pond is approximately 75 to 100 feet from the proposed construction of intervenors.

18. Permits for on-lot disposal systems in Sayre are issued by the Bradford County Sanitation Committee (sanitation committee) pursuant to an agreement between Sayre and the sanitation committee dated October 13, 1975.

19. The sanitation committee was created by municipalities in Bradford County to administer the permit provisions of the Pennsylvania Sewage Facilities Act, *supra*.

20. Although the two streets adjoining Brock Street, Stevenson and Lockhart Streets, are presently sewered, the borough informed the DER that it had neither plans nor funds for sewering Brock Street.

21. DER's regulations require that a municipality update its official sewage facilities plan (official plan) whenever a subdivision is proposed.

22. Because the Henrys' on-lot disposal permit did not conform with the Sayre official plan, the DER, by letter dated November 14, 1977, requested the sanitation committee to revoke the Henrys' permit.

23. The sanitation committee revoked the Henrys permit by letter dated November 16, 1977.

24. The Henrys requested Sayre to revise its official plan to address the sewage disposal needs of the Brock Street development and their request was refused.

25. Pursuant to 25 Pa. Code §71.17(a), the Henrys submitted a private request for revision of the Sayre official plan to the DER on November 21, 1977.

26. As part of the request, the Henrys submitted a planning module for land development; a deed for the property in question; a copy of the permit issued and subsequently revoked by the sanitation committee; and the permit application, including the percolation tests and site inspection reports.

27. Sayre's objections to the Henrys' request were that on-lot systems were inconsistent with the borough's objectives of providing public sewers; that, despite a court order, the proposed development was inconsistent with its zoning ordinance; that the soils underlying the site were unsuitable for use of on-lot systems; that use of on-lot systems would pose a danger of groundwater contamination and subsequent pollution of Packer Pond; and that installation of a sewer line in the area was not financially feasible.

28. The Sayre official plan makes no provision for how property owners erecting structures in existing developed areas will dispose of sewage until sewer lines are extended into those areas.

29. On-lot disposal is employed by the residents in the immediate vicinity of the proposed Henry development.

30. There are no limitations on the issuance of on-lot disposal system permits in the area, nor does Sayre have any ordinances restricting their use.

31. The DER has received no complaints regarding malfunctioning of the existing on-lot systems in the area.

32. Because of the controversy surrounding the Henrys' proposed development and an anticipated appeal of the DER's decision on the private request, the DER undertook an independent site investigation.

33. Although the DER did not directly notify Sayre of the field inspection, it did notify the sanitation committee.

34. No representative of the sanitation committee was present at the field inspection.

35. Lester Rothermel, DER soil scientist, described soil profiles from each of the three backhoe pits.

36. There was no evidence of a seasonal water table at any of the three backhoe pits.

37. In our review of this matter, we agree with the conclusion of DER that the Henrys' proposed system was properly isolated from Packer Pond, a nearby body of surface water, since the disposal area was more than 50 feet away from the pond.

38. The bedrock geology of the area is composed of shales and siltstone, while the surface geology is alluviam and glaciofluvial material(gravel).

39. The Henrys' proposed development would be consistent with the Sayre official plan since the municipality is presently unable to extend sewers to Brock Street and the residents of the area currently employ on-lot systems for disposal of their wastes.

40. The Henrys' proposed development is consistent with the Northern Tier Regional Plan, the only relevant county, regional or state plan.

41. A building permit was issued to the Henrys on August 10, 1977, and was revoked on or about May 31, 1978, because the Henrys failed to commence construction within the requisite six months.

42. The Henrys unsuccessfully appealed the building permit revocation to the Sayre Zoning Board and are presently litigating the matter before the Bradford County Court of Common Pleas.

DISCUSSION

The intervenors in this case have displayed an unusual amount of perserverance against an intractable municipal government and no doubt are beginning to believe the old adage about "fighting City Hall".

On July 1, 1977, a permit to construct an on-lot sewage disposal system was issued to David T. and Mary Sheila Henry, developers of the proposed Brock Street Apartments, by the Bradford County Sanitation Committee. The permit was revoked by the sanitation committee on November 16, 1977, because of the lack of municipal approval. The Henrys thereafter on November 21, 1977, initiated a private request through the Department of Environmental Resources for an order directing the Borough of Sayre to amend or supplement its official plan and at approximately the same time appealed the revocation before the Sayre Borough Council. The borough denied the Henrys' request, but on May 4, 1978, the department issued an order, requiring Sayre to amend or supplement its official plan to accomodate the Henrys' sewage disposal plan. The borough appealed said order June 7, 1978, and thereafter the Henrys intervened in the proceedings.

It was because of the difficulty the intervenors were experiencing at the local level that they submitted a private request to the DER to order the borough to amend or supplement its official plan pursuant to 35 P. S. §750.5(b) and Chapter 71.17 of the DER regulations. On January 24, 1978, DER's soil scientist made an independent investigation of the site, examined and tested soils and subsequently determined that the location was suitable for the installation of an alternate on-lot system.

It may be that appellant actually refused to amend its Act 537 plan because it does not want the proposed multi-family dwelling [1] in the area, but it argues against on-lot sewage disposal. While it is true that there are public sewer lines on nearby streets, as a practical matter, they are unavailable to intervenors. One existing sewer line is more than 200 feet away and the other would require a pump in order to reach it, because of elevation. Appellant admits it does not have any present plans to meet the sewage disposal needs of intervenors who are otherwise presently ready, willing and able to develop their tract of land.

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1. On-lot disposal is used by other residents of the borough in the immediate vicinity.

Intervenors have pursued the only available means to obtain a plan revision. The Pennsylvania Sewage Facilities Act, *supra*, provides §5(b) that a private request for revision may be made when: ". . . the official plan is inadequate to meet the resident's or property owner's sewage disposal needs. Such request may only be made after a prior demand upon and refusal by the municipality to so revise its official plan."

Another matter of appellants' concern, although not easily identified, seems to be a fear of pollution of Packer Pond. Appellant borough has planted trees near the pond and does maintain it for public use. Appellant seems to accept the scientific evidence which indicates that the soil is suitable for an on-lot alternate system.[2] It is the fact that no one representing the borough was present when the tests were conducted, that does not sit well with the borough.[3] No doubt more detailed information could have been collected, but we must nevertheless, conclude that the pond which is estimated to be 75 to 100 feet from the proposed site, will not be adversely affected by a properly installed system. If appellant had evidence as opposed to suspicions, to the contrary, it should have been presented at the hearing. In fact, the less satisfied that appellant was with the DER's findings, the greater was its responsibility to gather data of its own to refute it. We believe the appellant should have been notified of DER's intention to inspect the site and test the soil so its representative could be present. But this oversight on the part of DER does not change the results of that testing, and indeed they are not seriously contested.

Perhaps the major objection raised by appellant concerns the question of local zoning. On May 27, 1977, the borough and its zoning officer were ordered by the Court of Common Pleas of Bradford County, to issue a building permit to intervenor for the purpose of constructing a four-unit apartment house on Brock Street in Sayre, Pennsylvania. The order was issued as a result of the borough's inaction for more than 45 days after an application and hearing on the matter.[4]

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2. On page 6 of its brief, appellant states that: "No suggestion is made by the Borough of Sayre that there was any error in the findings of the Department" as relates to soil suitability.

3. DER's explanation was that when it notified the Bradford County Sanitation Committee to whom the responsibility had been delegated, that it would in turn notify Sayre. This was a matter of dispute.

4. The area in question is zoned for single family structures and intervenors sought a variance under the Municipalities Planning Code, the Act of July 31, 1968, P. L. 805, *as amended*, 53 P. S. §109.12 (§908[9]) the court granted the variance because no decision was issued by Sayre Borough within the required 45-day period.

The borough issued the permit, apparently with some reluctance, on August 10, 1977.

In May of 1978, the borough revoked the building permit and the legality of that action is now before the Bradford County Court. Appellant would bootstrap its way in this matter by arguing that we should sustain the appeal because intervenors have no permit and the proposed construction would violate local zoning laws. We are urged to disregard the court order, as appellant has done, and ". . .not simply to take the Court Order at face value". We find this argument all the more incredible because appellant cites the *Fox* case[5] for the proposition that the department is not to second guess the validity of local decisions properly made in the areas of planning and zoning. Yet, that is exactly what it asks us to do with regard to the Bradford County Court. We will not. When and if the local court enters a new order on the action now before it, we would expect the DER to act consistantly with it.[6]

It is clear that appellant has no present intention or discernable future intention to sewer the Brock Street area, here in question. The other dwellings in the area have on-lot sewage disposal. Intervenors have a desire to develop their property but the borough has failed to either provide for public sewerage or to amend its sewage disposal plan to allow intervenor to use an on-lot system. The Commonwealth Court in *Commonwealth v. Trautner*, 19 Pa. Commonwealth Ct. 116, 338 A.2d 718 (1975), dealing with a related situation, said:

> ". . .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 reasonable time, or for that matter, ever occur.
>
> "Even if municipal officials failed to comply with an order directing them to revise their official plan and were fined or eventually found in contempt, the property owner would still not have DER approval for his project. Likewise, a municipality may *refuse* to revise its plan to include an on-lot system because of plans for a community sewage system to be constructed some time

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5. *Community College of Delaware County v. Fox*, 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975).

6. If the Bradford County Court upholds the building permit revocation and denies the zoning change, the Act 537 amendment will be of no help to intervenor. If, on the other hand, the court upholds its prior order, we would expect all parties to act accordingly.

in the distant future. The property owner can be effectively denied the use of his land while a plan, which is to be implemented at some indefinite time, if at all, is managed by local officials.

* * *

"We have carefully examined the record and the regulatory scheme involved in this case and we conclude that, as applied to Trautner's circumstances, the regulations noted above constitute an unreasonable restriction on the use of his land and are, in effect, a confiscation without due process of law. By sustaining DER's appeal we would be enforcing these regulations in derrogation of Trautner's constitutional rights, and this we cannot do."

We conclude that there has been no abuse of discretion on the part of the DER in ordering an amendment to appellants' Act 537 plan.

CONCLUSIONS OF LAW

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

2. DER's conclusion that the intervenors lot is suitable for the installation of an alternate subsurface disposal system with safety to Packer Pond is supported by substantial evidence.

3. While the DER regulation §71.17(c)(3) requires that applicable zoning be considered in this matter, DER and this board must be guided by a decision of the appropriate common pleas court regarding zoning rights.

4. DER did not abuse its discretion under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.1, *et seq.* in ordering appellant to accommodate the sewage disposal needs of intervenor by amending its sewerage plan.

O R D E R

AND NOW, this 31st day of January, 1979, the order of the Department of Environmental Resources is hereby sustained and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

DATED: January 31, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

NEWLIN TOWNSHIP :

Docket No. 78-127-D

Approval of Revisions to Landfill Permit

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and STRASBURG ASSOCIATES, Permittee-Intervenor

ADJUDICATION

By Joanne R. Denworth, Member, February 16, 1979

Newlin Township has appealed from a letter from the Department of Environmental Resources (DER) to Strasburg Associates (SA), holder of a permit granted by DER in 1975 to construct and operate a landfill site in Chester County, in which DER approved certain revisions to the permit plans and allegedly approved a *de facto* transfer of the permit without compliance with its own regulations. The letter, dated September 8, 1978, which the permittee claims is not an appealable action of the department, included these determinations by the department: (1) acknowledgement and acceptance of receipt of a termination agreement purporting to terminate a landfill lease and management agreement, which DER had previously determined to necessitate a transfer of the permit, (2) approval of revisions to the original plans for the landfill site, and (3) directions to take certain steps to correct a soil erosion and sedimentation problem existing on the landfill site.[1]

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1. Because of the significance of the September 8 letter for purposes of determining what action was taken by the department in that letter and what action is appealable, the letter is quoted in full:

"Strasburg Associates
Market Street & Westtown Road
West Chester, Pennsylvania 19380

ATTENTION: Earl Hart, General Partner

Gentlemen:

RE: Strasburg Landfill
Newlin Township, Chester County
Permit No. 101038

This is to acknowledge receipt and to accept the Termination Agreement, revoking the Landfill Lease and Management Agreement, which was submitted to Keith Welks of this Department on September 6, 1978.

On October 10, 1978, Newlin Township filed an appeal from the department's letter of September 8. The township alleges that DER's letter effected three unlawful actions: (1) approval of a *de facto* transfer of solid waste permit no. 101038 (the permit) for the 25 acre landfill site known as Strasburg Landfill located in the township, without compliance with Regulation 75.22(f), which requires an application for permit reissuance where there is a change of ownership of the landfill operation, (2) approval of certain revisions to the permitted plans, and (3) failure to condition its approval of the revisions on an adequate soil erosion and sedimentation control plan. On November 6, 1978, the township filed a petition for supersedeas under §1921-A(d) of the Administrative Code, 71 P. S. §510-(c) and Rule 21.16 of the Board's Rules of Practice and Procedure, 25 Pa. Code §21.16. Hearings on the petition for

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1. (cont'd)

"Further, we also acknowledge receipt of revised plans and specifications for the Strasburg Landfill submitted in your behalf by Martin & Martin, Inc. Consulting Engineers. The revisions include: (a) letter of May 11, 1978, to Wayne L. Lynn, Regional Solid Waste Manager from Richard M. Bodner, P.E.; (b) letter of July 5, 1978, to Dwight D. Worley, Permits Unit, Department of Environmental Resources from Richard M. Bodner, P.E. with accompanying design drawings, Sheets 1-7 through 7-7 and; (c) letter of July 27, 1978, to Dwight D. Worley from Richard M. Bodner, P.E. with revised design drawings, Sheets 2-7, 3-7, and 7-7.

"The revisions have been reviewed by this Department and are acceptable. The revisions are hereby made a part of Permit No. 101038 issued August 15, 1975, to Strasburg Associates and implementation within the following stipulations are mandatory.

a. The first leachate storage tank must be installed within ninety (90) days from the start of the landfill operation. The second leachate storage tank must be installed within two (2) years from the start of the operation unless otherwise approved by this Department.
b. An access road must be provided to the leachate sump prior to operating the landfill.
c. The ground water monitoring system must be installed and monitored as previously approved. The eight (8) additional ground water observation wells must be measured on a monthly basis and the levels reported to the Department on a quarterly basis.
d. Landfilling must not proceed beyond the "Initial Pad" area as revised on Sheet 2-7, June, 1978, until authorized by the Department. Construction sequence of additional pad areas must be submitted prior to completing the initial pad.
e. Liner subdrains must be installed on forty foot (40') centers for the "Initial Pad" area. The subdrain spacing for additional pad areas must be approved by the Department prior to construction.

"This acceptance in no way alters the stipulations and limitations set forth by Permit No. 101038 issued August 15, 1975.

"It has come to our attention that an erosion problem has developed at this site as a result of the earth-moving activities associated with the construction of the access road to Laurel Road, Newlin Township. Steps must be taken immediately to eliminate this problem on an interim basis and plans for the permanent correction of this problem must be submitted to the Department within ten (10) days of receipt of this correspondence. These plans must be immediately implemented upon receipt of the Department's approval of the plans submitted.

Sincerely yours,

Donald A. Lazarchik, P.E.
Director of Land Protection"

supersedeas began on November 13, 1978. The board having concluded that at least some of the issues raised by the township were appealable and that the appeal should be resolved as quickly as possible because of the financial obligations of Strasburg Associates, the supersedeas hearing was expanded into a full scale hearing on the merits, which was concluded on December 19, 1978, after ten days of testimony.

On December 18, 1978, Chester County filed a petition to intervene in these proceedings. That petition was denied by order of January 11, 1979, on grounds, *inter alia*, that the petition was untimely filed under the Board's Rule 21.14(a) requiring the filing of a petition to intervene prior to the initial presentation of evidence.

On December 26, 1978, the board entered an order granting a limited supersedeas, which was later extended until February 15, 1979, in order that the board could resolve the questions relating to the transfer of ownership of the permit. Although the hearing examiner concluded from the evidence that there would be no threat of irreparable harm to the environment from the operation of the landfill in accordance with the revised plans as approved by DER on September 8th, the board concluded that irreparable harm may occur in contemplation of law by the operation of a landfill without a permit and that the board should resolve the transfer questions prior to any operation of the landfill. The parties have filed findings of fact and conclusions of law and briefs dealing with all the issues in this appeal; consequently, the board will address all of the issues raised by the appeal in this adjudication.

FINDINGS OF FACT

1. Appellant, Newlin Township (township), is a second class township located in Chester County, Pennsylvania.

2. Appellee is the Department of Environmental Resources (DER), which is the agency of the Commonwealth of Pennsylvania authorized to administer the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001, *et seq.*

3. Intervenor-Permittee is Strasburg Associates (Strasburg or SA), Westtown Road at West Chester Pike, West Chester, Pennsylvania.

4. Strasburg is a joint venture consisting of two Pennsylvania limited partnerships known as Strasburg Associates I (Strasburg I) and Strasburg Associates II (Strasburg II) (collectively Strasburg). Strasburg I and II have always conducted business jointly and solely as and under the name of Strasburg Associates, though this joint venture relationship was not formalized by executed agreement until September, 1978.

5. Strasburg I and II were formed in December, 1973, by Earle Hart, Alex Barry and James Hart, all of whom were both limited and general partners in Strasburg I and II at the time of formation. James Hart is Hart's brother and Barry is a

relative to Hart by marriage. Barry had experience in the solid waste business but Earle and James Hart had none.

6. Strasburg I and Strasburg II were formed for the purpose of acquiring and holding title to two contiguous parcels of land consisting of a total of 297.4 acres, for the development of a sanitary landfill thereon. Approximately 225 acres of the tract are located in the township and the remainder are in West Bradford Township, an adjoining municipality.

7. Earle Hart has exercised primary decision-making authority for Strasburg throughout its history. At least 98% of Strasburg's business activities are conducted by Earle Hart and he is now the only remaining general partner in Strasburg I and II. James Hart's entire partnership interest was terminated in early 1976 as part of the settlement of a lawsuit he had commenced seeking dissolution of the partnerships. Barry's general partner status was terminated by an agreement dated October 11, 1978.

8. After purchasing the tract in 1973 for $600,000 with mortgage financing arranged by Hart, Strasburg Associates retained the engineering firm of Robert F. Harsch & Associates (Harsch) and a geologist, James Humphreysville, to prepare the necessary applications for development of a sanitary landfill on the township portion of the tract.

9. In October, 1974, Strasburg submitted an application to DER for a solid waste permit for a lined landfill on 49.8 acres of the tract. The application for a Water Quality Management Permit for disposal of leachate from the landfill was filed by Strasburg with DER in April, 1975.

10. On August 15, 1975, DER granted to Strasburg "Permit for Solid Waste Disposal and/or Processing Facility" No. 101038 (the permit) applicable to the facility names as Strasburg Landfill (the landfill) and also issued Water Quality Management Permit No. 1575201 for the leachate collection facility appurtenant thereto. No appeal was taken from the issuance of these permits.

11. The permitted site is located in a twenty-acre drainage basin on the west side of Briar Run, a small stream that runs through the eastern portion of the tract, and flows into the Brandywine Creek that flows along the southern border of the tract. The permitted site begins 100 feet west of Briar Run. The originally permitted plans called for an asphalt liner consisting of a single asphalt membrane with a toe drain for leachate collection. Landfilling was to begin at the bottom of the ravine comprising the permitted site and continue up the slope. A soil and erosion control basin was to be constructed at the bottom of the site and leachate was to be stored in two earthen lagoons also in that area, prior to its being hauled away for treatment or its being recycled through the landfill.

12. After issuance of the permit, Strasburg was in need of further financing to facilitate construction and operation of the landfill. Strasburg began negotiating with a variety of potential investors for this purpose. Numerous parties were interested in investing in or purchasing the landfill.

13. In considering the addition of investors or the sale to purchasers, Strasburg wanted to be sure that its permit could be transferred without difficulty and that it would remain valid if a proposed transaction did not reach fruition. It requested both Harsch and its legal counsel, Pepper, Hamilton & Scheetz, to inquire into and review this question and was advised by both that, at that time, DER required the reissuance of a permit through an abbreviated application procedure that did not appear difficult.

14. In May, 1976, Strasburg entered into an agreement of sale with Eco-Environs System, Inc. (Eco) to sell the permitted site and the remainder of the tract to Eco-Environs. Eco-Environs had made a feasibility study of the site, through Roy F. Weston Company (Weston) and offered $3,000,000 for the tract. Of this, $100,000 was paid to Strasburg as a deposit and $40,000 was due at settlement. The agreement with Eco-Environs provided for certain contingencies, one of which was the reissuance of the permit to Eco-Environs. Eco-Environs began discussions with DER regarding reissuance, but, despite obtaining an extension of the settlement date from Strasburg, failed to go to settlement and forfeited their deposit in September, 1976.

15. Over the summer of 1976, residents of the township became increasingly concerned about the possible effects of the Strasburg Landfill, particularly when Eco-Environs made known its desire to dispose of sludge from the City of Philadelphia in the landfill. Public meetings were held by the township in August and September, 1976. At this time the township retained legal counsel, Joseph Manko, Esquire and retained Weston as an engineering consultant.

16. In 1972, Weston had prepared, for a prior owner, an application for a natural renovation landfill on the site, which was denied by DER. Walter Satterthewaite, who is now the township's consultant, was employed by Weston at that time and he prepared that application.

17. In October and November, 1976, Strasburg undertook negotiations with an investment group known as Harp-fill. The parties proposed that Harp-fill would invest in Strasburg both with funds and with construction and operational contributions to construct and operate the landfill. Several agreements, which in essence amounted to a letter of intent, were signed and negotiations on a comprehensive agreement

were started. Because of the impending onset of winter, construction was begun on the landfill in October. This work was performed by Harp-fill for Strasburg under the inspection of Earle Hart and Harsch. Harp-fill's payment for performance of the work was contingent upon completion of their investment negotiations and was thus a risk.

18. On October 14, 1976, West Bradford Township issued a cease and desist order gainst further construction of the access road to the permitted site through that township. This order was appealed to the Zoning Hearing Board by Strasburg.

19. On November 5, 1976, at the township's request, a meeting was held at DER to discuss concerns that Weston had raised with respect to the permit. In attendance were representatives of DER, principals and representatives of Strasburg and representatives of township and the concerned citizens. Many topics were discussed, including the permit provisions for storage of leachate and in the suitability of soils on the site. Strasburg displayed a willingness to respond to the concerns raised and undertook preparation of modifications to its plans to address these issues.

20. Plan revisions submitted to DER on November 17, 1976, provided for the following changes: (1) a change in the liner system from a sprayed asphalt liner to a PVC liner with a leachate collection underdrain system with collection pipes at 40 ft. centers; (2) a change in the leachate storage system from earthen basins in the vicinity of Briar Run to precast concrete tanks located in the service facilities area over 800 feet from the creek; (3) an increase in the size of the leachate sump tank to 10,000 gallons and in the size of the pumps; and (4) a relocation of the access road from Strasburg Road. The plans submitted also showed a proposed access road extension to Laurel Road and indicated areas to be considered for future expansion of the landfill.

21. On December 29, 1976, DER, by letter from Donald A. Lazarchik to Strasburg, approved the materials submitted by Strasburg on November 17, 1976, and made them a part of permit no. 101038 subject to two stipulations: (1) the first of the two precast leachate storage tanks must be installed within ninety days from the start of landfill operation and the second within two years; and (2) an access road must be provided to the leachate storage sump prior to operation. Although the township was aware of the approval of these changes by DER, no appeal was taken by the township or anyone else.

22. In the first half of November, 1976, Strasburg's construction had advanced to the point where the subliner of MC-30 had been sprayed on the first lift and a portion of the cover material had been placed on that area. At that time, con-

struction stopped because of weather and the zoning appeal in West Bradford. Presumably as a result of these problems, Harp-fill terminated negotiations with Strasburg, abandoned its work product, and concluded its interest in and with Strasburg Landfill.

23. In the spring of 1977, Strasburg settled its appeal of the West Bradford Township cease and desist order by a subdivision agreement which permits construction of the access road.

24. A DER inspection of conditions at the unfinished first lift at the landfill on April 14, 1977, revealed that the first lift basin had filled with water resulting from the fact that excavation intersected the seasonal high groundwater table; that the asphalt sub-base surface had been disrupted by frost action and gully erosion from the previous winter; and that the sedimentation and erosion control measures were in need of repair and upgrading.

25. In May, 1977, a second meeting was held at DER offices attended by Hart, representatives of the township and Harsch, among others. The township's comments at the meeting related mainly to the permeability of the soil on the site. DER suggested that Strasburg conduct additional soil tests to establish permeability. A subsequent soil report was submitted July 7, 1977, by Strasburg.

26. During 1977, Strasburg, in need of capital to complete and operate the landfill, continued to negotiate with a number of potential investors and/or purchasers of the landfill. One group with which Hart negotiated beginning in late 1977, consisted of David Ehrlich, Richard Winn, and Robert Buckley ("the Ehrlich group"). Mr. Ehrlich had been in touch with Hart concerning possible purchase of the landfill since 1975.

27. Ehrlich and Buckley offered Strasburg approximately $3,000,000 to buy the landfill in the fall of 1977. When Hart indicated he did not want to sell out his entire interest in the landfill, Hart and the Ehrlich group began discussing the formation of a joint venture to purchase the tract and construct and operate the landfill.

28. In late 1977, the Ehrlich group hired the engineering firm of Martin and Martin, Inc. (Martin), to do a feasibility study of the Strasburg Landfill. The president and chief engineer of Martin is Richard M. Bodner, who has extensive experience in landfill design. He had done previous work for Ehrlich and is doing the engineering for Ehrlich's and Winn's other landfill sites. This study was to include consideration of how to address the groundwater problem that developed in the spring of 1977, as well as the potential for landfilling on the rest of the tract.

29. While attempting to investigate the Strasburg Landfill and the potential of the tract, Ehrlich requested information concerning the Strasburg Landfill from DER. James Snyder of DER asked Ehrlich to obtain written authorization from Strasburg for DER to discuss these matters with Ehrlich. On March 31, 1978, Hart notified DER as follows:

> "This is to inform you that Strasburg Associates is working on the development of its landfill with a group consisting of Bob Buckley, David Ehrlich, and Dick Winn. Please feel free to deal with them on any matter pertaining to the Strasburg Landfill. This also applies to their engineer, Rick Bodner. (Richard Bodner, Martin & Martin, Inc., 149 E. Queen Street, Chambersburg, PA 17201 - Phone: (717) 264-6759)."

30. Another DER inspection of the permitted site on March 22, 1978, revealed evidence that the groundwater table was substantially higher than previously reported with groundwater discharge still in evidence in the partially constructed lift basin. Elevated groundwater levels were found in a monitoring and observation well, and groundwater discharge was six feet above the base of the excavation.

31. On the basis of these inspections, Wayne L. Lynn, DER Regional Solid Waste Director, Region I, advised Hart, by letter dated April 18, 1978, as follows:

> "It appears that the excavations shown in the approved plans will either intersect or approach the water table over much of the site. Since the approved design plans envision the entire site remaining above the water table, additional ground water study and a subsequent plan revision is required before any landfilling can begin."

32. When Strasburg received DER's letter, it was no longer employing Harsch as its engineering consultant, in part because Strasburg could not pay its bills. Strasburg then retained Martin and Martin, Inc., specifically Richard Bodner, to deal with the revisions required at the landfill site. On May 3, 1978, Strasburg paid Bodner a retainer of $1,000. Bodner has also billed a total of $6,862.50 directly to David Ehrlich for work in connection with the landfill.

33. Ehrlich and Bodner met with DER representatives on April 27, 1978, to discuss changes to the landfill plans that would satisfy DER. Subsequently, on May 11, 1978, Bodner submitted revised plans to DER. No copy of these plans was sent to Hart, although he later became aware of the plans.

34. The revised plans included the following changes: (a) change from PVC to an asphalt liner; (b) placing the initial pad in the upland area of the site, complete with underdrains at 60 foot spacing; (c) the location of eight monitoring wells established by Mr. Yaniga, then geologist for DER (now employed by Satterthwaite) and Dr. Thomas Earl, of the firm of Meiser and Earl, State College, Pennsylvania,

Strasburg's geologist, to be installed as a landfill operating procedure and to be monitored monthly; (d) a plan to monitor weekly discharges from both the underdrains and the leachate collection underdrains and to divert the flow for treatment if leachate is found; (e) a plan for piping the liner leachate collection drains to the 10,000 gallon leachate collection sump; (f) repair of the southerly corner of the sedimentation basin and placing of additional rip-rap; (g) a new construction schedule for the above work; and (h) a change in lift sequences to fill from the top-down rather than from the bottom-up. The revised plans showed the permitted site as approximately 25 acres rather than 22 acres as originally permitted.

35. Between May 11, 1978, and July 5, 1978, DER communicated to Martin with respect to certain aspects of the May 11 submission. As a result, on July 5, 1978, Strasburg, through Martin, withdrew the plans. The July 5 plans confined landfilling to the permitted site (eliminating the additional three acres contained in the May 11 plans); reasserted the decision to use an asphalt liner; and, relocated monitoring well #78-2 so that it would not be located within the confines of the initial pad (which was relocated as a result of eliminating the three acres).

36. After further review and comments by DER, with regard to leachate collection and monitoring wells, Bodner submitted revised sheets 2, 3 and 7 to the July 5, 1978, plans. These plans as finally revised on July 27, 1978, were approved by the department's letter of September 8, 1978. (See footnote 1).

Joint Venture Agreement

37. By agreement dated May 23, 1978, Newlin Corporation, Somerset Strippers of Viginia, Inc. and Eco-Waste, Inc. entered into a joint venture. Newlin Corporation is a Pennsylvania corporation, all of whose stock is owned equally by Ehrlich and Winn. Ehrlich is president of Newlin. Somerset Strippers of Virginia, Inc. is a Virginia corporation that is a subsidiary of a company controlled by Buckley. Eco-Waste, Inc. is a Pennsylvania corporation, all of whose stock is owned by Hart and his wife, Marion. The joint venture is known as Strasburg Landfill Associates (SLA).

38. Ehrlich is a person with extensive professional experience in landfill management. He is a principal in Pennsylvania Environmental Management Systems, Inc., a company that has applied to DER for permits for two other landfill sites in Chester County. He is also a principal in three New Jersey landfill companies, which own and/or operate landfills in that state.

39. Winn is an investor who is regarded as credit-worthy by American Bank.

40. Buckley is a principal in the Buckley Company, a large excavation contractor. Ehrlich is a business associate of Buckley's in at least one other endeavor.

41. The joint venture agreement provides that the joint venturers' purpose is "to carry on as co-owners a sanitary landfill business" and that Strasburg Landfill Association's sole purpose is "acquiring, owning, improving and operating a sanitary landfill on the Tract or parts thereof. . . ."

42. The essential terms of the joint venture agreement are:

a) The interests and liabilities of the joint venturers are to be 50% for Eco-Waste, Inc. and 25% for the other joint venturers, except that the interests are to be equal one-thirds during any time the joint venture is prohibited "by other than the DER" from landfilling certain wastewaters and dried sewage sludge in the permitted site.

b) The joint venture is to be managed and controlled by a steering committee of three persons, comprised of a representative of each joint venturer. The presence, in person or by telephone, of only two persons is needed to constitute a quorum for the conducting of business, and decisions require only a majority vote.

c) Ehrlich is specified as Newlin's initial representative to the Steering Committee, and Buckley as Somerset's.

d) Decisions "in the ordinary and customary course of business" are to be made by Newlin and Somerset only, not Eco-Waste, Inc.

e) Ehrlich is specially employed by the joint venture for a one-year period after operations commenced "to supervise Strasburg Landfill Associate's ordinary and customary operation". His compensation for serving as "manager" of the joint venture is 4% of gross operating revenues, which compensation is to be "in addition to [his] distributive share of the joint venture's earnings and profits accruing to Newlin, of which Ehrlich is a shareholder".

f) The obligation to make any capital contributions (above a nominal $1 per joint venturer) was subject to Newlin's and Somerset's being satisfied as to, or waiving, the modification of the West Bradford Agreement and the permit, the latter modification to be "to the sole satisfaction of Newlin and Somerset". In the event the permit modification did not take place within 60 days after the joint venture agreement was executed, the period in which the foregoing modifications were to take place was specified to be extended "until such final action is taken and notice thereof is given to Newlin and Somerset".

g) On fulfillment or waiver of the §9B(i) conditions, Eco was required to sell the tract to the joint venture for $783,000, plus interest and tax accruals from May 1, 1978. The first $1,917,000 of Eco's joint venture distributions is to be allocated to Eco-Waste, Inc. as additional consideration for the sale of the tract.

h) On fulfillment or waiver of the §9B(i) conditions, Eco is required to cause Strasburg Associates to assign all its rights and obligations under the permit to the joint venture, which assignment contemplates DER's written consent thereto. The joint venturers agreed that, if the permit could not be assigned to the joint venture "without public hearings and other actions [they] desire in their reasonable judgment to avoid", Strasburg or Eco would retain the permit and the permit would "be used by the joint venture under a management contract" for $1 per year.

i) Hart cannot sign any checks drawn on the operating account, and can only sign on the capital account with Buckley's or Ehrlich's co-signature.

j) The joint venture agreement contemplated the joint venturers attempting to get an amendment to the permit to allow "at least 8,000,000 cubic yards of DER-permitted air space".

43. The joint venturers did not impose restraints on competition in the landfill business on any of the joint venturers.

44. Hart and SA were represented by Pepper, Hamilton and Scheetz up through the negotiation of the joint venture agreement. Thereafter Hart was represented by different and various counsel for his personal and business interests. In connection with the landfill permit and financing negotiations, he has been represented by Lentz, Riley, Cantor, Kilgore & Massey, Ltd., which is also representing Ehrlich, Winn and Buckley in these matters.

45. By letter dated June 6, 1978, DER posed four questions to Hart in an effort to clarify the involvement of and relationship among the new parties involved in the development in order "to enable the Department to carry out its obligations under the statute and §75.22(f) of the Rules and Regulations adopted thereunder".

46. Prior to the present case, DER's only experience with a transfer of a permit or change of ownership has been approximately six situations in which the new owner who had taken possession was thereafter advised or realized that the DER solid waste permit was not transferable and thereupon submitted an application and statement of intent in compliance with §75.22(f).

47. A June 13, 1978, letter prepared by Ehrlich, which Hart approved for his signature over the phone, responded to DER's letter indicating that Strasburg was still the applicant and record owner, the principal owners were still the same

as on August 15, 1975, and Barry was still the authorized agent. In addition, the June 13, 1978, response indicated that Strasburg "will shortly be entering into a Management Agreement with an entity called Strasburg Landfill Associates, whereby Strasburg Landfill Associates will be managing" the landfill. Eco, Newlin and Somerset were identified as the owners of Strasburg Landfill Associates. No mention was made of the agreement for sale of the land to Strasburg Landfill Associates under the joint venture agreement. DER did not learn of the existence of the joint venture agreement until it was produced through discovery in the proceedings before the board.

48. The June 13, 1978, letter prompted DER to investigate further whether the relationship of the parties might necessitate a transfer and reissuance of the permit. At DER's request a meeting was held in July, 1978, to discuss the possible application of the permit transfer regulation. At the meeting DER was advised that SLA was going to purchase the tract but had not yet done so and that it intended to enter into a management agreement with Strasburg Associates to manage the landfill. It was agreed that a copy of the draft of the management agreement would be provided to DER.

49. A number of drafts of a Lease and Management Agreement were provided for DER's inspection and advice as to whether DER would regard the proposed management agreement as requiring a reissuance of the permit under §75.22(f). Finally, at Mr. Manko's suggestion, DER requested that SLA and SA submit a final executed document embodying the agreement of the parties. Accordingly Strasburg Landfill Associates submitted to DER a landfill Lease and Management Agreement, dated August 14, 1978, executed by Strasburg and Strasburg Landfill Associate's three joint venturers, Eco, Newlin and Somerset.

50. The essential terms of the management agreement provided:

a) SLA, the owner of the tract, leased back to Strasburg the permitted site for a five-year term with provisions for termination upon SLA's receiving a DER permit for "any portion of the Tract";

b) SA preserved a right of entry following termination of the lease to take any corrective measures required by DER;

c) SLA's yearly management fee was to include gross operating income less all operating costs and expenses plus $20,000;

d) SA was to receive a nominal rental of $1 per year while SLA was the management and 70% of gross revenues if SLA ceased to be manager;

e) If SLA obtained the "necessary permits for the landfill", SLA agreed to pay Strasburg $20,000 per year "for each unexpired year of the base lease term" and Strasburg agreed to "forthwith terminate its permits and surrender the same";

including hiring and firing of all employees; providing equipment and materials (payable out of landfill revenues); authorization to "enter into contracts necessary for the daily operation of the landfill, including contracts with customers, for and on behalf of Strasburg, and in Strasburg's name; the right to "collect all fees charged for disposal or processing" (such fee to be set by SLA and approved by Strasburg); and the right to carry on all banking, including the deposit of landfill revenues and withdrawal of landfill funds for the payment of expenses;

g) SLA was obligated to correct any violations of DER regulations, the permit or plans cited to SLA by Strasburg's engineer;

h) The management portion of the Lease and Management Agreement could be terminated by Strasburg only upon the filing of SLA of a voluntary petition in bankruptcy or failure by SLA to cure deficiencies cited by Strasburg's engineer, A. A. Fungaroli, or deficiencies or violations cited by DER.

51. DER concluded that performance of the executed Lease and Management Agreement would constitute a change of ownership under §75.22 because there was "little, if no control, by Strasburg, the original permittee and all control was vested in the landfill manager, SLA".

52. On September 6, 1978, Strasburg and SLA submitted to DER a document entitled Termination Agreement wherein the parties to the Lease and Management Agreement purport to terminate the agreement, which Termination Agreement DER "accepted" in its letter of September 8, 1978. (See footnote 1).

53. During the summer of 1978, minor construction activities, mainly clearing and grubbing, were conducted on this site under the supervision of Joseph Herzog, an experienced construction engineer, who is an employe of Somerset Strippers and who continues to supervise the construction of the landfill site. Herzog reports to Joseph Martosella, president of Somerset and vice-president of the Buckley Company.

54. Hart has visited the site as frequently as several times a week to confer with Herzog. Ehrlich, who resides in Philadelphia, has not visited the site often during the construction period, as he is primarily engaged in developing business for the landfill.

55. On August 29, 1978, erosion at the site caused sediment to be deposited upon and block Laurel Road, a township road, requiring the township to use a loader to remove it.

56. After Strasburg received DER's letter of September 8, 1978, construction of the landfill site began in earnest under the supervision of Herzog. Construction of the initial pad at the top of the hill has proceeded during the last months of 1978, with the placing of soil drains, the MC-30 subliner, placement of the 12 inch

subgrade layer of soil containing a series of leachate collection witness pipes at 40 feet intervals, a sprayed application of the primary asphalt liner and various actions relating to soil and erosion control.

57. Strasburg's financial situation had become critical by the summer of 1978 with foreclosure of its mortgages on the tract threatened by the mortgage holders.

Agreements of October 11, 1978

58. When SA received DER's letter of September 8, the second and final condition required for settlement under the joint venture agreement (DER's approval of the modifications to the permit) had been met. Consequently after further negotiations on October 11, 1978, SA and SLA made settlement on the sale of the tract to SLA and entered into numerous agreements for financing the purchase and for construction and operation of the landfill. The closing agreements included sale of the tract from SA to SLA at a price of $663,000 payable at settlement and a purchase money second mortgage of $2,037,000; a lease-back of the permitted site to SA; an employment agreement between SA and David Ehrlich as "manager" of the landfill; and an amendment to the joint venture agreement to reflect the changes in the parties' agreement.

59. Beginning in June of 1978, SLA had sought financing, through Winn, from American Bank and Trust Company, which had been unwilling to loan money to Strasburg for the operation. As conditions of the committment made to the joint venture by American Bank in letters of July 7 as modified on September 12, 1978, and provided at the closing on October 11, Newlin and Somerset were required to construct the necessary on-site landfill improvements and equipment and Strasburg was required to employ Ehrlich as supervisor of operations and Joseph Martosella of the Buckley Company as controller. SLA is also required by the bank to advance operating capital to SA on request, the debt to be evidenced by promissory notes.

60. In addition to the financing by American Bank, SLA sought assistance of the Chester County Industrial Development Authority (CCIDA) in undertaking a mortgage financing project for the purchase and construction of a sanitary landfill on the tract. In its representations to the CCIDA, in June 1978, SLA was represented by counsel as qualifying under the CCIDA as the "occupant and equitable owner" of the site. In the final agreements executed on October 11, the tract was sold to CCIDA, and resold by installment sale of agreement from CCIDA to the joint venture, which resale was financed by the mortgage from American Bank. SA's debt was paid off or refinanced with the money received at closing for sale of the tract.

61. The terms of Ehrlich's employment agreement are similar to the terms of the SLA management agreement in that Ehrlich is responsible for "overseeing and

supervising operations" including those duties "generally entrusted to the chief officer supervising daily operation of a corporation including, but not limited to, the hiring and firing of subordinate personnel, the purchase of goods and materials necessary for daily operation of the business, the setting of fees and rates and the day-to-day administration of the business". Again he received 4% of gross revenues as compensation for the first year of operations. His employment can be terminated only for "willfull and intentional misconduct against Strasburg when such conduct is of a reasonably serious nature and inimical to the best interest of Strasburg". Any dispute as to the nature of such conduct is to be determined by binding arbitration by the American Arbitration Association.

62. Pursuant to his power to hire employes, Ehrlich has hired John Huffman as on-site supervisor of the operation.

63. Although SA has nominal control of the permitted landfill in that it is the lessee of the permitted site, no real control or financial benefit inures to Hart or SA as a result of the lease. Rental under the lease includes all of SLA's fixed debt, real estate taxes, public assessments, insurance and utility costs, as well as an additional rental payment of 75% of all net operating revenues. To the extent that SA receives any profit from the lease, is to be deducted against Eco-Waste's share of profits in SLA, the joint venture.

64. The lease grants Strasburg a right of reentry to inspect and repair any injury, damage or environmental consequence "resulting from [SLA's] landfill operation". An addendum to the lease dated November 7, 1978, grants Strasburg the further right of reentry upon termination of the lease to take corrective measures required by DER, which additional right of reentry was identical to the right of reentry provided to Strasburg in the Lease and Management Agreement. The addendum also contains a provision entitling Strasburg to correct deficiencies in SLA's construction, as determined by Strasburg's engineer, if SLA fails to promptly and diligently correct such deficiencies, and to deduct the cost of correcting the deficiencies from the additional rent to be paid by Strasburg to SLA.

65. The sole purpose of structuring the October 11, 1978, documents so as to keep SA as the permittee in theoretical "control" of the operation was to avoid the delay that public hearings on a transfer and reissuance of the permit might entail. If the permit could have been transferred to SLA without an appeal and public hearing, the parties would have transferred the permit as provided in the joint venture agreement.

66. By letter dated November 8, 1978, DER's counsel, Keith Welks, directed 17 questions to John Snyder, counsel for Strasburg and SLA, inquiring as to the October 11 transactions between the parties. On the following day, November 9, 1978,

Strasburg, through Hart, submitted a seven-page detailed response to Mr. Wolks' questions. After review of this letter, Mr. Wolks and James Snyder of DER concluded that there had not been a change of ownership of the permit that would require a reissuance of the permit under §75.22(f).

Future Landfilling

67. It has always been Hart's intent, as well as intent of potential investors or purchasers of the site, to landfill on as much of the 297 acre tract as could be permitted by DER.

68. Sometime in May of 1978, Ehrlich and Hart, on the advice of their counsel, Lentz, Riley, requested Bodner to prepare a final contour map for the entire tract. This map was prepared and submitted to the township, as notice, for protection against subsequent township zoning ordinances. That final contour plan showed a maximum elevation for the permitted site of 650 feet, rather than the 475 feet shown on the permitted plans.

69. On October 30, 1978, Bodner, on behalf of SLA, submitted an application to DER for a permit for a 200 acre site, which included the permitted site. The plan submitted with the application showed the area to be landfilled as virtually the same area shown on the plans submitted to the township during the summer and shown on the 1976 Strasburg plans as the potential limit of the landfill. No groundwater module or final contour plan was submitted with the application.

70. In submitting the October 30 application, SLA intended to apply for and obtain a permit for the 200 plus acre area indicated in its October 30 application and to include in the area to be landfilled additional air space above the present permitted elevations at the permitted site as shown on the final contour plan.

71. DER returned the October, 1978, application to SLA as incomplete.

72. On November 13, 1978, the township adopted a landfill siting ordinance on which it had been working for some time. The ordinance was drafted by special counsel to the township and the Township Planning Commission. The ordinance, *inter alia*, prohibits private landfills on which more than 25 acres of ground are disturbed or which take waste from municipalities outside of the solid waste plan region of Chester County in which the township is located. The ordinance also requires landfill applicants to agree to dedicate their land to the township upon completion of landfilling.

Environmental Aspects of the Permit Revisions

73. The permitted site is located on an uphill sloping area. The area of 4.8 acres constituting the first lift approved for landfilling in the approval letter is located near the top of the sloping area. The newly approved plans envision landfilling beginning in the new first lift and moving down the slope toward the original first lift excavation which was abandoned in a partially constructed state by Harp-Fill in 1976. The 1976 excavation is included within the permitted site in the newly approved plans as an extra sedimentation basin, with the original sedimentation basin located immediately adjacent thereto. Briar Run meanders through the areas designated Phases II, V and VI, just south of the permitted site of Phase I, on the newly approved plans and passes within 100 feet of the sedimentation basin. The soil stockpile of 75,000 cubic yards is located near the 1976 excavation in the southern area of the permitted site within 100 yards of Briar Run.

74. The groundwater level at the permitted site has risen since the initial groundwater data, collected at the seasonably low groundwater level period, was submitted with the application in 1974.

75. The permitted site is situated on the side of a large swale comprising a drainage basin approximately 20 to 25 acres in size. The basin flows generally from west to east toward Briar Run. In this area, and generally across the state, the groundwater flow mirrors the surface water flow. However, in the higher elevations the distance from surface level to groundwater is greater than in the lower elevations closer to Briar Run. Once the groundwater reaches the vicinity of Briar Run, it flows in a southerly direction paralleling Briar Run with most of the groundwater under the permitted site finding its way through surface discharge into Briar Run prior to leaving the tract. As a result of this direction of groundwater flow, none of the groundwater which flows under the permitted site passes by any existing residential well. Therefore, no possible contamination of the groundwater under the permitted site would contaminate any existing well.

76. According to the conditions of DER's approval of September 8, a groundwater monitoring system is to be installed on approved locations on the permitted site and no landfilling beyond the initial pad can proceed without DER's approval.

77. Although the depth to groundwater in the area of the initial pad has been measured as much as 20 feet, plan revisions call for a system of groundwater underdrains which have been installed on 60 foot centers, beneath the MC-30 subliner for the entire first lift.

78. Since DER's regulations require that there be a minimum isolation distance of 4 feet between the groundwater and the subliner, and that will clearly be provided by the precautions taken in the design and construction of the first lift,

DER did not need to require a groundwater study before authorizing construction and operation of the first lift, though information from the groundwater monitoring system required by the plan revisions will be essential to determining whether DER should permit construction of lower lifts.

79. The change of sequence in landfilling from top to bottom was suggested by DER as a means of avoiding the possibility of leachate formation by lessening the amount of runoff that comes in contact with the fill. This method of operation has been successfully followed at several landfills in recent years at the suggestion of John R. Rosso, Chief of Program Development of the Bureau of Solid Waste Management, DER. At the Lanchester Landfill in Lancaster County, a site topographically similar to this site, the same sequence of filling was followed. No leachate has been generated at that landfill in four years of operation.

80. Only that rainfall which falls on the 30 square yard open face of the landfill or which penetrates through the protective cover, becomes potential leachate. This amount of rain water must then pass through the refuse which has a presumed absorptive capacity of 25 gallons per cubic yard, although the actual absorptive capacity is on the average of 50 gallons per cubic yard. The low permeability of the cover material on the site will induce a greater percentage of water runoff than might otherwise be expected. In light of all of these factors, and in light of the department's experience with the Lanchester Landfill which utilizes top to bottom landfilling, it is unlikely that any real volume of leachate will be generated from the site. As a result, the leachate estimates of Strasburg, as accepted by DER are realistic and reasonable and the township's concern that more leachate storage capacity should be provided is unfounded.

81. Soil on the site has a high clay content and a low permeability. Soil used in the subgrade layer (now covered by the liner) was taken from soil selected and segregated from a particular vein of soil on the site and approved by DER in an on-site inspection. Although no sieve analysis was made of the subgrade soil before it was placed, tests made in November, 1978, of the selected cover material taken from the same source indicates that the material conforms to the requirements of §75.22(h) relating to permeability requirements.

82. Compaction of the subgrade soils, though not tested in place, was reliably assessed by Herzog on the basis of his engineering experience as satisfying the requirements of Regulation 75.25(g) for compaction to a relative density of at least 90% Standard Proctor. This standard can easily be achieved by the use of heavy equipment such as was used on the site. DER has not required a standard

proctor density test at any landfill site, although Regulation 75.25(g) requires such a test. An in-place test of the compacted sidewall (not the sub-grade layer) showed compaction in excess of 90%.

83. Both PVC and asphalt liners are permitted by DER's Regulation 75.25. ID-2A material was laid on the floor of the first pad. The sidewalls were constructed with a sprayed asphalt membrane of one application of MC-30 and two applications of RC-800. The sidewalls were sprayed with a hand spray jet upon authorization by DER since distributor truck equipment with available spray bar was not permitted by the owner thereof to be modified to permit spray on the side slope grade. The installation of both the ID-2A liner and the sprayed asphalt liner were performed under the inspection of DER. As a result of supervision by Herzog, a third application of RC-800 was placed in some areas of the side slopes to assure coating and compliance with DER requirements.

84. Although DER's regulations do not distinguish between types of liner as to conditions of applicability, a PVC liner has more flexibility than an asphalt liner and is more suitable to being applied in low temperatures.

85. The application for the 1975 water quality management permit indicates that leachate would be "hauled off-site for treatment". The only documentation regarding off-site transport or disposal of leachate was an undated letter from the City of Coatesville indicating that the city was "agreeable to receiving leachate at its sewage treatment plant for treatment and discharge". There is no contractual arrangement as to quantity, quality or whether, in fact, the City of Coatesville would be able to accept leachate from the landfill when it is requested to do so.

86. In the erosion control plan submitted in 1975 by Strasburg, the erosion control measures were designed with the intention that only the present working area of the landfill would be disturbed. During the course of construction of Strasburg Landfill, only areas necessary to the construction of the landfill have been disturbed, although that area has been enlarged because of the new area of operation. While these areas include more of the site than the immediate working face of the proposed first lift, the disturbed area includes only areas necessary to construction of the first lift and will be re-vegetated upon completion of that construction as contemplated by the erosion control plan for the landfill.

87. Although the original sedimentation basin would not be adequate for the site as now constructed, the additional retention basin, for sediment and erosion control provided by the original first lift excavation gives a total of at least 100,000 cubic feet of retention capacity for the landfill. Through the course of construction, the soil and erosion control basins have successfully retained runoff, even during the heavy storm of December 9, 1978.

88. The rear portion of the soil stockpile is in a drainage basin immediately to the south of the permitted area. Water flowing from the back of the soil stockpile, without artificial diversion would not flow to the erosion and sedimentation control basin on the permitted site. Herzog has begun construction of a diversion ditch around the southern end of the soil stockpile and had discussed this measure with DER on site and has received DER approval of this improvement. Construction of the diversion ditch has begun but has been delayed because of the dynamic nature of the growth of the stockpile. In the meantime, the high dense undergrowth at the southern edge of the stockpile is being used as a natural erosion control measure. During the storm of December 9, 1978, silted water reaching Briar Run from the drainage basin south of the permitted site was coming, not from the stockpile, but from an area of construction west of the soil stockpile. This flow was coming through the partially constructed diversion ditch, and therefore upon construction of the diversion ditch, would also flow to the present sedimentation control basins.

89. Although Bodner initially provided only oral plans for temporary control measures to control erosion at the Laurel Road access road in response to DER's letter of September 8th, erosion control measures for the Laurel Road access road have been provided in a November 8, 1978, erosion control plan submitted by Martin to DER. The temporary measures, including hay bales and the temporary sedimentation basin have prevented further siltation on Laurel Road. Upon approval, and completion of construction, the permanent erosion control facility proposed for Laurel Road will be constructed.

90. Upon conclusion of the first lift construction and stabilization of the soil stockpile, the disturbed areas of the site will be re-vegetated thus reducing substantially the amount of erosion occurring on the site. During the dynamic phases of construction, local erosion and substantial water flow over unstabilized slope and construction area is to some degree unavoidable.

91. The Strasburg Landfill as designed and constructed has more environmental safeguards and design features than any other landfill in Region I of the Commonwealth of Pennsylvania and is not exceeded in its environmental protection design features by any landfill in the Commonwealth of Pennsylvania.

92. The proposed Strasburg Landfill concept of top to bottom filling, use of low permeability cover material for daily cover, AC-20 on top of ID-2A impermeable liner, sub-drain witness pipes in the subgrade material beneath with an MC-30 liner and underdrains beneath all of the above, constitute the most complete concept presently available to prevent mixing of leachate and groundwater.

93. With the proposed design protective measures and natural protective features it may reasonably be concluded that leachate from the proposed landfill

could not get into the groundwater flow system in such a way as to pollute any water supply well.

94. The groundwater monitoring system for the proposed landfill is adequate to detect any malfunction in the environmental safeguard system, as well as to allow removal by pumping or drains of any possible escaping leachate.

95. The topographic, hydrogeologic and geologic studies that have been done indicate that the permitted site is suitable for solid waste disposal.

96. The proposed landfill is in the general area included within the area of Newlin Township designated for solid waste disposal in the Chester County Solid Waste Management Plan as filed with DER pursuant to the Pennsylvania Solid Waste Management Act.

DISCUSSION

Appealable Action

Permittee-Intervenor, Strasburg Associates, argues that the alleged "actions" taken by the DER's letter of September 8, 1978, are not appealable. Initially, DER agreed with SA that no appealable action had been taken on September 8; however, DER revised its position midway through the hearings to the extent of allowing that the approval of revisions that have environmentally significant consequences and without which the landfill could not operate are actions of the department that are appealable to this board.

There are two categories of action in dispute here. The first concerns revisions to approved plans. SA and DER argued that the board cannot review all the revisions, changes and modifications that may be approved by the department on a set of plans for the construction of a landfill (or for that matter any environmental facility). We agree that every change or modification probably should not be regarded as an appealable event. It must be noted, however, that the board's rules, 25 Pa. Code §21.2 define an action of the department to include a "modificaion"[2], and the board has previously ruled that approval of revisions to plans for a landfill site that authorize the commencement of operations is a reviewable action of the DER.[3] *Porter v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 74-205-W, 73 D. & C.2d 185 (1975). And see *Bethlehem Steel Corporation v. Commonwealth of Pennsylvania, DER*, Pa. Commonwealth Ct. , 390 A.2d 1383 (1978). DER's position is that a change or revision is only appealable where the revision or modification is required to avoid environmental degradation or contamination and where the operation could not be allowed to proceed without approval of the revision.

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2. In Rule 21.2 of the Board's Rules and Regulations, an "action" that may be appealed is defined as follows:

> "Any order, decree, decision, determination or ruling by the department or local agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers and treatment facilities; and orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties."

3. In *Porter* the board said:

> "If it were shown that the landfill should not have been authorized to open, or if conditions should now be added to limit that authorization, this board is properly called upon to take corrective action."

DER's witness James Snyder, Chief of Operations and Compliance in the Division of Solid Waste Management, gave examples of the application of this policy in his testimony. He suggested that changes in plans such as the location of a litter fence, the use of water rather than oil to control dust on access roads are changes that might be approved by the DER that would not have significant effect in terms of the operation of the landfill or any environmental consequence.

Applying DER's proposed test to the approved revisions in this case, DER suggests that the only significant change was the requirement that Strasburg Associates install soil drains to ensure an isolation distance between the groundwater and the bottom of the liner. This change was required because of the intersection with the groundwater that occurred in construction of the first lift as a result of changes in groundwater levels from the time the module was submitted for the 1975 permit to the time when construction was begun. That this change was significant is established by Mr. Lynn's letter of April 19, 1978, to Mr. Hart informing him that because of the elevated groundwater levels observed on inspection of the site, "a subsequent plan revision is required before any landfilling can begin". Thus, the revision approved on September 8, requiring the installation of soil drains and the installation of a groundwater monitoring system, meet DER's test of significance in that DER would not have permitted the operation of the landfill to proceed without these revisions. Also, these revisions have significant environmental consequences in that they are designed to avoid groundwater contamination. We agree with DER that these revisions were of significance and constituted appealable action that this board may review.

DER classifies the other revisions approved in the September 8 letter as not of the same consequence and therefore not reviewable. Mr. Snyder stated that the change from a PVC liner to an asphalt liner is one largely for the convenience of the operator as both are permitted by the regulations and DER would not regard this as a change of significance. Similarly, DER regards the requirement to begin landfilling at the top of the hill rather than the bottom of the hill as an insignificant change. While we agree with DER that some of these revisions may not be environmentally significant according to the tests set out by the department, we cannot preclude an appellant from raising the question whether particular changes may be significant within those tests. For instance, in this case appellant has claimed that a change from the bottom of the hill to the top of the hill was to avoid groundwater problems in the beginning of landfilling operations; whereas DER and Strasburg claim that the purpose for the move is to decrease the amount of runoff encountered and avoid possible leachate formation. The board is satisfied that the revision is environmentally and

operationally sound. We could not say, however, that appellant could be precluded from raising the question of the environmental significance of this revision without any hearing. In *Porter v. Commonwealth of Pennsylvania, DER, supra,* the board reviewed DER's approval of revisions where "the single most important change [was] as to the type of liner", 73 D. & C. 2d at 187, although *Porter* was decided at a time when liners were entirely experimental and the regulations did not address requirements for liners. To some extent the appealability of particular revisions must be determined on a case by case basis, although there may well be revisions—such as the relocation of the litter fence or the use of water rather than oil for dust control--that the board could not consider significant enough to review.

The second category of "actions" allegedly taken by DER in its letter of September 8, are in reality failures to act—e.g., failure to require Strasburg Associates and Strasburg Landfill Associates to apply for a transfer of ownership under regulation 75.22(f) when an alleged *de facto* transfer had occurred, and failure to condition approval of construction and operation under the permit upon a proper soil and erosion sedimentation control plan. DER and Strasburg Associates argue that these are negative actions from which no appeal lies, and cite *George Eremic v. Commonwealth of Pennsylvania, DER,* EHB Docket No. 75-283-C, issued December 2, 1976, in which the board held that a negative enforcement action of the department—not to revoke a landfill permit—was not an action that could be appealed to this board. The situation here is distinguishable. Strasburg Associates was granted a permit for the construction and operation of a landfill on 22 acres of this 300 acre site in 1975, and no appeal from that permit issuance was taken by the township. In the intervening three years, concern over location of the landfill has been expressed by many nearby residents and Newlin Township, its counsel and consultants have expressed many criticisms of the landfill plans to DER. In addition, and most importantly, DER on inspection of the site discovered groundwater problems in the construction of the first lift and in April of 1978 told Strasburg Associates that construction could not proceed until revised plans were submitted to the department. Further, in the time since 1975, Strasburg Associates has had trouble financing construction of the landfill, the landfill has never been completed, and Strasburg has considered sale or financing arrangements with various parties. In May, 1978, Strasburg Associates' general partner, Earle Hart, entered into a joint venture agreement with Newlin Corporation and Somerset Strippers for construction and operation of the landfill and sale of the tract. This agreement and subsequent agreements are alleged by appellant to confirm a change of ownership of the landfill operation prohibited by regulation 75.22(f) without a reissuance of a permit.

There is no question that the township, having failed to appeal the 1975 permit could not appeal now if Strasburg Associates had simply proceeded to build according to the 1975 plans, there were no questions as to the change of ownership of the operation and the department had not required revisions to the plans before construction and operation could begin. However, where changed circumstances require new action on the part of DER, an appeal must lie from DER's final action authorizing the project to proceed, and the board must look at all the circumstances in determining at what point the department acted finally. See *Porter v. Commonwealth of Pennsylvania, DER, supra; Bethlehem Steel Corp. v. Commonwealth of Pennsylvania, DER, supra.* Here it is clear that the letter of September 8 was a culmination of the department's consideration of the issues raised by the township and DER itself. As such, the September 8 letter, which had the positive consequence of allowing construction and operation of the landfill to begin again, was a final reviewable action of DER. This was not true in *Eremic* where the board concluded that the department's decision not to revoke the landfill permit was not a final action of the DER since DER was free to reconsider that action at any time and the neighboring landowner who sought the revocation from DER was free to continue to pursue that remedy as well as any other remedies we might have under the law. We do not interpret *Eremic* as meaning that a failure on the part of DER to act may never be reviewed. Where DER has taken a final action and an appeal lies, an appellant may always show that the action was improperly taken because the department failed to comply with its own regulations or the statutes it administers.

Conditions a and b of the department's approval letter of September 8—that the first leachate storage tank be installed within 90 days from the start of the landfill operation and the second within 2 years, and the requirement that an access road be provided to the leachate sump—were conditions of the previous approval of revisions by DER in 1976, from which no appeal was taken. Consequently, appellant cannot appeal from these conditions now or attempt to use them as grounds for attacking other aspects of the permit. However, there is a narrow line here between revisions that may have been approved earlier and are therefore foreclosed and revisions that may or should be required as a consequence of the newly adopted regulations of the department. Among the changed circumstances in this case is the adoption by the Environmental Quality Board of comprehensive solid waste management regulations during the time since this landfill was originally permitted. By their terms, these regulations apply to any existing and/or operating landfill. 25 Pa. Code §75.21(a)(d)(g).[4]

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4. "§75.21. Processing and Disposal Area Permits
(a) A permit shall be required of any person, municipality, State Agency or authority proposing to use or continue to use their land or any other land as a solid waste processing or disposal area.
* * *
(cont'd next page)

Where a permitted operation is not yet begun, revisions are required, and consequently the plans are not finalized, the plans as revised presumably are subject to the requirements of the new regulations. To some extent the application of new regulations must depend on where an operator is in terms of his operation. Obviously, if a permitted landfill already has been constructed and is partially filled, DER could not require compliance with regulations relating to the liner for that portion of the landfill. But where, as here, a landfill is not yet constructed, the revisions required must be in compliance with new regulations. In fact, the parties, through their engineer have taken that approach and submitted revised plans in conformity with the requirements of the new regulations. Thus, while appellant cannot challenge the adequacy of conditions a and b since they were approved without appeal in 1976, and simply reiterated in the 1978 letter, appellant can challenge DER's failure to require that the permittee conform to any new requirements regarding leachage collection. See discussion, *infra*, p. 40.

With regard to the failure to condition approval of the revisions and construction of the landfill upon the submission of an adequate soil and erosion sedimentation control plan, we conclude that this issue is one that should have been raised by appeal from the 1975 approval and could not be the basis for an appeal in this case,[5] except to the extent that changes in the areas of operation may require additions to the plans already filed with DER. Because of the difficulty of determining what issues were foreclosed by the grant of the unappealed permit in 1975, the board did hear testimony on most of the "concerns" of the township and nearby residents, including the soil and erosion control problems observed on the site. The question of whether the department should have conditioned the grant of the permit or the filing of a soil and erosion control plan for the entire site is different from the question of whether the department should, in approving revisions to the plan, take any measures to require erosion control measures to correct conditions that have been observed on the site or because of changes in the revised plans. That question can be raised in an appeal challenging the adequacy of revisions approved by the department.

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4. (cont'd)

"(d) All facilities shall comply with the general standards set forth in this Chapter.

* * *

"(g) No person shall operate a solid waste processing or disposal facility area or system which is not in compliance with the provisions of this Chapter."

5. In fact, an erosion and sedimentation control plan, approved by the United States Soil Conservation Service was submitted with the 1975 application.

Standing

Strasburg Associates argues that appellant, Newlin Township, does not have standing to take this appeal, and cites in support of its position, *Snelling v. Department of Transportation*, 27 Pa. Commonwealth Ct. 276 (1976) and *Commonwealth of Pennsylvania, DER v. Borough of Carlisle*, 16 Pa. Commonwealth Ct. 341, 330 A.2d 293 (1974). In *Snelling* a number of petitioners, including the City of Allentown, sought to contest a highway occupancy permit issued by PennDOT for construction of an opening in a medial barrier on a highway to serve a shopping mall. The Court found that none of the petitioners had standing, although interestingly, the Court went on to consider the merits of the case "in the event that a higher Court concludes that we have incorrectly determined the standing issue". As to the City of Allentown, the Court found that it had no standing to challenge PennDOT's action because a municipality is "merely a creature of the sovereign created for the purpose of carrying out local government function" and has no standing to assert the claims of individual property owners against the department. *Philadelphia v. Fox*, 64 Pa. 169 (1870). In *Borough of Carlisle, supra*, the Court said that the borough was simply an agency of the state for purposes of carrying out orders under The Clean Streams Law, and did not have standing to appeal from a sewer connection ban issued by DER, as a representative of the private citizens who would be affected by the ban.

Section 1921-A of the Administrative Code, 71 P. S. §510-21, gives a right of appeal to the EHB to any "person" "adversely affected" by an action of DER. The board's Rule 21.42 defines an action as any order, decision, etc. "affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person". As a municipality is clearly a "person" within the Administrative Agency Law, 2 Pa. C.S.A. §101, and 25 Pa. Code Rule 21.2, the question is whether the township is itself adversely affected or qualifies as a "person aggrieved" by DER's action approving revisions permitting the operation of the landfill. In determining whether an individual or an entity has standing to appeal, the board has been guided by the Supreme Court's decision in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975) in which the Court articulated the standing requirements in terms of a "direct, immediate and substantial interest" in the challenged action. The Court appeared to broaden the concept of standing by noting that the interest did not have to be pecuniary and that the alleged wrong did not have to be of such a nature as to give rise to a cause of action for invasion of a legal right. The board applied the Supreme Court's test in *Buckingham Township Civic Association v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 76-093-D, issued September 8, 1977, and concluded that the civic association, which could not allege any direct, immediate or substantial

impact on itself or any of its members by DER's action, did not have standing to appeal from DER's approval of a private revision to a sewage facilities plan.

A township or municipality is considerably different from a civic association in that a municipality has governmental duties and obligations to the population that it serves that may be affected by any threat to the environmental integrity of its jurisdiction. Thus, the board has recognized, often without question, the right of a township to appeal from the grant of a permit by DER for an activity within its boundaries that is alleged by the municipality to have potentially degrading effects on the environment. See e.g. *Brady Township, et al v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 74-246-W (1975) (landfill); *Hallam Borough v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 75-016-D, issued August 15, 1976 (landfill); *Township of Penn, et al v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 75-317-C (1976) (strip mining permit); *Anthony J. Agosta, et al v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 75-208-W, issued March 25, 1977 (landfill); *Township of Heidelberg v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 76-150-D, issued October 21, 1977 (private sewage treatment plant); *Township of Salford, et al v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 76-135-B, issued May 3, 1978 (quarrying permit).

Particularly in the case of a landfill within its borders, a municipality has an interest in protecting its water resources, avoiding the creation of nuisances and assuring that the use of the land accords with local planning. These interests of the township are supported by the powers and duties of the township, which include the power to prohibit nuisances, including accumulations of garbage or rubbage, 53 P. S. §65712, to regulate the depositing of ashes, garbage, rubbish and other refuse materials within the Township, 53 P. S. §65708, to provide for the construction, repair and maintenance of roads, 53 P. S. §65710, to provide a water supply for public or private use, 53 P. S. §65731, and to promote the public health, 53 P. S. §65729 and safety, 53 P. S. §65747. In addition, under the Pennsylvania Solid Waste Management Act, a municipality, depending on its size, is responsible for the collection, transportation, processing and disposal of solid waste within its boundaries, 35 P. S. §6010, and is necessarily a participant in the extensive planning process envisioned by the act, see 35 P. S. §§6002, 6005 and 6006, and the Pennsylvania Municipalities Planning Act, 53 P. S. §10101 *et seq.*[6]

The Commonwealth Court has also recognized without question that a municipality may challenge DER's action where the action appealed from requires the municipality to spend money or otherwise affects its financial obligations. See, e.g., *East Pennsboro Township Auth. v. Dept. of Environmental Resources*, 18 Pa. Commonwealth Ct. 58, 334 A.2d 798 (1975); *Ramey Borough v. Dept. of Environmental Resources*, 15 Pa. Commonwealth

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6. In discharge of its planning responsibilities, the township adopted the Chester County Solid Waste Management Plan and recently adopted its controversial landfill siting ordinance.

Ct. 601, 327 A.2d 647 (1974); aff'd Pa. , 351 A.2d 613 (1975); *Twp. of Monroe v. Dept. of Environmental Resources*, 16 Pa. Commonwealth Ct. 579, 328 A.2d 209 (1974). Thus, the question is not whether a township can appeal from an action of DER, but whether the interest it is asserting is sufficiently direct, immediate and substantial to allow the challenge. Clearly, a municipality cannot appeal simply as a representative of the interests of its residents if the action complained of has no real effect on it. We take that to be the import of *Borough of Carlisle, supra*, where the borough appealed from a sewer connection ban order that affected private landowners, not the municipality. Similarly, in *Snelling v. PennDOT, supra*, the City of Allentown could not have much interest in a medial barrier that was not even located within its boundaries. Although this case presents a close question under the Commonwealth Court decisions, we believe that municipalities should have the right to appeal to this board where they are dissatisfied with a DER action that could prospectively affect their municipal responsibilities to a significant degree, and we will not abandon the board's practice by denying a right of appeal in this case.

In attacking the township's interest in this matter, Strasburg confuses the adequacy of the township's allegations with the adequacy of its proof. In its notice of appeal, the township alleged that the landfill is located in an environmentally sensitive area of the township along the Brandywine Creek, that the tract is underlain by the Peter's Creek Schist formation, which is the source of well water for domestic and farming purposes for residents of the township, and that the township is interested in protecting its surface and groundwater resources. While we agree with Strasburg that the township does not have standing to assert any claim on behalf of the City of Wilmington's interest in the Brandywine Creek as a drinking water source, the township does have standing to appeal by virtue of its alleged interest in protection of surface and groundwaters within its own borders. The township certainly has an interest in assuring that a landfill facility within its jurisdiction will not cause pollution of surface and groundwater, or create a nuisance because of operation of the landfill or conditions that might exist there (such as the blocking of Laurel Road by siltation in August, 1978). Similarly, the question of who owns the permit and operates the landfill is important to a municipality because of the consequence of poor or inadequate management or of an insufficient financial committment. In our view, a municipality may be more directly affected by an unlawful grant of a solid waste permit by DER than individual citizens, since it is the municipality rather than individual residents that could be called upon as a last resort to remedy any threat to the public health, welfare or safety that might be created within its jurisdiction.

See *Township of Ridley v. Blanchette*, 421 Fed. Sup. (E.D. Pa. 1976), where the Court said:

> "The Township of Ridley, which shoulders the obligation, *inter alia*, or protecting the health, safety and general welfare of its citizens . . ., already qualifies as a proper organizational plaintiff." 421 Fed. Sup. at 439-440.

Whether or not the township's allegations of unlawful action by DER are correct, we believe the township has standing to appeal from DER's action.

Transfer of the Permit

This case presents a novel question under the newly adopted Solid Waste Management Regulations, Chapter 75.1 *et seq.* as to whether a *de facto* transfer of the 1975 permit issued to Strasburg Associates has been effected without compliance with §75.22(f). Section 75.22 provides in material part:

> "75.22 *Permit Application and Issuance.*
> (a) *Application.*
> Application for a permit to operate a solid waste processing or disposal facility or area shall be made to the Department.
> . . .
> (d) *Issuance of Permits.*
> When the Department has determined that the application is completed and the proposed design meets the requirements of the pertinent regulations and acts, a permit shall be issued. . . .
> (f) *Re-issuance of Permits.*
> (1) Permits are not transferable or assignable.
> (2) When a change of ownership occurs, the new owner must submit the following:
> (i) An application for a revised permit on a form to be provided by the Department.
> (ii) A notarized statement attesting to the following items:
> (A) Verification of possession of all approved plans, maps, documents, schedules, and commitments approved by the Department.
> (B) Statement of agreement and intent to comply with all the requirements, plans, stipulations, and commitments previously approved by the Department.
> (iii) A clear and cogent narrative indicating the scheduling and procedure to be utilized in the transfer of ownership and subsequent operational intent."

Adoption of this regulation (which was adopted as part of the new solid waste management regulations of Chapter 75, effective June 29, 1977) is found in §7 of the Solid Waste Management Act, 35 P. S. §6007, which provides in relevant part:

> "Applications and Permits
> (a) It shall be unlawful for any person . . . to use or continue to use their land or the land of any other person . . . as a solid waste processing or disposal area . . . without first obtaining a permit from the department. . . .
> (b) Application for a permit shall be in writing and shall be made on a form prescribed, prepared and furnished by the department and shall set forth such information and be accompanied by such data as the department may require.
> (c) Upon approval of the application, the department shall issue a permit for the operation of each solid waste processing or disposal facility or area set forth in the application."

As appellant points out, these sections are concerned with a permit for "operation" of a landfill site. We agree with DER that the central question so far as the application of §75.22(f) is concerned is who is in "control" of the operation. We conclude that

by nearly all indices the joint venture was already in control of the operation of the Strasburg Landfill on September 8 and continues to be today.

DER and Strasburg argue that the joint venture agreement itself was not a transfer of the permit and could not be regarded as such by the department, and that as there had in fact been no transfer by September 8, 1978, the department cannot be faulted for failing to require application for reissuance of the permit—at least as of that date. While it is certainly true that the joint venture agreement itself did not accomplish a transfer of the permit (and could not since such a transfer requires an application and approval by DER), the department's act, of accepting the termination of the Lease and Management Agreement and essentially authorizing the commencement of operations at the landfill without further inquiry into what the final arrangement between the parties for operational control for the landfill would be, is an appealable event that allows the board to investigate the circumstances surrounding the department's authorization to proceed with landfilling—whether those events occurred before or after the department's action. *Warren Sand & Gravel v. Department of Environmental Resources*, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975). DER's action had the effect of positively authorizing the commencement of operations. If an aggrieved person believes that DER's regulations have not been complied with, he is not obliged to wait longer for DER to fail to act before filing an appeal.

Although DER could "assume" on September 8 that operational control of the permit would remain in Strasburg, it had reason to know otherwise since its discussions concerning the site and the necessary revisions to the plans were with new individuals or entities who were clearly going to be directly involved with landfilling under the old permit, and DER had reviewed a lease and management agreement embodying the substantive arrangement of the parties and concluded that it did constitute a change of ownership. Based on findings of fact 26 through 57, we conclude that by September 8 it was clear that construction and operation of the landfill was dependent on a transfer of control of the operation to the joint venture. DER should have required that it be apprised of the final relationship between the parties before it allowed the commencement of landfilling operations. We cannot much fault DER for this failure, however, since this case presented a novel situation apparently unlike any DER had previously encountered. James Snyder testified that the few change-of-ownership applications DER has dealt with have been cases where there was no question as to whether or not a transfer had occurred; and DER did attempt to wrestle with the questions presented by this case. Nonetheless, we believe the issue to be of more consequence than it apparently was to DER. In approving the revisions, DER should have required that the final agreements of the parties be submitted to it before any operation of the

landfill could begin, so that DER could be satisfied that it had the right party on the permit.

DER and Strasburg would have the board be bound by events as they had occurred up to September 8, 1978, without recognizing any relationship between the events that occurred on October 11, 1978, and the events that occurred before September 8, 1978. This is a formalism to which we refuse to submit. The board may review the documents of October 11, 1978, in order to determine whether they confirm or negate a change of ownership since a presumption of a *de facto* transfer had been raised by events prior to September 8th, and since DER has subsequently reviewed the October 11 documents and concluded that there has not been a change of ownership necessitating a reissuance of the permit. Under the doctrine of *Warren Sand & Gravel, supra,* facts developed at the hearing *de novo* may be the basis of the board's decision whether or not all those facts were available to DER when it acted. Although technically we could remand to DER for a determination as to the October 11th transactions, we know the answer and we believe it to be in the interest of the parties to resolve this matter promptly.

Fundamental to the issue here is the question of what purpose and significance Regulation 75.22(f) has. The regulation has no "legislative history" of which we are aware. Mr. Snyder testified that what the department is looking for in the application of this section is "control of the operation". DER identifies the main purposes of §75.22(f) to include:

> (1) Obtaining, by way of the permitting process, a formal admission from the correct party that it is operating the landfill;
>
> (2) Insuring that the party in operational control has in its possession all the relevant plans and documents describing the permitted facility, and that that party intends to comply with them;
>
> (3) Insuring that the department is sending all relevant correspondence or communications to the proper party;
>
> (4) Insuring that the performance bond has been posted by the proper party and will be legally available, if necessary.

Although DER characterizes these concerns as "clerical", we believe them to have more significance than that word implies. A permit is essentially a privilege granted by the state to conduct landfilling in compliance with the state's rules and regulations enacted to protect the public health, safety and welfare.[8] While it is quite possible

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8. The fact that it is a very lucrative privilege is attested to by the fact that the value of the permitted site is far in excess of the value of the land.

for a landfill to be constructed and operated without any detrimental effect to the environment, particularly according to the advanced "state of the art" regulations adopted by the Environmental Quality Board in 1977, the consequences of a badly operated landfill can be pollution and creation of a public nuisance. See, e.g., *Ryan v. Commonwealth of Pennsylvania, DER,* Pa. Commonwealth Ct. , 373 A.2d 475 (1977); *Plymouth Equipment Company v. Commonwealth of Pennsylvania, DER,* EHB Docket No. 75-184-D, issued July 1, 1976. For purposes of assuring that DER can proceed against an "operator" of the landfill in case of any failure to comply with DER's regulations as to the operation or in case of pollution or nuisance resulting from the operation, DER should have the party or parties that are in control of the operation named as the operator on the permit and therefore legally liable for operation of the facility and correction of any environmental harm that may result from that operation. Identification of the parties actually in control of an operation is important to assure legal liability on the performance bond required under 25 Pa. Code §101.9, as well as legal liability for any harm that may require the expenditure of funds beyond the amount of the performance bond. Complicated ownership arrangements where it is difficult to identify who is in control of an operation should be discouraged rather than encouraged as they might be if DER were to sanction transactions structured for the purpose of avoiding a reissuance.

What is the situation here? The ingenious and complex transactions, which were structured in their final form solely for the purpose of avoiding delays that might result from reissuance of the permit, resulted in a sale of the entire tract, including the permitted site, to SLA, the joint venturer, and a lease-back to SA, the permittee, for a fixed rental obligation including all of SLA's debts, as well as rental payments equal to 75% of net operating revenues. SLA provides the operating capital through Newlin and Somerset and through the ability of Winn, Ehrlich and Buckley to obtain financing from American Bank and the Chester County Industrial Development Authority. Hart retains a significant interest to be sure. However, it is not from the operation, but from sale of the tract to SLA. He receives 50% of SLA's profits, deducting any rentals retained by him under the lease, as payment for the property. The daily management of the operation is controlled by Ehrlich who gets 4% of gross revenues. Newlin and Somerset are obliged to do the construction and preparation of the site and Ehrlich is obliged to do all the marketing and financial promotion of the landfill business as well as the daily supervision of the landfill business.

The problem with this arrangement, as we see it, is that the parties who are really in control of the construction and operation of the landfill have no legal

liability *vis a vis* DER. If they abandon the project for any reason, DER could not proceed against either Newlin or Somerset even though they or their principals will have provided the capital and directed the operation of the landfill. DER could proceed against SA and Hart, which may or may not be satisfactory to correct violations. In fact, the right of SA under the October 11 lease to insist upon the correction of violations and re-enter the property upon termination of the lease for correction of violations is the only semblance of control over this operation that is given to Hart. The power to hire and fire and supervise daily operations, which were cited as significant elements of control by Snyder, are in other members of the joint venture, which also has control of the land. Under the circumstances we doubt if Hart's somewhat remote ability to correct violations is sufficient to constitute real control of the operation. It may be quite difficult for SA to exercise any actual control over correction of violations on the site, particularly if any part of the larger site is permitted and SLA is operating a landfill on the remaining portions of the site. Although it might be more desirable to have a general partner and local resident as the permittee of the site than to have three corporations whose shareholders have limited liability, we cannot ignore what we believe to be the purpose of Regulation 75.22(f), of having the person or entity that is, in fact, operating on the site responsible for the permitted operation.

Whether or not a change of ownership has occurred so as to transfer control of the operation is really a question of how much is too much. We agree with DER and SA that ownership of the land is not critical to ownership of the permit. The act itself clearly permits the operation of the landfill on "the land of any other person".[9] Similarly, the fact that the permittee employs professional management for a landfill would not alone indicate a change of ownership that would necessitate reissuance of the permit. Nor would we necessarily consider 50% investment in a landfill operation as constituting a change of ownership unless, as it appears here, the investors are, in fact, in control of the operation. In this case it is the combination of facts—ownership of the land by the joint venture, the providing of construction, design and day-to-day management of the operation by members of the joint venture other than the original permittee, the fact that financing for the permitted landfill was obtained by the other joint venturers and was only given on the condition of their participation in control of the operation, the fact that any financial benefit from the operation

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9. The correctional difficulties that this may pose, however, were demonstrated in *Ryan v. Commonwealth of Pennsylvania, DER, supra*, where the landfill operator claimed that he did not have to comply with DER's abatement order because he had only been a tenant of the property and could not be required to trespass on the owner's land to correct the violations and clean up the pollution which occurred after he abandoned his unpermitted site. He believed that the owner should be liable for remedying these defects even though DER had obtained a consent order from the owner permitting the operator to go on the land to take corrective action.

venturer, and the fact that SLA intends to attempt to conduct a landfill operation on the entire site, including landfilling over the permitted site--that lead to the conclusion that there is a shift of control of the operation sufficient to require a permit reissuance. In essence, Hart's participation here, while significant, is as a seller. He receives payment for the property that includes a share of future profits, but he has no control over the day-to-day operation of the landfill other than to demand that Ehrlich and Somerset comply with DER's requirements. Hart has a theoretical right to fire Ehrlich, but only for willful misconduct, and it is unlikely that he would do so since Ehrlich's employment is required by the bank as a condition of its loan.[10]

We are aware that the joint venturers were motivated to avoid a transfer of the permit by the township's impending activity in adopting a landfill siting ordinance, which would appear to apply to this landfill--particularly if the permit is reissued to the joint venturers. Without commenting on the validity of that ordinance, we conclude that that question must be faced directly if the joint venturers intend to conduct the landfilling operation under the terms of their agreements of October 11. Reviewing the facts of this case, we believe that control of the operation had indeed passed to the joint venture before September 8 and that that was confirmed rather than changed by the transactions completed on October 11, 1978. Thus, we conclude that before there is any landfilling activity on this site, there must be application for a reissuance of a permit in compliance with §75.22(f).

While we agree with appellant that there has been a transfer of control sufficient to constitute a change of ownership and require reissuance of the permit under the facts as presented to DER, we do not accept appellant's view of the consequence of failure to comply with §75.22(f). Appellant appears to regard the permit as somehow extinguished, or in need of suspension or revocation by this board because of failure to comply with §75.22(f). The conclusion that control of the operation has shifted does not necessitate a revocation or suspension of the permit, but rather requires a reissuance of the permit, and we simply find that DER should have required that before allowing landfilling to proceed. The point in time at which the permit is actually issued upon application must depend upon the consummation of relationships between the parties. In the earlier deals that Strasburg had with Eco-Environs and

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10. That the substance of the parties' agreements amounts to a change of ownership is further borne out by the requirements of the Industrial and Commercial Development Authority Law (IDA law), 73 P.S. §376(d)(2) which prohibits an authority, such as CCIDA from "acquiring existing industrial . . . development projects under circumstances which would be primarily for the purpose of directly or indirectly refinancing the obligations of or providing working capital or other funds for any industrial . . . enterprise, or any . . . affiliate . . . thereof, which would thereafter continue to occupy or utilize said project". Counsel has given an opinion that the transactions of October 11 do not violate the IDA law, and yet maintains to this board that Strasburg continues to "occupy" and "utilize" the permitted site, which would appear to be prohibited under the IDA law where the CCIDA provides financing assistance.

Harp-Fill, construction on the site performed by those parties was abandoned for various reasons when the agreements between the parties were not finalized. Although it would be proper for a permit transfer and reissuance to take place prior to construction activities when they are going to be performed by a new controlling party, we regard the beginning of landfilling as a critical point at which a permit must be reissued so that the one in control of the operation is responsible for any environmental degradation resulting from the operation. In this case we have allowed construction of the landfill to proceed because of the obvious continuity of interest between the alleged transferor and transferee of the permit, and the conclusions drawn by the board during the course of the hearings that the design of the permitted landfill is environmentally sound.

Although we believe it is extremely important that the proper parties in control of an operation be named as the permittee, we do not regard the reissuance of a permit as an opportunity to challenge a valid permit on environmental grounds, particularly when no appeal was previously taken from the grant of the permit. The reissuance provision simply requires an application for a reissuance, an affidavit verifying possession of the approved plans and a statement of subsequent intent to be bound by the plans and requirements of DER. This is not an occasion to question the adequacy of provisions of the plans already approved by DER. In this case, DER required revisions to the plans and it is the approval of those revisions that the board considers an appealable event, as previously outlined.

In the course of the hearings appellant sought to raise the question of Mr. Ehrlich's reputation as a matter that must be considered by the department on an application for reissuance of the permit. Appellant attempted to introduce documents from New Jersey claiming alleged violations of landfilling requirements in that state. After consideration, the board ruled that these documents were not admissable since it was not clear that DER could consider "reputation" in considering an application for a reissuance of the permit (or for that matter, an original permit), and since the question would have to be addressed in the first instance by DER, if it could be considered at all. Mr. Snyder testified that the department does not consider reputation and feels it has no authority to do so under the Solid Waste Management Act, which unlike The Clean Streams Law makes no mention of other violations as grounds for denying a permit. The only situation in which DER does consider other landfilling by an applicant is when an operator applies for an extension of landfilling on a site on which there are existing violations. Although it might be desirable for the regulations to include some provision requiring consideration of other landfilling experience, and we

do not share DER's view that the Solid Waste Management Act precludes adoption of regulations dealing with other landfilling activities or violations (at least in the Commonwealth), we must agree with DER that there are no guidelines under which DER could perform such an assessment under the present law. Certainly, DER cannot consider what are only allegations of violations from another jurisdiction in evaluating a landfill application that is otherwise satisfactory.

DER's Action in Approving Revisions to the Permit

We do not find much merit in appellant's criticism of DER's action from an environmental perspective. Over the years since this landfill has been permitted, perhaps in large part due to appellant's active interest in this matter, the plans for the permitted site have become increasingly detailed and sophisticated to the point that the plans, as finally approved on September 8, 1978, are possibly the most advanced landfill plans in the state of Pennsylvania. Appellant's attempts to find fault with these plans are somewhat belabored. We sense that the township's real interest is in preventing landfilling on the larger site as is being proposed under the plans shown to the township and recently submitted to DER. Obviously, the board cannot make any determination about the merit of those plans until DER has acted upon them.

As noted in our discussion of appealable action, in reviewing appellant's criticisms of DER's action, we have, where appropriate, considered the impact of the new regulations adopted in 1977. Many of appellant's criticisms relate to actions taken in the course of construction of the landfill and reviewed by DER during on-site inspections in the fall of 1978. While we would not normally regard these as reviewable actions of DER, we have permitted a great deal of testimony relating to what was done or not done on the site in recognition of the fact that the process of constructing an environmentally sound sanitary landfill is a dynamic one that requires careful supervision by DER in order to assure that the actual construction and operation conforms to the plans. However, the board cannot generally engage in review of DER's daily supervisory activities and must confine itself to the question of whether DER abused its discretion or acted arbitrarily and capriciously when it approved the final revisions to the plans on September 8th.

We will briefly review our conclusions relating to appellant's environmental complaints.

Groundwater Monitoring System

The township argues that no construction or landfilling should have been allowed to proceed at any point on the permitted site until the groundwater monitoring system has been installed and the results of the monitoring have been reviewed by the department.

We cannot agree, since it is clear from the elaborate design features of the first lift, including soil underdrains, and the location of the lift at the top of the hill, that it is extremely unlikely that any problems with groundwater will be encountered in the operation of this lift. As DER points out, the purpose of requiring a groundwater monitoring system is to determine whether a system of underdrains is necessary to comply with regulation 75.25(o)(8). Where the applicant has proposed to install the system required by that section under the first lift even though it is not demonstrated to be necessary, DER does not have to require results of the groundwater study before allowing construction of the first lift.

Clearly, the results of the groundwater monitoring will be important to DER's decisions concerning additional operating lifts. The letter of September 8 does not permit landfilling beyond the first lift without DER's approval. Appellant is concerned that landfilling should not proceed in the lower area of the site where groundwater intersection occurred, and would have the board rule out that area of the site ahead of time. This is not the best approach to the problem since that area cannot at this point be precisely delineated, and as Strasburg points out, ground levels under the site may change as a result of filling, which will prevent groundwater recharge. Appellant fears that under DER's new "state of the art" technology regulations, DER will permit landfilling anywhere so long as a system of groundwater drains is installed. Be that as it may, the board must await DER's ruling on this question. Presumably, DER will proceed carefully and in compliance with the law and regulations, as well as any federal regulatory constraints that may be applicable.

Sequence of Filling

Appellant objects to the change in the sequence of filling to start from the top of the hill rather than the bottom. It believes that this change was solely for avoiding the groundwater problem and not as DER and Bodner insist, a design change primarily to avoid leachate formation. We are persuaded by the testimony of John Rosso that this is the general method of operation that has been used successfully by the department in recent years, and that avoidance of the groundwater problem was only a secondary effect of that design change. We do not accept appellant's contention that there will be more problems with construction of the leachate collection trenches if construction proceeds downhill rather than uphill.

Asphalt vs. PVC Liner

DER's new regulations permit various types of liners to be used in the construction of a sanitary landfill, regulation §75.25(g), and both asphalt and PVC liners are permissable. The testimony of DER's and the permittee's engineers was in

some agreement that a PVC liner might be preferable to asphalt under certain temperature conditions since asphalt may not be as successful when applied in low temperatures, particularly on the side slopes. Appellant attempted to introduce evidence after the close of testimony, indicating problems with the asphalt side walls. The board refused to admit that evidence on the ground that it would not continue to supervise DER's daily inspection activities. We are satisfied to let DER resolve any problem with the asphalt liner through its normal inspection procedures. If upon inspection, DER concludes that the asphalt liner is unsatisfactory on the side slope, DER should require the permittee to take whatever corrective action it believes is reasonably required.

Soil Permeability and Compaction

Appellant's complaint in these two areas is that DER did not require testing to assure that the permeability of the soil conforms to the requirements of §75.25(h) and (i) and that compaction of the soils in the subgrade attained a relative density of at least 90% as measured by the standard proctor density test in conformity with §75.25(g). Appellant would have us require that the installed liner be dug up so that the soil compaction and permeability characteristics of the soil under the MC-30 liner can be tested in place. We regard this as unnecessary in view of the fact that DER approved the soil used in the subgrade and that soil from the same source used in the subgrade tested after the fact showed a permeability that would not require a subliner under §75.25(h). Additionally, the soil drains in the subgrade were placed on 60 foot centers rather than 175 foot centers as required by that regulation. As to the compaction test, we accept Mr. Herzog's assessments that the appropriate density was achieved in the subgrade, though in future construction we believe an *in situ* test should be made under the inspection of the department. The question of testing is a difficult one. The regulations do not specify how much testing is required. Appellants would undoubtedly like the department to require that the permittee put all of the soil it intends to use on the site through a sieve and make impaction tests at numerous points. Testing requirements must not be onerous and unreasonable, but DER should devise a policy of requiring limited testing to assure compliance with its new regulations during on-site construction.

So far as the protective cover material is concerned, we accept appellant's expert's observation that the soil stockpile contains some material in excess of the requirement of §75.25(i), which requires that "no aggravate, rocks or solid material which is larger than two inches (2") in greatest dimensions that we placed in this zone". In addition, regulation §75.24(c)(2)(xi)(xii) provides:

"(xi) Soils to be used as daily and intermediate cover material shall be soils that fall within the USDA textural classes of sandy loam, loam, sandy clay loam, silty clay loam, loamy sand, and silt loam. All other cover materials must be approved by the Department. The coarse fragment content (fragments not passing the No. 10 mesh sieve, 2 mm.) shall not to exceed 75% by volume and the combustible and/or coal content shall not exceed 12% by volume.

"(xii) Boulders and stones as classified by the USDA shall be separated out or excluded from soils to be used for any type of cover material or renovating soils."

Prior to the commencement of landfilling operations on this site, DER should require a procedure for separating and classifying soils that will meet the criteria in the regulations and should specifically confirm by inspection that this has been done.

Leachate Collection

We have concluded that appellant should not be allowed to challenge the adequacy of the leachate storage tanks in this appeal since those revisions were approved in 1976 and were not appealed, and since there are no provisions of the new solid waste regulations that would alter the requirement then imposed by DER on the permitted site. Nontheless, the board heard testimony concerning the possiblity of leachate formation—a subject upon which conclusions must necessarily be speculative. While appellant's expert's hypotheticals as to the amount of leachate that might be generated by a heavy storm range from 100,000 gallons per day to 40,000 gallons per day, we found the testimony of John Rosso of the department to be more credible, and conclude that the leachate storage capacity required by the department will be adequate.

Appellant also claims that DER should have required a contract for leachate collection and treatment under the new regulation 75.25(o)(7). That regulation requires that documentation assuring proper treatment and disposal of leachate shall be provided by the applicant, and that said documentation "may include a contractual agreement with the operators of the treatment facility off site and a contractual arrangement for the transporting of leachate to said site". (emphasis supplied) Strasburg's original application provided that the leachate would be "hauled off site for treatment" and that is still the plan. While the extent to which the actual requirements with regard to documentation have changed since 1975, is not clear, we believe it would be appropriate for DER to require more from the permittee than the simple letter stating that the City of Coatesville is agreeable to accepting leachate as this would accord with DER's current practice under regulation 75.25(o)(7). However, we do not regard that failure as invalidating DER's approval of September 8th.

Soil and Erosion Control

The township raises three issues with respect to soil and erosion control: (1) the adequacy of the sedimentation basins; (2) the adequacy of erosion control measures; and (3) the failure of the permittee to submit plans for the Laurel access road in compliance with DER's September 8th letter.

As to the adequacy of the sedimentation basins, we find them to be adequate as long as there is compliance with the plan to drain and repair the old first lift to be used as a retention basin in conjunction with the sedimentation basin previously on the site. Since the revised plans call for the basin of the first lift at the top of the hill, the exposed area is greater than that contemplated under the original plans. However, that greater area is compensated for by the additional retention basin in conformity with the requirements of regulation 102.13(d)(1), requiring that a sedimentation basin shall have a capacity of 7,000 cubic feet for each area of project area or tributary to it. Together these basins have a capacity of considerably more than 100,000 cubic feet, and although the actual disturbed area has not been exactly determined, it is not greater than 10 acres. In any future landfilling that may be permitted, DER should ascertain the amount of disturbed acreage, and be sure that there continues to be compliance with those requirements.

We are more concerned with the erosion control measures in connection with the soil stockpile, which is 30 to 50 feet high, is of a highly erodible nature, and is located approximately 100 yards from Briar Run. This should be alleviated by the diversion ditch being constructed around the stockpile and is alleviated to some extent by the dense vegetation between the stockpile and the stream which acts as a natural erosion control measure. It did appear from photographs in evidence at the hearing that some erosion was occurring that was not directed to any basin, although the permittee is in the process of constructing diversion ditches to channel the erosion into these basins. To a large extent, improvements such as this must be done on a day-to-day basis under the supervision of DER and do not require the submission of an erosion control plan as appellant would insist. However, we urge DER in the course of its frequent inspections of this site to require that soil and erosion control measures that cannot or need not be covered by any plan, nonetheless be implemented promptly.

Appellant's third contention that the permit should be revoked or suspended because Bodner failed to supply any erosion control plan as to the Laurel Road access within 10 days, as required by DER's letter of September 8th, is a technicality that requires very little consideration. Bodner did immediately respond with temporary measures for control of erosion at the access road and has subsequently submitted a plan when he understood that that was required by DER.

Methane Gas

Regulation 75-24(c)(2)(xxiv) requires gas venting systems and gas monitoring systems to be installed at all landfilling sites. Strasburg's representatives testified that they intend to provide a gas venting system at the landfill. Although other sections of §75.25(c)(2) require certain items to be included on the plan submitted for landfill applications, subsection (xxiv) does not require the gas venting system and gas monitoring system to be shown on the landfill application plans. Therefore, the failure to include the design of a gas venting system in its May and July 1978 submission was not a violation of regulation 75-24.

Conflict of Interest

Appellant claims that DER's revision of the plans submitted by Martin and Martin was biased because that firm serves as Township Engineer for Lower Frankford Township in Cumberland County and in that capacity passed upon John Rosso's application for a subdivision approval in the township. Appellant's claim of bias was not substantiated. Though there was no argument that Rosso and Bodner did have that contact, it was not shown that Mr. Rosso deviated from sound engineering judgment in his review of these plans, or that he dealt with these plans any differently than he would any others.

CONCLUSIONS OF LAW

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

2. A letter of DER approving revisions to plans for a permitted landfill is an appealable action of the department where the revisions were required by DER to avoid possible environmental degradation and where commencement of construction and operation of the landfill could not be allowed to proceed without approval of the revisions.

3. In the context of an appeal from an approval letter from DER that has the affect of authorizing commencement of construction and operation of a landfill, a party may challenge DER's failure to act in conformity with applicable law as well as DER's affirmative actions.

4. A township has standing to appeal from DER's final action authorizing construction and operation of a private landfill within its borders on the basis of its alleged interest in protecting surface and groundwater within the township and its governmental duty to protect the health, safety and general welfare of its citizens.

5. A change in the party or parties receiving the primary financial benefit from the operation of a solid waste disposal facility and exerting operating control over that facility, constitutes a "change of ownership" within the meaning of 25 Pa. Code §75.22(f)(2).

6. A "change of ownership" constitutes a "transfer" or "assignment" of the solid waste facility and is prohibited by 25 Pa. Code §75.22(f)(1) without a reissuance of the permit in conformity with that section.

7. Where a change of ownership occurs after a solid waste disposal facility has been permitted but prior to its commencement of operations, DER must require that the new owner submit an application for a reissuance of the permit as required by 25 Pa. Code §75.22(f)(2) prior to the beginning of the operation of the landfill.

8. Where DER has requested modifications in the overall design of a solid waste disposal facility as a condition to the commencement of operations of that facility and where no significant construction of the facility has yet occurred, DER must assure that the permitted facility complies with the latest regulations under the Solid Waste Management Act and other applicable statutes and regulations before approving the modifications.

9. DER did not abuse its discretion or act arbitrarily or capriciously in approving revisions to the plans for the Strasburg Landfill, when the plans as revised conform to the requirements of Chapter 75 of the department's rules and regulations.

10. Appellant did not carry its burden of proving that revised plans for the Strasburg Landfill do not conform to the requirements of Chapter 75 or that DER failed to require compliance with Chapter 102 of the regulations.

11. Although the board has power to condition a solid waste disposal facility permit to assure compliance with all applicable statutes and regulations where DER has failed to do so, this power cannot be used in such a way that the board becomes an overseer of DER's inspection activities.

O R D E R

AND NOW, this 16th day of February, 1979, the appeal of Newlin Township is sustained insofar as it challenges DER's failure to require compliance with 25 Pa. Code §75.22(f), and dismissed insofar as it relates to DER's approval of revisions to the permitted plans for the Strasburg Landfill and failure to require adequate erosion and sedimentation control measures. DER shall not permit landfill operations at the Strasburg Landfill to begin without compliance with regulation 75.22(f), in accordance with this adjudication. It is further ordered that prior to the beginning of operation of the landfill, DER shall require the permittee to provide more complete documentation of its arrangements for off-site treatment of leachate in conformity with regulation 75.25(o)(7).

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

CONCURRING OPINION

I concur in the result and join in the opinion of the board except for the discussion on the appealability of a modification of permitted plans. I do not believe that the jurisdiction of this board to hear an appeal from an approval by the DER of a modification of a permit is dependent upon whether the board believes that the modification is "significant enough to review". Rather, I believe that all actions of the DER, including the approval of modifications to permitted plans are appealable by any person adversely affected thereby. See §1921-A of the Administrative Code, Act of December 3, 1970, P. L. 834, No. 275, 71 P. S. §510-21.

ENVIRONMENTAL HEARING BOARD

THOMAS M. BURKE
Member

DATED: February 16, 1979

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
BLACKSTONE BUILDING
112 MARKET STREET
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

In The Matter Of:	:	
	:	
KERRY COAL COMPANY,	:	
	:	
Appellant,	:	Docket No. 77-083-C
	:	
vs.	:	Surface Mining Permit
	:	Surface Mining Conservation
COMMONWEALTH OF PENNSYLVANIA	:	and Reclamation Act
DEPARTMENT OF ENVIRONMENTAL	:	
RESOURCES,	:	Docket No. 77-084-C
	:	
Appellee.	:	Mine Drainage Permit
	:	The Clean Streams Law
AND	:	
	:	
PENNSYLVANIA COUNCIL OF	:	
TROUT UNLIMITED, INC.,	:	
	:	
Intervenor.	:	

ADJUDICATION

By the board, March 9, 1979.

The following adjudication was drafted by Louis R. Salamon, Hearing Examiner, and is issued by this board without modification.

On July 7, 1977, the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), issued to Kerry Coal Company (Kerry) an amended permit under the terms of which Kerry was authorized to construct and operate industrial waste treatment facilities and to discharge treated industrial wastes generated as the result of Kerry's bituminous coal surface mining operation in Slippery Rock Township, Lawrence County.

Kerry was required to seek such a permit under and by virtue of the provisions contained in Section 315 of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended,* 35 P. S. § 691.315. This permit is commonly referred to as a mine drainage permit .

On that same date, DER issued to Kerry a permit under the terms of which Kerry was authorized to mine bituminous coal by the surface mining method in the same area of Slippery Rock Township, Lawrence County, as was included in the amended mine drainage permit to which we earlier referred.

Kerry was required to seek such a permit under and by virtue of the provisions contained in Section 4 of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P. L. 1198, *as amended,* 52 P. S. § 1396.4. This permit is commonly referred to as a surface mining permit .

DER attached the following special condition to said mine drainage permit[1]:

> "1. There shall be no area affected within 300 feet of the McConnell's Mill State Park property unless a variance is received from the Department of Environmental Resources for this area."

DER attached the following special condition to said surface mining permit[2]:

> "There shall be no surface affected by mining within 300 feet of McConnels Run State Park[3] until the proper variance is approved by this Department."

On August 5, 1977, Kerry filed separate appeals to this board from the imposition of the special condition, which we have set forth, *infra*, in each said permit.

Kerry and DER stipulated as to certain facts necessary for inclusion in an adjudication of these appeals by this board; they delivered a written stipulation of facts to us; and, they agreed that there was no need for the taking of testimony for the reason that the issues raised by each appeal were legal in nature.

On December 5, 1977, the Pennsylvania Council of Trout Unlimited, Inc. (Trout Unlimited) petitioned this board for leave to intervene in the appeal of Kerry from the imposition of said special condition in said surface mining permit. On May 17, 1978, we granted leave to Trout Unlimited to intervene in both appeals of Kerry.

We have consolidated these appeals for the purpose of this adjudication.

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[1] DER assigned the designation 3174SM3 (amended) to the mine drainage permit which it issued to Kerry.

[2] DER assigned the designation 41 - 36(A) to the surface mining permit which it issued to Kerry.

[3] We assume, for purposes of this adjudication, that the McConnels Run State Park referred to in surface mining permit 41 -36(A) is the same park as McConnell's Mill State Park which is referred to in mine drainage permit 3174SM3 (amended).

FINDINGS OF FACT

1. Kerry is a corporation, organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business at R. D. # 2, Box 19, Portersville, Pennsylvania.

2. DER is the department of the Commonwealth of Pennsylvania which is vested with the responsibilities, *inter alia*, to issue permits required under The Clean Streams Law, *supra*, and under the Surface Mining Conservation and Reclamation Act, *supra*.

3. On January 20, 1975, DER issued mine drainage permit 3174SM3 to Kerry, pursuant to Section 315 of The Clean Streams Law, *supra*, under the terms of which Kerry was authorized to construct and operate industrial waste treatment facilities and to discharge treated industrial wastes to be generated as the result of a bituminous coal surface mining operation which Kerry sought to undertake in Slippery Rock Township, Lawrence County.

4. On April 15, 1977, Kerry applied to the Bureau of Surface Mine-Reclamation of DER for an amendment to mine drainage permit 3174SM3. In said application Kerry sought authority to mine an area additional to that authorized in the original permit and to discharge industrial wastes therefrom to the waters of the Commonwealth.

5. On June 28, 1977, Kerry applied to DER for a surface mining permit and surety bond in the amount of $14,000.00 for 14.0 acres of land on property of T. A. Leonhardt (the surface and mineral owner) in the same area of Slippery Rock Township, Lawrence County, as was included in the application for said amended mine drainage permit.

6. In this application for a surface mining permit, Kerry sought to conduct surface mining operations and to affect an area adjacent to the boundary of McConnell's Mill State Park.

7. McConnell's Mill State Park is a park within the meaning of Section 4.2(c) of the Surface Mining Conservation and Reclamation Act, *supra*, 52 P. S. § 1396.4b.

8. On July 7, 1977, DER issued mine drainage permit 3174SM3 (amended) to Kerry.

9. On July 7, 1977, DER issued surface mining permit 41-36 (A) to Kerry.

10. DER attached the following special condition to said mine drainage permit:

> "1. There shall be no area affected within 30 feet of the McConnell's Mill State Park property unless a variance is received from the Department of Environmental Resources for this area."

11. DER attached the following special condition to said surface mining permit:

> "There shall be no surface affected by mining within 300 feet of McConnels Run State Park until the proper variance is approved by this Department."

12. On August 5, 1977, Kerry filed separate appeals to this board from the imposition of each above described special condition.

13. On May 17, 1978, we entered an Order under the terms of which Trout Unlimited was permitted to intervene in each appeal of Kerry.

DISCUSSION

I. As to Surface Mining Permit No. 41-36 (A)

DER attached the following special condition to Surface Mining permit no. 41-36 (A), which it issued to Kerry on July 7, 1977:

> "There shall be no surface affected by mining within 300 feet of McConnels Run State Park until the proper variance is approved by this Department."

DER contends that the express statutory authority for the imposition of this condition is contained in Section 4.2(c) of the Surface Mining Conservation and Reclamation Act, *supra*, 52 P. S. § 1396.4b(c); this section provides as follows:

> "(c) From the effective date of this act, as amended hereby, no operator shall open any pit for surface mining operations (other than borrow pits for highway construction purposes) within one hundred feet of the outside line of the right-of-way of any public highway or within three hundred feet of any occupied dwelling house, unless released by the owner thereof, or any public building, school, park or community or institutional building or within one hundred feet of any cemetery, or of the bank of any stream. The secretary may grant operators variances to the distance requirements herein established where he is satisfied that special circumstances warrant such exceptions and that the interest of the public and landowners affected thereby will be adequately protected. Prior to granting any such variances, the operator shall be required to give public notice of his application therefor in two newspapers of general circulation in the area once a week for two successive weeks. Should any person file an exception to the proposed variance within twenty days of the last publication thereof, the department shall conduct a public hearing with respect thereto."

Although Kerry does not concede that DER has the authority to impose this special condition under this section or under any other statute or regulation, or for that matter that this section is constitutional, Kerry advances, for the purpose of argument, the proposition that if DER can prohibit the opening of any pit for surface mining pursuant to this section, unless a variance is granted, it can only do so as to an area within three hundred feet of any park building, rather than as to an area within three hundred feet of any park.

The basis for this proposition is that in Section 4.2(c), *supra*, the words, "school", "park", "community" and "institutional" are co-ordinative adjectives which modify the noun "building". Kerry would construe the language of Section 4.2(c), *supra*, as it applies to the instant matter, to mean that DER can prohibit the opening of any pit for surface mining, unless a variance is granted, within three hundred feet of any park building.

Although we believe that for purposes of clarity the legislature should have placed a comma after the word park in Section 4.2(c), *supra*, we cannot view such omission as being indicative of a legislative intent that the word park is a co-ordinative adjective which modifies the noun building. We find that the word park, as used in Section 4.2(c), *supra*, is one in a series of nouns. It is the park itself, and not merely the buildings thereupon, which is the subject of the statutory limitation. We cannot believe that the legislature, in attempting to limit the opening of a pit for surface mining to certain areas, would include the buildings in a valuable natural resource like a park and ignore the park land itself. Such a construction as Kerry would have us adopt is simply not reasonable, and we reject it.

The second contention which is advanced by Kerry, again advanced without conceding that Section 4.2(c), *supra*, is a valid exercise of the police power of the Commonwealth of Pennsylvania, is that DER in imposing this special condition in the surface mining permit which Kerry received, exceeded the authority granted to it by virtue of the language of this section.

Kerry notes that the language contained in Section 4.2(c), *supra*, establishes a prohibition only against the opening of any pit for surface mining operations within three hundred feet of any park, while the language contained in this special condition establishes a prohibition against affecting any surface by mining within three hundred feet of McConnell's Mill State Park.

Kerry avers that there is a great difference between a prohibition against opening any pit for surface mining operations within three hundred feet of any park and a prohibition against affecting any surface by mining within three hundred feet of any park. Kerry submits that this difference is readily apparent upon an examination of the definition of the word pit and an examination of the term "land affected", as contained in Section 3 of the Surface Mining Conservation and Reclamation Act, *supra*, 52 P. S. § 1396.3. These definitions are as follows:

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

Kerry construes Section 4.2(c) to mean that while a surface mine operator cannot open a pit within three hundred feet of a park, such operator may, unimpeded by the language and effect of that section, create, *inter alia*, spoil and culm banks within three hundred feet of that park. Kerry concludes that by this special condition, DER has imposed a prohibition on mining activity which is much more extensive than that which was intended by the legislature when it enacted Section 4.2(c).

DER, in a lengthy, well-written brief, has advanced numerous reasons why this special condition, as written and declared, is valid. These reasons may be summarized as follows:

A. This special condition may be imposed under and by virtue of the express statutory authority contained in Section 4.2(c).

B. The Environmental Quality Board (of Pennsylvania) acting pursuant to the mandates contained in Section 1920-A of the Administrative Code, Act of April 9, 1929, P.L. 1977, *as amended*, 71 P. S. § 510-20 (a) and (f) and in Section 4.2 (a), has adopted a regulation in which it is provided that all mining activities near parks are prohibited in the absence of a variance.

C. The language of the above regulation, Section 77.92 (a) (5), Environmental Quality Board Regulations, Chapter 77, Subchapter D, "Requirements Accompanying Permits Authorizing The Operation of Surface Coal Mines", 25 Pa. Code, § 77.92 (a) (5), in which all mining activities near parks are prohibited in the absence of a variance, is a valid and binding administrative interpretation of the intent of the legislature in enacting Section 4.2(c), *supra*.

D. A construction of the language of Section 4.2(c), as reflected in said regulation and by said special condition, is in keeping with

the intent of the Surface Mining Conservation and Reclamation Act, to-wit, to protect the users and resources of the park from hazardous and environmentally damaging conditions relating to mining.

E. A construction of the language of Section 4.2(c), in which it is determined that such language does not act as a complete bar to mining activities within three hundred feet of a park, is inconsistent with and violative of the provisions in the Federal Surface Mining Control and Reclamation Act of 1977, Act of August 3, 1977, P. L. 95-87, 30 USC §1201, *et seq.*

F. Kerry has failed in its burden to show that in imposing this special condition, DER abused its discretion or otherwise acted in a manner which is clearly contrary to law.

We will, initially, dispose of the contention by Kerry that Section 4.2(c) is not constitutional. We hold that the Surface Mining Conservation and Reclamation Act, and in particular, Section 4.2 (c) thereof, is a valid and proper exercise of the police power of the Commonwealth of Pennsylvania.

Although it is true that Kerry, by virtue of the provisions contained in Section 4.2(c), may not be able to conduct surface mining operations on land which it has leased for such purpose, we find that such prohibition is designed to protect the interest of the public in its enjoyment of McConnell's Mill State Park and that such prohibition is not unduly oppressive upon Kerry. See *Commonwealth of Pennsylvania v. Harmar Coal Company*, 452 Pa. 77, 306 A. 2d. 308 (1973); *Dufour v. Maize, et al*, 358 Pa. 309, 56 A. 2d. 675 (1948); *Harger v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 9 Pa. Cmwlth. 482, 308 A. 2d. 171 (1973).

In order to treat the contention by Kerry that by this special condition DER has created a prohibition on mining activity which is much more extensive than that which was intended by the legislature when it enacted Section 4.2(c), it is of paramount importance that we discern the extent of the prohibition intended by the legislature when it enacted Section 4.2(c).

Although the language of Section 4.2(c) provides that the prohibition extends to the opening of any pit for surface mining operations within three hundred feet of any park, we will resort to judicial and administrative interpretation of that language to determine what was meant by the legislature by its use of the term "opening of any pit for surface mining operations" for the reason that this language is not free from ambiguity. See *Loeb Estate*, 400 Pa. 368, 162 A. 2d. 207 (1960).

A judicial interpretation of the language of Section 4.2 (c) was provided by the Commonwealth Court of Pennsylvania in *Harger, supra.* In that case, the court found that where DER had imposed, in both a surface mining permit and a mine drainage permit, a restriction on surface mining within three hundred feet of any occupied dwelling, such restriction comported with the language contained in Section 4.2(c), the same section with which we are dealing in this matter.

An administrative construction of the meaning of said language in Section 4.2(c) was provided by the Environmental Quality Board, in 1972, when it adopted a regulation which is found in Section 77.92 (a) (5), *supra,* 25 Pa. Code § 77.92 (a) (5), in which it is provided as follows:

> "(5) The permittee shall not mine within 100 feet of the outside line of the right-of-way of any public highway or within 100 feet of any cemetery or the bank of any stream. No mining shall be conducted within 300 feet of any occupied dwelling house, unless released by the owner thereof, or any public building, school, park or community or institutional building. If the permittee should be granted an exception after public hearing to mine within any of the above restricted areas, reclamation of all areas shall be to the approximate original contour." (Emphasis supplied)

In providing such a construction, the Environmental Quality Board was performing the duty assigned to it by the legislature in (A.) Section 4.2 (a) of the Surface Mining Conservation and Reclamation Act, *supra* 52 P. S. § 1396.4b(a), in which it is provided, *inter alia,* that:

> "(a) Except as otherwise provided hereunder, all surface mining operations coming within the provisions of this act shall be under the exclusive jurisdiction of the department (DER) and shall be conducted in compliance with such reasonable rules and regulations as may be deemed necessary by the secretary (of DER) for the health and safety of those persons engaged in the work and for the protection of the general public..." (Words within parenthesis added for clarification.)

and in (B.) Section 1920-A of the Administrative Code, *supra,* 71 P. S. § 510-20 (b) and (f), in which it is provided as follows:

> "(b) The Environmental Quality Board shall have the power and its duties shall be to formulate, adopt and promulgate such rules and regulations as may be determined by the board for the proper performance of the work of the department, and such rules and regulations, when made by the board, shall become the rules and regulations of the department."

"(f) The board shall establish such rules and regulations, not inconsistent with law, for the control, management, protection, utilization, development, occupancy and use of the lands and resources of State parks, as it may deem necessary to conserve the interests of the Commonwealth. Such rules and regulations shall be compatible with the purposes for which State parks are created."

It is clear that both the Commonwealth Court and the Environmental Quality Board have interpreted the language of Section 4.2(c) to mean that the prohibition contained therein is as to surface mining within three hundred feet of any park.

We find that such interpretation of the language of Section 4.2(c) is a reasonable one and we adopt it in this adjudication.

We must now determine whether the prohibition against affecting an area within three hundred feet of McConnell's Mill State Park, as contained in said special condition, is broader in scope than the prohibition against surface mining within such three hundred feet area which is contained in Section 4.2(c), as we interpret that section, and as contained in 25 Pa. Code § 77.92 (a) (5).

In order to arrive at such determination, we direct our attention to the definition of the term "surface mining", as contained in Section 3 of the Surface Mining Conservation and Reclamation Act, *supra*. This definition is as follows:

"'Surface mining' shall mean the extraction of minerals from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between them or otherwise exposing and retrieving them from the surface, including but not limited to strip, drift, and auger mining, dredging, quarrying and leaching, and activities related thereto, but not including those mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings. "Surface mining" shall not include (i) the extraction of minerals (other than anthracite and bituminous coal) by a landowner for his own non-commerical use from land owned or leased by him; nor (ii) the extraction of sand, gravel, rock, stone, earth or fill from borrow pits for highway construction purposes, so long as such work is performed under a bond, contract and specifications which substantially provide for and require reclamation of the area affected in the manner provided by this act; nor (iii) to the handling, processing or storage of slag on the premises of a manufacturer as a part of the manufacturing process." (Emphasis supplied)

It is clear, from a reading of this definition, that the term surface mining encompasses the actual extraction of minerals from a pit and every physical activity on land which is related to the mining operation. In this context, the area affected by Kerry's surface mining would be identical to that land which would be included in the definition of the term land affected as contained in Section 3 of the Surface Mining Conservation and Reclamation Act, *supra*.

We conclude, therefore, that the prohibition against affecting an area within three hundred feet of McConnell's Mill State Park, as contained in this special condition, is no broader in scope than the prohibition against surface mining within three hundred feet of any park which is contained in Section 4.2(c) and in 25 Pa. Code § 77.92 (a) (5).

In so concluding, we are supportive of the principles expressed in Article I, Section 27 of the Pennsylvania Constitution wherein it is provided that:

> "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."

Furthermore, we are acting in a manner which is consistent with the provision, contained in Section 1 of the Surface Mining Conservation and Reclamation Act, *supra*, 52 P. S. § 1396.1, in which it is stated that such act is an exercise of the police power of the Commonwealth for the general welfare of the people of the Commonwealth by, *inter alia*, aiding in the protection of birds and wildlife, decreasing soil erosion, preventing water pollution and by eliminating hazards to health and safety.

We hold that DER had the statutory authority to impose this special condition upon Kerry in the surface mining permit which Kerry received and that, as such, the instant appeal from such action by DER must be dismissed.

We note, however, that Kerry has, subsequent to the filing of this appeal, applied to DER for a variance from the effect of this special condition. On March 2, 1978, DER denied this application for the sole reason that in Section 522 (e) (5) of the Federal Surface Mining Control and Reclamation Act of 1977, *supra*, 30 U.S.C. §1272 (e) (5), it is provided that after August 3, 1977,

subject to valid existing rights, no surface coal mining operations[4] except those which exist on the date of enactment of such act shall be permitted within three hundred feet of any public park. Kerry filed a timely appeal to this board from the denial of such variance, which is docketed at our docket no. 78-034-B.

We are, of course, not called upon, in these consolidated matters, to address any aspect of that subsequent proceeding.

II. As to Mine Drainage Permit No. 3174SM3 (amended)

The special condition imposed by DER upon Kerry in mine drainage permit no. 3174SM3 (amended) is almost identical to the special condition imposed by DER upon Kerry in said surface mining permit.

We hold that DER had as much authority to impose such special condition upon Kerry in said mine drainage permit as it did to impose a similar condition upon Kerry in said surface mining permit.

We take this position for the following reasons:

1. It would be an absurd result if DER was unable to prohibit Kerry, in a mine drainage permit issued pursuant to The Clean Streams Law, *supra*, from constructing and operating industrial waste treatment facilities in connection with a surface mining operation and from discharging industrial wastes in an area within three hundred feet of any park, if in connection with the same surface mining operation, DER was able to prohibit Kerry from affecting an area within three hundred feet of said park pursuant to authority granted by the Surface Mining Conservation and Reclamation Act, *supra*, by the Pennsylvania Constitution, *supra*, and by the Administrative Code, *supra*. With such result, the latter described prohibition would lose its effect.

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[4] The definition of the term "surface coal mining operations" as contained in Section 701 (28) of the federal act, *supra*, 30 U. S. C. § 1291 (28) clearly includes all areas which could conceivably be affected by surface mining.

2. The Pennsylvania Legislature, in enacting The Clean Streams Law, the Administrative Code and the Surface Mining Conservation and Reclamation Act, did not intend to create an absurd result. See Section 3 of the Act of November 25, 1970, P. L. 707, *as amended,* 1 Pa. C. S. A. § 1922 (1).

3. Since a surface mining operator cannot commence his operations without adherence to provisions in both The Clean Streams Law and the Surface Mining Conservation and Reclamation Act and since, in some particulars, the two acts already overlap, these acts are, as they relate to Kerry, *in pari materia,* and must, insofar as these special conditions are concerned, be construed together as one statute. See Section 3 of the Act of November 25, 1970, *supra,* 1 Pa. C. S. A. § 1932.

Accordingly, the instant appeal by Kerry from the imposition of said special condition in the mine drainage permit which Kerry received from DER must be dismissed.

CONCLUSIONS OF LAW

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

2. The Surface Mining Conservation and Reclamation Act is a valid and proper exercise of the police power of the Commonwealth of Pennsylvania.

3. The language contained in Section 4.2(c) of the Surface Mining Conservation and Reclamation Act establishes a prohibition against "surface mining" as that term is defined in Section 3 of the Surface Mining Conservation and Reclamation Act, within three hundred feet of any park, unless a variance so to do is obtained.

4. The term "surface mining", as it is defined in Section 3 of the Surface Mining Conservation and Reclamation Act includes the actual extraction of minerals from a pit and every physical activity on land which is related to the mining operation.

5. The prohibition contained in the special condition in the surface mining permit issued to Kerry and in the mine drainage permit issued to Kerry that Kerry shall not affect an area within three hundred feet of McConnell's Mill State Park, unless a variance so to do is obtained, is no broader in scope than the prohibition against surface mining within three hundred feet of any park which is contained in Section 4.2(c), *supra*.

6. DER had the authority under Section 4.2(c), *supra*, to impose said special condition in the surface mining permit issued to Kerry.

7. DER had the authority under Section 4.2(c), *supra*, which in this context, is *in pari materia* with The Clean Streams Law, to impose said special condition in the mine drainage permit issued to Kerry.

ORDER

AND NOW, this 9th day of March, 1979, the appeals of Kerry Coal Company from the imposition by the Department of Environmental Resources of special conditions in Mine Drainage Permit No. 3174SM3 (amended) and in Surface Mining Permit No. 41-36 (A) are dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS, Chairman

THOMAS M. BURKE, Member

CONCURRING OPINION

By Joanne R. Denworth, Member

I concur. However, I would not rest the validity of these conditions so much on an interpretation of Section 4.2(c) of the Surface Mining Act, as on the authority of the Environmental Quality Board to adopt Regulation 77.92(a)(5) under both Section 4.2(a) of the Surface Mining Act, 51 P.S. §1396.4b(a), and §1920-A of the Administrative Code. The latter statute, *inter alia*, authorizes the Environmental Quality Board to adopt regulations for the protection of public parks, 71 P.S. §510-20(f). Regulation 77.92(a)(5) appears to be a reasonable exercise of delegated legislative authority by the Environmental Quality Board; and it clearly authorizes the imposition of the permit conditions appealed from here.

JOANNE R. DENWORTH
Member

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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HELEN MINING COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and PEOPLES NATURAL GAS COMPANY

Docket No. 78-036-B

Gas Operations Act

ADJUDICATION

By Thomas M. Burke, Member, April 18, 1979.

This is an appeal by Helen Mining Company (Helen) from a February 27, 1978, action of the Division of Oil and Gas of the Department of Environmental Resources (sometimes referred to herein as the Division of Oil and Gas and sometimes referred to as the DER) granting well-drilling permits to Peoples Natural Gas Company (Peoples), intervenor in this matter, under the Gas Operations Well-Drilling Petroleum and Coal Mining Act, Act of November 30, 1955, *as amended*, P.L. 75, 52 P.S. 2101, *et seq.*, (Gas Operations Act), to drill two gas wells through an unmined portion of a deep coal mine owned and operated by Helen known as the Helen Mine.

On April 13, 1978, we entered an order, with the consent of the parties, granting a supersedeas of the DER February 27, 1978, action pending our determination of the merits of Helen's appeal. Two days of hearings were held in Pittsburgh. The appellant, the DER and intervenor have filed briefs in support of their positions. We now hereby enter the following.

FINDINGS OF FACT

1. Appellant is Helen Mining Company (Helen), a Pennsylvania corporation with an address at Post Office Drawer "D", Homer City, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, Division of Oil and Gas, (sometimes referred to as the DER and sometimes referred to as the Division of Oil and Gas), the agency authorized to administer

the Gas Operations Well-Drilling Petroleum and Coal Mining Act, the Act of November 30, 1955, *as amended*, P.L. 75, 52 P.S. 2101, *et seq.* (Gas Operations Act).

3. Intervenor is Peoples Natural Gas Company, (Peoples), Two Gateway Center, Pittsburgh, Pennsylvania.

4. On September 22, 1977, Peoples filed with the Division of Oil and Gas a "notice of proposed location of well" which proposed to locate gas well no. 5213 on the Joseph H. Carlson farm, Burrell Township, Indiana County (Carlson Well).

5. On September 22, 1977, Peoples filed with the Division of Oil and Gas a "notice of proposed location of well" which proposed to locate gas well no. 5215 on the Charles O. Swasy farm, Blacklick Township, Indiana County (Swasy Well).

6. On November 9, 1977, Peoples resubmitted a notice of proposed location for the Swasy Well. It proposed to relocate the well 345 feet to the northwest of the original site.

7. Helen owns and operates the Helen Mine which is located near Homer City, Indiana County, Pennsylvania.

8. The proposed Carlson and Swasy gas wells would penetrate two seams of coal in the Helen Mine.

9. Helen filed with the Division of Oil and Gas objections to the locations of the Swasy and Carlson wells.

10. The Division of Oil and Gas held a hearing on December 20, 1977, on Helen's objections. Charles Updegraff, Acting Chief of the Division of Oil and Gas, presided at the hearing.

11. Helen, on December 28, 1966, entered into a Coal Sales Agreement with Pennsylvania Electric Company and New York State Electric and Gas Company to supply coal to the Homer City Steam Generating Station. The Homer City Station is owned by these two utilities.

12. The Coal Sales Agreement contains a provision permitting the Pennsylvania Electric Company and New York State Electric and Gas Company to take over the capital stock of the Helen Mining Company at their sole discretion.

13. Helen employs approximately 464 persons and has made a capital investment in excess of 20 million dollars in the mine and related facilities.

14. The actual drilling of the gas wells at the approved locations does not present a safety hazard to the employes of Helen as the locations are a significant distance from the present areas of active mining.

15. The distance from the present area of active mining to the approved location of the Carlson and Swasy gas wells is over 16,000 feet. Active mining will not reach the sites of the wells for 10 to 20 years.

16. The existence of gas or oil wells penetrating coal seams and coal mines is commonplace in Western Pennsylvania since a good geologic correlation exists between coal deposits and gas pools or oil pools.

17. The area encompassed by the Helen Mine had already been penetrated by approximately 25 active gas wells when the mine was opened in 1966. The number of wells penetrating the Helen Mine has increased to 56.

18. The approved site of the Carlson Well is located at the southwesterly section of the Helen Mine 1148 feet from property owned by the United States of America for the Conemaugh River Reservoir.

19. The approved site of the Swasy Well is located in the westerly portion of the Helen Mine, 158 feet from the Conemaugh River Reservoir property of the United States of America.

20. Helen has proposed that the proposed gas wells be drilled at the boundary between its mine and the U.S.A. Conemaugh River Reservoir property.

21. Helen has not yet projected the mains, and entries and their associated pillars for the areas where the gas wells are proposed to be located because a projection would be likely to change before the areas are ready to be mined.

22. The gas wells themselves will not present a safety hazard if an adequate pillar is left around them.

23. Helen has operated a shortwall mining section at the Helen Mine for about two years. It recovers approximately 10% more coal than conventional mining.

24. The shortwall method of mining employs a mining machine that traverses back and forth along the face of a solid coal panel 200 feet wide and at least 3,000 feet long.

25. The shortwall mining method utilizes 170-ton jacks underneath a steel canopy for roof support.

26. Helen also uses the conventional method of mining at its Helen Mine. In December 1977, Helen operated one shortwall mining section and three room and pillar sections.

27. The shortwall mining method is relatively new. There are five presently operating in the U.S.A. and another six are preparing to start up.

28. The shortwall mining system is not suitable for use in all coal mines.

29. The conventional method of mining is an industry-wide accepted method of mining; it is the predominant method of mining in Pennsylvania.

30. Helen has not experienced a single lost-time accident in the shortwall mining section since it went into operation. During the same period, conventional mining sections experienced over 215 lost-time accidents.

31. Mining around a gas well by the conventional mining method does not present a safety hazard if an adequate pillar of coal is left around the well.

32. In Pennsylvania, it is a common practice to mine around producing gas wells.

33. The size of the pillar of coal required to be left to support each of the gas wells is 100 square feet.

34. If the Swasy Well is drilled at the approved location, Helen will be required to mine one panel of coal 200 feet in width and 3,000 feet in length by the conventional mining method instead of by the shortwall mining method.

35. If the Carlson Well is drilled at the approved location, Helen will be required to either: (a) mine one panel of coal 200 feet in width by 3,000 feet in length by the conventional mining method; or (b) mine all but 500 feet of the 3,000 foot panel by the shortwall mining method. However, movement of machinery involved with the shortwall mining operation will take an estimated three to five days and result in a three to five day loss of production from one mining crew.

36. Peoples chose the locations for the Carlson Well and the Swasy Well because of the thickness of the gas enriched sands, i.e., reservoir rock for the gas, and the need to maintain adequate distance from other gas wells to preclude cross drainage of gas from other wells and the suitability of the surface topography.

37. A Peoples Natural Gas Company map of the thickness of the Balltown sands indicates that the location for the Carlson Well proposed by Helen along the

boundary of the Carlson tract with the U.S.A. Conemaugh Reservoir contains very thin or no Balltown sands.

38. The federal government denied Peoples permission to drill on the edge of U.S.A. property or make use of any part of the surface of its property in drilling for gas.

39. The second site chosen by Peoples for its Swasy Well is as close to the boundary of the Swasy tract with the U.S.A. Conemaugh Reservoir property as is physically possible since there is a steep hill running from the site, which sits on a small plateau, to the U.S.A. property line.

40. A copy of the notice of the hearing the Division of Oil and Gas scheduled for November 28, 1977, was sent to Lou Antal, President, District 5, United Mine Workers of America, on November 18, 1977.

41. The Division of Oil and Gas postponed the November 28, 1977, hearing and rescheduled it for December 20, 1977. A copy of the notice of the rescheduling of the hearing was sent to Lou Antal, President, District 5, United Mine Workers of America, on December 1, 1977.

42. There was not a representative of the United Mine Workers of America present at the December 20, 1977, hearing before the Division of Oil and Gas.

43. Lou Antal, President of District 5, United Mine Workers of America, was notified of the Environmental Hearing Board hearing scheduled for May 17 and 18, 1978, (which was postponed) by letter dated April 12, 1978, and was notified by the Environmental Hearing Board of the hearing conducted on June 5 and 6, 1978, by letters dated May 26, 1978, and June 1, 1978.

44. Val Scarton, President, District 2, United Mine Workers of America, was notified of the Environmental Hearing Board hearing scheduled for May 17 and 18, 1978, by letter dated April 13, 1978, and the Environmental Hearing Board hearing conducted on June 5 and 6, 1978, by letters dated May 26, 1978, and June 1, 1978.

DISCUSSION

In Western Pennsylvania a good geologic correlation exists between coal deposits and gas or oil pools; hence, gas wells, in many instances, must penetrate coal seams or coal mines to reach underlying gas pools. This appeal concerns the rights and duties of a coal mine operator and a gas well operator in one such instance where their interests appear to collide.

The Gas Operations Well-Drilling Petroleum and Coal Mining Act, the Act of November 30, 1955, *as amended*, P.L. 75, 52 P.S. 2101, *et seq.* (Gas Operations Act) sets forth a scheme for defining the rights and duties of the coal mine and gas well operators and for resolving those disputes which must inevitably occur when their activities intersect. Section 201 of the Gas Operations Act provides for the notification of the owner of a coal mine before a gas well is drilled through it; the notification must include specifications on the location of the well site. Section 202, *supra*, allows a coal operator to file objections with the Division of Oil and Gas if he believes that the gas well will unduly interfere with or endanger his mine. Conversely, Section 203, *supra*, provides for the notification of the owner of a gas well when the workings of a coal mine progress to within 500 feet of his well and provides for the filing of objections by a gas well operator with the Division of Oil and Gas if he believes the pillar proposed to be left around the gas well is insufficient in size. The Gas Operations Act also provides for mandatory conferences to attempt to settle disputes and where resolutions cannot be achieved amicably, it requires the Division to hold hearings and, based on testimony given at the hearings, issue appropriate orders adjudicating the disputes.

Here, Peoples, in accordance with Section 201 of the Gas Operations Act filed with the Division of Oil and Gas notices of proposed location for two gas wells; one gas well no. 5213 was proposed for the Carlson farm tract in Burrell Township, Indiana County (Carlson Well) and the other, gas well no. 5215, was proposed for the Swasy farm tract, Blacklick Township, Indiana County (Swasy Well). Both gas wells would penetrate an unmined area of the Helen Mine, a mine owned and operated by Helen.

Helen, on October 3, 1977, filed objections to the locations of the proposed wells. A conference was called on October 12, 1977, by Charles Updegraff, Acting Chief of the Division of Oil and Gas under Section 502 of the Gas Operations Act to attempt to resolve the differences between Helen and Peoples. After the conference, Peoples proposed to move the location of the Swasy Well 345 feet to the northwest of the original location. It did not propose to alter the location

of the Carlson Well. The revised location for the Swasy Well was also unacceptable to Helen and on December 20, 1977, a hearing was held on Helen's objections by the Division of Oil and Gas (Charles Updegraff presiding) as provided for by Section 502 of the Gas Operations Act. An "Opinion and Order" was issued on February 27, 1978, approving Peoples proposed location for the Carlson Well and Peoples revised location for the Swasy Well and dismissing the objections of Helen.

Helen alleges that the DER action granting the well drilling permits to Peoples was in error because: (a) the gas wells will unduly interfere with its mine; (b) the gas wells will endanger the mine; (c) notices of proceedings held under Section 202 of the Gas Operations Act were not sent to the "collective bargaining representative of the employes of the coal operation"; and (d) the Division of Oil and Gas may approve no more than one well on any given tract of land and Peoples had previously drilled wells on the Swasy tract of land.

Section 502(n) of the Gas Operations Act states:

> "Whenever a coal or gas operator is to be given notice by the [division of oil and gas] of any proceeding to be held under this section, the division shall also send simultaneously a copy of such notice to the collective bargaining representative of the employes of the coal operator."

Appellant contends that the notifications sent by the Division of Oil and Gas of its proceedings to the collective bargaining representative were defective because they were sent to the President of United Mine Workers of America (UMWA), District 5, while the Helen Mine is located in UMWA District 2.

Initially, the DER argues convincingly that Helen does not have standing to contest the validity of the DER's notification to the UMWA.[1] The DER cites the Pennsylvania Supreme Court's opinion in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975) for the proposition that:

> "...one who seeks to challenge governmental action must show a direct and substantial interest...[and] a sufficiently close causal connection between the challenged action and the asserted injury to qualify the interest as 'immediate' rather than 'remote'." Id. 346 A.2d at 286.

The DER contends that Helen was not aggrieved or harmed by the DER's manner of giving notice to the UMWA because appellant's ability to set forth its objections to the locations and the basis for the objections was not hampered

1. The DER initially raised the question of standing by a Motion to Quash Appeal In Part, filed prior to the hearing. We denied the motion because it was filed too close to the hearing date and thus untimely. However, DER was given leave to argue the question by post-hearing brief.

thereby either at the conference before the Division of Oil and Gas, at the hearing before Acting Chief Updegraff or at the hearing before this board.

Helen's posture is similar to that of the petitioners in the recent Commonwealth Court case of *Campbell v. Comm. of PA, DER*, ___ Pa.Cmwlth.Ct. ___ , 396 A.2d 870 (1979). The Campbells filed a petition for review of a DER action arguing that the DER did not provide adequate notice to the public prior to its issuance of a mine drainage permit. The Commonwealth Court, after noting that the petitioners were able to prosecute their objections before the DER and the Environmental Hearing Board, stated that:

> "Petitioners argued, both in their brief and before the Court, that the failure to give newspaper notice deprived other property owners in the vicinity of an opportunity to join in the controversy. Whether there is merit to this contention or not such facts will not supply the showing of injury to petitioners necessary to sustain this appeal. Petitioners unquestionably lack standing to assert such error on this appeal; any harm resulting from the alleged error would accrue to persons not parties to this appeal." Id. 396 A.2d 870 at 871.

We find that appellant is not within the scope of persons that Section 502(n) is intended to protect. Appellant's rights are assured by various notification requirements throughout the act. Appellant, as with the petitioners in the Campbell case, does not have a legally cognizable interest in the sufficiency of the DER's notification to others.

Further, we can't help but to observe that the DER gave sufficient notice to the UMWA. The DER is required to take such steps as may be reasonably calculated to put the union on inquiry. During the proceedings before the Division of Oil and Gas, notices of the hearing to be held on Helen's objections were sent on two different occasions to Lou Antal, President of UMWA District 5 and member of the UMWA negotiating team. During the proceedings before the board, the UMWA was inundated with notices of hearings. Antal was notified by letter dated April 12, 1978, of the hearings scheduled for May 17 and 18, 1978. When those hearings were subsequently postponed until June 5 and 6, 1978, Antal was notified by two different letters; on May 26, 1978, he was notified by letter from counsel for the DER and on June 1, 1978, by letter from Updegraff. Moreover, the DER sent the same notices of the board hearings to Val Scarton, President of UMWA District 2, the person whom appellant contends should have received the notices on behalf of the UMWA. Scarton was given notice of the May 17 and 18

hearing dates by letter dated April 13, 1978, and notices were sent to him of the hearings scheduled for June 5 and June 6 by letters dated May 26, 1978, and June 1, 1978.

The hearings before the board were *de novo*. See *Warren Sand and Gravel Company, Inc. v. Comm. of Pa., DER*, 20 Pa.Cmwlth.Ct. 186, 341 A.2d 556 (1975). If the UMWA had felt that its interests had been harmed or that it should appear to put forth pertinent testimony in this matter, it could have sought leave to intervene. Thus, the DER's notice to the UMWA prior to the hearings before the board adequately fulfilled the requirements of Section 502(n), *supra*. There is no dispute that Val Scarton, who was sent notice of the board's hearing, is a proper person to receive the notice on behalf of the UMWA.

Appellant contends that the DER's approval of the locations of the gas wells constitutes an abuse of discretion because it contravenes Section 202(b) of the Gas Operations Act by endangering the Helen Mine. Section 202(b) of the Gas Operations Act states in part that:

> "If they [well operator and coal operators or owners] fail to agree upon a location, the division shall direct that a hearing be held within five days of such conference in accordance with section 502 and, after such hearing, shall, by an appropriate order, determine a location on such tract of land as near to the original location as possible where, in the judgment of the division, the well can be safely drilled without unduly interfering with or endangering such mine." (Emphasis supplied.)

The distance from the present area of active mining to the locations approved by the DER for the Carlson and Swasy gas wells is over 16,000 feet. It will take from 10 to 20 years for active mining to reach those well sites. Hence, the actual drilling of the gas well, which takes approximately 3 months, will not endanger the mine or the men that work there. Nor will the gas wells themselves endanger the mine; protective support pillars can be left around the gas wells. Rather, appellant argues that the mere presence of these two gas wells will preclude it from mining the coal in the area of the wells by a method of mining known as the shortwall method of mining, which appellant contends is safer than conventional mining.

The shortwall mining method uses a steel canopy supported by 170-ton jacks for roof support which Robert Browning, Helen's vice president of engineering, believes affords greater protection than a roof supported by roof bolts or roof timber. Mr. Browning testified that since the shortwall method went into operation in September 1976, Helen has not experienced a single lost-time accident in the shortwall section of the mine.

Shortwall employs a mining machine that traverses back and forth along a solid panel of coal 200 feet in width by 3,000 feet in length. An uninterrupted panel of coal 3,000 feet in length must be present to enable shortwall mining to be used. The 100 square foot pillar which is left as support for a gas well disrupts the continuity of the panel and thus precludes the use of shortwall mining around it. The parties disagree on the amount, but there is no question that some coal in the pillar area cannot be mined by the shortwall method, but must be mined conventionally. At the Swasy Well, one 200 foot x 3,000 foot panel would probably have to be mined conventionally. Less coal is involved at the Carlson Well.

The shortwall method of mining is a relatively recent development. Helen's shortwall operation has been operating approximately two years and is one of only 5 presently operating in the United States.[2] It is not suited for every mine or all sections of a mine. Poor roof conditions as well as pillar emplacements preclude its use. In contrast, conventional mining, which includes room and pillar mining and continuous mining, is an industry-wide accepted method of mining. Even at the Helen Mine most of the coal is mined by conventional mining. There was no testimony that conventional mining will endanger employes. To the contrary, Mr. Lester Kimmel, an underground mine inspector for the DER's Office of Deep Mine Safety, testified that it is safe to mine by the conventional method in the area of a gas well pillar and that he would approve a program for conventional mining around a gas well pillar..

In Pennsylvania, mining around producing or inactive gas wells is a fact of life for the mining industry. For example, 56 wells now exist within Helen's reserve. The coal around these wells will be mined conventionally. No one contends that mining should be prohibited in the area of these wells because they preclude the use of shortwall mining. Conventional mining is and will continue to be the predominant and most important method of mining in Pennsylvania. It would be imprudent and contrary to the weight of the evidence to say that its use will so endanger the men working in the Helen Mine that the gas wells which would cause its use must be prohibited.

Since Helen has not shown that the use of conventional mining in the area of gas well pillars will endanger either the men working in the mine, or the

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2. There are also six other shortwall operations preparing to start up.

mine itself, we find that the DER could not have precluded Peoples from drilling the Swasy and Carlson gas wells at the locations they propose on the basis that the wells would "endanger the mine".

Helen also contends that the locations of the gas wells, because they preclude Helen from using shortwall mining at the site of the gas wells, will "unduly interfere with" the operation of the Helen Mine.

The Helen Mine, which is Helen's only mining operation, is a mine mouth facility for the Homer City Generating Station. Its entire coal reserves are pledged to the Homer City Station by a coal sales agreement with Pennsylvania Electric Company and the New York State Electric Gas Company, the utilities that own and operate the Homer City plant. The coal sales agreement contains a provision permitting the utilities to take over the Helen Mine at their sole discretion.

Shortwall mining at the Helen Mine has resulted in the recovery of 10% more coal than conventional mining; thus where it is used, it has reduced production costs. Helen asserts that the increase in production costs that it will sustain because of its inability to shortwall mine in the area of these gas wells might cause the utilities to take over the mine.

Again, conventional mining is the predominant method of mining in Pennsylvania. It is used throughout the Helen Mine for reasons other than the presence of gas well pillars. We do not believe that the existence of a gas well, because it mandates its use, can be considered as causing undue interference with the operation of the mine. The Gas Operations Act presupposes that gas wells will be drilled in active mines and coal reserves. Its purpose is to insure that the gas wells are located at sites as compatible as possible with the physical layout of a mine. However, some interference is expected. We cannot abrogate the drilling of gas wells in coal seams because shortwall mining cannot be performed around the wells.

Also the possibility for a takeover of the mine by the utilities is, on this record, completely speculative.

Section 202(b) of the Gas Operations Act requires a coal operator who objects to a proposed placement of a gas well to indicate, if possible, an alternative location at which the proposed well could be drilled to overcome the

objection. Helen has indicated that the gas wells could be located at the boundary between its mine and the U.S.A. Conemaugh River Reservoir property.

Peoples chose their locations for the wells because of the thickness of the gas enriched sands, the need to maintain adequate distance from other gas wells in order to preclude cross drainage of gas from other wells, and the suitability of the surface topography. The Carlson Well cannot be located along the boundary of the Carlson tract with the Conemaugh River Reservoir property because that location contains very thin or no Balltown sands, and therefore little or no potential for gas at the Balltown level. The Swasy Well site sits as close to the boundary of the Swasy tract with the U.S.A. Conemaugh River Reservoir property as is physically possible. It is prevented from being moved closer by a steep hill which runs from the proposed site to the property line. Also, the federal government has denied Peoples permission to drill on the edge of federal property or make use of any part of its property in drilling for gas.

We therefore find that the DER did not abuse its discretion in approving the Carlson and Swasy gas well locations since it had no basis for finding that the gas wells would unduly interfere with or endanger the Helen Mine and because the sites suggested by appellant are unsuitable for the production of gas either because of the lack of potential for finding gas or because of the surface terrain.

Finally, appellant argues that the Gas Operations Act prohibits more than one well to be drilled in each tract of land. In support of its argument, appellant quotes that part of Section 202(b) which provides that the division shall, if a location cannot be agreed upon between the coal mine and gas well operators, "determine a location on such tract of land as near to the original location as possible where, in the judgment of the division, the well can be safely drilled..." Appellant contends that the article "a" before "location on such tract of land" limits the number of gas wells which may be drilled at each tract to one.

Appellant's interpretation of "a location" is unreasonable, and we reject it. "A location" simply refers to the well site to be chosen by the Division of Oil and Gas, after consideration of the coal company's objection. It is not intended to be a phrase of limitation.

CONCLUSIONS OF LAW

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

2. Appellant lacks standing to assert that the DER erred in its notification to the UMWA of proceedings held on Helen's objections to People's proposed locations for the Carlson and Swasy wells because it did not suffer harm from the alleged error and thus has no legally cognizable interest in the sufficiency of the notification.

3. The notice given by the DER to the UMWA was sufficient to satisfy the requirements of §502(n) of the Gas Operations Act.

4. Appellant did not carry its burden of proving that the Carlson and Swasy wells , if drilled at the approved location, will unduly interfere with or endanger the Helen Mine.

5. The DER did not abuse its discretion in approving the Carlson and Swasy gas well locations since it had no basis for finding that the gas wells would unduly interfere with or endanger the Helen Mine and because the sites suggested by appellant are unsuitable for the production of gas either because of the lack of potential for finding gas or because of the surface terrain.

6. Section 202(b) of the Gas Operations Act does not limit the number of gas wells which can be drilled on a tract of land.

O R D E R

AND NOW, this 18th day of April , 1979, it is hereby ordered that the action of the DER dated February 27, 1978, approving the location of the Peoples gas well on the Carlson tract and the location of the Peoples gas well on the Swasy tract is sustained and the appeal by Helen Mining Company therefrom is dismissed.

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RAYMOND E. DIEHL :

Docket No. 78-037-B

v. :

Pa. Sewage Facilities Act

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Thomas M. Burke, Member, May 14, 1979.

This matter concerns an appeal by Raymond E. Diehl (Diehl) from the Commonwealth of Pennsylvania, Department of Environmental Resources' (DER) refusal to approve a revision to the Monroe Township Official Sewage Facilities Plan to include a 13-lot subdivision proposed by Diehl for Martin Road in Monroe Township. The DER notified Monroe Township of its refusal to approve the proposed plan revision in a letter dated February 14, 1978. The letter set forth three reasons for the disapproval: (1) It failed to address the future use of the parent tract; (2) It failed to examine all the alternatives available for sewage disposal; and (3) The proposed plan failed to consider that the size of the lots of the subdivision may make it difficult to repair or replace sewage systems without encroaching at each lot.

A hearing on Diehl's appeal was held in Harrisburg. Appellant has filed findings of fact and conclusions of law and a brief in support thereof. We hereby enter the following:

FINDINGS OF FACT

1. Appellant is Raymond E. Diehl, an individual with a mailing address at Route 174, R.D.#2, Boiling Springs, PA 17007.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, the agency authorized to administer the Pa. Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750, *et seq.*

3. Appellant wishes to subdivide part of a farm that he owns in Monroe Township, Cumberland County, Pennsylvania, into 13 one-half acre lots.

4. The minimum lot size permitted for this subdivision by the Monroe Township zoning ordinance is one-half acre.

5. The parent tract of 138 acres is used for agricultural purposes. After the subdivision is developed, approximately 131 acres will remain to be used for farming.

6. The proposed subdivision is approximately two miles from the nearest public sewage line.

7. On August 11, 1977, the supervisors of Monroe Township passed Resolution No. 2-77 which approved appellant's subdivision and requested the DER to approve the subdivision as a revision to Monroe Township's Official Sewage Facilities Plan.

8. The request for revision was received by the DER on November 7, 1977.

9. The plan revision proposes the use of an on-lot sewage disposal system for each lot.

10. The plan revision proposes individual wells for water supply.

11. Prior to approving the subdivision, Monroe Township had its sewage enforcement officer, Ernest J. Walker, test the soil for acceptability of on-lot sewage systems.

12. The size of each lot is 100 feet by 200 feet.

13. The soil at the Diehl subdivision is able to accommodate an elevated sand mound sewage disposal system on each lot.

14. There is sufficient room on each lot to allow a 100 foot isolation distance between the sewage system and the water well and to permit the installation of a second repair or replacement system if subsequently needed.

15. The request for plan revision forms include a Planning Module for Land Development. Monroe Township stated on the module that the ultimate sewage facilities for the subdivision will be individual and the ultimate water supply will be individual.

16. The DER notified the Monroe Township supervisors by letter dated February 14, 1978, that the proposal to revise the official plan to include Diehl's subdivision could not be approved.

17. The DER letter of February 14, 1978, set forth three reasons for the disapproval of the proposed revision to the official plan:

> (1) The submittal failed to address the future use of the parent tract;
>
> (2) The submittal failed to examine all the alternatives available for sewage disposal; and
>
> (3) The submittal failed to consider that the size of the lots of the subdivision may make it difficult to repair or replace the systems without encroaching on the required isolation distances.

18. The DER's objection that the proposal does not address the future use of the parent tract can be satisfied by a formal submittal to the DER stating that the parent tract will be used for farming.

19. The subdivision lots are large enough to allow for the isolation distances between the water wells and sewage disposal facilities required by 25 Pa. Code 73.12; nevertheless, the DER is concerned that a sewage disposal system might inadvertently be constructed too close to a water well.

20. If isolation distance was the DER's only concern, it would have approved the plan revision and notified the sewage enforcement officer that extra care was needed in the placement of the sewage systems.

21. On March 1, 1978, the DER notified Monroe Township by letter that its official sewage plan was in a disapproved status and that no further sewage permits could be issued.

22. It will take from 8 months to one year for Monroe Township to submit, and for the DER to approve, a new base sewage facilities plan for the entire township.

23. There are no questions on the DER prepared planning module forms which request information on the ultimate use of the parent tract or alternatives available for sewage disposal.

24. Monroe Township provided as much information on ultimate sewage disposal as was requested by the DER prepared planning module form.

25. Monroe Township was not given the opportunity to submit information on ultimate sewage disposal systems and the ultimate use of the parent tract.

DISCUSSION

Monroe Township, as with every other municipality in the Commonwealth, is required by Section 5 of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1, *et seq.*, to have a plan for providing sewage services to all areas within its jurisdiction. The official sewage facilities plan (official plan) must be officially adopted by Monroe Township and approved by the DER. Only those sewage systems which are consistent with the plan are able to be permitted by Monroe Township for installation. See Section 7(b)(4) of the Sewage Facilities Act, *supra*.

Raymond Diehl, appellant, wished to subdivide 13 lots from a 138 acre farm he owns off Martin Road in a rural area of Monroe Township, Cumberland County. Since Monroe Township's official plan does not provide for sewage services for the area where the subdivision is proposed, Diehl requested Monroe Township to revise its official plan to provide for individual sewage systems for his 13-lot subdivision.[1] In response to Diehl's request, the Monroe Township supervisors on August 11, 1977, passed a resolution revising its official plan to include Diehl's subdivision and requesting the DER to approve its plan revision.

It is from the DER refusal to approve this plan revision request that Diehl has filed this appeal.

A party who appeals a DER refusal to approve a revision to an official sewage facilities plan has the burden of proof. See Rule 21.42 of the board's rules of practice and *Eagles' View Lake v. DER, et al*, EHB Docket No. 76-086-W (issued April 4, 1978). Our review of the DER action is to determine whether the DER committed an abuse of discretion or an arbitrary exercise of its duties or functions. *Warren Sand and Gravel Co., Inc. v. Com. of Pa, DER*, 341 A.2d 556, 20 Pa. Cmwlth Ct. 186 (1975); *Doris J. Baughman, et al v. Com. of Pa, DER, et al*, EHB Docket No. 77-180-B (issued January 26, 1979).

The initial DER objection — the proposal failed to discuss the future use of the parent tract — need not be dwelled upon. It results from appellant's lack of knowledge of the information needed by the DER. The problem arises because the DER prepared plan revision application forms do not request any information on the future use of the parent tract. In any event, the matter can be resolved to

1. 25 Pa. Code 71.15 (b) requires that a municipality must revise its official plan to allow for a subdivision unless the official plan adequately meets the sewage disposal needs of the proposed subdivision.

DER's satisfaction by a formal submittal from Diehl stating that the parent tract will be used for farming[2], and Diehl is willing to submit such a statement.

The DER also objected to the plan revision because it contends that the size of the lots make it difficult to repair and replace on-lot sewage disposal systems without encroaching on the isolation distances between the sewage systems and the water wells.

Prior to approving the inclusion of the Diehl subdivision in its official plan, Monroe Township had its sewage enforcement officer, Ernest J. Walker, test the soil for acceptability of on-lot systems. He found the soil to be able to accommodate an elevated sand mound sewage system. He also found that if the on-lot systems and the water wells are properly positioned, there will be sufficient isolation distance between them to allow for the 100 foot minimum distance required by 25 Pa. Code 73.12, and to add a second or third repair or replacement system if later needed.

The DER does not dispute Walker's findings; in fact, it agrees that the proper isolation distance between the on-lot system and the water well can exist if the sewage system is placed properly. It is concerned that, for reason of error or otherwise, the system might be improperly placed, abbreviating the necessary isolation distance.

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2. The testimony of Jeffrey Gordon, the DER employee responsible for recommending or rejecting approval, went as follows:

"Q. Okay; wasn't a second problem the fact that the plan did not say what the ultimate use was going to be of the parent tract?

"A. That was another problem, also.

"Q. But in discussion, didn't you waive that?

"A. I think that has been taken care of.

"Q. Mr. Gordon, didn't you drop that requirement about stating the use for the parent tract?

"A. We have discussed this with Mr. Diehl and yourself, and it is a matter that Mr. Diehl could answer it in a formal submittal, and it would be acceptable.

"Q. So, that is no problem either?

"A. It doesn't appear to be.

"Q. Mr. Diehl has testified, too, that the parent tract — and you heard Mr. Diehl testify that the parent tract is used for farming and will be so used for farming?

"A. Yes, I did.

"Q. Would that satisfy you if he put that into a formal submittal?

"A. That would answer that question that was raised in our disapproval, yes." NOTES OF TESTIMONY, pp.87 and 88.

Notwithstanding plan revision approval by the DER, a permit still must be procured from Monroe Township to install an on-lot system. The applicant, to receive a permit, must demonstrate adherence to DER rules regulating installation and placement of subsurface systems. See Section 7 of the Sewage Facilities Act, *supra*, and 25 Pa. Code Chapter 75. DER's concern can be alleviated if Monroe Township insures the proper placement of the subsurface systems during the administration of the permit program. Jeffrey Gordon, the DER employee who received the proposed plan revision for review and recommended disapproval, testified that if the isolation distance was the only problem, the plan revision would have been approved with a caution to the sewage enforcement officer that extra care must be taken.[3]

We do not believe that the projected isolation distances can properly form the basis for the disapproval of this plan revision. The projected isolation distances comply with the DER's regulations, and the proper placement of the sewage disposal systems can be assured by the proper administration of the on-lot sewage permit program. Also, the DER did not offer any reason why appellant would need greater isolation distances at his lots than required by regulation.

The remaining reason for the DER's failure to approve the plan revision — failure to examine other alternatives available — also results

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3. "Q. Isn't this a problem in every case; even when you give approval, isn't this a problem that someone will go out and put the well closer to the sewage system than allowed?

"A. It is, yes.

"Q. And you have approved cases where this problem is a possibility, right?

"A. But this was only one of several reasons for the disapproval of the Diehl subdivision.

"Q. So, this reason for disapproval was one that you face in almost every case?

"A. Right, sir.

"THE EXAMINER: Let me ask a question then.

"Are you leading me to believe that if this were the only problem, you would not have disapproved it?

"THE WITNESS: It would have been raised as a possible problem, and it would have probably gone forth.

"I would have notified the sewage enforcement officer in our approval letter that it appears there is a problem; that you should take extra care.

"THE EXAMINER: And it would have been issued?

"THE WITNESS: Yes."

NOTES OF TESTIMONY, p. 86.

from the DER's dissatisfaction with the information submitted by Monroe Township. It wanted an explanation of the future or "ultimate" sewage disposal facilities for the subdivision. The DER appears to be satisfied with on-lot sewage disposal facilities for present or interim needs, but wants more information on such factors as population growth before making a decision on the suitability of on-lot disposal systems as ultimate systems.[4]

Monroe Township provided as much information on ultimate sewage disposal as was requested by the DER prepared planning module form which accompanies the application for plan revision. The module submitted by Monroe states at Part II-C that individual sewage facilities and water supplies are to be the ultimate proposed systems. In Part II-D, question no. 3, the module states that the land will not be served by sewers. At Part II-E, question no. 3, the module states that the use of land in this area is agricultural in nature.

The location of projected areas of population growth is not addressed by the module. However, there are no questions requesting this information. The DER, because of the exigencies of a particular application, certainly can ask for information above and beyond that provided by their forms; however, it is patently unfair to disapprove a plan revision proposal because such information is not included in the original submission and not give the applicant an opportunity to provide the information. Here, the DER took its February 14, 1978, action rejecting the plan revision request without the applicant having the opportunity to supplement its application with such information.

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4. "THE EXAMINER: If Monroe Township came in tomorrow and submitted a plan for the Diehl subdivision stating that the on-lot system is the ultimate plan and also that there is a significant isolation distance and also that there is a significant area for a repair unit, would that then allow you to approve the revision to the area of the official plan in which the Diehl subdivision is enclosed?

"THE WITNESS: In view of the March 1 letter?

"THE EXAMINER: Yes.

"THE WITNESS: The township has been asked to revise their 537 plan; and as part of that, they are going to tell us where they want growth to take place.

"If they don't want growth to take place in this area or they want very limited growth, yes, I think you could say that this is [acceptable]; but if they are going to go forward and say this is their growth area, this is where they want development to occur and we are going to provide public sewer out here, perhaps, that would be something else.

"It would probably be approvable if they were going to say it was a growth area and extend sewer out there.

"THE EXAMINER: If they said it was not a growth area and they were not going to extend services out there?

"THE WITNESS: If they said it was not a growth area, that they weren't going to extend sewers and it was possible to maintain isolation distances for a primary and a repair area, yes." NOTES OF TESTIMONY, pp 106, 107.

We find that the DER abused its discretion by refusing to approve the Diehl subdivision revision to the Monroe Township official plan. Monroe Township could not in good faith have known that the DER wanted more information on the ultimate use of the parent tract and population growth than was requested in the application and plan module. It should have been given an opportunity to supply the information. Further, and of primary importance, appellant has shown by a preponderance of the evidence that on-lot sewage disposal systems can be installed on the 13 lots in compliance with DER's requirements and that there can be sufficient isolation distance between the sewage disposal facilities and water wells to comply with the DER's regulations.

On March 1, 1978, two weeks after it disapproved the Diehl subdivision plan revision, the DER notified Monroe Township that its official sewage plan was in a disapproval status and that Monroe must submit to the DER a "major plan revision" for all areas of the township. The DER contends that so long as the Monroe Township plan is in a disapproval state it cannot be revised, thus the Diehl plan revision cannot be acted upon until Monroe's plan is reinstated, whether or not it complies with the DER's requirements. Mr. Gordon aptly described appellant's predicament when he testified: "It appears that you (appellant) got caught — you couldn't answer the questions before the March 1 letter went out, if that is what you are getting to."

DER may be correct when it contends that it cannot act upon a plan revision application when the base plan is in a disapproved state. However, the March 1, 1978, action disapproving the Monroe Township base plan should not have had any effect on the Diehl plan revision, as the township's plan should already have included the Diehl plan revision when Monroe received the March 1, 1978, notice of disapproval. Diehl should not suffer harm from the DER error. He should be in the position he would have been in if his plan revision had been approved prior to the March 1, 1978, action.

CONCLUSIONS OF LAW

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

2. The burden of proof in an appeal by a private party from a DER refusal to approve a sewage facilities act plan revision is upon the appellant.

3. The board's review of a DER action is to determine whether the DER committed an abuse of discretion or an arbitrary exercise of its duties or functions.

4. The projected isolation distance between the on-lot sewage disposal facilities and the water wells cannot form the basis for disapproval of a plan revision because the projected isolation distances comport with the DER's regulations and the DER did not justify the imposition of greater distance.

5. Monroe Township's plan revision application should not have been disapproved because of the failure of the township to examine alternatives available for sewage disposal where the application did state the township's intention as to present and future development of the subdivision area, where the application form prepared by the DER did not request any information concerning such alternatives, and where Monroe was not given the opportunity to submit information on available alternatives.

6. The March 1, 1978, action of the DER disapproving the Monroe Township base sewage facilities act plan had no affect on the Diehl plan revision because the township's base plan should have included the Diehl plan revision prior to the township's receipt of the March 1, 1978, notice of disapproval.

O R D E R

AND NOW, this 14th day of May, 1979, it is hereby ordered that the refusal of the DER to approve the plan revision for the Raymond E. Diehl/ Martin Road subdivision is reversed.

It is further ordered that upon the submission to DER by Monroe Township or Raymond Diehl of a written statement that the parent tract will be used for farming, the DER shall approve the plan revision for the Raymond E. Diehl/ Martin Road subdivision.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

DATED: May 14, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

WILLIAM A. LUCAS AND AUGUST J. LUCAS : Docket No. 77-059-D

v. : Abatement Order Under The Clean Streams Law

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joanne R. Denworth, Member, May 23, 1979

Appellants William and August Lucas have appealed from an order of the Department of Environmental Resources (DER) issued May 18, 1977, requiring them to obtain a permit for the treatment of industrial waste allegedly resulting from sludge disposal in a strip mining pit completed by appellants in 1972. DER bases its order on the 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. §691.1 *et seq.*, and the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq.* DER asserts that appellants did not have a permit to dispose of solid waste under the Solid Waste Management Act. Appellants claim that the sludge disposal was approved by the Division of Surface Mine Reclamation within DER, and that as the sludge disposal was approved appellants cannot now be required to obtain a permit for the treatment and discharge of industrial waste. DER denies that any such approval was given, but in any event asserts that appellants can be required under The Clean Streams Law and the Administrative Code to correct any pollution condition resulting from appellants' mining and sludge disposal operations. Appellants deny that any such conditions were caused by their operations.

FINDINGS OF FACT

1. Appellants are William A. and August J. Lucas, partners in the Lucas Coal Company, 400 North Third Street, Grove City, Pennsylvania.

2. Appellee is the Department of Environmental Resources, which is the agency of the Commonwealth authorized to administer the Solid Waste Management Act, The Clean Streams Law, and the Surface Mining Conservation and Reclamation Act, Act of May 31,

1945, P. L. 1198, *as amended*, 52 P. S. §1396.1 *et seq.*

3. The strip mine that is the subject of the order appealed from is located in Merion Township, Butler County. It is identified by mining permit no. 174-5 issued under the Surface Mining Conservation and Reclamation Act, and amendments to that permit which are numbered 174-5(c), 174-5(c)(2), and 174-5(c)(2)(a). The mine is within the larger geographical area identified under mine drainage permit no. 2866BSM39, issued under The Clean Streams Law. When the mine drainage permit was first issued in 1965 it was permit no. 365BSM1, which was later renumbered by the department to the present number. Both mine permit 174-5 and its amendments, and mine drainage permit no. 2866BSM39 were issued to the Lucas Coal Company by DER and its predecessors.

4. Some time in early 1972 William Lucas contacted Walter Kohler, Chief of the Mine Drainage section of the Bureau of Surface Mine Reclamation to inquire as to the procedure to be followed for obtaining permission to dispose of sludge from the Armco Steel plant at several of his mining operations.

5. Lucas was advised by Kohler that the procedure was to request a backfilling variance or amendment to the mining permit to allow the disposal of sludge in particular strip pits. Although Mr. Kohler has since died and was unavailable to testify, it appeared from the testimony of William Lucas that Kohler did not inform Mr. Lucas that any other permit from any other division of DER was required to dispose of sludge in a strip pit.

6. By letter dated May 22, 1972, addressed to Mr. Kohler, Mr. Lucas requested "an approval to amend our backfilling plans at our 174-5A, 174-7 and 174-9 permits" to allow disposal of Armco sludge from the strip pits under these mining permits. That letter did not refer to mine drainage permit numbers.

7. A copy of Mr. Lucas' letter in the Bureau of Surface Mines' files has marked on it, in writing that is not Mr. Lucas', the mine drainage identification numbers, which are 2866BSM39 for mining permits 174-5 and 174-7 and 3071BSM1 for mining permit 174-9. The copy also bears a notation at the bottom "OK—put in folder".

8. By letter dated May 26, 1972, Kohler gave approval to place calcium sulphate material in the strip mine pit as requested. However, Mr. Kohler's letter stated that it was re: permit no. 3071BSM1 and did not mention or refer to mine drainage permit no. 2866BSM39.

9. Prior to approving the variance or amendment, the Bureau of Surface Mining had a chemical analysis conducted on a sample of the Armco sludge collected by William Lucas and forwarded to Harrisburg by mine inspector Merle Urey.

10. On July 29, 1972, Lucas began dumping Armco steel corporation's pickle liquor sludge into the strip mine area identified as mine drainage permit no. 2866BSM39 and mining permit number 174-5 and amendments thereto.

11. On July 31, 1972, District 30 mine conservation inspector Merle Urey was notified that the Lucas Coal Company had begun dumping operations. Mr. Urey requested at that time that Mr. Lucas have ready for his site inspection the authorization required for disposal of the sludge.

12. On August 2, 1972, Mr. Urey inspected the disposal site and Mr. Lucas showed him Kohler's letter authorizing the disposal of the sludge within the area covered by mine drainage permit no. 3017BSM1. Mr. Urey pointed out that the area authorized for sludge disposal by its letter permit and the actual dumping site were not the same area, and told Mr. Lucas to get approval for disposal at the 174-5(c) mining permit site.

13. On August 5, 1972, Mr. Lucas sent a letter to Mr. Kohler which stated, *inter alia*:

> "You will note that in my May 22, 1972 letter to you, I requested approval on Strip Permit Numbers 174-5A, 174-7 and 174-9. Your letter of approval to a Variance to Backfilling Plan in error did not include the two Water Permit Numbers as listed above."

14. Although Mr. Lucas asserts that Mr. Kohler approved the disposal of sludge in the strip mine pit in question over the telephone, no written evidence of that approval was received by him. It did appear that there was at least informal approval of this disposal site by Mr. Kohler since he and W. E. Guckert, chief of the Bureau of Surface Mine Reclamation and Mr. Kohler's direct superior, and Merle Urey all visited the site after the date of Mr. Lucas' letter and no suggestion was made at any time that Lucas did not have authority to dispose of sludge at that site. Mr. Guckert testified that the disposal at that site was authorized by his bureau. Mr. Urey assumed from what Mr. Lucas told him and from the action of his superiors that the disposal was authorized.

15. Prior to the time Mr. Lucas disposed of the sludge there was an informal agreement between the Bureau of Surface Mine Reclamation and the Division of Solid Waste within the Department of Environmental Resources that the Bureau of Surface Mine Reclamation had authority to approve disposal of industrial waste in active coal strip mine operations; whereas the Division of Solid Waste had jurisdiction to approve disposal of industrial waste in inactive coal mining operations.

16. During the sludge disposal operation in August of 1972, complaints were received by the department and investigated by personnel from the Division of Solid Waste Management. The complaints related primarily to the transportation of the sludge through

Butler and spillage of it onto the roads. As a result of these complaints and investigations the department initiated an injunction suit in the Butler County Court of Common Pleas against the hauler, which resulted in a consent decree dated September 13, 1972, Paragraph 5 of the consent decree stated:

> "Bilowitch and Geiger shall continue to transport waste sludge from the Armco Steel Corporation plant located in Butler, Pennsylvania, to locations where the Lucas Coal Company has obtained a permit from the Pennsylvania Department of Environmental Resources for the disposal of such waste and shall not dispose of such sludge in any other location without the prior written approval of the Department of Environmental Resources."

17. A memorandum written by Merle Urey to the chief of the Open Pit Mining Permit section dated September 22, 1972, relating to "location of sludge dumpings" on permit 174-5 of mine drainage permit 2866BSM39 states that the author has marked the location of "recent Armco steel sludge dumping and burying". The memorandum also states, "I received the approved amendment in today's mail but without a map."

18. On September 15, 1972, Walter Heine, Associate Deputy Secretary for Mines and Land Protection, who was the supervisor, of both the Bureau of Surface Mine Reclamation and the Division of Solid Waste, sent a telegram to Mr. Lucas stating that the amendment to Surface Mining Permit no. 3071BSM1 was suspended. In a letter to Mr. William Lucas of the same date, Mr. Heine confirmed the suspension order. The letter included the statement that: "the above mentioned amendment is not considered a permit under Act 241, Commonwealth of Pennsylvania Solid Waste Management Act . . . and therefore you must obtain a permit under said act before you can resume disposal of solid waste into the strip cut."

19. Prior to the issuance of the cease and desist order by Mr. Heine, DER had received a telegram from the Butler County Commissioners formally objecting to the disposal of the Armco sludge and the mining properties operated by Lucas without first obtaining their approval as required by the Solid Waste Management Act.

20. No appeal from the cease and desist order was taken by appellants. Appellants ceased any further dumping operations.

21. Lucas Coal Company received $55,475.35 from Armco Steel for the disposal of the sludge.

22. There was a dispute within the department as to jurisdictional authority over the disposa of industrial waste in active mines that was brought to a head by this case. A formal procedure was promulgated within the department on September 6, 1973, providing for coordinated approval of any solid waste disposal in active strip mines including the requirement for the issuance of a solid waste permit except in the case of coal refuse.

23. Other variances or amendments to mine drainage permit were issued by the Bureau of Surface Mine Reclamation for the disposal of industrial waste in active mines prior to this time. In January of 1973 a permit was issued by the bureau for depositing the Armco sludge in the Seechan Limestone strip pit in Butler County.

The Mine Site

24. The area of land covered by mine permit no. 174-5 lies immediately northwest of the C. Kelly property (Commonwealth Exhibit 1). The strip pits into which the sludge was disposed were initially separated from the Kelly property by a pre-existing open pit left unfilled by a previous mine operator.

25. The area in which Lucas mined contained many indications of prior mining, including old acid drains and unfilled strip mine cuts created prior to the time that Lucas mined under permit nos. 174-5(c) and amendments.

26. One of the Lucas pits was dug adjacent to the old open pit, at a higher elevation on the hill, and next to the Kelly property line. The other pit was located further up the hill, approximately 500 feet north of the old pit.

27. At the low side of the old pit, Lucas found a previously constructed surface drain, a deep open ditch which began at the base of the highwall, continued across the excavated area, cut through the low wall of the pit and extended horizontally through the hill so that any water drainage could flow by the force of gravity out of the pit.

28. Prior to the start of the Lucas mining operation under 174-5 site, this old gravity drain was identified on the map accompanying Lucas Coal Company's mine drainage application (Appellant's exhibit E) and shown as having a pH of 3.5. Prior to the start of mining this old gravity drain had been measured at having a flow of approximately 4 gallons per minute or 5,760 gallons per day. A map notation shows it to have been observed as dry on occasion.

29. It has been the policy of the Bureau of Surface Mine Reclamation that a coal mine operator who did not disturb or "affect" an existing acid mine drain would not be held responsible at a later time for acid mine drainage at that location.

30. At Mr. Lucas' urging, Mr. Urey noted the existence of the old gravity drain in most of his inspection reports and commented in several of them that it would not be affected or reaffected by Lucas' mining.

31. At Mr. Urey's request, Lucas placed a double clay seal in the old gravity drain and backfilled the drain and pit with overburden extracted from his new pit.

32. The seam of coal mined in the area covered by mining permit no. 174-5 was the Lower Kittanning coal seam. The Lower Kittanning coal seam and the overburden associated with it are acid producing.

33. Beneath the coal seam is a layer of impermeable underclay. This underclay affects the flow direction of groundwater since groundwater that percolates down through replaced stripped soil will flow in the direction that the underclay dips when it meets the underclay.

33. The direction of dip of the underclay beneath the 174-5 mining area is southeasterly, the clay having a higher elevation in the northwest, thus, the underclay dips in the general direction of the Kelly property and the main discharge area. Any groundwater flowing from the Lucas mine area would flow in a southeasterly direction toward the old gravity drain and the Kelly property.

34. Lucas' mine drainage permit authorized discharge of industrial waste to an unnamed tributary of Seaton Creek, which is a stream that is highly polluted by acid mine drainage. During the mining operation Lucas was required to discharge industrial waste within the parameters of the permit, namely a pH between 6 and 9 and iron not in excess of 7 mg/l.

35. On the course of mining Lucas eliminated several acid discharges, particularly on the northern and western side of the mining area. He also backfilled the old strip cut as required by the Bureau of Surface Mine Reclamation. According to the completion inspection report, the quality of the backfilling was excellent.

The Sludge Disposal

36. Approximately 80,000 cubic yards of sludge was disposed of in the two strip mine pits in the 2866BSM39 mine drainage permit area in July and August of 1972. Mr. Kohler's original authorization letter required that three feet of clean fill be placed in the bottom of the pit and that the material be deposited in two foot layers and prohibited the disposal of more than four feet of sludge. Because of the gelatinous character of the material and the difficulty of compacting it, these instructions were orally changed, and Mr. Kohler advised Mr. Urey that the method should be to mix the sludge with overburden by rolling it with a bulldozer and pushing the mixture into the pit.

37. The sludge disposed in the Lucas strip pits is material from the steel-making operations of Armco Steel Corporation in Butler. Acid pickle liquor and rinse water, which have been neutralized by lime, is pumped to settling lagoons where the clear water is separated. The process of neutralization causes the heavy metals, flourides and solids to drop out of the mixture to form a sludge. The sludge is composed of flourides and sulfates due to the acids, calcium due to the neutralizing agent, and certain heavy metals alloyed with the steel; chrome, nickle and zinc. An additional result of neutralization is the adjustment of the pH of the sludge and the remaining liquid effluent to approximately 9 or 10, thus permitting the latter to be discharged free of contaminants into the Connoquenessing Creek.

38. It is possible and even likely that sludge placed in the acid environment of the strip pits will leach when the sludge comes into contact with the descending flow of acid waters created by rainfall percolating down through the acid producing overburden material mixed with sludge.

39. The potential for leaching was demonstrated by a leachate test conducted on the Armco sludge in May of 1978 in the Pittsburgh laboratory of the DER's Bureau of Water Quality. This test, similar in nearly all material respects to the leachate test proposed by the American Society for Testing and Materials, involved the exposing of a 500 gram sample of the Armco sludge to water adjusted to a pH of 4, stirring the mixture for a period of 24 hours, and after filtering, testing the filtrate for metal and flouride levels. When metals come in contact with acid water, the metals will generally go into solution, dissolve and be extracted from the solid form into a liquid condition. This reaction occurred during the leachate test and the following results were obtained:

iron	1200 ppm	copper	6.5
manganese	1200	zinc	2.5
chrome	95	lead	.45
cadmium	.045	flouride	14.6

Water Pollution

40. In mid-April, 1974, Mr. Kelly, who resided immediately adjacent to the disposal area, complained to the DER that his water supply had become contaminated because of the Lucas mining operation.

41. As a result of this complaint, from March, 1974, through 1977, Mr. John Davidson of DER began collecting samples from the area near the mine. The samples were collected at various down-gradient points: at the main discharge area of the 174-5 mine site, at the spring that is the source of Kelly's drinking water and at various other springs and seeps downgradient in an easterly direction from the disposal site.

42. Laboratory analyses of the samples from the main discharge area (the old gravity drain) the Kelly's spring, and an abandoned farmhouse down-gradient in an easterly direction from the disposal site, showed "high" levels of the following contaminants: aluminum, chrome, flouride, iron, manganese, nickle, sulfates and zinc.

43. "High" levels for these parameters means that the levels were elevated above what would be expected in normal groundwater or in acid mine drainage in this region in the opinion of the DER's experts based on their experience in collecting and analyzing samples in the southwestern Pennsylvania region.

44. The department did not obtain any up-gradient or down-gradient samples or background data on groundwater at these points prior to mining and sludge disposal by Lucas.

45. All of the contaminants found in the sampling may be found to some degree in acid mine drainage.

of the heavy metal constituents found in the samples because these parameters *could* be found at these levels in acid mine drainage.

47. The flouride and sulfate levels in the samples do suggest that the sludge is leaching. Gary Merrit, presently chief geologist for the Division of Mine Drainage Control and Reclamation, testified that levels of flourides in southwestern Pennsylvania in groundwater are found in the general range of .5 ppm. Patrick Byrne chief chemist of the Pittsburgh laboratory of DER's Bureau of Water Quality Management who has had experience with the DER groundwater monitoring program testified that usual flouride levels in groundwater in southwestern Pennsylvania are less than .3 ppm. John Davidson, an environmental protection specialist of DER's Bureau of Water Quality Management for the last 12 years testified that in his experience, normal flouride levels in samples of natural water supplies throughout southwestern Pennsylvania range between .2 and .3 mg/l. Roger Higbee, hydrogeologist for the Bureau of Water Quality in the southwestern Pennsylvania region testified that in his experience in reviewing up-gradient samples from strip mine and landfill sites in the region, the heavy metal and flouride levels of the Lucas samples were high.

48. The Lucas samples were found to contain relatively high levels of flouride as follows:

	Main Discharge Area	Kelly Spring	Abandoned Farm Springhouse
1/20/76	0.48 mg/l	1.06 mg/l	.078 mg/l
10/26/76	8.40	—	16.8
3/9/77	8.90	1.45	1.44

49. Although most of the literature on acid mine drainage indicates that flourides may be present in acid mine drainage, none of the literature reported on by appellants' expert, Todd Giddings, reported levels as high as those found in the DER samples.

50. One sample reported in a study of water supply wells in Butler and Mercer counties contained a flouride level of 11 mg/l. However, well data indicated that the well was located in limestone, which contains flourospar-producing flourides. The average flouride content of the water supplies reported in that study was approximately .3 to .4 ppm.

51. EPA documents report that flouride is one of numerous major constituents of acid mine drainage, but do not indicate levels for flouride. A study by H. L. Lovell of Penn State which bi-weekly sampling of one mine site in Pennsylvania was conducted for one year showed an average flouride level of .29 mg/l with a low of .03 mg/l and a maximum value of 1.6 mg/l.

52. A study entitled the Slippery Rock Creek Mine Drainage Pollution Abatement Project, known also as the Operation Scarlift Report, was prepared for DER in 1969. It contains an examination of water quality of drainage located in the vicinity of the

Lucas mine. These samples indicated that from January 20, 1969, through September 17, 1969, the sulfate levels at two sample points ranged between 662 mg/l and 144 mg/l, a range considered to be normal for sulfates coming off of the Lower Kittanning Coal Seam.

53. The sulfate levels found in the Lucas samples were high, ranging from 4780 mg/l to 2865 mg/l.

54. The initial field inspector reports also indicate that the pre-mining sulfate levels were lower than those found in post-mining samples.

55. The Lucas mining operation affected the pre-existing low quantity acid discharges from the mine site by increasing the volume of acid water. Inspection reports of the 174-5 area completed in 1969 indicate that the acid water from the old gravity drain (the site of present main discharge point) was flowing at a rate of approximately 4 gallons/minute, or a total of 6,000 gallons/day. On September 17, 1969, this discharge point was found dry. However, seven measurements of the discharge flow taken after Lucas commenced mining operations, between August 13, 1973, and November 5, 1973, indicate a flow between 7,390 gallons/day and 22,891 gallons/day.

56. The Slippery Rock Creek Report indicates that at the time those samples were taken in the operational area of the mine site, only two discharge points could be found with a flow of acid water greater than 2,000 gallons/day, the minimum amount necessary to measure any flow.

57. There are dead trees in an area approximately 500 feet by 10 feet in the area of the main discharge. William Lucas testified that he had observed dead trees in that area prior to the start of his mining operation.

58. A sample taken on 4/4/74 of the tap water at Kelly's residence indicated that the water was acidic (pH 4.6) and had a high copper content. The high copper content can be attributed to the agressive corrosive action of the acidic water upon the copper water lines within the Kelly residence. Although Mr. Davidson stated that Mr. Kelly had told him that the water quality had changed since Lucas mined, no samples of Kelly's drinking water prior to Lucas' mining had been obtained and Mr. Kelly did not appear to testify to any such change.

59. DER based the treatment parameters for heavy metals contained in its order to appellant on the effluent limitations for certain chemical constituents set by consideration of the general water quality criteria in Chapter 93 of the Department's Rules and Regulations, 25 Pa. Code §9301 *et seq.*, the EPA toxic substances documents, and specific regulations for industrial waste discharges.

60. John Blazasky, a registered professional engineer employed by Todd Giddings and Associates, estimated the cost of constructing and operating a small treatment plant at the 174-5 mine site in compliance with the department's order. The treatment

process would require chemical additions to adjust pH and precipitate metals in order to meet DER's requirements. The estimated initial construction costs of such a treatment facility is $250,000. Operating costs are estimated between $50,000 and $75,000 a year. Included in operating costs are costs for chemicals, personnel and sludge disposal.

61. Even though the sludge is leaching, the sludge will reach a state of equilibrium within 8 to 15 years of its placement in the strip pit and will stop leaching substances in excess of the parameters normally found within acid mine drainage. That this process has begun can be seen by the decrease in levels of flouride and sulfate found in the later samples taken by the department. (Exhibit 23).

DISCUSSION

There are many difficult questions in this case, but the critical questions are questions of fact: Is the sludge that the Lucas' disposed of in the strip mine pit in question leaching and contaminating the waters of the Commonwealth? Is there acid mine drainage emanating from the area that Lucas mined for which he can be held responsible? Did appellants have a permit for the disposal of sludge in this strip pit?

The Commonwealth has issued an abatement order and has the burden of establishing the facts that justify its order. 25 Pa. Code §21.42. We conclude that the Commonwealth established that there is acid mine drainage coming from the area that appellants mined that is to some extent further contaminated by leachate from the sludge that was disposed of by appellants at this site, and that this combination is causing pollution of the ground and surface waters of the Commonwealth. The Commonwealth did not establish to our satisfaction that appellants did not have a permit for the disposal of the sludge under the Solid Waste Management Act. However, we conclude that the question of whether or not appellant had a permit to dispose of this sludge is largely immaterial to the question of whether they have to abate any discharges resulting from disposal of the sludge. Under The Clean Streams Law it is clear that they would have to do so whether or not they had a permit for the sludge disposal We conclude further that an abatement order is authorized under the provisions of The Clean Streams Law and the Administrative Code; however, we cannot sustain all of the provisions of the department's order upon the evidence presented in this case.

The Sludge Disposal

From our examination of the evidence in this matter we believe that the sludge deposited in the two strip pits covered by mining permit 174-5(c) and amendments is leaching and contributing to acid mine drainage discharges along the eastern side of the area where Lucas mined. The thirteen water samples taken in this area by the department over a period from 1974 to 1977 have elevated levels of heavy metals—particularly copper, chromium, nickel and zinc, which are not generally associated with mine drainage. These metals do occur in mine drainage, however, and *may* occur at these levels in certain areas according to appellants' expert witness with whom Mr. Merritt of the DER agreed on this point. DER bases its conclusions that the sludge is leaching on the flouride levels in the samples and to a lesser extent on the sulfate levels. It is clear that the sludge does contain flourides and sulfates, as well as the heavy metals that were reported in the sample reports. Although the sludge is highly alkaline when removed from the lagoons the placement of it in the acid environment of the strip pits is likely to result in leaching of these elements when the sludge comes into contact with rainwater precolating down into the sludge and overburden mixture, as demonstrated in the leachate test performed in the department's laboratory as an experiment.[1]

DER regarded the flouride as a tracer that would demonstrate whether or not the sludge is leaching. In fact, DER's entire case depends on whether this is a sound conclusion. DER's own witnesses were quite persuasive that in their experience flourides do not occur in groundwater in southwestern Pennsylvania in excess of .3 to .5 ppm. These conclusions were based for the most part on examination of natural groundwater and water supplies and not on examination of acid mine drainage. This conclusion as to natural groundwater was further supported by appellants' experts literature search, which included a survey of 75 water wells in Mercer and Butler counties where the average flouride was around .3 ppm. However, one sample in that survey showed 11 ppm of flouride, but well data indicated that that well was located

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1. Appellants' objection that the leachate test is not a proper test because water with a pH of 4 was used rather than distilled water and because the sample was stirred constantly, are not well taken. Obviously a simulation of conditions in the strip pit would require the use of acid water rather than distilled water. Also, the fact that the mixture was stirred for a period of 24 hours is only a simulation of the effect of mixing acid water and sludge in the strip pit. The test was not presented as an exact measure of what would happen, but only as an indication of what might happen in the strip pit.

in limestone where fluorospar is likely to be present. A more relevant study produced by appellants' witness Mr. Giddings, entitled "The Chemical Nature of Mine Drainage" by H. L. Lovell, gave a range of values based on samples taken at two-week intervals for one year from an active Pennsylvania coal mine. The range of values in this report for flourides was given as an average value of 0.29 mg/l with a minimum value of .03 mg/l and a maximum value of 1.6 mg/l. Four of the samples taken by DER were considerably above the maximum found by Dr. Lovell in coal mine drainage— 5.50 mg/l, 8.90 mg/l, 8.40 mg/l and 16.8 mg/l. The other values reported in the samples gathered by the department were with one exception above the average reported in Dr. Lovell's study for coal mine drainage:

.14 mg/l collected and discharged near abandoned barn on 10/26/76

1.10 mg/l collected at the tributary flowing under Route 308 on 1/20/76

.7 mg/l collected at the spring near the old farmhouse on 1/20/76

1.45 mg/l collected at the spring on the right side of Route 308 on 1/20/76

.48 mg/l collected from the tributary which joins with the overflow from the Kelly spring and flows past the Kelly house on 1/20/76

1.06 mg/l collected from the Kelly spring overflow pump on 1/20/76

1.44 mg/l collected from the springhouse at the abandoned farm on 3/9/77

1.45 mg/l collected from the Kelly spring on 3/9/77

In addition to the flouride levels, DER relied upon the high sulfate levels in the samples as indicative of leaching of the sludge, which contained sulfates precipitated out of the acid pickle liquor. The inspection reports prior to Lucas' mining and the Operation Scarlift report show much lower sulfate levels in the discharges from the site than those reported in the department's samples, which range from 2865 mg/l to 4780 mg/l. This is further evidence that the sludge is contributing to the discharges sampled, although it is somewhat less persuasive than the flouride levels since sulfate levels of up to 4,000 mg/l are reported in the Operation Scarlift Report in discharges of acid mine drainage in the vicinity.

The department's evidence is enough to conclude that the sludge is leaching and contributing to acid mine discharges on the eastern side of the area that Lucas mined. We do not agree with most of appellants' objections to the evidence offered by the DER in this case. Appellants insist that no valid scientific conclusion that the sludge is leaching can be drawn from DER's evidence without background samples of groundwater and acid mine drainage prior to the time that Lucas mined and disposed of the sludge. It may be noted that if Lucas had been required to obtain a permit from the Solid Waste Management Bureau, such background information would have been required

before any sludge disposal was permitted. (In fact, it is unlikely that the Solid Waste Management Division would have approved of the disposal of sludge in an acid strip pit environment.) While it would obviously be more desirable to have such background information, we do not disagree with DER's witnesses that one can reach a valid, if circumstantial, scientific conclusion based on the facts that parameters known to be in the sludge appear in the discharges at levels elevated over the normal range found in groundwater and acid mine drainage; the sludge was placed in an acid environment which is likely to cause leaching of heavy metals and other contaminants; the slope and dip of the underclay and the downgradient direction in which the discharges are occurring. The ultimate consequence of appellants' position would be that if one disposes of waste underground without gathering background data as to the exact parameters of the groundwater, one can never be held responsible for pollution resulting from that disposal. We do not interpret *North American Coal Corporation v. Air Pollution Commission*, 2 Pa. Commonwealth Ct. 469, 279 A.2d 356 (1971) and *Bortz Coal Company v. Air Pollution Control Commission*, 2 Pa. Commonwealth Ct. 441, 279 A.2d 388 (1971), as requiring that the department has background data where that is not available. In the *North American* case the court said, *inter alia*:

> " . . . when recognized scientific tests are *available* and practical, courts must insist upon their use and presentation."
>
> and
>
> " . . . If a regulatory agency desires to order the abatement of a violation of its regulations, it must meet its burden to prove that violation with substantial evidence. Nothing less will permit a reviewing court to affirm the action of the agency." (Emphasis supplied). 279 A.2d at 360 and 362.

In this case background data from before Lucas' mining and disposal operation was completed was simply not available. Although that makes the questions of fact and of proof more difficult, the board may conclude with reasonable certainty that the sludge is leaching and contributing to the discharges coming from this mine site. Appellants claim that DER should have performed a tracer study. DER made the assumption, which we find to be reasonable, that as the sludge contained large amounts of flourides the flourides would act as a tracer if they were in fact leaching out of the sludge and appearing in the groundwater discharges.

Appellants argue that fluorospar sometimes occurs in pockets in connection with the Van Port Limestone which lies beneath the Lower Kittanning Coal Seam and might account for the fluctuating flourides present in the discharges from this area. We find this to be unlikely since no mining of the Van Port Limestone was done in this area and it seems highly unlikely that if a pocket of fluorospar were accidently disturbed, it would produce flourides at all of the different sampling points that were sampled by the department.

We should note that we do not base any conclusion as to pollution coming from the mine site on the assertion by DER's inspectors that the Kelly's drinking water quality had "changed", since that assertion was completely hearsay and was not substantiated by the appearance and testimony of Mr. Kelly. Since DER did not take any samples prior to 1974, we do not have any evidence that the Kelly's water was or was not acidic before that time. Nevertheless, we are able to conclude with certainty based simply on DER's samples collected since 1974 that there is acid mine drainage coming from the mine site that was caused by Lucas' mining operation and that that drainage contains some amount of pollutants leached from the sludge. Under The Clean Streams Law it is clear that appellants must be held responsible for any acid mine drainage coming from the mine even after mining has been completed.

Acid Mine Drainage

Although Lucas eliminated several acid mine discharges in the course of his mining operations and did a satisfactory job of backfilling the area, including old strippings, it is clear that there is some acid mine drainage now occurring as a result of Lucas' operation. In the area of the old gravity drain the amount of flow has increased from approximately 5,000 gallons per day to between 7,000 and 22,000 gallons per day as measured before and after the mining operation. In addition there are springs and seeps that come together to form a discharge past the old abandoned farmhouse, which were not identified on any of the pre-mining maps or inspection reports. After Lucas sealed the old gravity drain and during his mining operation there was no discharge at the drain. Both Lucas and mine inspector Merle Urey testified that this was probably due to the fact that Lucas was pumping water from the mine to settling basins for treatment prior to discharge as was required by this mine drainage permit. Once mining was completed and backfilling begun, the drain began flowing at an increased rate.[2]

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2. Mr. Urey testified on cross-examination regarding the old gravity drain:
"Q Mr. Garrison looked at it at one point and found it dry. Were there any other measurements of that gravity drain prior to July of 1972?
"A No. To the best of my knowledge, there wasn't. I know I didn't take any until 1973, August 13.
"Q Is that because it had dried up?
"A No, I didn't take it for that reason. I took it because I knew that there was going to be some controversy here.
I was trying to establish a background. That is all. But I might point out too for fairness of presentation that Mr. Garrison notes a drain up here, which I later noted. He don't note one here that I picked up.
Now, these two drains were eliminated. Taking those two drains out could change the flow of water for maybe this one running heavier than it did before, if that is the case. These two dried up. If the bottom was raising that day, the water was bound to come back.
"Q Come out the area of the old gravity drain?
"A That is right. Remember, that gravity drain was put in the low spot originally by the coal operator.
"Q Maybe he found an increase of flow after 1973?
"A My records show that the flow has increased since the Coogan record was made."

Appellants claim that the main discharge area was not "affected" by their mining operation and cite Mr. Urey's inspection reports that constantly refer to the drain and the fact that it was unaffected by the mining. The assertion by the mine inspector and appellants that the drain was not "affected" is a legal conclusion that cannot preclude an investigation of whether or not there are in fact discharges in that area resulting from appellants' mining and disposal activities. What seems clear is that water percolating down through the acid-producing overburden mixed with sludge must go somewhere and, as might be expected, it is flowing downhill towards the old gravity drain and the main discharge area. The question then becomes what if any liability does Lucas have for these discharges under the applicable statutes and is the department's order valid under those statutes?

Solid Waste Management Act

Appellants argue that DER's order is invalid insofar as it charges them with the disposal of solid waste without a solid waste management permit since they claim to have had a permit for the disposal of sludge at this site. There is no question but that in the year 1972 the disposal of sludge in a strip mine pit required a permit under the Solid Waste Management Act, which had been adopted in 1970. Section 7 of that act provides, *inter alia:*

> "It shall be unlawful for any person, municipality, county, or authority to:
> (1) Dump or deposit, or permit the dumping or depositing of any solid wastesinto the surface of the ground or into the waters of the Commonwealth without having obtained a permit as required by §7: . . .
> (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."
> (Emphasis supplied.)

The permit requirements of §7 are as follows:

> "Applications and permits
> (a) It shall be unlawful for any person, municipality, county or authority to use or continue to use their land or the land of any other person, municipality, county or authority as a solid waste processing or disposal area of a solid waste management system or transport solid wastes to a mine without first obtaining a permit from the department: . . .
> (b) Application for a permit shall be in writing and shall be made on a form prescribed, prepared and furnished by the department and shall set forth such information and be accompanied by such data as the department may require."
> 35 P. S. §6007

Although we do not believe that an amendment or a variance to a backfilling plan is what was contemplated as a solid waste management permit under the act, we are inclined to agree with appellants that since appellant was instructed by a person in the department's bureau of Surface Mine Reclamation to apply for a variance to its backfilling plan in order to dispose of sludge in the strip pit, such an amendment or variance at the time constituted a "permit" issued by the "department".

The Bureau of Surface Mine Reclamation is after all a division of the department. The act does not state that one must get a permit from the Division of Solid Waste Management within the department. A citizen of the Commonwealth cannot be expected to know that a division of the department does not have authority to do what it proports to do. What seems to have happened here is that the Bureau of Surface Mine Reclamation continued its old policy of authorizing disposal of solid waste in active mines as it had been doing under the authority of the Bituminous Coal Open Pit Conservation Act, Act of May 31, 1945, P. L. 1198, 52 P. S. §1396.1 *et seq.*[3] As the department correctly notes this rather casual approach to the disposal of industrial waste within mines does not accord with the policy and intent of the Solid Waste Management Act.[4] It appears that at the time of Lucas' application, the department had not yet established a clear-cut policy for handling the disposal of waste in mines, as it did by September of 1973, largely as a result of this case. It is also clear that the Solid Waste Management division did not approve of the disposal of Armco sludge in this strip mine pit and that the Deputy Secretary in charge of the Bureau of Land Protection, which included both the Bureau of Mine Reclamation and the Solid Waste Management Division, did not grant any solid waste management permit to appellants. In September Mr. Heine notified appellants to cease disposal of the sludge without a permit under the Solid Waste Management Act and notified appellants that its amended backfilling permit did not constitute such a permit. Appellants did not dispose of sludge after this date. We conclude that up until that notification appellant was

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3. That act provides in Section 4:

> " . . . Other alternatives to contouring or terracing may be proposed in conjunction with such proposed land uses as . . . *solid waste disposal area development*, and unless such proposed alternatives or uses pose an actual or potential threat of water pollution, are deemed impractical or unreasonable, involve unreasonable delay in their implementation, or are violative of Federal, State or local law, *such alternatives and uses shall be approved by the department*."
>
> (Emphasis supplied.) 52 P. S. §1396.4 (a)(2)(G)

4. That policy is stated in Section 2 of the act as follows:

> "With respect to the disposal of solid waste in mines, and the transportation of solid waste for such purpose, it is further determined and declared that since such waste may be a potential source of pollution of the water table, methane gas or mine fires, and since the effects of decomposition of solid waste underground in mines are not fully understood or known at present, and since the processing, transportation or disposal may adversely effect the environment of the area, and may constitute a serious danger to health, safety and the public welfare, this act shall be so construed as to prohibit the disposal of solid waste in mines and the transportation thereof for that purpose unless and until the Department of Health and the Department of Mines and Mineral Industries shall have determined and prescribed the specific conditions under which the processing, disposal and such transportation may be accomplished without adverse effect upon the health, environment and economic development of the area involved, and shall have determined in each individual case that said conditions have been fully met. To that end, the provisions of this act and of lawful rules and regulations promulgated pursuant thereto shall be strictly construed."
>
> 35 P. S. §6002.

entitled to conclude that an amended backfilling plan constituted whatever "permit" was required by the department under applicable statutes; and that an amendment or variance to the backfilling plan did as a matter of law constitute such a permit under the Solid Waste Management Act at that time. Although we doubt that §7(2) was intended to apply to this situation, we agree with appellant that the term "permit or other approval from the department . . ." could be interpreted to allow the disposal of solid waste pursuant to an amendment or variance to the backfilling permit so long as that was the permit procedure being followed by the department.

A further problem here is even if the amended backfilling variance can be regarded as a permit for purposes of the Solid Waste Management Act prior to Mr. Heine's telegram to appellants, appellants did not produce any written evidence that they had such a permit for the site in question in this case—that covered by mine drainage permit 2866BSM39 and mining permit 174-5(c) and amendments thereto. We believe from the somewhat murky facts surrounding the events in this case that the Bureau of Surface Mine Reclamation did in fact approve appellants' disposal of sludge at this particular site; although we observe that much of appellants' authorization for this disposal operation resulted from Lucas' informing personnel from the DER that he had a permit issued by Mr. Kohler and those inspectors or investigators taking him at his word. However, it does appear to us that the Bureau of Surface Mine Reclamation intended to approve this disposal and thought they had done so, as shown by the fact that personnel from the bureau, including its chief, visited the site to observe the dumping operations and never suggested that Lucas did not have authority to dispose of the sludge. Further, the consent order in the Butler County Court of Common Pleas indicates that the department thought the dumping operation was approved. We suspect that when it was discovered that the authorization letter accidently omitted the correct mine drainage permit number that the department told Mr. Kohler not to reissue the amended authorization letter to cover this site. While it is understandable that DER would not want to give any further sanction to an authorization by its own division that it may have determined was contrary to the Solid Waste Management Act, appellants should not be caught in the middle of this bureaucratic dispute. Under the unique facts of this case, we believe appellants should be given the benefit of the doubt as to the existence of a permit, and we cannot conclude that appellants disposed of the sludge in violation of the provisions of the Solid Waste Management Act as stated in DER's order.

Certainly appellants cannot be held responsible for failure to comply with Section 7.1 of the Solid Waste Management Act as DER contends, since that section

applies to the duties of the department, not the applicant for a solid waste permit.[5]

The Clean Streams Law and The Administrative Code

The department bases its order on The Clean Streams Law and the Administrative Code as well as the Solid Waste Management Act. Under The Clean Streams Law it is clear that if there are discharges to the waters of the Commonwealth resulting from the sludge disposal and/or appellants' mining operations, appellants are responsible for those discharges whether or not they had a backfilling permit to dispose of sludge in the mine. The relevant provisions of The Clean Streams Law are as follows:

Section 301:

> "No person or municipality shall place or permit to be placed, or discharged or permit to flow, or continue to discharge or permit to flow into any of the waters of the Commonwealth any industrial wastes, except as hereinafter provided in this act." 35 P. S. §691.301.

Section 307:

> "No person or municipality shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, into 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 . . . A discharge of industrial wastes without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the board is hereby declared to be a nuisance."

Section 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). 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. . . ."

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5. Section 7.1 provides in part:

> "Additional requirements affecting disposal in mines and transportation of solid waste for such purpose
>
> (a) In addition to the foregoing requirements, before granting any permit for the disposal of solid wastes in mines or for the transportation thereof for said purpose, the department shall, as applicable:
>
> (1) Require the restoration of the landscape, including the planting of trees and shurbbery.
>
> (2) Except in the case of a municipality, county or authority which is directly performing the operations, require the posting of a bond sufficient to assure the financial responsibility of the operator, including the restoration of the area.
>
> (3) Notify the county commissioners of each county affected of the proposed plan.
>
> (4) Transmit a copy of the proposed plan to the Secretary of Commerce."

Appellants claim that these provisions are not applicable because they did have a mine drainage permit for discharges from the mine site and a "permit or other approval" to dispose of sludge in the mine. The problem with appellants' arguement is that none of these permits or approvals authorized the discharge of acid mine drainage after mining or the discharge of chemical contaminants leached from the sludge. The authorization that Lucas obtained for backfilling was simply an authorization to dispose of the sludge. It made no reference to any permitted discharge and no provision for treatment in the event of a discharge. Certainly such an authorization cannot be construed as a permit to discharge industrial waste to the waters of the Commonwealth. Appellants' mine drainage permit did authorize the discharge of mine drainage to the waters of the Commonwealth within certain parameters governing acid, iron and pH primarily. Appellants complied with those provisions during the period of the mining operation. In most of the department's samples collected since the mining operation was completed, the parameters for acid, iron and pH have been exceeded. The fact that appellants had a mine drainage permit and complied with it during the period of the operation can in no way authorize the discharge of acid mine drainage and chemical constituents of industrial waste after the completion of mining operations. Section 315, *supra*, specifically provides that:

> "A discharge from a mine shall include a discharge which occurs after mining operations have ceased, . . ."

The leading cases of *Commonwealth v. Barnes & Tucker Company*, 455 Pa. 392, 319 A.2d 871 (1974) ("Barnes and Tucker I"); 472 Pa. 115, 371 A.2d 461 (1977) ("Barnes and Tucker II") which dealt with acid mine drainage from an abandoned coal mine must apply where acid discharges from the mine include sludge leachate resulting from sludge disposal in the mine by the operator. In those cases the Supreme Court announced the principle of strict liability for acid discharges after the operator had ceased mining on the ground that such discharges constitute a public nuisance both by statute and at common law. The Supreme Court held that the company could be required to abate such discharges even though only 1.2 of the 7.2 million gallons per day being discharged could be attributed to the company's own operation.[6] The Court ruled that the discharge of acid mine drainage from a closed mining operation constituted a statutory public nuisance under §3 of The Clean Streams Law and a public nuisance under common law principles, and that the operator of the mine could be required by the Commonwealth to abate the nuisance under §601 of The Clean Streams Law, which

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6. The rest was "fugitive water" from an adjacent mine that was caused to be discharged by the fact of the company's mining.

provides in part:

> "(a) Any activity or condition declared by this act to be a nuisance, shall be abatable in the manner provided by law or equity for the abatement of public nuisances."

In this case the department is also proceeding under §1917-A of the Administrative Code, 71 P. S. §510-17, which includes among the powers and duties of the Department of Environmental Resources, the power:

> "(1) To protect the people of this Commonwealth from unsanitary conditions and other nuisances, including any condition which is declared to be a nuisance by any law administered by the department; . . .
> "(3) To order such nuisances . . . to be abated and removed; . . ." 71 P. S. §510-17.

Under these provisions the department clearly has the power to order appellants to abate the discharges of acid mine drainage containing sludge leachate, both of which constitute industrial waste within the meaning of The Clean Streams Law. *Commonwealth v. Harmar Coal Co.*, 452 Pa. 77, 306 A.2d 308 (1973); *Delmar Coward v. Commonwealth, DER*, EHB Docket No. 77-032-W, issued July 10, 1978; *John T. Ryan v. Commonwealth, DER*, 30 Pa. Commonwealth Ct. 180, 373 A.2d 475 (1977).

The Supreme Court in *Barnes & Tucker I* and *II* rejected many of the arguments appellants make as to their legal liability to abate discharges coming from past mine and disposal operations. In *Barnes & Tucker I* the Court rejected the Commonwealth Court's reliance on a case distinguishing between pollution of a clean stream and an already polluted stream as grounds for absolving the company from responsibility. The Court stated:

> "The Commonwealth Court attempted to distinguish *Sagamore* on the basis that that case involved a pure stream used as a supply of water for domestic consumption for a large segment of the public. Those factors were important there to establish a public use of the water. In the present case the Commonwealth Court found that the only public use of these waters was a developing recreational use. We need not decide whether such a use is sufficient in itself upon which to base injunctive relief, since we believe that the public has a sufficient interest in clean streams alone regardless of any specific use thereof. Toward this end we are mindful of article I, Section 27, of the Pennsylvania Constitution, P.S., which provides:
>
> '§27. Natural resources and the public estate
> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and 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.'
>
> "As this Court recently stated in *Commonwealth v. Harmar Coal Coal Co.*, 452 Pa. 77, 94, 306 A.2d 308, 317 (1973): 'There cannot be any doubt that an overriding public interest in acid mine drainage pollution control does exist.'"

The Court also addressed the issue of the effect of a past operation under a mine drainage permit. The Court said:

"During the time that mine no. 15 was operated pursuant to a mine drainage permit, *Barnes & Tucker* had *at best* a limited privilege to discharge untreated acid mine drainage."
319 A.2d at 885.

Appellants rely heavily on the Bureau of Surface Mine's policy that an operator will not be held responsible for a pre-existing acid mine discharge if he does not disturb or "affect" it. This concept is undoubtedly related to the definition of "land affected" under the Surface Mining Conservation and Reclamation Act, 52 P. S. §1396.3.[7] It is clear from the testimony that Lucas did not disturb or affect the old acid mine drain in the sense of cutting into the land where the drain existed. It may be noted, however, that the drain is within the brown outlined area on appellant's mine drainage map, that purports to identify the area to be "affected". Whether or not the old gravity drain was in the area affected in terms of land area, we do not believe that this is the controlling fact for purposes of determining whether or not the mining operation caused a discharge as prohibited by The Clean Streams Law. Under that act the question is whether there is a discharge resulting from the mining operation and/or the sludge disposal. In this case we conclude from the evidence that although there was a pre-existing discharge at the location, that discharge has been increased and other discharges have occurred along the eastern perimeter of the mine site as a result of the Lucas operation. Thus, even if we were to say that the Bureau's policy as to pre-existing acid drains should be the basis for decision in this case, we cannot say that the old gravity drain was not affected by Lucas's operations. Even the mine inspector whose reports continually made this assertion, testified that the discharge had been increased since Lucas's mining operations were completed. Under *Barnes & Tucker II* it is clear that an operator may be required to treat acid mine drainage resulting from this operation even though it includes water from prior abandoned mining operations.

DER's Order

We turn now to the terms of DER's order and whether that order can be sustained in all its particulars.

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

As discussed above, we cannot sustain the findings in paragraphs 3 and 4 of DER's order relating to appellants' failure to obtain a solid waste management permit. We conclude that as a matter of law an amended backfilling permit or variance could be regarded as a permit issued by the department as required by the Solid Waste Management Act, and did constitute such a permit until the department acted to inform appellants that such a permit issued by its own division was not a permit for purposes of the Solid Waste Management Act. Although appellants, through apparent error, did not receive a variance covering this particular site, it is clear from the actions of the Bureau of Surface Mine Reclamation that it intended to permit this disposal site. Appellants should have the benefit of the doubt as to the existence of a permit where it is clear that appellants intended to get the approval of the department and did in fact have the approval of the Bureau of Surface Mine Reclamation.

The department has established by a preponderance of the evidence, the facts that are the basis for the findings set forth in paragraphs 5 and 6 of its order and the legal conclusions set forth in those paragraphs and in paragraph 7 of the order, insofar as that paragraph relates to violations of The Clean Streams Law and the department's authority under the Administrative Code.[8]

Lastly, we consider the remedial provisions of the order, which require appellants to take certain action to treat the industrial discharges required by The Clean Streams Law and to abate the nuisance created by those discharges as required by that law and the Administrative Code.

Paragraph A of the department's order requires appellant to submit an application for an industrial waste permit within 60 days of receipt of the order. We find no merit in appellants' contention that the department may not order appellants to apply for an industrial waste permit. Section 610 of The Clean Streams Law provides, *inter alia*:

> "The department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. . . .

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8. Paragraphs 5, 6 and 7 of the order are as follows:

> "5. The disposal of industrial sludge at the mine operated by Lucas has caused the discharge and continuing discharge of industrial wastes from the area of the mine into an unnamed tributary of Seaton Creek, a water of the Commonwealth.
> "6. The discharge of untreated industrial waste is contrary to the provisions of Sections 301 and 307 of the Clean Streams Law, the Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §§691.301 and 691.307.
> "7. The continuation of the discharge of untreated industrial wastes is a nuisance, pollution and illegal conduct, as defined in Sections 2(3), 9(1), 9(4), 9(7), and 9(8) of the Solid Waste Management Act, *supra*, and Sections 1, 3, 301, 307, 315, 316, 401 and 402 of the Clean Streams Law, *supra*, and Section 1917-A of the Administrative Code, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §510-17."

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, . . ."

Section 402 of The Clean Streams Law provides in part:

"§691.402. Potential pollution

"(a) Whenever the board finds that any activity, not otherwise requiring a permit under this act, including but not limited to the impounding, handling, storage, transportation, processing or disposing of materials or substances, creates a danger of pollution of the waters of the Commonwealth or that regulation of the activity is necessary to avoid such pollution, the board may, by rule or regulation, require that such activity be conducted only pursuant to a permit issued by the department or may otherwise establish the conditions under which such activity shall be conducted, or the board may issue an order to a person or municipality regulating a particular activity."

In this case it is appropriate to require appellants to abate the discharges resulting from its mining and sludge disposal operations by requiring that appellants treat the discharges to a satisfactory level. The question then is what is a satisfactory level of treatment? The department has required that appellants treat the discharges to satisfy standards set forth in paragraph B of the order. Paragraph B specifies certain average and maximum concentration levels for a number of substances found in the discharges.[9] DER bases its authority for the imposition of these specific standards on Regulation 93.4 of Chapter 93, Water Quality Criterion of 25 Pa. Code. That section provides:

"§93.4. General water quality criteria.

"(a) Water shall not contain substances attributable to municipal, industrial or other waste discharges in concentration or amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life.

"(b) Specific substances to be controlled shall include, but shall not be limited to, floating debris, oil, scum and other floating materials, toxic substances and substances which produce color, tastes, odors, turbidity or settle to form sludge deposits."

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9. "B. Within one hundred twenty days of receipt of this order, effluent from the Lucas mine shall meet the following standards:

Parameter	7-Day Average Concentration (mg/l)	Maximum Concentration At Any Time (mg/l)
Total Suspended Solids	25.0	50.0
Total Iron	4.0	7.0
Total Chromium	0.5	1.0
Hexavalent Chromium	0.05	0.1
Total Copper	1.0	2.0
Total Nickel	1.0	2.0
Total Zinc	1.0	2.0
Total Lead	0.15	0.3
Total Manganese	4.0	8.0
pH	between 6--9 (At All Times)"	

Chapter 93 of the regulations goes on to provide in §§93.5 and 93.6 specific water quality criteria for specific waters of the Commonwealth. Section 93.5(c)&(d) give ranges of criteria for pH, temperature and specific pollutants that are keyed into the list of specific waters of the Commonwealth in §93.6 on the basis of the use of those waters. Section 93.5(e) provides:

> "(e) The list of specific water quality criteria does not include all possible substances that could cause pollution. For substances not listed, the general criterion that these substances shall not be inimical or injurious to the designated water uses applies. The best scientific information available will be used to adjudge the suitability of a given waste discharge where these substances are involved."

DER's witness Charles Blumenschein, a sanitary engineer working for the Planning Section of the Bureau of Water Quality Management, testified that DER sets limits for toxic substances or other substances specified in §93.4 and referred to in §93.5(e) on a case-by-case basis depending on the identification of those substances in a waste stream, the volume of flow, the receiving stream, the presence of other industrial discharges on that stream, and other relevant factors. In establishing particular numbers on a case-by-case basis DER refers to EPA documents on toxic substances as well as its own regulations establishing levels for particular substances, where those exist.

We are troubled by the generality of §93.4 and the lack of any specific reference to standards for toxic substances within Pennsylvania's own regulations. Obviously, it makes some sense to establish requirements for toxic substances on a case-by-case basis depending on their identification in a waste stream and the "water uses to be protected" in a particular situation. However, there must be some recognized basis for establishing these levels in a particular case.

DER's witness referred to several EPA documents[10] as containing the material from which the levels of the substances listed in the order were set; however, it was impossible to tell from the testimony exactly what the toxicity levels are or how DER arrived at its particular numbers. Mr. Blumenshein testified that chromium, copper, nickel, zinc and low pH's and alkalinities are "toxic" at certain levels. Iron and manganese, while not toxic *per se*, are particularly harmful to aquatic life because they coat stream bottoms and prevent aquatic life from feeding. We are aware that toxicity may vary depending on whether human, animal, plant or aquatic life is affected. While DER may refer to EPA documents establishing toxicity for particular substances where those substances have been identified, the basis for those standards must be identified by DER when they are imposed. This is particularly true in the

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10. Specifically, "Water Quality Criteria" published in 1972 and 1976.

case of an abatement order, as opposed to an industrial wastewater permit where the applicant would have the opportunity to learn what the bases for DER's standards in a particular case are and to challenge those standards if they believe them to be inappropriate. See, e.g. *Wolfe Dye and Bleach Works v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 77-019-D, issued October 19, 1978.

In the case of discharges flowing directly into the tributary of Seaton Creek (the main discharge, which is joined by the discharge from the Kelly spring overflow pipe, and the discharges that come together and flow past the abandoned farmhouse), DER did not establish that the standards in the order are related to any "water uses to be protected", which appears to be the premise for the application of Section 93.4. No evidence was presented by the department as to the level of any of these substances in the creek. Appellants' evidence and Operation Scarlift show that the creek is a highly acid stream. Consequently, as to these discharges, the most the department can require is that effluent discharges be related to the levels applicable to the Slippery Rock Basin (which is listed in Table 14 of §93.6 and keyed back to Group A in 93.5(d) which sets limits only for pH, dissolved oxygen, iron, temperature, dissolved solids and bacteria) as well as the regulation applicable to discharges to acid streams (25 Pa. Code §95.4). The latter section also forbids the discharge of "toxic" substances that would cause "pollution" of the stream, but again no indication is given as to what levels constitute pollution. Under The Clean Streams Law, DER may certainly prohibit the discharge of toxic and polluting substances even to an acid stream, since the object of the law is to reclaim those streams and not to pollute them further. See *Commonwealth of Pennsylvania, DER v. Harmar Coal Company, supra; Rushton Mining Co. v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 72-361-CP-D (issued March 12, 1976). However, if through its regulations DER elects to control these substances on a case-by-case basis, it has the burden of demonstrating precisely what the bases for the standards are in each case.

The department did establish that water from the Kelly spring was used for drinking water in the Kelly house in 1974, through the testimony of John Davidson, who collected a sample from the Kelly's tap and observed that it was connected by a copper pipe to the Kelly's spring. Patrick Byrne and John Davidson testified as to the U. S. Drinking Water Standards for some of the parameters listed in paragraph B of DER's order. We accept these standards as some indication of acceptable levels for human consumption.[11] DER's regulations impose the U. S. Public Health Service

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11. The Drinking Water Standards for parameters in the order that were testified to are as follows:

pH	6-9
iron	.3 mg/l
copper	1 mg/l
manganese	.05 mg/l

(cont'd)

Drinking Water Standards on waterworks where water is being provided to the public. 25 Pa. Code 109. 42. As appellants are not providing water to the public, these standards cannot be imposed on them. The parameters in DER's order are not as stringent as drinking water standards, except as to pH and copper. Certainly the toxic substances as well as iron and manganese, should be controlled in the area of the Kelly spring to levels that are not "inimical" or harmful to human life. However, we are not able to say what those levels are on this record. It may be that the levels set forth in paragraph B are appropriate. We simply cannot say.

Considering the evidence and circumstances in this case, we will follow the example of Commonwealth Court in *Barnes & Tucker* and require that at a minimum appellants treat the discharges from the mine and disposal site "to achieve minimum water quality standards as prescribed by law pertaining to the discharge of acid mine water into the waters of the Commonwealth". This is not to say that DER may not establish levels for the substances in the sludge leachate discharge in paragraph B, but only that they have not satisfactorily done so on this record. Reviewing the application for an industrial waste permit that is required to be submitted in this case, the department may establish treatment parameters for the elements listed in paragraph B only to the extent that they can be justified in relation to specific, current water uses and established toxicity levels.

Appellants argue that the cost of treating any discharge is prohibitive and unduly oppressive. Appellants should have considered the possible environmental harm that might result from disposal of sludge in the strip pit in 1972; and cannot be absolved from liability because of cost. However, in view of the unique circumstances of this case, specifically the implication of the Bureau of Surface Mine Reclamation in approval of appellants' sludge disposal, and DER's testimony that the sludge will stabilize and cease leaching within a period of approximately 8 to 15 years from the time of its deposition, we are especially concerned that appellants not be charged with excessive or unreasonable treatment costs. We are mindful of the Supreme Court's statement in *Barnes & Tucker I* that the exercise of the police power must be reasonable and not unduly oppressive. On the other hand, the Court there upheld Commonwealth Court's order to pump water out of the mine and treat it as "the only known effective abatement order which can be entered in this case".

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11. (cont'd)

zinc	5 mg/l
lead	.01 mg/l
flouride	1.5 mg/l

The 4/4/74 sample from the Kelly tap had a pH of 4.6, iron of .15 mg/l, copper 1.6 mg/l, manganese 38 mg/l, zinc .53 mg/l, flouride .9 mg/l, nickel .25 mg/l and chromium .05 mg/l.

Several of the possible solutions here are clearly unreasonable--the placement of a trench and seal around the entire area of the mine, which was estimated to cost as much as $1,000,000, and removal of all of the sludge placed in the mine, the cost of which could not be estimated. However, appellants may be required to collect and treat the discharges in a treatment basin in the area of the main discharge and the Kelly spring.

DER's order did not set any time limit on appellants' obligation to treat these discharges. The testimony indicates that the sludge is likely to stop leaching within the next 7 years. Of course, the acid mine drainage may continue indefinitely. Under The Clean Streams Law and *Barnes & Tucker*, appellants would be responsible for acid mine drainage resulting from the operation for as long as it continues. However, DER's order was directing to discharges resulting from the disposal of industrial wastes, and to acid mine drainage only insofar as it is inevitably mixed with the sludge leachate. It appears that DER does not generally pursue strip mine operators for acid mine drainage after reclamation has been successfully completed. Although this policy is understandable from the point of view of protecting the mining industry from interminable, unlimited expense, the policy does not accord with the policy of The Clean Streams Law or Article I, Section 27 of the Constitution. On this point, we must come to the general conclusion that appellants should be required to treat these discharges only for as long as it can be clearly established that the discharges have resulted from their operations.

Paragraph C of DER's order requires appellants to post bond in the amount of $200,000 "to assure financial responsibility for the continued treatment of the industrial waste". Although the power to require the posting of a bond is usually specifically authorized by statute (as, for example, in the Surface Mining and Reclamation Act), DER may have the authority to require the posting of a bond under the broad power given in §610 of The Clean Streams Law to formulate "such orders as are necessary to aid in the enforcement of provisions of this act". That section further provides:

> "The department may, in its order, require compliance with such conditions as are necessary to prevent or abate pollution or effect the purposes of this act."

However, we regard the posting of a bond as an extraordinary remedy that at the least requires showing as to "necessity". No such showing was made here. On the record it appears that appellants have abided by DER's requirements in their coal mining operations, and no evidence was presented to suggest that appellants would not comply with a valid order of DER. Under The Clean Streams Law, DER has available various specified means for enforcement of an order, including withholding a future

permit for noncompliance under §609. Without some evidence as to the necessity for the posting of a bond in this case, we cannot sustain paragraph C of the order.

CONCLUSIONS OF LAW

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

2. Where a mine operator was told by personnel of the Bureau of Surface Mine Reclamation, Division of the Department of Environmental Resources, that a variance or amendment to his backfilling plan was all that was required to dispose of sludge in a strip mine pit, and where the operator complied with the directions of the bureau and was given *de facto* approval by the bureau for the disposal of the sludge, that approval constituted a "permit" issued by the "department" within the meaning of the Solid Waste Management Act until the department's deputy secretary for land protection notified appellants that such an approval did not constitute a permit under the Solid Waste Management Act. Consequently, appellant did not violate the provisions of the Solid Waste Management Act when they deposited sludge in strip mine pit covered by mine drainage permit 2866BSM39 and surface mining permit 174-5(c) and amendments prior to September 15, 1972.

3. The disposal of Armco sludge into appellants' strip mine pit identified on Commonwealth Exhibit No. 1 has resulted in the discharge of industrial waste and consequent pollution of the waters of the Commonwealth in violation of The Clean Streams Law.

4. While background samples of groundwater prior to appellants' mining and sludge disposal operations would provide the best evidence of any change in water quality, where no such samples are available, the board may rely on evidence as to the nature of the sludge, its placement in an acid environment, the geologic conditions of the site and the collection of down-gradient samples containing elevated amounts of flouride, sulfates and heavy metals contained in the sludge to conclude that the sludge is leaching and causing discharges into the waters of the Commonwealth.

5. Under The Clean Streams Law a mining operator is responsible for discharges resulting from the disposal of industrial wastes in the mine, as well as acid mine drainage disposal from the mining operations after it has ceased.

6. Both acid mine drainage and sludge leachate are industrial wastes within the meaning of The Clean Streams Law.

7. The discharge of industrial waste into waters of the Commonwealth constitutes a public nuisance under The Clean Streams Law and the Administrative Code.

8. Even though appellants had approval for the disposal of the sludge in the strip pit from a division of the department, such approval does not constitute a permit to discharge industrial waste into waters of the Commonwealth under The Clean Streams Law.

9. Even though a mine operator has complied with the terms of his mine drainage permit during the mine operation, he may be held liable for post-mining discharges resulting from the operation and/or the disposal of industrial wastes in the strip mine pit.

10. Under The Clean Streams Law and the Administrative Code, DER may require a mine operator to apply for a permit to treat industrial wastes, where DER has established that such discharges are occurring as a result of the operation.

11. Although DER has power under The Clean Streams Law and Regulation 93.4 to require toxic and other polluting substances in a waste stream to be controlled to levels that are established on a case-by-case basis, DER has the burden of establishing the levels that it sets in a particular order on the basis of "water uses to be protected or harm to human, animal, plant or aquatic life".

12. DER did not sustain its burden of demonstrating the basis for all of the parameters set forth in paragraph B of its order.

13. Although DER may have power to require posting of a bond in a particular case under The Clean Streams Law, the board will not sustain such an order without a showing of the "necessity" for that condition.

O R D E R

AND NOW, this 23rd day of May, 1979, it is hereby ordered that the appeal of William A. and August J. Lucas, from the order of the Department of Environmental Resources issued May 18, 1977, is dismissed in part and sustained in part as follows:

A. Paragraph A of the DER's order is sustained insofar as it requires appellants to submit an application for an industrial waste permit for the collection and treatment of all industrial waste discharges resulting from appellants' sludge disposal and mining operation. Appellants shall submit the application within sixty (60) days of this order.

B. Appellants shall prepare an industrial waste permit application to treat discharges to the specific water quality standards applicable to the Slippery Rock Creek Basin under Chapter 93 of 25 Pa. Code. In the process of reviewing appellants' application, the department may establish treatment parameters for the additional elements listed

in paragraph B of its order only to the extent that they can be justified in relation to specific, current water uses and established toxicity levels.

C. Appellants shall not be required to post a bond as required by paragraph C of the DER's order.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

Board Member Thomas M. Burke did not participate in the decision in this matter.

DATED: May 23, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

EDWARD S. SWARTZ :

:

Docket No. 78-152-W

: Surface Mining and Reclamation Act

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and VERNELL, INC., Permittee

ADJUDICATION

BY: Paul E. Waters, Chairman, May 23, 1979

This matter comes before the board as an appeal from the grant of a permit to Vernell, Inc. for the mining of rock from a quarry on land adjacent to the Indian Echo Caverns in Lower Swatara Township, Dauphin County. The owner of the Caverns, appellant Edward S. Swartz, contends that the blasting necessary for the quarrying operation will cause irreparable permanent damage to his sight-seeing attraction, in that the geological formations will be weakened or destroyed thereby.

FINDINGS OF FACT

1. On or about October 31, 1978, the Department of Environmental Resources issued mining permit no. 1895-1 to Vernell, Inc. authorizing the opening of a surface mine in Lower Swatara Township, Dauphin County, Pennsylvania.

2. Indian Echo Cavern is a limestone cavern located in Swatara Township and owned by appellant, Edward S. Swartz.

3. Indian Echo Cavern has been open to the public since approximately May of 1929 and has been owned by appellant since 1942.

4. The rock forming the Cavern is made up of alternating beds of dolimite and limestone which beds are separated in some locations by distances up to several inches.

5. DER required the permittee to conduct seismographic testing on its land which was performed on June 15, 1977, by the detonation of one test blast.

6. The test blast was monitored at Indian Echo Caverns by placing one seismographic device on the concrete floor immediately inside the cavern.

7. As of July 29, 1977, the department was not satisfied that a permit should be granted to Vernell, Inc. and requested further information relating the vibration levels from the seismographic test to the stability of the cavern.

8. On or about April 10, 1978, appellant submitted additional data to the department in the form of a report by Mr. James A. Humpreville, a consulting geologist.

9. Based upon the report submitted April 10, 1978, and previous submissions, the department concluded that the permit should be granted.

10. Special condition 7 of the permit requires the permittee to open and develop the quarry during periods that Indian Echo Cavern is not open to the public. It further limits production blasting to two per week.

11. The extraction of the natural resources located on permittee's land is a necessary and proper function and one that is beneficial to the public at large.

12. The quarrying use proposed by permittee is one that has been performed in varying degrees in the general area for approximately 100 years.

13. Normal quarrying operations within the guidelines established by the permit can be conducted without hazard to the Indian Echo Caverns.

14. Some indication that controlled blasting can be performed without hazard is that charges appear to have been detonated within the cavern itself, for its own purposes, with no apparent ill affects, some time ago.

15. The seismographic readings obtained as a result of the test blast were so low as to be insignificant and well within all accepted safety criteria.

16. The standard criteria of two-inches per second particle velocity used in this case relates to vibration levels considered safe for structures.

17. Distance has a bearing on vibration levels generated from blasting sites inasmuch as the blasting operation proposed will proceed in a direction away from appellant's property, this will create even greater distances between the sites, thereby creating lower readings by any acceptable testing standard.

18. Permittee has met accepted business standards in providing adequate insurance coverage for its operations which will protect not only appellant but others who could be affected by permittee's operations.

DISCUSSION

Appellant has raised a number of questions regarding the blasting activities which permittee, Vernell, Inc., his neighbor, proposes to carry out. Appellant has operated the Indian Echo Caverns as a tourist attraction for many years and is now faced with an unknown future because the DER has granted permission for a quarrying operation directly across from the Caverns.

The Caverns are a natural geological formation which developed thousands of years ago when limestone and dolomite were eroded by underground water. The Caverns are located on one side of the Swatara Creek and the proposed quarrying site is on the other, about 1,000 feet away. The Caverns are two large rooms extending northeasterly about 265 feet with ceiling heights up to 37 feet. They are used for educational as well as sight-seeing purposes.

It is perfectly understandable why appellant would have the DER deny the mining permit involved in the case, as he has large sums of money and indeed his future livelihood tied up in and largely dependant upon the continued attractiveness of the Caverns. Certainly, the DER should have considered this, and it is a major concern to this board. The fact that the DER was not satisfied with the information provided by permittee initially and required additional technological support data to be supplied by permittee on April 10, 1978,[1] does indicate a proper concern for appellant's investment.

Our basic concern is that the blasting, which is permitted, be conducted at a level which will not disturb the lawful operation of appellant's business. The parties agree that present established standards by which the safety of a blast vibration is determined by the DER is a maximum particle velocity of 2.0 in/sec.[2] Appellant takes serious issue with this standard, as applied to caves or a cavern such as his. He argues that the standard was in fact developed for "structures" such as buildings or homes. It is true that the DER has not developed a special blasting safety standard for caves, as opposed to other structures. The problem however, that appellant faces, is that he must carry the burden of proof if he would have this board find that the standard used by the DER is inappropriate, and impose a different one. Our rules provide that where a permit has been issued

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1. The report prepared by James H. Humphreville, a consulting geologist, appellant's exhibit 9, gives the detailed geological background of the area and discusses the blasting operations for the quarry and the effect this will have on the Caverns.

2. This is the maximum allowable as recommended by the U. S. Bureau of Mines.

the party challenging it must carry the burden of proof. See Rule 21.42(c).[3]

Again, no doubt recognizing that both the board rules and court decisions are contrary to his position, appellant argues that nevertheless he should not have the burden of proof in this case. If, however, this rule is to be changed, suffice it to say that it will not be done on an *ad hoc* basis.

These limestone caverns which took thousands of years to develop are part of the Commonwealth's public trust which the DER is required to protect as a trustee of the state's public natural resources. See *Payne v. Kassab*, 11 Pa. Cmwlth. Ct. 14, 312 A.2d 86 (1973), aff'd. by Pa. Supreme Ct. at 468 Pa. 226, 351 A.2d 263; *Concerned Citizens for Orderly Progress, et al v. Comm. of PA, DER and Emerald Enterprises, Limited*, ___ Pa. Cmwlth. Ct. ___, 287 A.2d 989, (1978), and the concurring opinion of Member Denworth in *Eagles View Lake, Inc. v. Comm. of PA, DER and William Cohea*, EHB Docket No. 76-086-W, issued April 4, 1978. Thus, if a likelihood exists that the blasting from the operation of the quarry would cause damage to the limestone caverns, the DER must deny the application for the permit to operate a quarry.

Permittee, at the insistence of the DER, has conducted a blasting test to determine whether the expected vibrations from its quarrying activity will disturb appellant's business operation.

Using 228 pounds of explosives per delay, the test indicated, based on a seismographic reading directly inside of the Caverns, that there would be no damage to the Caverns.[4] The reading was 0.08 in/sec. which is considered very low, and substantially below that which is considered safe for homes and other structures. We have previously indicated why this must be accepted by the board until evidence is forthcoming indicating it to be in error. None was presented.[5]

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3. The rules provide:

> "A private party appealing an action of the Commonwealth acting through the Department of Environmental Resources shall have the burden of proof and the burden of proceeding in the following cases unless otherwise ordered by the board:
>
> "(a) Refusal to grant, issue or reissue any license or permit.
> "(b) Refusal to grant any variance from any regulation dealing with air quality standards.
> "(c) Where a party who is not the applicant or holder of a license or permit from the Commonwealth protests its issuance or continuation."

4. Appellant has suggested that the seismograph was improperly placed. However, when questioned on this point, appellant's technical witness said at N.T. page 129, lines 1 through 13:

> "THE WITNESS: No, I wouldn't go so far as to say it was placed improperly. I would say if I were doing it, I probably would have put it on the rock.

Continued to next page.

Considering the nature of appellant's tourist attraction, the permit specifically provides as a condition, that the blasting take place only during hours when the Caverns are not open to the public.[6] This is a reasonable limitation, and would seem to resolve at least some of the anticipated problems in allowing these adjoining landowners to both enjoy the full use and benefit their property.

The final matter which concerns us is the long-range effects of the blasting on the walls and ceiling of the Cavern. Appellant indicates that there have been occasions when rocks have fallen, and that there are some areas where the fractured rock is not as strong as in other places. It is clear to us that the quarrying operation will certainly do nothing to help the stability of the Cavern—our question, however, is whether it will actually damage the Cavern. Keeping in mind that other blasting operations have taken place in the vicinity off and on over many years, and that prior owners apparently did some blasting inside the cave itself, we are convinced that the risk of measurable damage is very slight. It is the fact that even slight damage is not to be ignored by appellant, which caused the board to request evidence of the insurance coverage for permittee's intended quarrying operation.

Appellant argues that the blasting operations will constitute a nuisance and inasmuch as the DER has the authority under 71 P.S. §510-17 to abate a nuisance, the surface mining permit here in question should not be granted. There is no doubt that blasting can under certain circumstances become a nuisance. See *Comm. of PA, DER v. Glasgow Quarry, Inc.*, 351 A.2d 689 (1976). Appellant's argument is that there has been no evidence offered to show that the limited blasting in this case will constitute a public nuisance. Indeed, the evidence is to the contrary.

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4. Continued from page 4:

"But, I am not really calling into question the judgment of the engineers who did it. We might just have done it differently.
"THE EXAMINER: Go ahead.
"BY MR. BOSSERT:
"Q Do you feel that placing it on the concrete gives as accurate a reading?
"A Well, I would be very surprised if a reading done on the rock was greatly different from that done on the concrete. I would not expect it to be very different."

5. Appellant's exhibit no. 15, a report prepared by a technical witness for appellant, agreed that the vibration intensity he calculated was "well within" the conventional "safe level".

6. Indian Echo Cavern is open from April through October during the hours of 9:00 to 5:00 and weekends only in November and March. The blasting will occur about two times each week and will last less than a second each time.

Cavern and to the extent that this solves one problem, it creates another. The fractures tend to reduce the blasting impact and attenuate seismic vibrations because of air space. The difficulty this presents, according to appellant, is that any weak or weakening joints in the formations are all the more susceptable to coming loose after continuous blasting. The danger thus created to the visiting public from falling rock is obvious. No one can guarantee appellant that there will be no falling rock in his Cavern on any future date. We would, however, expect no appreciable change in this regard attributable to permittee's quarrying operation, because of the low level and infrequency of the blasting. Although the applicant's insurance coverage cannot be substituted by the DER or this board for a determination of harm to the Caverns, it is relevant to show that in the event of any unexpected personal injury, permittee has insurance for this very purpose.[7]

CONCLUSIONS OF LAW

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

2. The appellant, Edward S. Swartz, has the burden of proof under Rule 21.42 of this board inasmuch as he has appealed from the issuance of a permit.

3. Appellant has failed to show that the present particle velocity standard, i.e. 2.0 inches per second, utilized by the DER to determine the safety of blasting operations for quarrying purposes near a cavern, is inappropriate in this case.

4. Although there should be no damage to the appellant's property from the low level blasting vibrations permitted in this matter, in the event that such damage does occur, the permittee has adequate insurance coverage for this very purpose.

5. DER has taken all reasonable precautions in requiring an additional blasting test and by imposing conditions in the permit, limiting the blasting schedule, to cause the least disturbance to appellant.

6. The permit was properly issued in accordance with the Surface Mining Conservation and Reclamation Act and Article I, Section 27 of the Pennsylvania Constitution.

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7. The insurance coverage applies to damages for bodily injury and property damage, both on permittee's property and off-site, which would cover appellant's business operation. The liability limits are $500,000 for each occurrence for bodily injury and $100,000 for property damage.

ORDER

AND NOW, this 23rd day of MAY 1979, the appeal of Edward S. Swartz is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

DATED: MAY 23 , 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

DUPONT BOROUGH

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and LOWER LACKAWANNA VALLEY SEWER AUTHORITY, THE BOROUGH OF OLD FORGE, THE BOROUGH OF TAYLOR, THE BOROUGH OF AVOCA, and THE BOROUGH OF DURYEA, Intervenors

Docket No. 78-167-W

The Clean Streams Act
Pennsylvania Sewage Facilities Act

ADJUDICATION

BY: PAUL E. WATERS, Chairman, June 6, 1979

This matter comes before the board as an appeal from an order issued by the DER to Dupont Borough requiring it to apply for a Step I grant and prepare a facilities plan for public sewers. The Lower Lackawanna Valley Sewer Authority and member municipalities are interested in having appellant, Dupont, cooperate in a joint project because of economic and other reasons. Appellant is reluctant to go forward with a needed sewer project because the other municipalities are not now being required to sewer 100%.

FINDINGS OF FACT

1. Appellant, Dupont Borough, is located in Luzerne County, Pennsylvania.

2. The population of Dupont was between 3,300 and 3,500 at the time of the 1970 census.

3. Liddy and Collins Creeks flow into Dupont Borough where they join Mill Creek.

4. Raw untreated sewage is being discharged into the waters of the Commonwealth in at least thirteen locations within Dupont.

5. Mr. William McDonnell, a water quality specialist with the DER in the regional office in Wilkes-Barre, observed discharges of raw sewerage into Mill and Collins Creeks within Dupont Borough on March 31, April 5, 1978, and April 2, 1979. He was able to identify specific sewage debris in the form of

feces, toilet papers, sanitary napkins, and pieces of vegetable matter in the water discharges. He identified the odor of sewage. Mr. McDonnell took photographs which documented his observations of evidence of direct raw sewage discharges at 13 locations in Dupont. He was able to identify toilet paper in at least seven of those locations. He observed vegetable matter in at least four of these locations.

5. On April 2, 1979, Mr. McDonnell took a sample of water from a manhole covering a storm sewer at Grant Street and Main Avenue in Dupont for the purpose of chemical analysis. The ammonia nitrogen content of the sample was 45.9 milligrams per liter, approximately 18 times the level (mg/l) which could be expected to be found in an unpolluted stream. The biochemical ozygen demand (BOD) of the sample was 288 mg/l compared to approximately 1 to 5 mg/l for an unpolluted stream. The level of fecal coliform organisms in the sample was 6000/100 ml, whereas a natural, unpolluted stream would have levels of only 25 to 100 organisms per 100ml.

6. Boreholes, drilled into abandoned mines, sometimes become blocked causing sewage to back up and overflow onto the ground in appellant township.

7. Boreholes also exist in some of the intervenor boroughs but are more common and widespread in Dupont.

8. The master plan for water supply and wastewater management in Luzerne County, Pennsylvania, calls for the construction of a sanitary sewer system to serve Dupont Borough and the portions of Pittstown Township (Glendale Village and a part of Suscon Road) and conveyance of the sewage to the authority's sewage treatment plant.

9. On September 11, 1978, Dupont Borough Council adopted the sewer section of the above mentioned master plan as its official plan under §5 of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, (hereinafter Sewage Facilities Act), and Chapter 71 of the department's regulations.

10. Only two out of 1,100 homes or businesses in Dupont are connected to a sanitary sewer system for conveyance to a sewage treatment plant. In the intervenor boroughs, however:

Duryea	92% sewered
Taylor	65% sewered
Old Forge	65% sewered
Avoca	60% sewered

11. Dupont is not adequately implementing its official sewage facilities plan. The plan calls for collection sewers, and there are none. The plan calls for conveyance of sewage to the authority's sewage treatment plant; the authority receives sewage from less than 0.2% of Dupont households. This fact was uncontroverted by any evidence or testimony.

12. Sixty-five percent of the soils of Dupont are unsuitable for installation of on-lot sewage disposal systems. Mr. Harleth David so found as part of his duties as a sanitarian with the department when he conducted an analysis of the administration of the Sewage Facilities Act by Dupont for the years 1975 through 1978.

As part of that analysis he examined building permits, on-lot sewage disposal permits, and compared these to field inspections.

13. The purpose of the department's priority rating system for sewage facility grants is to efficiently and effectively allocate the limited funds available to Pennsylvania.

14. The rating system assigns points according to the extent of water pollution control needs, stream segment quality, population affected and enforcement status.

15. Seventy (70) points are currently needed to qualify for a grant.

16. Dupont currently has 74 points.

17. None of the intervenor boroughs has enough points to qualify for a grant.

18. Each of the intervenors has applications for grants for construction of sanitary sewers filed with the department.

19. On July 6, 1966, the Lower Lackawanna Valley Sewer Authority was formed by the Boroughs of Old Forge and Taylor in Lackawanna County and the Boroughs of Dupont, Duryea and Avoca in Luzerne County to plan and construct joint sewerage facilities to convey and treat sewage originating in the aforementioned municipalities.

20. The authority has constructed and is operating interceptor sewers and a sewage treatment plant for conveyance and treatment of the sewage from its member municipalities.

21. Dupont's refusal to provide collector sewers in accordance with its adopted sewage facilities plan and its agreement with the authority reduced the revenues the authority can collect below the level needed to finance operations and payments on bonds issued by the authority in anticipation of providing sewage treatment services for Dupont.

DISCUSSION

The Lower Lackawanna Valley Sanitary Authority, intervenor herein, was formed by five municipalities. They are Avoca, Duryea, Old Forge and Taylor, all intervenors, and the Borough of Dupont, appellant. All parties except Dupont acknowledge that they have a sewage disposal problem and seek, by joint action, to solve the same. It is ironic, yet clear from the evidence, that appellant which has by far the worst problem[1], is the one most reluctant to admit it and to take necessary steps to solve it.

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1. Although none of the member municipalities is sewered 100%, appellant has the least amount: Duryea has 92%, Avoca—60%, Old Forge—65%, Taylor—65% and Dupont—0.2%.

DER, recognizing the disagreement which has led to this appeal, issued an order on December 13, 1978,[2] citing Dupont for violations of The Clean Streams 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.*, Dupont was the only municipality of the five previously indicated which had sufficient points [3] to qualify for funding to construct sanitary sewers. The authority presently has a sewage plant in operation at only 68% of its capacity and it is having severe financial problems not solely, but primarily because Dupont has failed and refused to construct public sewers and generate additional revenue.

Dupont has raised three main objections to the order of the DER. First, it argues that inasmuch as the other parties also have sewage disposal problems and yet it was the only one made the subject of an order, that it is being discriminated against in violation of law. It is clear that what really bothers appellant is the fact that it alone qualifies for federal and state funds, and DER, the sanitary authority, and four other municipalities now look to it as the key to solving <u>their</u> problems. It would be an understatement to characterize this view as myopic. First of all, it is appellant which has the <u>most</u> to gain by the requested action because it has the least amount of public sewers—indeed, almost none. This board refuses to believe that a municipality would allow its citizens to continue to live with a health hazard, only because it does not want to help neighboring municipalities at the same time it solves its own problem. We have searched in vain for another logical explanation to the impasse which has developed in this matter. In responding to the charge that Dupont was being discriminated against or singled out for special treatment, the DER asserts

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2. The order provided:

> "a. Within fifteen (15) days from the date of this Order, submit, or cause to be submitted, a study area delineation for preparation of a Facility Plan under the Clean Water Act.
>
> "b. Within seventy-five (75) days from the date of this Order, submit a completed application for a Step 1 Grant under the Clean Water Act to prepare a comprehensive plan for water quality management and pollution control for the Borough. Said plan shall take the form a Facilities Plan and shall be submitted to the Department as a revision to the Official Plans for sewerage systems for the Borough pursuant to the Sewage Facilities Act and Sections 71.15 and 71.16 of the Department's Regulations.
>
> "c. Within two hundred and seventy (270) days from the date of receiving Step 1 Grant approval, submit to the Department for its review and approval the comprehensive plan set forth in Paragraph b.
>
> "d. Within fifteen (15) days of the Department's approval of the comprehensive plan set forth in Paragraph b, submit to the Department a satisfactory and acceptable schedule of implementation concerning the design, financing, construction and

Continued to next page

that its policy is to proceed only against municipalities which qualify for sewer project funding—in this case of the five municipalities involved, only appellant is so qualified.[4] In any event, the kind of "discrimination" here alleged is not within any statutory or constitutional prohibition. See *Comm. of PA, DER v. Medusa Corporation*, EHB Docket Nos. 76-085-CP-C and 77-097-W, issued August 23, 1978. Appellant implies that it is the only one being required to move toward solution of sewage disposal problems. It has, for some reason, overlooked the fact that the other parties are ready, willing and able to join in an effort to use public sewers to dispose of sewage through the Lower Lackawanna Valley Sanitary Authority. It is only appellant who seems reluctant to give its full cooperation.[5] We can find nothing arbitrary or capricious in DER's action.[6]

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2. Continued from preceeding page:

> operation of the wastewater facilities required by said plan including grant applications under the Clean Water Act and all properly executed agreements with the authority and municipalities that are necessary to implement said comprehensive plan."

3. Points are assigned based on weighted criteria. In order to be eligible for construction grants under the Clean Water Act, 33 U.S.C.A., Section 1251, *et seq*, a municipality must prepare and submit to the department and the U.S. Environmental Protection Agency, a facilities plan that meets the requirements of and conforms with 40 C.F.R. Part 35, Subpart E.

4. On this issue the DER regional water quality manager was asked at N.T. Page 384, Line 25 and Page 385, Lines 1 through 14:

> "Q. One other question: what are the policy considerations in your department which determine whether a borough is to be cited or not cited?
> "A. The first thing is that you must have enough points. We are not going and citing any borough that cannot get funding for their project.
> "Q. All right. So, when Attorney Kasper says that you haven't cited any of the other municipalities, none of those other municipalities presently have enough points to be considered for citation; is that correct?
> "A. That is correct. If —
> "Q. What else do you utilize?
> "THE EXAMINER: I didn't hear the last thing you said.
> "THE WITNESS: If they did have the points, they would have been cited, also."

5. The argument implies, that if Dupont was ready to proceed and Avoca, for example was not, that DER would not make a similar effort to get Avoca in line, to the benefit of Dupont.

6. A much harder case would be made out, if Dupont was presently sewered at 70% or more and was resisting further public sewers on the same basis .

Appellant next argues that there was some improper conspiracy between the other parties to this matter, all geared to "force" appellant to cooperate, inasmuch as it had the necessary points. There is no doubt that all parties agreed that appellant i an indispensable party for the success of the Lower Lackawanna Valley Sanitary Authority. It is clear that every proper effort has been and is being made to insure its participatio We are reluctant to characterize this activity as "force" and clearly it was not arbitrary and capricious action. It was necessary and proper action, mandated by appellants own intransigence.

Finally, appellant may have had serious questions about the particulars of water pollution in the Borough when this appeal was filed. It properly seeks to have DER specify the nature and source of the alleged discharges of untreated sewage in Liddy Creek, Collins Creek and Mill Creek. The evidence presented on this point was voluminous, specific, documented and largely unrefuted.[7] Appellant now seems to argue, not that raw sewage and pollution are not infiltrating waters of the Commonwealth in violation of The Clean Streams Law, but rather, that the other municipalities have similar problems only different in degree. We believe this to be true, but the degree is quite great and it is this magnitude which supports DER's action here. No one, least of all DER, has contended that the other parties to this proceeding are home free, but clearly the DER and the other parties are moving properly and in the right direction.

CONCLUSIONS OF LAW

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

2. The order issued by the DER on December 13, 1978, was not discriminatory as to appellant, Dupont Borough.

3. The order issued by the DER on December 13, 1978, was properly issued and was not arbitrary or capricious under the facts of this case.

4. The evidence is overwhelming in indicating that appellant is in violation of The Clean Streams Law, Act of June 22, 1937, *as amended*, 35 P.S. §691.1, *et seq.* and Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P. S. §750.1, *et seq.*

7. Among the specifics were a large number of photographs and explicit testimony indicated in findings of fact nos. 5 and 6.

ORDER

AND NOW, this 6th day of JUNE 1979, the appeal of Dupont Borough is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

BY: PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

DATED: JUNE 6 , 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ASSOCIATES COMMERCIAL CORPORATION

Docket No. 78-140-B

Surface Mining Conservation and Reclamation Act

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Thomas M. Burke, Member, July 2, 1979

This matter is before the Board on an appeal by Associates Commercial Corporation (Associates) from an order of the Department of Environmental Resources (DER) dated October 3, 1978, which prohibits Associates from repossessing certain pieces of mining equipment located at surface mining operations conducted by Blake Becker, Jr. and the Becker Coal Company (referred to collectively herein as Becker). The DER contends in the order that the mining equipment is needed to reclaim the strip mine sites.

Associates has filed a motion to vacate or dismiss contending that the DER lacks the statutory authority to issue the October 3, 1978, order. Oral argument before the board *en banc* was held on the motion and both parties have filed briefs in support of their respective positions.

We are empowered to grant a motion to dismiss prior to hearing where, on an appeal from a DER order, the appellant shows that there is no genuine issue as to any material fact and that the appellant is entitled to judgement as a matter of law. *Summerhill Borough v. Commonwealth of Pennsylvania, DER*, 34 Pa. Commonwealth Ct. 574, 383 A.2d 1320 (1978); *Primrose Mining Co. v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 77-184-B (issued October 4, 1978).

The appellant's motion to vacate or dismiss is granted for the reasons stated herein.

FINDINGS OF FACT

1. Appellant is Associates Commercial Corporation (Associates), a corporation which has a place of business at 6149 Saltsburg Road, Box 310, Verona, Pennsylvania 15147.

2. Associates is a commercial lending institution.

3. Associates contracted with Becker Coal Company to provide financing for three pieces of mining equipment. The pieces of equipment are one Caterpillar 966c wheelloader (serial no. 76J11597), one Caterpillar 245 excavator (serial no. 95V301) and one Caterpillar D-9 "H" dozer (serial no. 90V5121).

4. Becker Coal Company is in default of payments to Associates for the three pieces of mining equipment.

5. Becker Coal Company of Dubois, Pennsylvania, has conducted surface mining operations on at least ten sites in the Commonwealth of Pennsylvania on which reclamation work required by the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P. L. 1198, *as amended*, has not been completed.

6. Becker Coal Company in June 1978 filed a Petition in Bankruptcy under Chapter 11 of the Federal Bankruptcy Act, 11 U.S.C. §701 *et seq*. Shortly thereafter, Associates filed a Complaint in Reclamation with the Federal Bankruptcy Court to recover the three financed pieces of mining equipment.

7. The Bankruptcy Court on January 5, 1979, issued a Memorandum Opinion and Order requiring Becker to release the three pieces of mining equipment to Associates. The Bankruptcy Court found as fact that:

> (1) Defendant [Becker Coal Co.] has been in default in its payments for said equipment.
>
> (2) There is no equity in two of the items and an insubstantial equity in the third.
>
> (3) The equipment is not gaining in value and, indeed, is subject to diminution in value.
>
> (4) Said diminution results in jeopardy to plaintiff's [Associates Commercial Corp.] security since no parallel reduction of debt has been occurring.

8. The three pieces of mining equipment have been used by Becker for conducting surface mining operations.

9. The three pieces of mining equipment are capable of being used for the required reclamation work on some or all of the ten or more unreclaimed sites operated by Becker.

10. The DER on October 3, 1978, issued an order to Associates prohibiting it from removing the three pieces of surface mining equipment from the unreclaimed sites on which Becker has conducted surface mining operations.

DISCUSSION

Associates is a commercial lending institution. Its involvement in this surface mine reclamation dispute stems solely from its financing of three pieces of mining equipment for Becker. The pieces of mining equipment, a Caterpillar excavator, a Caterpillar dozer and a Caterpillar wheelloader are presently being used to mine coal at one or more of Becker's ten strip mining operations in Pennsylvania.

Becker has defaulted on its monthly installment payments to Associates and Associates has attempted to repossess its equipment. In June 1978, Becker filed a Petition in Bankruptcy under Chapter 11 of the Federal Bankruptcy Act. Shortly thereafter, Associates filed a Complaint in Reclamation with the Federal Bankruptcy Court to recover the three financed pieces of mining equipment. The Bankruptcy Court on January 5, 1979, issued a Memorandum Opinion and Order requiring Becker to release the three pieces of mining equipment to Associates. Its attempt at repossession is being thwarted by the October 3, 1978, order from DER, which prohibits Associates from removing any mining equipment from any mine site on which Becker is conducting surface mining operations until the sites have been completely reclaimed in accordance with the requirements of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P. L. 1198, *as amended*, 52 P. S. §1396.1 *et seq.* The DER issued the order because it believes that Becker will be unable to reclaim the sites if the three pieces of mining equipment are removed therefrom.

An administrative order cannot create a duty or obligation that does not otherwise exist. An order can only interpret and apply existing law to a given factual situation. Thus, even if these ten strip mined sites would remain unreclaimed without the use of Associates' mining equipment, DER cannot by order require Associates to use its equipment for reclamation unless Associates is under an antecedent legal obligation to do so.

The DER grounds its order on three different statutory provisions: (1) 25 Pa. Code 77.92(f)(2) which was adopted under the Surface Mining Conservation and Reclamation Act, *supra*; (2) 1917-A of the Administrative Code, the Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. 510-17, which empowers the DER to abate a nuisance; and (3) The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1 *et seq.*

25 Pa. Code 77.92(f)(2) provides that:

> "Backfilling equipment needed to complete the restoration shall not be removed from the operation until all backfilling and leveling has been completed and released by the Department. Backfilling equipment shall be operable, in use, and capable of meeting the requirements of the reclamation plan throughout the life of the mining operation."

The regulation is contained in subchapter D of Chapter 77 of 25 Pa. Code which is entitled "Requirements Accompanying Permits Authorizing The Operation Of Surface Coal Mines". As the title states, it applies to the permittee-operator as a condition of his permit. It helps to assure that the permittee will comply with the duty to reclaim the surface mining operation. The permit can be immediately revoked if reclamation equipment is removed.

We disagree with the DER's assertion that 25 Pa. Code 77.92(f)(2) also imposes upon Associates a duty to assure that reclamation equipment is present at mining operations. In fact, it is probably not possible for Associates to fully comply with the terms of Section 77.92(f)(2). The second sentence requires that the equipment be kept "operable, in use, and capable of meeting the requirements of the reclamation plan". It is unlikely that Associates can keep the equipment operable unless it has possession of the equipment. Associates cannot take possession of the equipment unless they remove it from the site and out of the control of Becker and the first sentence of Section 77.92(f)(2) prohibits the removal of the equipment from the site.

Not only is Associates unable to assure DER that the equipment will remain operable, the order deprives Associates of the ability to protect and maintain its own equipment. It must rely on Becker. Also, the order enables Becker to continue to mine coal with Associates' equipment at Associates' loss, but at no cost to Becker for an indeterminate period, and no assurance exists that Becker will use the equipment to reclaim the land. He might use the equipment to mine coal, to restore the land or he might abandon the equipment.

In sum, we are of the view that the interpretation placed on Section 77.92 (f)(2) by the DER is erroneous because: (1) Its interpretation contradicts the title of the subchapter where it is contained. Section 1924 of the Statutory Construction Act of 1972, the Act of December 6, 1972, No. 290, 1 Pa.C.S.A. 1501 *et seq.* states that the titles of sections of a statute, although not controlling, may be used to aid in its construction. (2) Its interpretation imposes two irreconcilable duties upon appellant. Section 1922 of the Statutory Construction Act, *supra*, states that a presumption exists that the General Assembly intends the entire statute to

be effective and certain. (3) Its interpretation places a duty upon an innocent third person to rectify a condition that he had no part in creating. (4) Its interpretation places appellant's property in the hands of the surface mine operator for the profit of the operator, without any assurance that appellant's property will not be misused or abandoned and without any assurance that the reclamation work will be performed.

The DER's course of action under 25 Pa. Code 77.92(f)(2) is against the permittee-operator. If the operator has its mining equipment repossessed, it is the operator who has violated 25 Pa. Code 77.92(f)(2); not the creditor. The DER argues that if its order is not sustained, an operator will be able to circumvent Section 77.92(f)(2) by selling or otherwise conveying the mining equipment to a third person. We disagree. Nothing said herein permits an operator to lawfully remove equipment from the site by conveyance to a third party.

DER's contention that Section 1917-A of the Administrative Code, *supra*, which empowers the DER to order the abatement of nuisances, constitutes authorization for the order is also erroneous. We agree that an unreclaimed surface mining site constitutes a nuisance per se. See Section 4b(a) of the Surface Mining Conservation and Reclamation Act, *supra*. However, the appellant has no duty to abate the nuisance. A person does not become responsible for continuing a nuisance, merely because he has the ability or has equipment available to abate a nuisance but chooses not to. "Mere failure to abate a nuisance does not alone constitute a continuance thereof; there must be some active participation in the continuance." 58 AM JUR2d, Nuisance §48. See also *Philadelphia Chewing Gum Corporation v. Commonwealth of Pennsylvania, DER*, 35 Pa. Commonwealth Ct. 443, 387 A.2d 142, 1978. The cases cited by the DER to support its contention, *Commonwealth of Pennsylvania, DER v. Barnes and Tucker Company*, 455 Pa. 392, 319 A.2d 871 (1974), *Commonwealth of Pennsylvania, DER v. Harmer Coal Co.*, 452 Pa. 77, 306 A.2d 308 (1973) and *United States Steel Corp. v. Commonwealth of Pennsylvania, DER*, 17 Pa. Commonwealth Ct. 594, 333 A.2d 510 (1975) are inapposite. In each case the party held responsible for abating the nuisance owned and had previously operated the coal mine at which the nuisance occurred. They abridged a duty to use their property in such a way that it would not be injurious to the public.

The DER's reference to The Clean Streams Law, *supra*, suffers from the same malady. The DER contends that the removal of the equipment prior to the completion of reclamation will "cause or allow pollution which otherwise might be prevented". The DER is mistaken; the cause of the pollution is the refusal or inability of the operator to reclaim its surface mining operations, not Associates removal of its

equipment. Merely because action by one person is necessary to prevent harm to another person or property is not sufficient in itself, to impose a duty to take such action, irrespective of the gravity of the harm and the insignificance of the effort or expense of providing aid. In *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959) the Pennsylvania Supreme Court held that the operator of a surface mine had no legal responsibility to rescue a person from drowning in water on his property, since the operator was not legally responsible for placing him in the perilous position. Prosser states in his "Law of Torts" the law on duty to provide aid:

> "Because of this reluctance to countenance 'nonfeasance' as a basis of liability, the law has persistently refused to recognize the moral obligation of common decency and common humanity, to come to the aid of another human being who is in danger, even though the outcome is to cost him his life. Some of the decisions have been shocking in the extreme. The expert swimmer, with a boat and a rope at hand, who sees another drowning before his eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette, and watch the man drown. A physician is under no duty to answer the call of one who is dying and might be saved, nor is anyone required to play the part of Florence Nightingale and bind up the wounds of a stranger who is bleeding to death, or to prevent a neighbor's child from hammering on a dangerous explosive, or to remove a stone from the highway where it is a menace to traffic, or a train from a place where it blocks a fire engine on its way to save a house, or even to cry a warning to one who is walking into the jaws of a dangerous machine. The remedy in such cases is left to the 'higher law' and the 'voice of conscience,' which, in a wicked world, would seem to be singularly ineffective either to prevent the harm or to compensate the victim."
> Prosser, Law of Torts §56 (4th Ed. 1971)

Similarly, because appellant's equipment is needed to prevent the pollutional discharge of mine acid drainage is not, by itself, sufficient to impose a duty upon appellant to give up its equipment for use in prevention of the pollutional discharge, and appellant does not "cause" pollution when it refuses to use its equipment to reclaim a surface mine site and thus prevent the discharge of mine acid drainage where appellant did not, in any way, contribute to the condition of the sites.

The Surface Mining Conservation and Reclamation Act provides for a myriad of remedies to be used against an operator if he fails to restore the mined areas. The DER may issue an order requiring reclamation (52 P. S. 1396.4(c)), enjoin the violation by court order (52 P. S. 1396.20), file criminal charges (52 P. S. 1396.3a) and may revoke the operator's license, prohibiting him from mining coal in Pennsylvania.

The Act also provides a remedy in the instance where the operator is unable to reclaim a mining operation. Section 4(c) provides that all operators are required to file with DER a bond for no less than the estimated cost of performing the reclamation work either by the DER or through independent contractors. If DER has errored and the forfeited funds are not sufficient to restore these lands then general funds must be used. Associates owes no legal duty to the public to reclaim these lands. As between the public and appellant, a third party who has no responsibility for the condition of the surface mining sites, we believe the public should sustain the cost of reclamation.

CONCLUSIONS OF LAW

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

2. The Board is empowered to grant a motion to dismiss where, on an appeal from a DER order, the appellant shows that there is no genuine issue as to any material fact and that the appellant is entitled to judgement as a matter of law.

3. An administrative order cannot create a duty or obligation that does not otherwise exist. An order can only interpret and apply existing law to a given factual situation.

4. 25 Pa. Code 77.92(f)(2) does not impose upon the appellant the duty to assure that reclamation equipment is present at the surface mining operations of Blake Becker, Jr. or Becker Coal Company.

5. 25 Pa. Code 77.92(f)(2) does not prohibit appellant from repossessing mining equipment from Blake Becker, Jr. or Becker Coal Company even if the mining equipment is able to be used for reclamation.

6. Appellant does not become responsible for continuing a nuisance merely because he has the ability or has equipment available to abate a nuisance but chooses not to.

7. Section 1917-A of the Administrative Code, *supra*, which empowers the DER to order the abatement of nuisances, does not prohibit appellant from repossessing mining equipment from Blake Becker, Jr. or Becker Coal Company even if the equipment is able to be used for reclamation.

8. Appellant is not required by The Clean Streams Law, *supra*, to use its mining equipment to prevent the occurrence of pollution merely because the mining equipment is available for use in preventing its occurrence.

9. The Surface Mining Conservation and Reclamation Act provides that all operators are required to file with the DER a bond for no less than the estimated cost of performing the reclamation work either by the DER or through independent contractors.

ORDER

AND NOW, this 2nd day of July, 1979, it is hereby ordered that the order of the DER issued to appellant, Associates Commercial Corporation, dated October 3, 1978, is dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: THOMAS M. BURKE
Member

DATED: July 2, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

WILLIAMSPORT SANITARY AUTHORITY	EHB DOCKET NO.	78-011-W
CITY OF WILLIAMSPORT	"	78-017-W
OLD LYCOMING TOWNSHIP	"	78-018-W
WEST BRANCH SUSQUEHANNA HOMEBUILDERS ASSN.	"	78-021-W
YODER BUILDERS, INC.	"	78-022-W
SCHON BROTHERS BUILDERS	"	78-023-W
LUNDY HOMES	"	78-025-W
WILLIAMSPORT FAMILY HOUSING ASSOCIATES	"	78-048-W
LUNDY HOMES	"	78-097-W
v.	The Clean Streams Law 25 Pa. Code §94.11, 94.21	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES		

ADJUDICATION

By Paul E. Waters, Chairman, July 27, 1979

This matter comes before the board as an appeal from the DER's denial of permits for sewer extensions pursuant to 25 Pa. Code §94.11 and 94.21 and The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §391.1, *et seq.*

Appellants, a sewer authority, a construction company and various affected municipalities in Lycoming County, allege that the present sewer system is not hydraulically overloaded as contended by the DER in refusing to allow sewer extensions to the West Treatment Plant of the Williamsport Sanitary Authority or to areas affected by the Bull Run pump station of the Central Plant.

FINDINGS OF FACT

1. Appellant, Williamsport Sanitary Authority, is a municipal authority created by the City of Williamsport pursuant to the Municipal Authorities Act of 1945, *as amended*, 53 P.S. §301, *et seq.*, and operates the West and Central Sewage Treatment Plants.

2. Appellant, Lundy Homes, is engaged in building single-unit dwellings in the Lycoming County area.

3. In July 1978, DER denied a request for sewer extensions to the West Plant for a Lundy Homes development to be known as Spring Grove.

4. The West Plant has two hydraulic flow limitations, a 2.5 m.g.d. total design average flow and 6.5 m.g.d. maximus flow rate capacity.

5. The authority provides secondary sewage treatment at both its Central Plant and its West Plant which serve the City of Williamsport, Loyalsock Township, Old Lycoming Township, the Borough of South Williamsport and Duboistown.

6. The sewer system serves both sanitary and storm water flows as provided on design modules approved by the DER.

7. The water quality permits issued for the plant after it was upgraded in 1970, contain specific requirements for and limitations on solid wastes and BOD removal, but do not mention any limitations on the average flows into an hydraulic loading into the plants.

8. Although the Central Plant was originally involved in these proceedings it is now agreed by all parties that there is no sewage problem with regard to that plant.

9. On August 28, 1974, the Environmental Protection Agency issued the authority its NPDES permits which became effective September 28, 1974. The West Plant permit states that the thirty (30) consecutive day average quantity of dry weather flow shall not exceed 2.5 m.g.d. and for wet weather it shall not exceed 6.5 m.g.d.

10. The average dry weather flow for the West Plant for the period 1973 through 1977 has never exceeded its 2.5 m.g.d. limitation, and has been about 2.2 m.g.d.

11. The West Plant has not ever exceeded the wet weather flow limitation set forth in the NPDES permits.

12. At the time the West Plant was designed, the maximum flow rate that was being conveyed by the collection system was 1.11 m.g.d., including both storm and sanitary sewer flows in both wet and dry periods.

13. The West Plant was designed for secondary treatment in 1969, and the design engineers did consider both wet and dry weather flows, because it was a combined (storm-sanitary) sewer system.

14. The plant was projected to serve 20,000 persons by the year 2010 on the basis of 100 g.p.d. It presently serves less than that number.

15. The West Plant design did utilize information from the Bureau of Water Quality Management's Sewerage Manual, which suggests that wet weather flows be considered in determining design flows.

16. DER did approve a treatment plant for Shamokin & Coal Township Joint Authority which provided for separate wet weather-dry weather flows for a combined sewer system, during the design period of the West Plant.

17. The module 4-1 approved by the DER for the West Plant refers to both 2.5 m.g.d. on line 4(e), but the forms prepared by the DER were not designed specifically to be used where there is a combined sewer system.

18. On January 24, 1978, DER imposed a ban on all new sewer extensions to the West Plant, and subsequently has returned all applications without consideration, based on a finding of hydraulic overload.

19. The authority has undertaken extensive and costly programs to reduce infiltration into the sewer system and funding efforts to completely separate the storm sewer and sanitary sewer systems are presently underway.

20. From October 1977 through June 1978, the hydraulic load to the West Plant exceeded 2.5 m.g.d. but did not exceed 6.2 m.g.d.

21. DER has refused extension applications for development of an area known as "Spring Grove" where 32 homes were to be constructed, based on the West Plant hydraulic condition.

22. On January 26, 1977, the DER also refused extension applications for a development in Loyalsock Township known as "The Heights" based on the hydraulic condition at the Bull Run pump station of the Central Plant.

23. Although the hydraulic problems at the Central Plant have been resolved, the Bull Run pump station continues to have an hydraulic overload at certain times, which requires that the station by-pass valve be opened and sewage is sometimes diverted to Bull Run, a nearby stream.

24. Originally DER denied an extension permit to appellant, Lundy Homes, for "The Heights", after giving planning approval, on grounds that the Central Plant was overloaded. Although DER now agrees that the Central Plant is not overloaded, the refusal is based on the conditions existing at a pump station (Bull Run) between "The Heights" and the Central Plant.

25. The Bull Run pump station by-passed sewage to Bull Run on April 20, 1978, May 23, 1978 and January 24, 1979, and this was observed by DER personnel.

26. Although the three incidents occurred generally during a wet period, it is unlikely that these are the only three times it ever occurred.

27. There are times during dry periods when the pump station was observed by DER, and no by-passing took place.

DISCUSSION

Appellant, Williamsport Sanitary Authority, had operated a treatment plant for some years when, in 1969, it became necessary to upgrade the plant to secondary treatment. There are actually two plants involved, one known as the West Plant and the other the Central Plant. Although at the beginning of the proceedings DER alleged both plants to be hydraulically overloaded, it was agreed at the hearing that the Central Plant is not now overloaded.[1] The basic legal and factual questions which we are called upon to resolve, arise because the DER refuses to allow any further extensions to Williamsport's sewer system. Builders and developers and the municipalities in which the new construction would be located, have all joined in urging that the DER has acted improperly inasmuch as the sewer system is not, in fact, hydraulically overloaded. Even though the hydraulic condition of the Central Plant has been resolved, one of its pump stations, (Bull Run) continues to have hydraulic problems. DER has refused a sewer extension permit for "The Heights" a proposed housing development in Loyalsock Township because of this problem.

There can be no serious dispute about the hydraulic conditions that exist at the Bull Run pump station. Although there is some disagreement about the frequency of surcharges[2] and sewage by-passes at the station, clearly it does occur at least during times of heavy rain. The regulations provide at 25 Pa. Code 94.11 that ... "A sewer extension shall not be constructed if the additional flows contributed to the sewerage facilities from the extension will cause the plant, pump stations, or other portions of the sewer system to become overloaded". Inasmuch as the Bull Run pump station has already experienced surcharges and it has been necessary to pump hydraulic flows directly to Bull Run without treatment, to avoid damage to the station, we believe the DER had sufficient reason to refuse sewer extension permits that will only add to the present problem.

Appellants argue that because the station was constructed with the capability to by-pass sewage and the DER allows such a facility, that it may not refuse an extension permit simply because it has become necessary to use the by-pass procedure from time to time. We are unable to follow this logic. Certainly protection of the pump station from hydraulic damage is an important concern. This, however, does not mean that whatever measures must be taken to do this, can operate outside of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1, *et seq.* and the rules and regulations of the department. It is

1. There have been extensive and expensive efforts made by appellant to eliminate storm water from the sewer system. Two appeals have been resolved because of this.

2. The evidence does indicate some—perhaps substantial improvement in the hydraulic load problem which could affect the pump station. We are not able to say however as the evidence does not, that the wet weather overload has been eliminated.

further indicated that DER did give conditional approval to the planning modules for "The Heights" housing project of Lundy Homes, in September 1977. Subsequently, there were alleged problems with the Central Plant and a sewer extension permit was refused. Now that the hydraulic problem at the Central Plant has apparently been solved, appellants imply that the Bull Run pump station problems should not be used to continue the refusal. It is, of course, clear that DER may at times deny an extension permit for any sewer system that is in an hydraulically overloaded condition.[3] *Krawitz Co. v. Comm. of PA, DER*, EHB Docket No. 77-118-W, issued October 30, 1978; *Borough of Carlisle v. Comm. of PA, DER*, 2 EHB 217 (1977) aff'd. 16 Pa. Comwlth. 341; *Steak & Ale Restaurants v. Comm. of PA, DER*, EHB Docket No. 74-039-W, issued September 17, 1974; *East Pennsboro Township Authority v. Comm. of PA, DER*, 3 EHB 33 aff'd. 18 Pa. Comwlth. 58 (1975). The burden of proof in this matter must be carried by appellants.[4] It is therefore the duty of Lundy Homes to show entitlement to a permit, i.e. to present evidence indicating that the entire system—including the pump station in question, is adequate to meet the increased demand to be placed upon it by the sewer extension proposed. This, appellants have failed to do.

The other major actions of DER contested by these appeals involve only the West Plant, as previously indicated. The appellants first question whether there is an hydraulic overload at all, because of some alleged misunderstanding at the time the water quality permit[5] for the West Plant was issued by the DER in 1970. The permit specifically refers to a "Total Design Average Flow" of 2.5 m.g.d.[6]

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3. As was said in Krawitz Co.:
"Where problems with the system develop it is logical and to us entirely proper, to begin by refusing to permit extensions of the system and as a last resort to prohibit any connections to existing lines. The policy that is embodied in the law, and the old and new regulations adopted by the Environmental Quality Board, to ban lateral connections to existing lines as a last resort where environmental conditions warrant such an imposition seems to us a reasonable one. We cannot accept appellant's argument that an extension should be allowed if lateral connections are being allowed."

4. Rule 21.42 of the Hearing Board provides:
"A private party appealing an action of the Commonwealth acting through the Department of Environmental Resources shall have the burden of proof and burden of proceeding in the following cases unless otherwise ordered by the board:
"(a) Refusal to grant, issue or reissue any license or permit.
"(b) Refusal to grant any variance from any regulation dealing with air quality standards.
"(c) Where a party who is not the applicant or holder of a license or permit from the Commonwealth protests its issuance or continuation."

5. The permit indicates that the construction, operation and discharge shall be in accordance with the application and its amendments which are incorporated by reference.

6. Million gallons per day.

Additionally, the "Maximum Flow Rate" is indicated to be 6.5 m.g.d.

Appellant, Williamsport, urges the board to go beyond the permit and consider certain ambiguities and conversations with DER personnel which led it to believe that the 2.5 m.g.d. applied only to dry weather hydraulic flow limits and that 6.5 m.g.d. applied as a wet weather limit.[7] This argument does seem to have some validity when it is considered that the sewer system was actually a combined storm water and sanitary sewer system. The problem however is that nothing in the permit, the application, design modules or anything else refers to the wet weather and dry weather figures. In other words it might have been a good idea to make the distinction and perhaps Williamsport and its design engineer wanted or intended such a distinction— but the fact remains that it was never made or agreed upon by the DER.[8]

The question remains as to whether the West Plant has exceeded its hydraulic capacity or is presently in an overloaded condition in violation of 25 Pa. Code 94.21. We must begin by defining the terms with which we are concerned. "Hydraulic overload" is defined in 25 Pa. Code §94.1 to mean: "The condition that occurs when the hydraulic portion of the load, as measured by the average daily flow entering a sewage treatment plant, exceeds the average daily flow upon which the permit and the plant design are based or when the flow in any portion of the system exceeds its hydraulic carrying capacity during a recent 3-month period." We further note that "Capacity" is defined as: "The rated ability of the plant, pump station, or sanitary sewer system to receive and effectively convey or treat a specified load."

The hydraulic capacity of the West Plant, i.e. the flow which it can effectively convey, is 6.5 m.g.d. This amount has not been exceeded. It is the 2.5 m.g.d. which has been exceeded at the plant. Can it be that under the regulations a plant can be within its hydraulic capacity and yet have an hydraulic overload? We think not. The regulations on this question are not a model of clarity. Nevertheless, we must attempt to read all of the provisions and give meaning to them. It seems to us that there has not been a sufficient distinction drawn between organic and hydraulic overload. This appears to be at the root of the problem as we read the regulations here in question. The definition of "Capacity" in trying to cover both hydraulic and organic capacity has caused the confusion. When it uses the words "receive and effectively convey", we believe it refers to hydraulic capcacity, but then when it goes on to "or treat" a specified load, we believe it refers to organic capacity.

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7. Apparently DER issued another permit to Shamokin-Coal Township which did not distinguish wet weather flows from dry weather flows and yet now so considers it. In addition, the EPA has specifically made the distinction on Williamsport's NPDES permit.

8. There was extended testimony and argument about whether infiltration was to be distinguished from in-flow, who should have called the DER employee (Mr. Merrow) who worked on the module, and whether estoppel has occurred and the inadequacy of the DER module forms. We find it unnecessary to resolve these disputes.

There is a temptation to seize upon the word "effectively" convey, as perhaps implying that the sewage plant must be able to meet the effluent standards of the permit, but this upon reflection must be construed to be a "treatment", and not a conveyance, requirement.[9] Appellant does not contend that the West Plant was designed to effectively "treat" 6.5 m.g.d. Indeed, the plant engineer admits that this was never intended.[10] But it is asserted, and without contradiction that the plant was in fact designed to convey 6.5 m.g.d. as the maximum flow rate. We can only conclude that neither the permit nor the design capacity—as to hydraulic capacity—has been exceeded.

The final proof of the conclusions we reach concerning the proper meaning to be given to the word "Capacity", is found in 25 Pa. Code §94.21 which was used by the DER as a basis for its actions in this matter. Here, the above indicated distinction is drawn, and it is provided: "Existing Overload": "If the annual report establishes or if the Department determines that either the hydraulic or organic overload on the sewerage facilities is exceeding the capacity approved by the permit, the permittee shall ..."

As previously indicated, the DER has not alleged that the West Plant is unable to meet the organic treatment requirements of the permit and regulations. Actually, the burden to show the ability of the plant to meet the treatment requirements is upon appellant, Williamsport, on an application for an extension permit. This need only be done before this board, however, when the DER has tendered organic overload as a basis for denying an extension permit, which is not this case.

Appellant, Lundy Homes, contends that DER abused its discretion and violated Article 1, Section 27 of the Pennsylvania Constitution[11] and The Clean Streams Law, *supra*, in denying extension permits without a showing that appropriate evaluations of environmental and social concerns were undertaken. Specifically they allege that the housing and employment needs of the Williamsport area have been neglected. We recognize the under *East Pennsboro Township Authority v. Comm. of PA, DER*, 18 Comwlth. 58, this is a shared responsibility.

> "Under the existing administrative law scheme for regulating environmental problems, there are now three separate and distinct regulatory bodies. First, there is the Environmental Quality Board (EQB), which is intended to establish rules and regulations governing environmental matters. We presume that the EQB considers the factors set forth in section 5 of the Act, 35 P.S. §691.5 (Supp. 1974-1975), including economic impact, when it formulates and adopts regulations. It is impossible, however, to predict in advance all of the

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10. It is, however, argued that the wet weather flow of 6.5 m.g.d. can be treated adequately so long as the storm sewer is combined.

11. "The people have a right to clean air, pure water, and to 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."

possible problems which might arise under a regulation and, therefore, section 5 requires DER and the Board to give on-going consideration to the factors set forth there, as they enforce the regulations."

After some further discussion, the court speaking through Judge Kramer said:

> . . ."DER in this and other cases has taken the position that it has no discretion to consider such things as economic impact based upon its reasoning that the EQB has already done so. We disagree. We read section 5 of the Act, quoted above, to require DER to give consideration to economic impact as it enforces the regulations. We do not believe that DER is required to make a detailed economic study before issuing an order, but we do believe it is highly improper for DER to issue an order without giving any consideration whatsoever to economic impact. DER must consider such adverse economic impact as can reasonably be foreseen or determined at the time it issues its order."

The failure of DER to consider economic impact can be harmless error when the board has received and properly evaluated such evidence. There can be no doubt that employees in the building trades are adversely affected by the cut off in construction which directly results from the DER orders. The evidence presented on this point has been considered by the board but has not convinced us that the DER abused its discretion in denying permits which would add to the existing Bull Run pump station hydraulic overload. Inasmuch as we must in any event remand this matter to DER for further consideration, for reasons previously indicated, we expect that when it reconsiders future extension applications, it will at that time weigh all of the economic consequences of its action.

CONCLUSIONS OF LAW

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

2. Pursuant to The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.* and 25 Pa. Code §94.21(3) of its regulations, where there is an hydraulic overload DER may prohibit further sewer extensions.

3. Where a sewage treatment plant (West Plant) has a design flow capacity of 6.5 m.g.d., it does not experience an hydraulic overload in violation of 25 Pa. Code §94.11 though the organic treatment capacity or average daily flow of 2.5 m.g.d. has been exceeded, so long as the total flow remains under 6.5 m.g.d.

4. The West Plant is not presently hydraulically overloaded, inasmuch as the total flow is under the 6.5 m.g.d. design capacity.

5. Whether there is an organic overlaod, an hydraulic overload or both, must be determined as separate matters based on the permit and design features of the individual plant and its effluent.

6. The Bull Run pump station of the Central Plant is overloaded from time to time, especially during wet weather periods, and DER may properly deny any extensions which would contribute additional flows thereto, in accordance with 25 Pa. Code §94.11.

6. Under The Clean Streams Law, 35 P. S. §691.5(a)(5), the DER and this board must give consideration to the economic impact of any decision to deny further sewer extensions based on a determination of hydraulic overload.

7. In deciding whether to issue the sewer extension permits here in question, DER also has the obligation to balance benefits against environmental damages as required by Article 1, Section 27 of the Pennsylvania Constitution, as provided in *Payne v. Kassab*, 11 Pa. Comwlth. 14 aff'd. 468 Pa. 226 and *Concerned Citizens for Orderly Progress v. Comm. of PA, DER*, Pa. Comwlth. 387 A.2d 989.

ORDER

AND NOW, this 27th day of JULY 1979, the above matter is hereby remanded to DER for further action consistent with this adjudication.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

CONCURRING OPINION BY
MEMBER THOMAS M. BURKE

I concur in that part of Chairman Waters' opinion applicable to the Bull Run pump station of the Central Sewage Treatment Plant and I concur in the result reached by Chairman Waters on the applications for permits for sewer extensions to lines tributary to the West Sewage Treatment Plant.

I concur in the order to remand because after a careful review of the record I am convinced that the West Sewage Treatment Plant is not hydraulically overloaded in that the flow to the plant does not exceed the flow that the plant was designed to accept.

Under Section 207 of The Clean Streams Law, the Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1 *et seq.*, a permit must be obtained from the DER before a sanitary sewer system can be extended. A reason for the pre-installation permit requirement is to allow the DER to assure that the treatment plant has sufficient capacity to treat the sewage added by the extension. See *Kravitz Company v. DER*, EHB Docket No. 77-118-W, issued October 30, 1978. In this case the DER has refused to issue permits to install sewer extensions to the system tributary to the West Plant because it believes the West Plant to be hydraulically overloaded. 25 Pa. Code 94.11

provides that "a sewer extension shall not be constructed if the additional flows contributed to the sewage facilities from the extension will cause the pump station or other portions of the sewer system to become overloaded." A hydraulically overloaded plant is defined by 25 Pa. Code 94.1 as a plant which suffers "the condition that occurs when the hydraulic portion of the load, as measured by the average daily flow entering a sewage treatment plant, exceeds the average daily flow upon which the permit and the plant design are based."

Generally, it is a simple matter to determine if a plant is hydraulically overloaded by comparing the average daily flow entering the plant with the plant's design flows. Here, the rate of flow entering the plant is not in dispute; however, the DER and the Authority disagree on the design parameters of the plant.

The disagreement exists because the plant serves a "combined sewer system"—it carries both sewage and storm water—and the parties disagree on the treatment the plant was designed to effectuate during the occurance of storm water inflow. The DER contends that the plant is designed and permitted, and thus required, to provide secondary treatment to the total flow it receives including storm water inflow and that the total flow is not to exceed 2.5 million gallons per day (m.g.d.) on a daily average. The Authority contends that the plant is designed to provide secondary treatment to a maximum dry weather flow of 2.5 m.g.d. and to "handle" storm water flows during wet weather periods up to 6.5 m.g.d. By "handle" the Authority means that the plant, rather than by-pass the excessive storm water flow, is designed to convey it through the plant and provide some treatment such as chlorination and some settling. Alfred Bailey, who supervised the design of the plant, and signed and sealed the plan specifications and design modules and is now the President of Chester Engineers, Inc. summarized the reasons for designing the plant in the manner propounded by the Authority as follows:

> "Well, as I stated earlier, we have a situation such that the existing sewer system contributing sewerage to the plant was a combined sewer system. Therefore, in analyzing the flows coming to the plant, and in view of the fact that total flows could fluctuate considerably over any period of time due to rainfall entering the combined sewer system, that we utilized the figure of what we called average dry weather flow; based our design on that figure so that we could have some rational basis for design that would not be affected by storm flows.
>
> "Then in order—recognizing the fact that we did have a combined sewer system, we designed—and also recognizing the fact that it's not normally economically feasible to design a sewerage treatment plant to treat all of the storm flows that would be delivered to the plant, we designed—we built into the system, or designed the plant so that it could hydraulically treat approximately three times the average dry weather flow."
> N. T. p. 164

If the plant was designed in the manner described by the Authority, then notwithstanding the treatment provided to a flow above 2.5 m.g.d. the plant would not be hydraulically overloaded since the present flows to the plant would not exceed the design flow.

I believe that the explanation given by the Authority is the correct interpretation of the plant's design for a number of reasons. The modules attached to the permit are not self-explanatory and the testimony of the witnesses who interpreted the permit on behalf of the Authority was more creditable because they actually participated in the design of the plant and the review of the design in the permitting process, whereas none of the DER witnesses participated in either the design or review of the design. Also, the lead article of the March-April 1975 edition of the Water Pollution Control Association of Pennsylvania journal featured the West Sewage Treatment Plant. The article described the plant's design rate of flow as 2.5 m.g.d. total average dry weather flow and 6.5 m.g.d. maximum wet weather flow. Certainly the DER is not bound to accept the design criteria stated by the Association journal but the article does show that the explanation of the permit and the design that the Authority presented to the Board is consistent with an interpretation it held shortly after the completion of the construction of the plant. Further, and of most importance, the criteria listed at Module 4-1 such as projected population and projected flow show that the 2.5 m.g.d. does not include storm water inflow. The module shows the 2.5 m.g.d. to be composed of 1.2 m.g.d. domestic wastes (20,000 population x 60 gallons per day per capita which was derived from residential water use records) plus .8 m.g.d. infiltration and .5 m.g.d. industrial waste flow. Thus, unless storm water inflow was included in the .8 m.g.d. infiltration, it is not part of the 2.5 m.g.d. The Authority's engineers testified that the infiltration flow did not include storm water inflow. Their testimony is in accord with the usage of the term in the sanitary engineering profession, where infiltration is used to describe groundwater seepage into the sewer lines and inflow refers to the inflow of storm water. Also the Authority's explanation comports with the model design suggested by the DER Sewerage Manual. The Authority's interpretation of the plant's design allows for 100 g.p.d. per capita (100 x 20,000 = 2.0 m.g.d.) including infiltration but excluding storm water inflow. Section 24.1 of the Sewerage Manual in effect at the time the permit was issued states:

> "New sewer systems shall be designed on the basis of an average daily per capita flow of sewage of not less than 100 gallons per day. This figure is assumed to cover normal infiltration, but an additional allowance should be made where conditions are unfavorable."

The Authority's interpretation is also consistent with past actions of the DER when issuing permits for sewage plants serving combined sewer systems. The permit which the DER issued to the Shamokin-Coal Township Joint Sewer Authority on October 30, 1972, for a plant which serves combined sewers, approved a flow design which provides for higher rates of flow during wet weather periods than during dry weather periods. Mark Roller, the environmental protection director for DER's Williamsport region testified that the DER policy at the time the West Plant permit was issued did not require treatment of the peak flows from combined sewers during the duration of a storm.[1]

I believe Mr. Roller's testimony is important because it shows that an approval of the West Sewage Treatment Plant with dry weather flow and wet weather flow limitations would be in accord with the DER policy on treatment of flows from combined sewers that existed at that time.

A further reason for rejecting the DER interpretation of the plant's design is that it leads to a result that the parties could not have contemplated, that is, that four years after the completion of the plant, its capacity would be exceeded and it would be unable to accept any further sewage.

The Authority offered testimony and graphs to show that the average daily flow to the West Plant has never exceeded 2.5 m.g.d. during dry weather or 6.5 m.g.d. during peak wet weather periods. Therefore since the rate of flow to the plant has not exceeded the average daily flow on which the permit and plant design are based, I find that the plant is not hydraulically overloaded.

In light of Chairman Waters' opinion I emphasize that my decision is based solely on a factual determination that the plant was designed and permitted to receive flows greater than 2.5 mg.d. during wet weather periods. I do not agree with Chairman Waters' application of Chapter 94 to this matter when he opines that a sewage treatment plant is not hydraulically overloaded until the flow it receives exceeds the plant's capacity to convey the flows. I believe that the basis of his decision, his interpretation of the definition of "capacity", is in error. "Capacity" is defined by 25 Pa. Code 94.1 as "the rated ability of the plant, pump station, or sanitary sewer system to receive and effectively convey or treat a specified load." The phrase "and effectively convey or treat" does not refer to the difference between "hydraulic and organic capacity" but rather differentiates between the functions of the plant

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1. Roller's testimony on this point was as follows:
"The policy would be that the waste that is coming through a sewer system would be treated by the sewerage treatment plant. The only exception to that would be where there are combined sewers, and realizing that you do have peak flows for the duration of the storm, which might be a day or two, there would be a diversion of flow."
N. T. p. 347

(treat) and the pump station or sanitary sewer system (convey).

I also disagree with his opinion that the DER must consider the economic consequences of its action when it denies a sewer extension permit because of the existence of a hydraulic overload. The Commonwealth Court, in discussing the DER's obligation to consider the economic impact of its actions in *East Pennsboro Township Authority v. Commonwealth of Pennsylvania, DER, supra,* stated that:

> "The only time that DER may ignore economic impact is when it is dealing with a mandatory provision of the Act or a regulation which does not give DER any discretion. See *Rochez Bros., Inc. v. Commonwealth of Pennsylvania, DER,* ___ Pa. Commonwealth ___, 334 A.2d 790 (filed March 19, 1975)."
> Id. 334 A.2d at 803

The authority under which the DER is acting in this matter is Section 207 of The Clean Streams Law, *supra,* which requires that a permit be acquired from the DER before a sewer extension is installed and 25 Pa. Code 94.11. Both provisions impose mandatory obligations upon the DER. It does not have the discretion to allow a sewer extension to be constructed without a permit because of economic considerations; nor is DER able to issue a permit in response to an application that does not comply with the regulations it is mandated to enforce because of economic considerations. The Commonwealth Court in *Rochez Bros., Inc.,* 18 Pa. Commonwealth Ct. 137, 334 A.2d 790 (1975) stated that:

> "In cases such as *Bortz, supra,* where DER and the Board have disretion, e.g., in establishing the timetables for enforcement of the regulations, economic impact is a proper issue upon which testimony and evidence should be received, if offered. In a case such as this, where an application for a permit, on its fact, fails to comply with the provisions of the Act and the applicable regulations, economic impact need not be considered."
> Id. 334 A.2d at 797

Moreover, 25 Pa. Code 94.11, by its terms, imposes a mandatory obligation upon the DER. The DER cannot ignore 25 Pa. Code 94.11.

Simply put, the DER may not disregard the provisions of Section 207 of The Clean Streams Law, *supra,* and 25 Pa. Code 94.11 because an adverse economic impact may result from their application.

ENVIRONMENTAL HEARING BOARD

THOMAS M. BURKE
Member

DATED: July 27, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

WILLIAM F. BRYAN

Docket No. 78-155-W

25 Pa. Code §94.55

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By Paul E. Waters, Chairman, July 31, 1979

This matter comes before the board as an appeal from the refusal of an exception to a sewer ban issued to the Upper Montgomery Sewer Authority in 1977. Appellant, William F. Bryan, seeks to connect his property, a converted railroad station, to the system, based on the fact that a building permit therefor was issued prior to date of the ban in accordance with DER rules and regualtions 25 Pa. Code §94.55.

FINDINGS OF FACT

1. Appellant, William F. Bryan, is an individual who owns property located in East Greenville Borough, Montgomery County, Pennsylvania.

2. Sometime during early or mid October 1977, the appellant, upon learning of the Reading Railroad Trustee in bankruptcy decision to accept bids for the East Greenville railroad station property, entered into negotiations with the railroad in the hope that the appellant could purchase the station property and thereafter make restorations to the property for use by appellant and his wife as a single family retirement home.

3. Upon becoming the successful bidder, the appellant had the property surveyed and settlement thereon was made on September 29, 1978.

4. The railroad station was constructed by the former title owner in 1920 and was used as a railroad passenger and freight station until 1970, whereupon it was leased by the railroad to a series of tenants until late 1976.

5. The property when constructed had and continues to have a men's and women's washroom and toilet facility which utilized an on-site septic system to handle the wastewater discharge from the property.

6. In 1961 the Upper Montgomery Joint Sewer Authority installed a sanitary sewer line which line started at the front of the property on Fourth Street and extended down along the Railroad Street side of the property. The railroad property was assessed at $1,320.12 for the 188 feet of sewer line fronting this property.

7. The sewer line which was installed within three feet of the curb line which fronts the Fourth Street side of the building was, for some reason unknown to the appellant, not connected to the property by way of making a lateral connection even though the former title owner paid the sewer assessment charge on March 15, 1962.

8. On November 9, 1977, DER issued an order to Upper Montgomery Sewer Authority banning further connections to the sanitary sewer system.

9. Upon acquiring title to the property, appellant met with the township council of East Greenville and advised them of his plan to restore the deteriorated railroad station property as a residential single family retirement home for him and his wife. It was at this time that the appellant learned of the DER order of November 9, 1977, banning further connections.

10. On October 11, 1978, appellant requested an exception to the sewer ban, after having been advised by the governmental officials of East Greenville responsible for issuing building permits, that it would be more appropriate to make a lateral connection into the existing sewer line than to utilize the on-site septic system.

11. On November 28, 1978, the DER denied appellants request for an exception to the sewer ban and it is this action of the DER which is the subject matter of this appeal.

DISCUSSION

This issue which we must resolve in this matter is not one of complexity. Appellant seeks an exception to a sewer ban order issued on November 9, 1977, which extends to a building which was built in 1920 and which he purchased on September 29, 1978.

The DER regulation which governs the grant of exceptions such as here requested, is found at 25 Pa. Code 94.55: "Building permit issued prior to ban. Any discharge which the Department determines will result from a structure for which a valid building permit had been issued prior to the day of the ban, shall constitute an exception to the ban." DER argues that an exception, which would allow appellant to connect his property to the Upper Montgomery Sewer Authority System, was properly denied because appellant did not himself obtain the permit for the building which is the subject of this proceeding. Upon close examination it is clear that the regulation does not specifically make the requirement DER would have the board impose. We will refrain from rewriting the regulation, and hold that there is no such limitation contained or necessarily implied, therein.

Although DER does not argue or dispute the fact that a building permit was no doubt issued for the property in question prior to November 9, 1977, the date of the sewer ban order, we must nevertheless have some legal basis to conclude that it was. The law provides for presumptions in certain cases to preclude the need for formal proof. There is a presumption that public officials have properly performed their duties. *Miners Sav. Banks of Pittston v. Duryea Borough*, 200 A.846, 331 Pa. 458; *Wilson v. City of New Castle*, 301 Pa. 358; *Miller v. Borough of New Oxford*, 109 Pa. Super. 85. Obviously this presumption can be overcome by proof to the contrary in a given factual situation. Here, no such proof was offered and we therefore conclude that a building which has been allowed to exist in and serve the township for more than fifty years, was constructed with the knowledge and proper permit authorization from township officials.

We therefore hold that an exception should have been granted to appellant allowing a sewer connection.

CONCLUSIONS OF LAW

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

2. Where the owner of a building, constructed in 1920, seeks an exception to a sewer connection ban issued in 1977 pursuant to 25 Pa. Code §94.55, it should be granted.

3. There is no express or implied limitation in 25 Pa. Code §94.55 that precludes a present property owner seeking a ban exception, from a benefit that would have otherwise accrued to his predecessor in title.

O R D E R

AND NOW, this 31st day of JULY 1979, the appeal of William F. Bryan is hereby sustained and the action of DER in denying an exception to the sewer ban on November 28, 1978, is hereby reversed.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

THOMAS M. BURKE
Member

DATED: July 31, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
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EAST COCALICO TOWNSHIP

Docket No. 78-111-W
Pennsylvania Sewage Facilities Act
25 Pa. Code 71.14(a)(7)(iii)

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Paul E. Waters, Chairman, August 31, 1979

This matter comes before the board as an appeal from a refusal of an Act 537 plan revision filed with the DER on behalf of appellant, East Cocalico Township, Lancaster, Pennsylvania.

The revision concerns a small development known as Lakeside Estates, where a few on-lot sewage disposal problems have occurred. Appellant proposes, because of the small number of homes involved, to repair the systems as needed and continue with conventional or alternate on-lot disposal. DER, concerned about the efficacy of this proposal, has rejected it, leaving no clear indication what would be acceptable, practical and satisfactory.

FINDINGS OF FACT

1. Appellant is East Cocalico Township, a political subdivision of the Commonwealth of Pennsylvania located in Lancaster County, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) which has the power and duty to administer the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, No. 537, *as amended*, 35 P.S. 750.1 *et seq.* and the rules and regulations promulgated thereunder.

3. Appellant's official plan (base plan) indicates that there are no planned municipal sanitary sewer systems in the Lakeside Estates area for the next forty years.

4. Lakeside Estates consists of twelve lots of which nine are developed and occupied, one is developed and unoccupied, and two are undeveloped.

5. All lots presently developed in Lakeside Estates use individual conventional on-lot sewage systems and individual domestic water wells.

6. Starting in 1977 and continuing to the present, the DER has observed and, in some cases, sampled malfunctions or various individual sewage disposal systems at Lakeside Estates.

7. The DER is also aware that there were numerous inspection and installation errors in the individual systems, including the construction of the subsurface absorption area on lot 3 within 100 feet of the domestic water well on lot 10 contrary to 25 Pa. Code 73.12(c)(1); and failure to properly conduct percolation tests at the site of a seepage bed.

8. By letter dated October 31, 1977, the DER required East Cocalico Township to revise its existing base plan.

9. The basis for issuance of the revision order was a DER determination that the existing base plan did not adequately address the present and future sewage needs of the Lakeside Estates area.

10. In attempted compliance with the DER order, appellants submitted a plan revision prepared by Spotts, Stevens and McCoy, Inc. on or about May 18, 1978, containing seven alternatives for sewage disposal.

11. Appellant was advised by letter dated May 24, 1978, that the DER review of the proposed revision could not take place without comments from the Lancaster County Planning Commission required by Section 5(d)(8) of the Pa. Sewage Facilities Act, *supra*, or selection by appellant of one of the seven options presented by the proposed revision.

12. The appellant, by resolution #23 adopted June 7, 1978, reaffirmed its previous adoption of the proposed revision, submitted comments by the Lancaster County Planning Commission and designated options 1 and 2 of the proposed revision as the township's preferred alternatives for implementation.

13. The plan revision was resubmitted to the DER and disapproved by department letter dated August 25, 1978.

14. The DER letter of August 25, 1978, stated that deficiencies of the proposed revision to the base plan existed in the following areas:

1. In depth analysis of all alternatives.
2. Relation to existing zoning and development plans.
3. Best estimates of complete costs and financing.
4. A implementation schedule of the option chosen.

15. In response to the DER's letter of disapproval of August 25, 1978,

and after appellant's appeal of said DER action was filed with the Environmental Hearing Board, appellant filed a supplemented plan revision.

16. On the basis of the information provided in the supplemental plan revision, the DER stipulated that the supplemental plan revision was approved as to those areas delineated by the supplemented plan revision outside Lakeside Estates and not approved as to Lakeside Estates.

17. The DER objects to the supplemented plan revision as to Lakeside Estates for three reasons:

a) The submittal failed to address the feasibility and implementability of the selected approach;

b) the implementation schedule submitted was inadequate in that it was vague and not capable of enforcement;

c) the submittal failed to properly develop or evaluate on a comprehensive basis the costs associated with the alternatives.

18. Spotts, Stevens and McCoy, Inc. recommended the use of alternate individual on-lot sewage systems on the basis of soils information provided by a soils survey performed by W.K. Kassees Associates on lots 8, 9 and 10 and a percolation test performed on lot 9.

19. Appellant's consultants made no effort to gather data concerning problems potentially existing on lots other than lots 9 and 10.

20. Robert S. Rosenfeld, an employee of Spotts, Stevens and McCoy, Inc., and a civil engineer, testified at the hearing at length concerning the numerous alternatives that were considered by the township and rejected or adopted at the time of the township's adoption of the revised plan.

21. There was testimony given as to the costs and possibilities of each of these options, and such testimony by stipulation of counsel, is a proper element to be considered in approving or rejecting the plan.

22. The owners of lot 9 filed a complaint in trespass and assumpsuit against the Township of East Cocalico, alleging as a basis for that complaint alleged improper testing and installation of the on-lot system on lot 9 and the malfunction alleged resulting therefrom. The township had joined the DER, the Commonwealth, and others as additional defendants in that suit. The status of that suit is that the Commonwealth has yet to answer the township's complaint against the Commonwealth.

23. Since the Lakeside Estates subdivision was subject to an Act 537 revision, the powers of the township under Act 537 were suspended and placed in the department during the pendency of the preparation of the revised plan.

DISCUSSION

We are here concerned with a residential subdivision, Lakeside Estates, which has only ten homes on a total of twelve lots. The subdivision located along Route 897 in East Cocalico Township, utilized conventional individual on-lot sewage disposal and water systems. This is consistent with the original official plan of the township, inasmuch as no municipal sewage system is planned in the next forty years in the area.

Because sewage problems began to develop in Lakeside Estates and other areas, on October 31, 1977, the DER required appellant township to revise its existing Act 537 plan,[1] in accordance with Chapter 71 Sections 71.14 and 71.15[2] of DER's rules and regulations.[3] In addition DER issued a sewer connection ban on the sewer system serving parts of East Cocalico Township.

The township, adopted a revision proposal having seven options, discussed separately, and finally indicated two options as the preferred alternatives. The plan deveploped by the engineering firm of Spotts, Stevens and McCoy, Inc. was based on a soils survey of lots 8, 9 and 10 and basically proposed alternate individual on-lot sewage systems, as presently in use on ten of the lots.

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1. The original or base plan which was the county plan, was adopted by the appellant on March 3, 1971.

2. 71.15 Requirements to revise official plans.

> "(a) Revisions to municipal or multimunicipal plans.
>
> "(1) Municipalities shall review their official plans and, if necessary, revise them at least once every five years. The municipality's duty to revise its official plan as required by this section shall not be altered by virtue of the existence, absence or content of a municipal or county subdivision ordinance or regulation.
>
> "(2) When the Department determines that an official plan, or any of its parts, is inadequate for the needs of a municipality to which it relates because of changed or newly discovered facts, conditions, or circumstances, the Department may upon written notice require a revision of the plan to be submitted within 120 days."

3. The scope of the original revision area included another area also, but this portion of the plan was approved by the DER.

The basic question which must be answered by this adjudication is—How much specificity is required in an Act 537 plan revision? Appellant has submitted a revision and a supplement thereto and has given extensive testimony about the plan, through engineering and other experts.[4] The sewage disposal plan revision simply proposes to allow alternate on-lot sewage disposal. Option 1 is for sand mounds and option 2 provides for a community on-lot system.

DER wants to use the plan revision as an enforcement tool to get appellant to take more responsibility and to do affirmative acts in rectifying sewage problems on lots previously permitted under a prior plan revision.

Appellant agrees that there have been some sewage problems experienced by home owners in Lakeside Estates, but argues that they have been corrected. In any event, it argues that it has no right or duty to go upon private property to make such determinations. It is clear that for the purpose of issuing and revoking on-lot sewage permits, appellant does have such authority. The Pennsylvania Sewage Facilities Act provides 35 P.S. §750.8(b)(5):

> "(b) Each local agency in addition to the powers and duties conferred upon it by existing law shall have the power and the duty:
>
> * * *
>
> "(5) To make or cause to be made, such inspections and tests as may be necessary to carry out the provisions of section 7 of this act, and its authorized representatives shall have the right to enter upon lands for said purpose."

This authority, however, as previously indicated, is for the purpose of granting and revoking permits—the latter only after notice and hearing. Nowhere is it indicated that this substantial authority is to be utilized to prepare a sewage plan or revision as in this case.

Appellant argues that its plan to continue the use of individual on-lot sewage disposal is adequate to meet the needs of the Lakeside Estates

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4. In passing upon the adequacy of the plan revision, the board under the decision in *Warren Sand and Gravel v. Comm. of PA, DER*, 20 Pa. Cmwlth. Ct. 186, 341 A.2d 556 (1975), must consider all the evidence offered at the hearing in support of the original submission.

area. It argues that the few malfunctions that have occurred have been or can be repaired. DER, not satisfied with this, wants more details, soils information, costs and a specific implementation schedule. It is clear that appellant has gone to considerable lengths to supply what it characterizes as DER's "thirst" for information. The soils have been expertly examined on more than one occassion on various lots, an engineering firm has prepared a professional review and evaluation of the options available to appellant. The appellant has selected, based in part on cost considerations, and the limited area involved, to move from conventional to alternate on-lot disposal and require repair of any systems needing it. The basic question raised by DER is whether the plan is feasible. There is no dispute that DER can require a plan revision to deal with the changed conditions existing at Lakeside Estates.[5]

The regulations, in referring to the contents of a plan revision, require at 25 Pa. Code 71.14, that the plan revision indicate what the municipality is going to do and when,[6] it will be done.

Inasmuch as the appellant—or for that matter—DER, cannot now possibly know whether the first alternative proposed will fail to meet the sewage disposal needs of Lakeside Estates, the plan cannot be said to be unreasonable.[7] DER seems to want more, and demands what appellant cannot give, a present assurance that the plan will be successful. We think a proposed plan revision under the circumstances in this case, must indeed, have at least a reasonable chance of success. Further, based on the test data, costs involved and expert testimony in this case, we believe the first two plan options meet this requirement. This is especially so, when there are further options available, which are not precluded by the first two, should they turn out to be unsuccessful, as feared by DER.[8]

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5. The rules and regulations of DER, 25 Pa. Code 71.3 indicate that:

> "(a) The provisions of Subchapter A relating to planning are designed to provide the Commonwealth and its citizens with a comprehensive mechanism for resolving existing sewage disposal problems and for avoiding the potential sewage problems attendant upon new residential and commercial development."

6. 25 Pa. Code 71.14(7) requires:

> "(7) A delineation of areas where because of growth, public health or pollution factors sewers [are] needed immediately. Under such circumstances the plan shall:
> "(i) Present and evaluate alternatives for sewerage services including proposed methods of financing the construction and operation of the planned community sewage system, together with the estimate of costs;
> "(ii) Select the most practical alternate scheme in terms of need and time considering both the long term and short term economics of the project; and
> "(iii) Set forth a time schedule for implementation of the project."

Continued to Page 7

The plan revision is clear in indicating a preference for on-lot systems of sewage disposal and the soils information that is available, while not clear cut, does indicate a resonable chance of success of alternate type sand mound systems.[9] When this is coupled with the cost estimates in the plan and at the hearing, we are convinced that the township should be permitted to try to meet its sewage disposal needs in this way. When and if this should prove to be unworkable, other more expensive options can then more appropriately be considered. We agree with DER that there should also be considerations beyond that of cost. While we find no fault with appellant in starting the planning to solve its sewage problem at the lowest cost, there must be a contingency option to finally correct the problem regardless of cost. For this reason, we find the seven alternatives analyzed by appellant to be very appropriate.[10] Although they are to some extent discussed in terms of implementation priority, the time schedule, especially the initial six-month delay, for a report on the implementation of options 1 and 2, does seem unduly protracted.

In short we are satisfied, based on all of the evidence, that appellant should be permitted to try to solve its sewage problems in this twelve-lot development, by on-lot methods.[11] We believe, however, the plan revision

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Continued from preceeding page:

7. Although DER and appellant speak in terms of "feasibility" of a plan, we believe the test should be one of reasonableness.

8. The plan revision also discussed holding tanks as option 3, a community holding tank as option 4 and a community septic tank as 5. Option 6 would use the East Cocalico treatment plant and 7 involved the construction of a package-type treatment plant.

9. Although the DER expert witnesses were not as optimistic as appellant, a soil scientist for DER did express the view that there was a 60% chance of success on some lots.

10. The plan, appellant's exhibit 1, provides at page 7: "Should options 1 and/or 2 of this plan revision be determined not implementable, the Board of Supervisors will need to authorize legal and technical work to be initiated for option 5. Should option 5 not be implementable, implementation of option 7 should be initiated."

11. An expert witness representing the engineering firm that prepared the plan revision proposal stated, in referring to the first two options: (N.T. Page 89, Lines 22 through 25 and Page 90, Lines 1 through 14)

> "As it says, '1 and 2 should be considered first since those options are the least costly and do not involve continuing municipal participation. The preliminary soils evaluations and percolation tests conducted in the area have indicated potentially acceptable on-lot disposal areas.'
> "Q. That is the Kassees report and the Young and Luckinbill percolation tests?
> "A. Yes.
> "Q. Option 1, as I read it, back on page 5, recommends sand mounds.
> "A. At the top of the page, yes. It says in parentheses, "sand mounds." Options 1 and 2, in the description, I don't think that we imply that we are just going to look at sand mounds. I would envision that the subsurface system design would be that system which would, in the opinion of the sewage enforcement officer or the engineer who designed that system, be acceptable and would work and would not necessarily just be a sand mound."

should indicate a reasonable implementation schedule as required by 25 Pa. Code 71.14(a)(7)(iii). We must therefore dismiss the appeal but no doubt the appellant will have an opportunity to provide the indicated additional information.

CONCLUSIONS OF LAW

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

2. Appellant was properly required to submit a plan revision pursuant to the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, No. 537, *as amended*, 35 P. S. 750.1 *et seq*. because of sewage problems in the Lakeside Estates area of the township.

3. An official plan revision pursuant to Act 537 and the regulations promulgated thereunder must be reasonable and contain a schedule for its implementation as required by 25 Pa. Code 71.14(a)(7)(iii).

4. Where only a very small number of residential homes are involved and only a few of them have experienced on-lot sewage disposal problems, a municipal plan revision which considers many options, but proposes to start with the least expensive solution should be approved, when the other more costly solutions are still available if needed.

O R D E R

AND NOW, this 31st day of August, 1979, the appeal of East Cocalico Township is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

P. E. Waters

BY: PAUL E. WATERS
Chairman

CONCURRING OPINION

I concur in the dismissal of the appeal because I believe that it is well within the discretion of the DER to require the appellant to submit sufficient documentation to show definitively whether the soils at Lakeside Estates are suitable for on-lot systems.

It is true that sewage facility plans, revisions or supplements are generally not lot specific. However, in this instance, where the revision to appellant's official plan for Lakeside Estates was ordered because 5 of the 10 occupied lots in the subdivision have had surface malfunctions, the DER has the authority and possibly the duty to require appellant to document the

ability of on-lot systems to succeed in this sub-division. Without an evaluation of the soil types, appellants are unable to intelligently decide if alternate individual on-lot systems are feasible and if they are feasible, which system should be used, and DER is unable to effectively review and evaluate for approval the recommended solution.

I do not believe that the DER's dissatisfaction with the documentation that appellant did submit to support the feasibility of alternate on-lot systems was based on arbitrary grounds. The DER severely questions the credibility of the W. Kassees Associates report because, among other reasons, the report recommended on-lot surface systems for soils (Croton) that the DER's regulations deem unsuitable for any subsurface system. The percolation tests performed by Mr. Young did not indicate a good permeability rate for the soil and only one of the six percolation tests done on lot no. 9 by Mr. Luckinbill indicated suitable soil.

The cogent point here is that future purchasers of these properties, both the two vacant lots and the developed lots as well as the residents of the developed properties, should be able to rely on the correctness of the sewage facilities plan's solution to the sewage disposal problems.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

DATED: August 31, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
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SPLIT VEIN COAL COMPANY, INC.

Docket No. 79-016-W
Surface Mining Conservation and Reclamation Act, 52 P.S. 1396.1
Land and Water Conservation and Reclamation Act, 32 P.S. 5101

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Paul E. Waters, Chairman, August 31, 1979

This matter comes before the board as an appeal from a mining cease and desist order issued to appellant, Split Vein Coal Company, Inc., by DER on January 19, 1979, under The Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, 52 P.S. 1396.1.

DER alleges that appellant by its mining operation in Northumberland County, destroyed part of a water pollution prevention project which had been constructed to prevent additional pollution by acid drainage going into the Shamokin Creek. Appellant contends that it has no responsibility to repair the damage because of its prior mining rights, and the inefficiency of the project.

FINDINGS OF FACT

1. Appellant, Split Vein Coal Company, Inc., (hereinafter Split Vein), is a corporation licensed to do business and undertake strip mining operations in Pennsylvania and holds mine drainage permit no. 4971302 and mining permit no. 113-36, which permit mining operations in Mt. Carmel Township, Northumberland County.

2. Appellee, DER, is the agency of the Commonwealth responsible for implementing and enforcing the provisions of The Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, 52 P.S. 1396.1; The Clean Streams Law, the Act of June 22, 1987, No. 394, *as amended*, 35 P.S. §691.1 *et seq.*, The Land and Water Conservation and Reclamation Act, the Act of January 19, 1968, P.L. 996, No. 443, *as amended*, 32 P.S. 5101 *et seq.*, The Water Obstructions Act, the Act of June 25, 1913, P.L. 555, *as amended*, 32 P.S. 681 *et seq.* and the applicable rules and regulations.

3. Acid mine drainage pollution, reslulting from prior mining operations not associated with the instant matter, exists in the vicinity of appellant's mining permit and mine drainage permit areas and in other adjacent areas, and adversely affects Coal Run, a stream adjacent to appellant's permit area and located in Mount Carmel Township, Northumberland County.

4. Coal Run is a tributary stream to Shamokin Creek and contains approximately 40 square miles of drainage area and is one of the larger tributary streams to Shamokin Creek.

5. Appellant secured a lease from Southern Anthracite, Inc., under date of November 1, 1974, which deed was recorded in Northumberland County on January 13, 1975. The lease entitled appellant to mine coal on certain areas adjacent to Coal Run.

6. On or about June 25, 1975, DER made a finding of fact pursuant to §5116 of the Land and Water Conservation and Reclamation Act, *supra*, 32 P.S. §5116, which found that stream pollution resulting from previous mining activity in the vicinity of Coal Run, appellant's permit areas, and other adjacent areas was at a stage where, in the public interest, immediate action was necessary to abate the acid mine drainage pollution. DER alloted public funds to control the stream pollution. Subsequently, DER authorized the construction of Acid Mine Drainage Abatement Project No. SL 113-5-1 (hereinafter AMD 113-5-1) in areas of the Coal Run Watershed, and was partially located on areas on which appellant had obtained leases to mine coal.

7. AMD 113-5-1 was one part of an overall plan to abate acid mine drainage pollution in Shamokin Creek.

8. AMD 113-5-1 was designed to divert unpolluted surface water run-off into secure, impervious and reconstructed stream beds, and thus avoid and prevent the discharge of such run-off into underlying deep mines.

9. AMD 113-5-1 consisted, in part, of an artificial stream channel which was constructed, in part, with an impervious, bituminized-fiber bottom liner, in order to prevent acid mine drainage from entering the underground, and had an overlying layer of rock rip-rap which was designed to protect the impervious liner from erosion. The new stream channel was designed to divert acid mine drainage from the old Coal Run, where acid mine drainage was previously discharged to the underground to a new, relocated stream channel, where the acid mine drainage discharge would be prevented from entering the underground. The new stream channel generally ran parallel to and north of the former Coal Run stream bed.

10. DER has not planned further projects necessary to abate acid mine drainage pollution at this time because of renewed interest in strip mining and possible conflicts with active mining operations.

11. On or about June 20, 1975, DER obtained a license and right-of-way-agreement from Susquehanna Coal Company to construct AMD 113-5-1 in order to abate the aforementioned mine drainage pollution problems on various lands in the Coal Run Watershed, including the areas leased by appellant from Southern Anthracite.

12. Susquehanna Coal Company and Southern Anthracite, Inc., are essentially the same, in that the two corporations have identical interests in the same land on which appellant has obtained leases, and on which DER obtained a license and right-of-way to construct AMD 113-5-1.

13. On or about the period of time extending from March 1975 through September 1978, AMD 113-5-1 was constructed by DER on various lands in the Coal Run Watershed, including the lands at issue. The approximate engineering and construction cost to DER of AMD 113-5-1 was $1,326,000.

14. In a letter to DER dated November 21, 1975, appellant informed DER that appellant intended to conduct mining operations on areas in the general vicinity of AMD 113-5-1, then already under construction and a meeting was later scheduled for January 8, 1976, to discuss the matter.

15. In a letter to appellant dated March 12, 1976, DER informed appellant that DER would proceed as planned with the construction of AMD 113-5-1, since appellant had not been able to specifically identify any areas or times in which mining operations would conflict with the construction and continued existence of AMD 113-5-1.

16. In a letter to DER dated March 26, 1976, in response to DER's letter of March 12, 1976, appellant informed DER of his intention to mine on a certain area and on an attached map, designated this specific area, which was located considerably west of the site of appellant's eventual MP 113-36 site.

17. DER subsequently deleted appellant's designated areas from AMD 113-5-1 and intended to complete construction of AMD 113-5-1 on the deleted site after appellant's mining operations were completed. In other areas not specifically identified as candidate mining areas by appellant, DER proceeded with the construction of AMD 113-5-1 in order to abate pollution. At all times material hereto, DER was generally willing to postpone the construction of various sections of the AMD 113-5-1 to accommodate appellant's mining operations.

18. On or about September 28, 1978, DER issued appellant MP 113-36, and on or about September 14, 1978, mine drainage permit no. 491302. The permits authorized surface mining operations on a tract of land (leased by

appellant on November 1, 1974 from Southern Anthracite) adjacent to a portion of Coal Run and AMD 113-5-1 (then virtually completed), all located in Mt. Carmel Township, Northumberland County. Shortly thereafter, appellant began mining operations on the MP 113-36 site.

19. Appellant's mine drainage permit no. 4971302 contains, *inter alia*, standard condition 26, which requires appellant to obtain approval for stream encroachments; standard condition 35, which requires a barrier of undisturbed earth to be maintained along each side of any stream encountered in the course of mining operations; and special condition 22, which prohibits surface mining operations within 100 feet of any stream.

20. On or about October 2, 1978, DER discovered that appellant was mining within 100 feet of the AMD 113-5-1 channel, located adjacent to the MP 113-36 site, and on a course which would intersect and disrupt the AMD 113-5-1 channel for some distance along its length, in violation of the terms of MP 113-36 and the rules of the department.

21. On or about the period of time between December 1, 1978, and January 19, 1979, appellant mined into the AMD 113-5-1 channel, within the maximum 100 foot limit imposed by DER, but then mined an additional 200 to 250 feet within and along the AMD 113-5-1 channel, and has not to date performed reclamation and reconstruction activities anywhere along and within the AMD 113-5-1 channel.

22. By a verbal mining cessation order delivered to appellant by DER mine inspector Joseph Ruane on January 19, 1979, and by a confirming letter of January 19, 1979, and mailgram dated January 22, 1979, DER ordered appellant to cease the mining operations on the permit site. The cease order indicated the following reasons:

> a. Appellant encroached upon and removed the drainage course of a stream, Coal Run, without benefit of an encroachment permit from the division of dams and encroachments; and
>
> b. Appellant mined beyond the boundaries of MP 113-36 in that mining was conducted within 100 feet of the bank of a stream, Coal Run; and
>
> c. The bond approved under MP 113-36 was determined to be insufficient for the purposes of reclamation.

23. To date, appellant has removed a total of 1,200 lineal feet of the AMD 113-5-1 channel and regraded the area so that the channel is no longer present.

24. The approximate cost to DER to replace the 1,200 lineal feet of disrupted AMD 113-5-1 channel is $100,000 with a possible 15% error.

25. Appellant diverted stream flow from the AMD 113-5-1 channel

back into the old and abandoned Coal Run channel in order to conduct mining operation in the AMD 113-5-1 channel.

26. The diverted stream flow is never returned to the AMD 113-5-1 channel downstream of the disrupted channel and the MP 113-36 site, and is lost to the underground.

27. On or about February 9, 1979, appellant ceased mining operations on the MP 113-36 site in compliance with the DER order of January 19, 1979, Appellant continued mining operations for a period of time after receipt of the DER cease mining order.

28. AMD 113-5-1 functions as planned and designed, except that 25% of the full benefit of the project is lost in the two areas which are presently disrupted, and stream flows are lost to the underground.

DISCUSSION

Appellant leased certain land in Northumberland County in 1974 for the purpose of mining coal therefrom. Subsequently, DER secured a license from appellant's lessor in order to construct artificial flumes and a water course to divert surface drainage from abandoned deep mines and to discharge this water into Coal Run which is a tributary to Shamokin Creek.[1]

Appellant does not deny that it did in fact, destroy a pollution prevention project, constructed by DER at great expense[2] in its effort to mine coal under its (appellant's) lease and permits.[3] Appellant contends that the DER project was ill conceived, ineffectual and without prior rights to the land usage.

We must first determine whether DER had the right, pursuant to legislation based on the state police power, to construct acid mine drainage project AMD 113-5-1 notwithstanding any rights obtained by appellant by a prior lease. Appellant, in effect, argues that the prior recording of its interest in the land abrogates

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1. Coal Run is a small stream five to ten feet wide and Shamokin Creek is ten to twenty feet wide, and both are presently acid streams.

2. The total project cost was $1,326,000.

3. Mine Drainage Permit No. 4971302 and Mining Permits 113-36 and 113-20.

any alleged interest relied upon by DER in constructing the water pollution project here in question. Clearly, this is error. In *Comm. of PA, DER v. Harmar Coal Co.*, 1973, 306 A.2d 308, the court said: "The police power may even be exercised over property and current business operations, requiring, the destruction of existing property...Regulations maintaining the state's water resources have also been held to be within the scope of the police power."

The appellant would have this board, now armed with hindsight, review the wisdom of AMD 113-5-1 which was carried out pursuant to DER findings made in June of 1975.[4] Appellant argues that the project was a waste of taxpayers' money, in that there is still so much acid mine drainage in the area that the streams in question have not been reclaimed in any noticeable degree. Indeed DER admits that it will take years and more than $50,000,000 to do the intended job in Shamokin Creek. This board, however, cannot now be called upon to adjudicate the question of whether the project ever should have been instituted.[5] The real question raised is whether the project was a proper exercise of the police power as alleged by DER. The project was carried out pursuant to The Land and Water Conservation and Reclamation Act, 32 P.S. §5116.[6] The Act itself provides: "It is hereby determined and declared as a matter of legislative finding that: ...(3) the prevention, control and elimination of stream pollution from mine drainage. . .are urgent matters requiring action by the Commonwealth of Pennsylvania not only for conservation purposes but for the protection of the health and welfare of citizens of the Commonwealth, especially those living in or adjacent to affected areas."

Appellant argues that DER should not have required it to agree to restore the portions of the abatement project destroyed in the course of its mining operations. DER, for its part, asserts that it has no interest in preventing appellants mining operation and only requires some reasonable efforts to reconstruct the destroyed channel and not necessarily full replacement of the original structures. The problem with appellant's position is, that it

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4. DER was authorized by The Land and Water Reclamation Act, *supra*, to select the projects needed to abate acid mine drainage pollution. This was done and the project in question was authorized by the Honorable Maurice K. Goddard by a written document (Exhibit 3).

5. The board in this context, cannot help but note that it is far from convinced on this record that project benefits have been substantial but realizes that the longest journey begins with one step. It will be a long journey indeed.

6. Article IX of the Pa. Constitution was amended on May 16, 1967, to authorize a $500,000,000 fund to be used for a Land and Water Conservation Fund to eliminate acid mine drainage and other water and air pollution. This act was passed to execute that amendment.

would take upon itself the decision of just what is, or is not needed to protect the citizens and the waters of the Commonwealth from acid mine drainage pollution.[7] Nowhere in our law is Split Vein Coal Company, Inc. given this authority. However, regardless of what needs to be done to restore the channel or who is to pay for it, the fact remains that appellant's permits were properly suspended by DER for another reason. Sometime between December 1, 1978, and January 19, 1979, appellant admittedly conducted its mining operation within 100 feet of the new project stream channel. It also appears that appellant and DER had previously discussed this matter and appellant took the position that its prior rights to mine the area superseded any interest DER had in limiting the mining operation in order to abate mine drainage pollution in the area. The Surface Mining Conservation and Reclamation Act, *supra*, provides: "No operator shall open any pit for surface mining operations...within one hundred feet of any cemetary or, of the bank of any stream." 52 P.S. 1396.4(b)(c). Further the Act specifically authorized DER ..."to order the immediate stopping of any operation...where the public welfare or safety calls for the immediate halt of the operation until corrective steps have been started by the operator to the satisfaction of the mine conservation inspector." 52 P.S. 1396.4(c). It is clear from the foregoing that DER did not lack authority to suspend appellant's permits.[8]

Appellant has raised the question of whether the government through DER has in fact exercised its powers of eminent domain. Because this question does relate to our findings, we will explore it briefly. At the outset, of course, we note that this board has no jurisdiction to decide cases in eminent domain.[9] The line between constitutional regulation under the police power and an unconstitutional taking is not always easy to discern. *Western Penna. Water Co. v. Pa. P.U.C.*, 370 A.2d 337. The state may enact reasonable laws for the proper regulation of mines and mining operations without violating provisions

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7. Reduced to its simplest terms appellant has refused to repair damage to a government authorized project because it believes the project to have been a mistake and the final results are not satisfactory to appellant.

8. DER has argued additional reasons to sustain its action, including violations of the Water Obstructions Act, 32 P.S. 681, The Clean Streams Law, 35 P.S. 691.316 and The Land and Water Conservation and Reclamation Act, 32 P.S. 5116 and bond insufficiency. We need not reach these questions.

9. 1929 April 9 P.L. 177, Art. XIX-A. 71 P.S. §510-21.

against taking property without compensation. *Comm. v. Plymouth Coal Co.*, 81 A.148. However, when in the making of public improvements, real estate is permanently injured in value, the case is for all legal purposes, part of the law of eminent domain, as to which there are principles and special constitutional rules which are inapplicable to police power cases in general. *Jackson v. Rosenbaum Co.*, 106 A.238 affirmed 43 S. Ct. 9, 260 U.S. 22. We can only say that if appellant is now entitled to any compensation for the land use, as alleged, it must be sought elsewhere.

CONCLUSIONS OF LAW

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

2. Rights acquired by appellant under recording statutes do not foreclose, abrogate or take any precedence over the proper exercise of the state police power by DER.

3. The construction of Acid Mine Drainage Abatement Project No. 113-5-1 was not an abuse of discretion by DER and was a valid exercise of the police power for the purpose of protecting the public interest under The Land and Water Conservation and Reclamation Act, 32 P.S. 5101.

4. Appellant violated The Surface Mining Conservation and Reclamation Act, 52 P.S. 1396.4(b)(c) and 25 Pa. Code 77.92(a) 5, when it conducted mining operations within 100 feet of the bank of a stream.

5. DER is authorized to require appellant to cease mining operations and to suspend its mining permits when it finds that appellant has violated provisions of The Surface Mining Conservation and Reclamation Act, *supra*, and its rules and regulations.

O R D E R

AND NOW, this 31st day of August 1979,

the appeal of Split Vein Coal Co., Inc. is hereby dismissed and the order of the Department of Environmental Resources issued on January 19, 1979, in the above matter is hereby sustained.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

BY: PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

DATED: August 31, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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CONCERNED CITIZENS OF BREAKNECK VALLEY, a non-profit corporation, CLARK SMITH and CHARLES WATSON

Docket No. 78-064-B

Air Pollution Control Act
Article I, Section 27

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and MINE SAFETY APPLIANCES CORPORATION

ADJUDICATION

By Thomas M. Burke, Member, September 5, 1979,

This matter comes before the board on an appeal by Concerned Citizens of Breakneck Valley, Clark J. Smith and Charles Watson from an action of the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) in granting three plan approvals under Section 6.1 of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001 *et seq.* to Mine Safety Appliances Company (MSA) for the construction of a plant in Forward Township, Butler County to manufacture N-hexylcarborane (NHC), a rocket fuel additive for use in an antitank weapon known as the Viper, an improved version of the bazooka of Korean War vintage.

Appellant, Concerned Citizens of Breakneck Valley, is a non-profit corporation of about 200 persons formed for the stated purpose of fighting pollution in Breakneck Valley. Along with appellants, Clark J. Smith and Charles Watson, it is concerned about the effects of emissions from the NHC plant on the health and property of the area residents. In particular, the appellants are concerned about the potential for harm by the admittedly toxic and flammable boron compounds, diborane and decaborane, which will be used at the plant in the production of NHC.

FINDINGS OF FACT

1. Appellant, Concerned Citizens of Breakneck Valley is a non-profit corporation composed of about 200 members formed for the stated purpose of fighting pollution in Breakneck Valley.

2. Appellant, Clark J. Smith, resides at R.D. 2, Evans City, Pennsylvania; the boundary of his property is about 125 feet from the MSA property line.

3. Appellant, Charles Watson, resides at Route 2, Marburger Road, Evans City, Pennsylvania; the boundary of his property is within 1200 feet of MSA's NHC plant site.

4. Charles Watson is president of Concerned Citizens of Breakneck Valley (Concerned Citizens).

5. Most of Concerned Citizen's members live within two miles of the MSA plant site.

6. Appellee is the Department of Environmental Resources, the Commonwealth agency authorized to administer the provisions of the Air Pollution Control Act, *supra*.

7. Intervenor is Mine Safety Appliances Company (MSA).

8. On February 2, 1978, MSA filed three applications for plan approval for air pollution control systems for an N-hexylcarborane (NHC) plant in Forward Township, Butler County.

9. The three air pollution control systems for which the applications for plan approval were filed are a wash vent scrubber, a flare and a thermal oxidizer/incinerator with a baghouse.

10. On May 19, 1978, the DER granted three plan approvals to MSA which permitted MSA to construct the NHC plant.

11. The plant will produce N-hexylcarborane, a rocket fuel additive, for use in the Viper weapon system, an antitank weapon which represents an improved version of the bazooka of Korean War vintage.

12. At full production the NHC plant will produce about 100 lbs. per day or 30,000 lbs. per year of NHC.

13. The NHC plant will be owned by the United States Army and operated by the Callery Chemical Company Division of Mine Safety Appliances Company.

14. The NHC plant will be constructed on a site located on top of a hill approximately 2,000 feet across a highway from MSA's existing Callery Chemical Plant.

15. The production facility consists of two principle process areas:

a. the decaborane area where diborane is converted to decaborane by pyrolysis; and

b. The NHC area where decaborane is converted to NHC.

16. The diborane which will be used in the process will be manufactured at MSA's existing plant and will be transported across the highway to the proposed plant via a 2200 foot long elevated pipeline.

17. Air pollution from the NHC plant will be controlled by a thermal oxidizer/incinerator on one waste stream, and a scrubber followed by a flare on a second waste stream. A third waste stream consisting primarily of organic vapors is taken directly to the flare.

18. In addition to the emission sources listed in finding of fact 17, an uncontrolled oil fired boiler will be operated at the NHC plant.

19. Liquid wastes and the materials from the decaborane vent header and the diborane pyrolysis operation are controlled by an incinerator followed by a quench followed by a baghouse.

20. Caustic material (sodium hydroxide) is added to the incinerator in order to enhance the collection efficiency of the baghouse by increasing the particle size of the particulates coming from the incinerator.

21. Sulfur oxides (SO_x) are created by the combustion of butyl sulfide in the incinerator.

22. The caustic material added to the incinerator will tend to react with and remove the sulfur oxides which are created in the combustion process.

23. Potential emissions from solvent washings are taken through the wash vent header to the water scrubber.

24. Methanol and acetone boiled off from the scrubber water are consumed in the flare.

25. Liquid from the scrubber regenerator is added to the liquid waste stream to the incinerator.

26. Vapors from the NHC process are taken through the NHC vent header to a chilled water condenser. Those vapors not removed by the condenser are piped to the flare.

27. The flare is a steam aspirated smokeless flare.

28. The incinerator is designed to operate at a temperature of 1600° F. and a residence time of 1 second. It is anticipated that its efficiency will be in excess of 99%.

29. The incinerator is expected to convert 100% of the diborane left over from the NHC manufacturing process to a borate compound.

30. Diborane is readily destroyed by incineration.

31. Diborane is readily destroyed by water quench following the incineration.

32. If any diborane were to escape the combustion chamber, the water quench could be considered as a redundant secondary control device.

33. There is no potential decaborane emission from the NHC plant.

34. MSA will install a vapor recovery system to capture the emissions from tank fillings.

35. Butler County, the site of the proposed NHC plant, is an attainment area for total suspended particulate (TSP).

36. The TSP emissions from the NHC plant's incinerator before the particles are controlled by the baghouse will equal 137.6 tons per year.

37. The 137.6 tons/year figure for TSP emissions from the incinerator includes 68.7 tons/year attributable to sodium hydroxide feed to the incinerator.

38. The organic materials used in the NHC manufacturing process are liquids prior to use.

39. The organic materials used in the NHC manufacturing process are in a predominantly liquid form after use and are sent to closed and buried tanks for holding.

40. A conservative method to estimate the potential hydrocarbon emissions from the process is to estimate that 10% of the relatively volatile organic materials and 5% of the relatively non-volatile organic materials handled during the manufacturing process will become vapors.

41. Following the methodology stated in finding of fact no. 40 the potential emissions of organic materials are 59.7 tons per year.

42. If the incinerator operated at only 97% efficiency, there would be a potential emission of organic materials of 15.8 tons per year from the incinerator.

43. The bulk of the feed to the incinerator is liquid wastes. Thus a shut down of the incinerator would not result in more emissions to the atmosphere; rather the liquid wastes would have to be transported to storage.

44. The site of the proposed NHC plant is in a non-attainment area for oxidants.

45. Control of oxidants is achieved by controlling hydrocarbon emissions.

46. Under normal operating conditions the SO_x emission rate from the space heater boiler at the NHC plant will be approximately 6.4 tons/year.

47. MSA's permit application estimates that the SO_x emission rate from the incinerator will be approximately 8.4 tons/year.

48. There should be essentially zero SO_x emissions from the incinerator because of the reaction of SO_x with the excess sodium hydroxide added to the incinerator.

49. Dr. Frohlinger, appellant's expert, used the Gaussian diffusion model and the Holland Plume Rise equation to predict the ground level SO_x concentrations which will occur as a result of emissions from the plant at various wind speeds and various distances from the plant.

50. Dr. Howard Ellis, MSA's expert witness, used the Crster model, which is recommended by the United States Environmental Protection Agency, to predict the ground level SO_x concentrations that will occur as a result of SO_x emissions from the plant.

51. Dr. Frohlinger's model showed a need to do a more sophisticated calculation of potential ground level concentrations of emissions from the plant.

52. Dr. Ellis's Crster model satisfied the need for an elaborate study of effect of the emissions on ground level concentrations.

53. Dr. Frohlinger agrees that the Crster is an excellent model and agrees with its results.

54. The predicted maximum annual average concentration of SO_x as a result of operation of the NHC plant (assuming that the excess sodium hydroxide does not react with the SO_x in the incinerator and assuming the heater boiler operates the entire year) is less than 1.76 micrograms per cubic meter compared to a national ambient air quality standard of 80 micrograms per cubic meter.

55. The predicted maximum 24-hour concentration of SO_x as a result of operation of the NHC plant (assuming no SO_x removal from the incinerator emissions because of a reaction with the sodium hydroxide) is 16 micrograms per cubic meter, and the second highest predicted 24-hour concentration of SO_x is 11 micrograms per cubic meter. The national ambient air quality standard for maximum 24-hour concentration is 365 micrograms per cubic meter.

56. The predicted maximum 3-hour concentration of SO_x as a result of operation of the NHC plant (assuming no SO_x removal from the incinerator emissions because of a reaction with the sodium hydroxide) is 82 micrograms per cubic meter and the second highest predicted 3-hour concentration of SO_x is 61 micrograms per cubic meter. The national ambient air quality standard for maximum 3-hour concentration is 1300 micrograms per cubic meter.

57. The SO_x emissions from the plant will not exceed the limitations set forth in DER's regulations.

58. One of the process wastes is butyl sulfide which is burned in the incinerator to form SO_x.

59. In reviewing the odor potential from the incinerator of the NHC plant, DER used an odor threshold for butyl sulfide of 5.8 micrograms per cubic meter.

60. DER estimated that the odor threshold for butyl sulfide would not be exceeded at the point of maximum ground level concentration as its calculations showed that the maximum ambient concentration of butyl sulfide would be 0.55 micrograms per cubic meter.

61. DER's odor calculations were based on an assumed combustion efficiency of 99% for the incinerator.

62. George Leonardos, MSA's expert witness, testified that on the basis of an experiment he performed for MSA the detection threshold concentration for butyl sulfide is between 32 and 40 micrograms per cubic meter.

63. Donald McBurney, appellant's expert witness, estimated the detection threshold of butyl sulfide for 50% of the population at 7 micrograms per cubic meter.

64. Butyl sulfide odors from the NHC plant should not be detectable outside MSA's property.

65. Diborane is a highly toxic and flammable boron compound.

66. Decaborane is a highly toxic and flammable boron compound.

67. The elevated 2200 foot long diborane pipeline crosses State Route 309.

68. The diborane pipeline will be made of carbon steel having a thickness of .179 inches and an exterior diameter of one inch.

69. The structures which support the pipeline where it crosses the highway will be located about 40 feet from either side of the highway.

70. No monitoring devices designed to detect diborane in the air are planned for the proposed facility even though such devices are available.

71. The air contaminant emissions from the NHC plant comply with the DER's emission limitations and will not adversely affect the ambient air quality standards.

DISCUSSION

Section 6.1 of the Air Pollution Control Act, *supra*, requires that a facility which will emit air contaminants into the atmosphere must receive a plan approval from the DER prior to its construction. Here, appellants are appealing the DER issuance of the requisite plan approvals to MSA to allow the construction of the NHC process plant. The NHC plant site is located across Pennsylvania Legislative Route 309 from the MSA's Callery Chemical Plant where other processes including the manufacturing of diborane are carried on. The NHC process is a relatively small operation, capable of producing, at full capacity, approximately 13 gallons or 100 lbs. per day of the NHC.

Separate plan approvals were issued for each of the three air pollution control systems to be installed at the plant. Plan approval no. 10-313-015 was issued for a wash vent scrubber, plan approval no. 10-313-017 was issued for a process incinerator and plan approval no. 10-313-016 was issued for a flare.

Initially MSA argues that the appellants lack standing to pursue this appeal. We are convinced that the individual appellants are entitled to appeal. Both Clark J. Smith and Charles Watson own land and reside within 1200 feet of the NHC plant site. Thus, they are unquestionably "directly" and "immediately" and "substantially" affected by the DER action of issuing the plan approvals. See *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 169, 346 A.2d 269 (1975). The standing of Concerned Citizens of Breakneck Valley, a non-profit corporation is not as readily apparent as it has not alleged any interest harmed by the DER action which is separate and distinct from that of its members. In *Northampton Residents Association v. Northampton Township*, 14 Pa. Commonwealth Ct. 515, 322 A.2d 787 (1974), the Commonwealth Court ruled that a civic association did not have standing to appeal as one adversely affected by enactment of a zoning ordinance, even though some of its members might be entitled to appeal. Nevertheless, we reiterate what we stated in *Buckingham Township Civil Association v. DER, et al*, EHB docket no. 76-093-D (issued September 8, 1977); we believe the

Commonwealth Court is prepared to recognize that an association has standing to assert its member's interest where the issue is one which will affect some, if not all, members of an association. A majority of the 200 members of Concerned Citizens reside within two miles of the plant site. In any event, the determination that the individual appellants have standing makes a decision on the standing of the Concerned Citizens unnecessary to the determination of this appeal. See *Raum v. Board of Supervisors of Tredyffrin Township*, 28 Pa. Commonwealth Ct. 426, 342 A.2d 450 (1975). We therefore proceed to the merits of appellants' appeal.

DIBORANE AND DECABORANE EMISSIONS

Diborane, the raw material for the manufacture of NHC, and decaborane, which is produced as an intermediate step in the process, are highly toxic boron hydrides. A publication on the handling and use of boron hydrides by the Manufacturing Chemists' Association describes diborane as a highly toxic irritant to the pulmonary system and decaborane as a toxic material which affects primarily the central nervous system. Low threshold limits for exposure in the workplace have been established for both of them.[1] Appellants understandably have expressed concern over the potential for these substances to be emitted into the outdoor atmosphere.

The facility is designed and permitted to prevent the emission of these compounds. The manufacturing process is totally enclosed to prevent escape. Even emergency venting relief valves are connected to vent headers which lead to the incinerator.

The process waste stream, composed of liquids and vapors, is disposed of by incineration. Any diborane and other boron compounds present in the waste stream will be 100% oxidized to boron oxides. The waste stream will not include decaborane as decaborane is completely converted to NHC and other boron compounds in the process. Caustic material (NaOH) will be added to the incinerator to convert the boron oxides to sodium borates, a larger particle particulate, more readily collectable by a baghouse installed on the incinerator exhaust.

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1. For diborane a threshold limit of 0.1 parts per million has been adopted as a maximum allowable concentration in the work place environment for an 8 hour exposure by the American Conference of Governmental Industrial Hygenists.

In series with, but between the incinerator and the baghouse, will be installed a water quench to cool the incinerator exhaust to a temperature which will not burn up the baghouse. Since diborane is readily hydrolyzed to boric acid by a water quench, the quench can be considered as a redundant, secondary control device for diborane because any that might escape the incineration would rapidly hydrolyze to boric acid.

Thus, the system is designed to prevent the escape of boron hydrides during the manufacturing process and to chemically change all the excess boron hydrides in the waste stream to a non-toxic particulate emission which is collected by a baghouse designed to operate at 99.5% efficiency.

BUTYL SULFIDE EMISSIONS

A waste material resulting from the NHC process is butyl sulfide. Appellants' witness, Dr. McBurney, testified that butyl sulfide has an unpleasant sulfurous odor, typical of rotten eggs. Appellants are concerned that the malodorous butyl sulfide emissions will be detectable beyond the plant's property contrary to 25 Pa. Code 123.31(b). Section 123.31(b) states:

> "No person shall cause, suffer, or permit the emission into the outdoor atmosphere of any malodorous air contaminants from any source whatsoever . . . in such a manner that the malodors are detectable beyond the property of the person."

Appellants' expert, Dr. Frohlinger computed that the projected butyl sulfide emission from the plant will result in a maximum ground level concentration of 12.90 micrograms per cubic meter 100 feet from the stack at a wind speed of 1/2 meter per second. The DER projected the maximum concentration of butyl sulfide at .55 micrograms per cubic meter and MSA projects a maximum concentration of butyl sulfide at 3 micrograms per cubic meter.

Appellants' computation has overstated the ambient concentration levels of butyl sulfide which will result from the plant's operation. The model assumed a higher level of butyl sulfide emissions from the plant than should occur. The high combustion temperature (1600° F.) and long residence time (1 second) of the incinerator will enable it to be

more than 99% efficient in converting the butyl sulfide to SO_x. Dr. Frohlinger's model assumed an incinerator efficiency of only 97%, which increases 3-fold the maximum concentration predicted by the model. If Dr. Frohlinger had assumed that the incinerator was 99% efficient, his model would have projected a maximum concentration of only 4.3 micrograms per cubic meter. Also, the vertical dispersion rate coefficients used by Dr. Frohlinger in his model, are substantially higher than those used in EPA models for distances up to a kilometer from the stack, and therefore tend to overstate the ambient concentrations of butyl sulfide which can be expected from the operation of the NHC plant.

The parties also disagree over the odor threshold level of butyl sulfide, that is, the ambient concentration at which the butyl sulfide is able to be detected., DER, in evaluating the odor potential of the plant, used an odor threshold level of 5.8 micrograms per cubic meter. Appellants concur; however MSA contends that an experiment performed by its expert shows the threshold level to be as high as 32-40 micrograms per cubic meter. We need not decide this issue as the evidence previously discussed shows that the emissions of butyl sulfide will not result in ambient concentrations of butyl sulfide in excess of the 5.8 micrograms per cubic meter concentration used by the DER.

In sum, appellants have overstated the ambient concentration of butyl sulfide that will result from the plant because of its underestimate of the incinerator's efficiency and because its model overstates the projected rate of vertical diffusion at distances proximate to the stack. The emissions of butyl sulfide from the plant should not result in ambient concentrations of butyl sulfide as high as 5.8 micrograms per cubic meter, which appellants believe to be a reasonable estimate of butyl sulfide's odor threshold level.

SO_x EMISSIONS

Butyl sulfide is converted by the incinerator to SO_x which, according to the plan approval application submitted by MSA, will be vented to the atmosphere. SO_x will also be emitted from a space heater boiler fueled with no. 2 fuel oil. The SO_x emissions will comply with

the DER's emission limitation regulations. However, appellants are concerned that the SO_x emissions will cause significant deterioration of air quality and/or prevent the maintenance of ambient air quality standards.

DER did not model or calculate the effect of the SO_x emissions on ambient air quality because it believed from past experience that the amount of SO_x which will be emitted from the plant, 8.4 tons per year from the incinerator and 6.4 tons per year from the boiler, will have a negligible effect on air quality. In preparation for the hearing on this matter both the appellants and MSA had experts calculate the effect of the SO_x emissions on ambient air quality. Dr. Frohlinger, using relatively simple calculations on a small computer, estimated the values downwind, and in his opinion, the results showed a need to perform a more detailed elaborate study. MSA did cause an elaborate study to be performed by Enviroplan Inc., an environmental consulting firm.

Dr. Ellis, President of Enviroplan Inc., evaluated the effect of the SO_x emissions by use of the Crster model, the major prediction model recommended by the United States Environmental Protection Agency for predicting short term maximum concentrations from an individual source. The model predicted the concentrations of SO_x for each hour of the year at each of 252 receptors and predicted the highest 24-hour concentration for the year, the second highest daily 24-hour concentration, the highest maximum 3-hour concentration for the year, the second highest 3-hour concentration and the annual average concentration. Appellants' witness, Dr. Frohlinger, concurred with Dr. Ellis' use of the Crster model. He opined that "the Crster model is an excellent model to use, and I think his application to a 3-hour average concentration of sulfur dioxide is a perfectly correct thing, and I would, you know, stand up and agree with his numbers right down the line."

The Ellis model shows that the emissions of SO_x from the plant will not adversely affect ambient air quality. The predicted contribution of the NHC plant to the annual average concentration of SO_x is less than 1.76 micrograms per cubic meter, to the 24-hour average it is 16 micrograms per cubic meter, and to the 3-hour average it is 82 micrograms per cubic

meter.[2] In comparison, the ambient air quality standards are 80 micrograms per cubic meter annual arithmetic mean, 365 micrograms per cubic meter 24-hour maximum, and 1300 micrograms per cubic meter 3-hour average. Nor will the SO_x emissions from the NHC plant preclude the maintenance of the existing air quality in Butler County. The Clean Air Act, as amended in 1977, 42 U.S.C. 7401 *et seq.*, provides for the prevention of significant deterioration of air quality in areas that have air quality better than that required by the ambient air quality standards. Some of these areas including Butler County are designated as Class II areas. Section 163(b)(2) of the Clean Air Act, *supra*, requires that a state's implementation plan assure that the allowable increase of SO_x in a Class II area not exceed the baseline concentration of SO_x by the following amounts:

annual arithmetic mean	-	20
twenty-four hour maximum	-	91
three-hour maximum	-	512

When the projected increase in SO_x emissions from the NHC plant is compared with the allowable increase in a Class II area, it can be seen that the effect of the SO_x emissions from the plant on area air quality will be minimal.

The SO_x level in the area where the NHC plant is to be located is approximately 33% lower than the National Ambient Air Quality standard for SO_x. Appellants contend that DER failed to protect the existing good air quality from increased SO_x emissions by failing to apply 25 Pa. Code 127.1. Section 127.1 states that new sources shall not be established in areas where the levels of pollutants are significantly lower than applicable air quality standards unless it is affirmatively demonstrated that:

> "(1) The establishment of such new sources is justifiable as a result of necessary economic or social development.
> "(2) Such new sources shall not result in the creation of air pollution as defined in section 3 of the act (35 P.S. § 4003).
> "(3) Such new sources shall conform to all applicable standards of this article.

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2. MSA contends that the second highest concentration should be used as a reference for the 24-hour and 3-hour readings since the National Ambient Air Quality 24-hour and 3-hour standards are in the form of limits not to be exceeded more than once a year. For comparison, the second highest 24-hour concentration predicted to result from the operation of the plant is 11 micrograms per cubic meter and the second highest 3-hour concentration is 61 micrograms per cubic meter.

"(4) Such new sources shall not result in the creation of ambient air contaminant concentrations in excess of those specified in Chapter 131 of this title (relating to ambient air quality standards).

"(5) Such new sources shall control the emission of air pollutants to the maximum extent, consistent with the best available technology."

Specifically, appellants contend that the DER did not require MSA to demonstrate that the establishment of the NHC source is justifiable as a result of necessary economic or social development and did not require MSA to install the best available control technology.

We find that the facts presented to this board establish that the source is "justifiable" as a result of necessary economic development. The employment potential of the plant is 65 persons and, as previously stated, the SO_x emissions from the plant are minimal and will not significantly affect the air quality of the area.

Best available control technology is required not only by 25 Pa. Code 127.1, but also by 25 Pa. Code 127.12. See *Baughman et al v. DER et al*, EHB docket no. 77-180-B (issued January 26, 1979). The DER determined that the use of no. 2 fuel oil as a fuel for the small space heater boiler constitutes best available control technology for SO_x emissions. We find this to be reasonable especially when the emission rate is only approximately 2 to 3 pounds per hour. The SO_x emissions resulting from the combustion of the butyl sulfide in the incinerator are, according to the plan approval permit application, directly vented to the atmosphere at a rate of 2.2 lbs. per hour. DER's position is that in the circumstance of such a minimal emission rate, no technology is for all practical purposes equivalent to best available control technology; that additional control would constitute a waste of resources.

Appellants contend that a caustic or alkaline scrubbing technology would be available to remove the SO_x emissions from the incinerator. MSA, in response, states that it will use a caustic scrubbing technique as best available control technology to remove the SO_x from the incinerator emissions. It relies on the testimony of William Cooper, a chemical engineer for MSA and Alfred Engel, a professor of chemical engineering, that excess caustic material added to the incinerator will react with the sulfur dioxide created there and remove 90-100% of it. We agree

that the removal of the sulfur oxides by the addition of caustic to the incinerator does constitute best available control technology. However, the plan approval, which incorporates the application for plan approval, should state all control devices and practices and thus should reflect the use of caustic and the removal of SO_x which results therefrom. We therefore remand plan approval no. 10-313-17 to the DER in order for MSA to amend its plan approval application no. 10-313-17 to state the projected removal of SO_x from the incinerator and the rate of sulfur oxide which will be emitted from the incinerator considering the reaction of the excess caustic and the sulfur oxides.

PSD PERMIT

Part C of the Clean Air Act, *supra*, has as its purpose the preservation of the quality of air in clean air areas including those areas where the ambient air quality standards are being attained and maintained. Section 165(a) prohibits the construction of a major emitting facility in an attainment area unless a prevention of significant deterioration (PSD) permit has first been issued for the proposed facility. Butler County has been designated by DER as an attainment area for particulate matter and hence MSA must procure a PSD permit for the NHC plant if it is a "major emitting facility" of particulate matter within the meaning of the Clean Air Act, *supra*. Section 169(1) defines "major emitting facility" as a stationary source which emits or has the potential to emit 100 tons per year of any pollutant. The amount of particulate emissions that the plant will actually emit is relatively small, less than one ton per year. However, the parties disagree over the amount of particulate that the plant has the "potential to emit" as they differ in their application of the definition of "potential to emit" promulgated by the EPA at 40 C.F.R. 51.24(b)(3). EPA has defined "potential to emit" as the capability at maximum capacity to emit a pollutant in the absence of air pollution control equipment. The recent decision by the United States Court of Appeals for the District of Columbia Circuit in *Alabama Power Co. v. Costle*, ___F.2d___,(D.C.Cir.1979)(No. 78-1006, entered June 18, 1979) has resolved the question as the decision determined that the EPA placed an incorrect interpretation upon "potential to

emit". The court, which addressed the issue in the context of review of the EPA's PSD regulations, stated:

> "We think the fairly discernible meaning of the statute, applying its text and giving consideration both to the comprehensive statutory scheme and to the legislative history, is that an emitting facility is 'major' within the meaning of section 169(1), only if it either (1) actually emits the specified annual tonnage of any air pollutant, or (2) has the potential, when operating at full design capacity, to emit the statutory amount. The purpose of Congress was to require a permit before major amounts of emissions were released. In our view, the design capacity of the facility takes into account not only its maximum productive capacity (which EPA uses) but also the design controls on emissions. The 'potential to emit' of any stationary source must be calculated on the assumption that air pollution control equipment incorporated into the design of the facility will function to control emissions in the manner reasonably anticipated when the calculation is made. EPA's regulations are remanded in this respect for appropriate revision." Id. P. 8 and 9 of Slip Opinion.

Since the particulate matter that the NHC plant will emit when operating at maximum capacity with the control equipment functional is less than one ton per year (compared with the 100 ton per year limit) it is clear that under the D.C. Circuit Court of Appeals decision in *Alabama Power Co. v. Costle, supra,* MSA does not need a PSD permit for the plant.

NON-ATTAINMENT REVIEW

Appellants also contend that MSA must comply with the EPA emission offset policy prior to construction of the NHC plant. Part D of the Clean Air Act has as its purpose the reduction of air pollutants in areas where ambient air quality standards have been exceeded. New construction of major stationary sources in non-attainment areas is permitted only if certain stringent conditions can be met, including the obtaining of equivalent offsetting emission reductions from existing sources. Since the entire state of Pennsylvania is a non-attainment area with regard to the ambient air quality standards for hydrocarbons, the emission offset policy applies to the NHC plant if it is a "major" source of hydrocarbon emissions. Major sources are those whose rate of emissions equals or exceeds 100 tons per year.

Appellants contend that the NHC plant is a major source as that term is used by the non-attainment provisions of the Clean Air Act

because the 100 ton per year limitation is based on potential emissions from the plant and the potential emissions, i.e., emissions which would result without the use of control equipment, exceed 100 tons per year. MSA disagrees; it contends that the plant is not a major source because the 100 ton per year emission rate is based on the actual emissions from the plant, i.e. emissions which will occur with the control equipment functioning; and further, even if the rate of emissions referenced by the Clean Air Act does mean emissions which will result without control equipment, the plant still does not have the capability to emit hydrocarbons at or above the rate of 100 tons per year.

We find that the plant is not a major source. The court's decision in *Alabama v. Costle, supra*, is dispositive of the meaning of "major source" when used in the non-attainment provisions of the Clean Air Act, *supra*. Although the decision was issued in the context of the validity of the PSD regulations, the definition of major source given by the Clean Air Act, *supra*, and interpreted by the court is the same for the non-attainment provisions as for the PSD provisions.[3] Also, the court in footnote 6 of its opinion recognized that its decision is also relevant to the non-attainment provisions of the Clean Air Act, *supra*. The court at footnote 6 stated:

> "In addition to the effect on the interpretation and implementation of the PSD provisions, several of the questions decided today are of significance for other comprehensive rulemakings under the 1977 Amendements, e.g., the regulations for 'nonattainment areas' under part D of the Act, 42 U.S.C. §§7501-07 (1978)".

Moreover, even if the determination of when a source is a major source is dependent on the quantity of emissions from the plant without the use of pollution control equipment, the NHC plant could not be considered a major source. The plant will emit approximately 11.2 tons per year of hydrocarbons from the incinerator, which is the relevant control equipment. However, if the incinerator ceases operating, the rate of emissions will not increase as the feed to the incinerator is predominantly liquid and in the absence of incineration will remain as liquid. Thus we concur

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3. Compare Section 169(1) of the Clean Air Act which is the subject of the *Alabama v. Costle, supra*, decision with Section 302(j). Both sections define major source as a source which directly emits or has the potential to emit.

with the DER's determination that the NHC plant is not a major source of hydrocarbon emission because the hydrocarbon emissions from the plant, either controlled or uncontrolled, will not exceed 100 tons per year.

INCREASED EMISSIONS FROM ADJACENT FACILITY

The diborane needed for the NHC plant will be manufactured at MSA's Callery Chemical Plant which is located approximately 2,000 feet from the NHC plant site. The Callery Chemical Plant will need to increase its production of diborane by a factor of 10 to supply the NHC plant's needs. The potential for increased emissions from the existing plant because of the increased production of diborane was not addressed by MSA in its application for plan approval for the NHC plant and was not considered by the DER in its review of the plan approval applications. The definition of "source" at 40 C.F.R. 51.24(b)(4) requires the DER to include the increased emissions from the adjacent Callery Chemical Plant which result from the increased production of diborane in its review of the plan approval applications. Source is defined by 40 C.F.R. 51.24(b)(4) as:

> "Any structure, building, facility, equipment installation or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)."

Therefore we remand these three plan approvals for the DER to consider in its review of the plan approvals the emissions from the existing plant, if any, which will result from the increased manufacture of diborane.

ARTICLE I, SECTION 27

Finally, appellants contend that the DER did not properly fulfill its duties under Article I, Section 27 of the Pennsylvania Constitution when it reviewed the plan approval applications.[4]

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4. Article I, Section 27 of the Pennsylvania Constitution states:

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

The Commonwealth Court in *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973), set forth a three standard test to determine whether the DER complied with its obligation under Article I, Section 27.

> "(1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
>
> "(2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
>
> "(3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?" Id. 312 A.2d 86 at 94.

Appellants have not shown that the DER failed to comply with the first standard as other than DER's failure to include the increased emissions from the existing plant in its calculations (for which we have ordered a remand), the record shows that the NHC plant will comply with the applicable emission and air quality standards for particulate, sulfur dioxide and odor emissions.

As to the second standard, MSA has demonstrated a reasonable effort to minimize or refrain from causing environmental incursions. As a result of incineration, there will be no discharge of liquid wastes. Sanitary wastes will be sent to an existing treatment plant and solid wastes will be taken away by an approved waste disposal contractor. The process within the plant is closed and air contamination emissions will comply with the DER emission limitations by substantial margins.

Nevertheless, appellants contend that the DER abused its discretion because it failed to require MSA to minimize environmental harm for reason that (a) it failed to consider or evaluate the toxicity of diborane emissions and (b) approved the plan approvals even though the plans contemplate the construction of a 2200 foot long pipeline to transport diborane from the existing Callery Chemical Plant to the NHC plant.

It is clear that the DER has the duty to evaluate the toxicity of emissions to the atmosphere from new sources even though ambient air quality standards have not been set. See Section 6.1 of the Air Pollution Control Act, *supra*, which prohibits the DER from issuing a permit for a new source unless it is satisfied the new source will not cause air

pollution. In this case, as previously stated, the system is designed to prevent the escape of diborane to the atmosphere during its manufacture and to prevent the emission of diborane into the atmosphere during its incineration by totally converting it to borate compounds. Thus there is no projected rate of emissions for DER to evaluate.

However, considering the toxicity of diborane and considering that 216 pounds of diborane will be introduced into the process daily as the principle feed stock and that excess diborane will be vented to the incinerator, we believe that the DER abused its discretion by not requiring MSA to monitor the emissions from the plant for the presence of diborane. 25 Pa. Code 127.12(3) requires an applicant for plan approval "to show that the source will be equipped with reasonable and adequate facilities to monitor and record the emission of air contaminants". We hold that 25 Pa. Code 127.12(3) together with Article I, Section 27, which requires the DER to minimize environmental intrusions, obligates the DER to require MSA to assure the protection of the area residents by monitoring for the emission of diborane into the atmosphere.

The diborane will be transported to the NHC plant from the existing Callery Chemical Plant by a 2200 foot elevated pipeline. The diameter of the pipe is one inch exterior, the wall thickness is .179 inch and it is constructed of seamless carbon schedule 80 steel. The elevation of the pipeline is from 12 to 20 feet. Appellants contend the DER should not have issued the plan approval with the diborane transported by pipeline because the pipeline is susceptible to rupture by lightning, wind and ice, falling trees, sabotage, bullets from hunter's guns and, at the place where it crosses Route 309, its supports could be run into by a truck.

The pipeline crossing is designed to protect the pipeline from vehicular traffic. The pipeline supports are located 40 feet off the side of the road. They are built with increased strength and are protected by a guardrail installed by MSA. We find that the possibility of damage to the pipeline by wind, ice, falling trees, sabotage or hunters as well as the potential for harm to the public from damage to the pipeline is speculation. See *Community College of Delaware County v. Fox*, 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975). Appellants have not shown that such damage is

likely to occur. Nor have they shown that the public would be endangered if a pipeline leak or rupture would occur. Diborane is pyrophoric, that is, it spontaneously ignites under normal atmospheric conditions and thus is likely to burst into flame at the point of a break. If it doesn't ignite but rather disburses into the atmosphere, it seems reasonable to expect that the flow to the pipeline can be shut off expeditiously.

The third standard requires the DER to balance the environmental harm occurring from its issuance of the plan approvals with the benefits to be derived therefrom to determine if the DER abused its discretion. Appellants argue that "by failing to require MSA to justify the selection of the proposed site by showing that it was better suited from an environmental point of view than other available sites on MSA's property DER violated its duties as trustee under Article I, Section 27 of the Pennsylvania Constitution". We disagree. Before the DER could require MSA to determine if another site is better suited for the NHC plant, it would have to show that there are environmental problems with the site chosen by NHC. In *Comm. v. Beitman*, 67 D & C 2d 499, (EHB, 1974) we required the DER to find a different site for a sewage treatment plant; however, we found that the initial site was environmentally unacceptable.

Also, the environmental harm which will result from the DER issuance of the plan approvals does not so clearly outweigh the benefits to be derived therefrom that it constitutes an abuse of discretion. All emissions will be controlled to permissible levels and the air quality standards will not be jeopardized. It will not cause air pollution or emit the toxic substances diborane or decaborane. We cannot say that the fact that emissions will occur from the operation of the plant so outweighs the employment benefits derived therefrom that the DER's approval constitutes an abuse of discretion.

CONCLUSIONS OF LAW

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

2. Section 6.1 of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001 *et seq.*, requires that a facility which will emit air contaminants into the atmosphere must receive a plan approval from the DER prior to its construction.

3. The individual appellants have standing to appeal as they are directly, immediately, and substantially affected by the DER action of issuance of the plan approvals.

4. Appellants have not shown by a preponderance of the evidence that diborane and decaborane emissions will be emitted into the outdoor atmosphere at a level inimical to the public health.

5. Appellants have not shown by a preponderance of the evidence that the emissions of butyl sulfide will be detectable beyond the plant's property.

6. Appellants have not shown by a preponderance of the evidence that SO_x emissions from the NHC plant will cause significant deterioration of the air quality standards.

7. The use of no. 2 fuel oil as a fuel for the space heater boiler constitutes best available technology for control of SO_x emissions.

8. The addition of excess caustic to the incinerator to remove SO_x therefrom constitutes best available technology for control of SO_x emissions from the incinerator.

9. The plan approval application must state all emission control devices and products which will be implemented at the plant.

10. The NHC plant did not require a PSD permit with regard to particulate matter as a condition of issuance of plan approval.

11. The NHC plant did not require non-attainment review with regard to hydrocarbon emissions as a condition of issuance of plan approvals by DER.

12. "Potential to emit" as that term is used by 40 C.F.R. 51.24 (b)(3) means the capability of a plant to emit air contaminants at maximum design capacity with air pollution control equipment functioning.

13. The issuance of the plan approvals was proper under the terms of 25 Pa. Code 127.1.

14. The issuance of the plan approvals was proper under the terms of the environmental amendment to the Pennsylvania Constitution, Article I, Section 27.

15. The DER abused its discretion when it failed to include the emissions resulting from the increased diborane manufacture at the adjacent Callery Chemical Plant in its review of the NHC plant's emission inventory.

O R D E R

AND NOW, this 5th day of September, 1979, it is hereby ordered that:

(1) Plan approval permit nos. 10-313-015, 10-313-016 and 10-313-017 are set aside and remanded to DER to:

> (a) require Mine Safety Appliances Company to supplement its applications for plan approval by including in its emission inventory for the NHC plant the increased emissions from the Callery Chemical Plant resulting from the increased production of diborane.
>
> (b) Require Mine Safety Appliances Company to supplement its applications for plan approval by proposing the installation of a device to monitor the emissions from the NHC plant to detect the presence of diborane.

(2) Plan approval no. 10-313-017 is set aside and remanded to DER to require MSA to supplement its application therefore to state the projected removal of sulfur oxide from the incinerator and the rate of oxide which will be emitted from the incinerator considering the reaction of the excess caustic and the sulfur oxides.

ENVIRONMENTAL HEARING BOARD

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PAUL E. WATERS
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THOMAS M. BURKE
Member

DATED: September 5, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

REESE BROTHERS COAL & CLAY COMPANY :

: Docket No. 79-076-W
: Surface Mining Conservation and Reclamation Act

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By Paul E. Waters, Chairman, September 27, 1979

STATEMENT OF FACTS

This matter comes before the board as an appeal from the refusal by DER to issue a mining permit (no. 539-10(A-2) to Reese Brothers Coal & Clay Co. The application was filed on or about May 9, 1979, by appellant lessee for land which had been leased to various operators since June 14, 1912. The original lease was assigned by General Refractories Company to appellant on August 1, 1977. DER has not required a consent form, known as Supplemental "C", to be signed by the lessor on prior applications where there was a lease which predated the effective date of Act 147 of 1972, P.L. 554, i.e., January 1, 1972. Based on a revision in its interpretation of the Supplemental "C" requirement, sometime in 1979, DER began to deny permit applications which did not contain the lessor's signature consenting to re-entry of the premises by the operator for reclamation purposes for five years after termination of operations.

The Surface Mining Conservation and Reclamation Act, *supra*, 52 P.S. §1396.4(a)(2)(I) specifically provides:

> "I. Except where leases in existence on the effective date of this amending act do not so provide or permit, the application for a permit shall include, upon a form prepared and furnished by the department, the written consent of the landowner to entry upon any land to be affected by the operation by the operator or by the Commonwealth or any of its authorized agents within a

> period of five years after the operation is completed or abandoned for the purpose of reclamation, planting, and inspection or for the construction of any such mine drainage treatment facilities as may be deemed necessary by the secretary for the prevention of stream pollution from mine drainage;"

The parties have waived a hearing and submit this matter for adjudication based on pre-hearing memoranda and briefs.

DISCUSSION

DER has argued and we agree, that the Surface Mining Conservation and Reclamation Act is an exercise of the police power of the Commonwealth. Indeed the purpose of the Act specifically so states.[1] The requirement for consent by the landowner to a five (5) year reentry right for reclamation etc., as evidenced in a Supplemental "C" agreement form, clearly falls within the ambit of the aforesaid police powers. We are not, however, here concerned with whether our legislature, by exercising the police power could have required the Supplemental "C" on a retroactive basis—but rather, whether it did. DER has discussed, at length, the extent of the state's police power and has cited a number of cases to support its assertion, which we do not question, that there is no unconstitutional impairment of the obligations of contract by a reasonable exercise of the police power. *Director General of Railroads v. West Penn Railways Co.*, 281 Pa. 309, 313 (1924); *De Paul v. Kauffman*, 441 Pa. 386, 398-399 (1971); *Pa. Railroad Co. v. Riblet*, 66 Pa. 164. While it may be true that the legislature could constitutionally require that a Supplemental "C" form be signed by the landowner before a mining permit could be granted and it could include leases predating the statutory requirement, it is also true that it could exempt these latter leases—and this would be equally enforceable.

DER urges our consideration of the legislative history to properly interpret the language which the parties agree controls the filing of a Supplemental "C" form. Apparently, the House of Representatives first rejected language which would have acted as a grandfather clause for all

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1. 52 P. S. §1396.1 provides:

> "This act shall be deemed to be an exercise of the police powers of the Commonwealth for the general welfare of the people of the Commonwealth, by providing for the conservation and improvement of areas of land affected in the surface mining..."

preexisting leases.[2] From this fact, it is argued that there was no such intention despite the language finally passed into law after the Senate amended the bill.[3] It is just as logical to conclude, however, that the Senate was not satisfied to extend the requirement to all leases including preexisting leases. To conclude as DER does, that the exemption is granted only where the pre-act lease "does not permit" the permit applicant to obtain the written consent of the landowner, requires us to ascribe an unnecessary obtuseness to the Act. It is difficult to conceive of the legislature, obviously aware of the important problem with which we are here concerned, mandating such a limited exclusion which hardly makes any sense and has even less impact. We are convinced that the Act employing the language "Except where leases in existence on the effective date of this amending act..." was intended to protect a lessee from having to again approach his lessor and hope that he could obtain a signature without having added financial or other burdens placed upon him and risk the denial of a mining permit unless the owners' demands, no matter how exorbitant, were met.[4]

The final matter which concerns us is the fact that the present lessor and lessee are not the same parties who entered an agreement prior to the effective date of the Act here in question. Having previously found that the purpose of the Surface Mining Conservation and Reclamation Act, *supra*, is for the general welfare of the people and to provide for conservation and improvement of areas affected in surface mining, we believe it is entitled to a construction which favors the public over the private interest.[5] The Supplemental "C" requirement does have many benefits to DER and clearly facilitates the administration of the Act by keeping DER out of disputes between lessors and lessees. It is for this reason that we believe

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2. This proposed amendment to H.R. 434 (Printer's No. 482) was defeated.

3. We do not believe a study of the legislative history is appropriate unless the statutory language is unclear or ambiguous, which we have not found in the matter before us. See 46 P.S. §551 now 1 Pa. C.S.A. 1921.

4. DER'S construction of the language requires us to believe that the legislature intended to exempt only those leases which specifically provided for reentry for reclamation purposes. Such an exemption would change nothing and would also presuppose that the parties anticipated that a law would be passed with the requirements that appeared in 1971.

5. 46 P.S. 552(5), Now 1 Pa. C.S.A. 1922.

there is no necessity to extend the exemption of the Act further than the original parties to the lease. When there has been an assignment at any time after the effective date of the Act, there is no reason why the Act should not apply to new parties and a Supplemental "C" should be required of the lessor. This construction not only makes sense, but is eminently fair because the parties will know that the law was changed in 1971. There can be, under these circumstances, no impairment of any obligation of contract. In *Maul v. Guthrie*, 9 D & C 3rd 482, we find some support for this view. There the court was called upon to determine the rights of the new lessor and a lessee who was required to obtain the owner's signature on a Supplemental "C" under the very provision with which we are here concerned. The lessor did not care to sign, but the court ordered that he do so.[6] The court said:

> "Plaintiff counters by asserting that even though the agreement between Maul and the Hamlers made no specific reference to the Hamlers being required to sign a consent such as that provided in the "Supplemental C" form, nevertheless such a consent is to be implied into the agreement by necessary implication. In support of that position plaintiff cites Neel v. Williams, 158 Pa. Superior Ct. 478, 45 A.2d 375 (1946), and Nagle Eng. and Boiler Wks. v. Erie, 350 Pa. 158, 38 A.2d 225 (1944), which hold that statutory requirements, whether imposed specifically or by necessary implication, become part of the assumed contractual liability. Plaintiff also cites DePaul v. Kauffman, 441 Pa. 386, 272 A.2d 500 (1971), which held that laws in force when a contract is entered into become part of the obligation of the contract, with the same effect as if expressly incorporated in its terms.
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> "We agree with plaintiff."

For all of these reasons, we will enter an order dismissing the appeal of Reese Brothers Coal & Clay Company.

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6. The court there said:

> ..."When the Hamlers entered into the agreement with Maul in December of 1974, it was the well established public policy in Pennsylvania that the people of the Commonwealth have a vital interest in having land which is affected in course of surface mining for coal or other minerals to be reclaimed. This policy was first stated in the Bituminous Coal Open Pit Mining Conservation Act and was subsequently reaffirmed in the amending act, known as the Surface Mining, Conservation and Reclamation Act. In order to accomplish this public policy the amending act, in section 5(a)(2)(I), calls for a consent to be signed by the landowner permitting entry upon the affected land at any time within five years after the coal operation is completed or abandoned.
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> * * *
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> "Therefore, we conclude that when landowners agree to have coal removed from under their premises by surface mining methods but their agreement with the coal operator is silent on the question of reclamation of the land affected in the course of such mining, it must necessarily be implied as part of the landowners' contract with the coal operator that the landowners will provide the consent referred to in section 5(a)(2)(I) of the Surface Mining, Conservation and Reclamation Act." (Footnotes omitted)

CONCLUSIONS OF LAW

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

2. The Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4(a)(2)(I) specifically exempts from its coverage, leases in existence prior to January 1, 1972, the effective date of Act 147 of 1971, P.L. 554, and in such cases the original lessee need not obtain the signature of the original lessor on a Supplemental "C" form.

3. Where, there has been an assignment or a change of ownership as to either the original lessor or lessee after the aforesaid date, the Act is to have full force and effect, and DER may properly require the lessee to provide the Supplemental "C" signed by the lessor, in order to obtain a mining permit.

4. The appellant lessee herein obtained its interest by an assignment dated August 1, 1977, and can therefore be required to supply a Supplemental "C" to DER, signed by lessor.

5. The lessor has a legal obligation to sign the Supplemental "C" form under the implied terms of the original lease and the Surface Mining Conservation and Reclamation Act, *as amended*.

O R D E R

AND NOW, this 27th day of SEPTEMBER 1979, the appeal of Reese Brothers Coal & Clay Company is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

BY: PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

DATED: September 27, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

MILAN MELVIN SABOCK
and CONCERNED CITIZENS OF GARLOW HEIGHTS
AREA ASSOCIATION BY RAYMOND BOSNICH,
VIVIENNE MESSINA, AND DAVID FORREST,
TRUSTEES ad LITEM :

Docket No. 78-085-B

Clean Streams Law

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and PLUM BOROUGH, Permittee
and TORO DEVELOPMENT COMPANY, Intervenor

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

By Thomas M. Burke, Member, November 2, 1979

This matter comes before the Board on an appeal by Milan Melvin Sabock from an action of the Department of Environmental Resources, Commonwealth of Pennsylvania (DER) in granting a permit under Section 207 of The Clean Streams Law, the Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691, to Plum Borough for the construction of a sewer line to convey sewage from a proposed development known as Greendale Village to the Plum Borough Garlow Heights Sewage Treatment Plant. Toro Development Company, the owner and developer of more than 90 percent of the lots in the Greendale Village Plan applied for, and was granted, intervention as a party appellee and The Concerned Citizens of Garlow Heights Association by Raymond Bosnich, Vivienne Messina and Donald Forrest, trustees ad litum, an unincorporated association of residents of the Garlow Heights area, was granted intervention as a party appellant.

Appellants contend that the Garlow Heights Sewage Treatment Plant lacks the capacity to treat the additional sewage from the Greendale Village Development and thus the permitted sewer line portends a nuisance to area citizens from improperly treated sewage.

Three days of hearings were held in Pittsburgh. The parties have filed briefs containing proposed findings of fact and conclusions of law. On the basis of the foregoing we enter the following:

FINDINGS OF FACT

1. Appellant, Milan Melvin Sabock, is an individual who resides at 306 Lowgar Drive, Plum Borough, approximately 1/4 mile from the Garlow Heights Sewage Treatment Plant.

2. Intervening appellant; Concerned Citizens of Garlow Heights Association by Raymond Bosnich, Vivienne Messina and Daniel Forrest, trustees ad litum, is an unincorporated association composed of residents of the Garlow Heights area.

3. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, the Commonwealth agency authorized to administer the provisions of The Pennsylvania Clean Streams Law, *supra*.

4. Intervening appellee is Plum Borough the permit holder and the operator of the Garlow Heights Sewage Treatment Plant.

5. On March 10, 1978, Plum Borough filed an application with the DER for a permit to construct a sewer line to convey sewage to the Garlow Heights Sewage Treatment Plant from a proposed housing development known as Greendale Village.

6. On June 7, 1978, the DER issued Water Quality Permit No. 0278434 to Plum Borough to construct a sewer line to convey sewage from the Greendale Village development to the Garlow Heights Sewage Treatment Plant.

7. Intervening appellee is Toro Development Company (Toro), a Pennsylvania corporation having its principal office at 1803 Route 286, Pittsburgh, Pennsylvania. Toro is the owner and developer of more than 90 percent of the lots in the Greendale Village Plan.

8. The Garlow Heights Sewage Treatment Plant was originally constructed in the early 1950's to service the Garlow Heights plan of homes.

9. The Siple Plan of homes was added to the Garlow Heights sewage treatment system in 1974.

10. The Garlow Heights Sewage Treatment Plant presently serves approximately 1,330 people.

11. The hydraulic capacity of the plant, as specified in the plant's design, its Clean Streams Law Permit, and its NPDES permit is 120,000 gallons per day (gpd).

12. The sewer line permit application calls for an additional 35,000 gpd to be added to the plant (538 people times 65 gallons per person).

13. The Garlow Heights Sewage Treatment Plant was designed to serve 1,200 people.

14. Leona Metro, Frank Leone, Carrie Taylor, Doris Kennedy and Doris Sturgis are residents of Plum Borough and live within 1,000 feet of the Garlow Heights Sewage Treatment Plant.

15. Local residents have experienced almost continuous odors emanating from the sewage treatment plant. The odors appear to worsen in summertime and in the evenings.

16. Malodors should not be emitted from a properly operated sewage treatment plant.

17. The sewage treatment plant is equipped with a skimmer return line which draws off and recirculates scum through the system. The skimmer return line operates 24 hours a day.

18. Plum Borough submits reports of the average daily flow of sewage through the plant to the Allegheny County Department of Health.

19. The average daily flow which is reported to the County Health Department is measured by counters located in the plant's ejector pots.

20. Plum also measured the hydraulic load of the plant by installing a portable electronic measuring device known as a "Manning Dipper" in a manhole immediately adjacent to the treatment plant entrance from May 11, 1977, until May 26, 1977, and in the chlorine contact tank located at the completion of the treatment process, from October 17, 1978, until November 2, 1978.

21. For the period of May 11, 1977, to May 26, 1977, the average flow through the plant as measured by the Manning Dipper at the manhole was approximately 86,000 gpd. The flow as measured by the ejector pot counters for this period averaged approximately 106,000 gpd.

22. The Manning Dipper at the chlorine contact tank during October and November of 1978 averaged 62,949 gpd, as opposed to a counter reading averaging 96,221 gpd.

23. The skimmer return line recirculates flow from the final clarifier back through the plant at a rate in the neighborhood of 20,000 gpd depending on the volume of flow in the final clarifier.

24. The National Pollution Discharge Elimination System (NPDES) permit issued for the Garlow Heights Sewage Treatment Plant under Section 401 of the Federal Water Pollution Control Act, 33 USC §1341 sets forth interim effluent limitations which are in effect at the present time. The discharge limits on the organic load expressed as Biological Oxygen Demand (BOD) are 30 milligrams/liter (mg/l) averaged over a 30 consecutive day period and 45 mg/l averaged over a 7 consecutive day period.

25. The Pennsylvania Clean Streams Law Permit for the Garlow Heights Sewage Treatment Plant required 85 percent removal of BOD when issued. The permit was amended in 1971 to impose a BOD effluent limitation of 20 mg/l maximum at any time.

26. The NPDES permit requires Plum Borough to effectively monitor the operation and efficiency of the Garlow Heights Sewage Treatment Plant and the quantity and quality of the plant's discharge, and to submit quarterly reports thereof to the DER.

27. Plum submits monitoring reports composed of readings of the average daily flow and the pH and chlorine readings of the plant's discharge to the Allegheny County Health Department. The information is submitted to the Health Department because of an agreement between the DER and the Health Department which authorizes the County Health Department to regulate the operation of certain sewage treatment plants in Allegheny County, including the Garlow Heights Plant.

28. The monitoring reports referred to in finding of fact no. 27 do not supply sufficient information to judge the present treatment efficiency or the future treatment capability of the Garlow Heights Sewage Treatment Plant as they do not provide any information on the removal of BOD, suspended solids and fecal coliform.

29. Plum Borough had samples of the influent to, and the effluent from, the treatment plant analyzed twice a month from June 15, 1977, to November 15, 1977.

30. Seventeen samples of the plant's influent and effluent were analyzed. The BOD removal rate averaged 83 percent, and the suspended solids removal averaged 81 percent. The actual organic load expressed as mg/l of BOD in the seventeen effluent samples were: 44, 45, 80, 57, 34, 10, 15.8, less than one, less than one, less than one, less than one, 58, 35.5, 26, 29, 35.5 and 25.5.

31. If the Garlow Heights Sewage Treatment Plant is not functioning properly, the addition of more sewage could aggravate the problem.

32. A condition of the permit for the sewer extension line requires the use of water-saving devices in the homes connected to the line.

33. Toro requires the builders in Greendale Village to sign an agreement stating that they will install water-saving devices in the homes.

34. The DER based its review of the subject permit application on the presumption that a new plant to serve the Little Plum Watershed would replace the Garlow Heights Sewage Treatment Plant in 1981 or 1982. The proposed plant has not received the expected federal funds and its planning has been postponed indefinitely. The DER would have given the permit application a more in-depth review had it known that the new plant would not be constructed in the foreseeable future.

35. A notice that the DER had issued Water Quality Permit No. 0278434 for the sewer line to Plum Borough was published in the *Pennsylvania Bulletin* on June 24, 1978.

36. Plum Borough's sewer line permit application, at page 4 of module 6, states that the total organic load to the stream from the Garlow Heights Sewage Treatment Plant after the sewer line is installed will be 30 pounds per day of BOD, that the present organic load to the stream from the plant is 17 pounds per day of BOD and that the additional sewage from the sewer line will add 13 pounds per day of BOD.

37. The 20 mg/l concentration limit stated in the Clean Streams Law Permit for the Garlow Heights Sewage Treatment Plant is equivalent to a discharge of 20 pounds per day of organic load expressed as BOD at 120,000 gallons per day.

DISCUSSION

Appellee, Toro Development Company (Toro) initially argues that this Board lacks jurisdiction over this appeal because it was not filed with the Board within the time limits provided by statute. See *Rostosky v. Commonwealth of Pennsylvania, DER,* 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976) wherein the Commonwealth Court held that this Board lacks jurisdiction to entertain an appeal that is not filed within the statutorily prescribed time period.

The pertinent authorities are §§21.21(a) and 21.13(a) of the Board's rules of procedure.[1] Section 21.21(a) requires that an appeal to the Board from an action of the department shall be commenced by the filing of a notice of appeal within 30 days from the date of the receipt of written notice of the action and §21.13(a) provides that publication of a notice of action by the department shall constitute notice to or service upon all persons, effective as of the date of publication.

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1. The Board's rules of procedure have been revised since this appeal was filed. The provisions of §§21.21(a) and 21.13(a) which remain basically unchanged, are now included in §21.56.

Here, the action of the DER, issuance of the permit, was taken on June 7, 1978, the notice of issuance of the permit was published in the *Pennsylvania Bulletin* on June 24, 1978, and the appeal was filed with the Board on July 22, 1978. Although the appeal was filed more than thirty days after the DER action, it was filed within thirty days of publication of notice of the DER action in the *Pennsylvania Bulletin*, and thus was filed within thirty days of notice of the action as required by §21.21(a).

Toro also requests that we dismiss Sabock's appeal on the grounds that the notice of appeal did not conform to the requirements of Section 21.21 of our rules of procedure. Sabock's notice of appeal, which was in the form of a mailagram, did not contain all of the information required by Section 21.21. However, it did confer jurisdiction upon the Board over the appeal and in response to a notice from the Secretary to the Board, Sabock filed the requisite information on August 16, 1978. As we have jurisdiction over the appeal, and thus discretion, we do not believe it appropriate to dismiss the appeal on the basis of the late filing of information.[2] We therefore proceed to the merits of the appeal.

Toro is developing an approximately 145 lot subdivision in Plum Borough, Allegheny County, to be known as Greendale Village. During the development's planning stage, two means of providing sewage treatment

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2. The Environmental Hearing Board's rules were revised on June 12, 1979. One of the revisions codified our practice on "skeleton appeals", that is, it recognized that we have jurisdiction to act on appeals which, although timely filed, do not completely comply with the form and content requirements of our rules. See 25 Pa. Code 21.52.

service were considered to be feasible, the installation of a package sewage treatment plant to service the 145 homes and, the construction of an interceptor sewer line to convey the sewage to the existing Garlow Heights Sewage Treatment Plant. After meetings with Plum Borough officials and a hearing before the Plum Borough planning commission, a preliminary decision was mady by Toro to proceed with the alternative denoting a sewer line to the Garlow Heights Sewage Treatment Plant.

Plum Borough favored the construction of the sewer line over the package treatment plant because it found the sewer line to be more compatible with the Borough's overall sewage facilities plan for the watershed. The plan contemplates the replacement of existing small treatment plants including the Garlow Heights plant by one large plant serving the entire watershed. The sewer line would continue to service properties along its corridor, whereas a package treatment plant would be replaced by the new plant. Also, the $94,000 tap-in fees paid by the owners of the 145 units could be used for improvements to the Garlow Heights Sewage Treatment Plant.

Plum revised its official sewage facilities plan to include the sewer line. The revision was approved by the Allegheny County Health Department and the DER. Hence, having gained the preliminary approvals, Plum Borough on March 10, 1978, submitted an application to the DER for a permit to construct the sewer line from the Greendale Village development to the Garlow Heights Sewage Treatment Plant.[3]

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3. Plum Borough submitted the application for the sewer extension permit rather than Toro Development Company because of a DER policy which requires that only a municipality, a municipal authority or a holder of a PUC certificate can receive a permit to construct a facility to provide sewage service to the public.

On June 7, 1978, the DER issued Water Quality Permit No. 0278434 to Plum Borough to construct the sewer line.

Appellants have filed this appeal contesting the action of the DER permitting the construction of the sewer line because they believe that the Garlow Heights Sewage Treatment Plant does not provide adequate treatment of the sewage it now receives, which causes sewage odors to premeate the surrounding neighborhood and that it does not have the capacity to treat any additional sewage. They fear that the addition of 35,000 gallons per day (gpd) of sewage to the plant from the sewer line will exacerbate the present condition.

A party who appeals a DER action of issuance of a permit has the burden of proof. See Rule 21.42 of the Board's rules of practice.[4] Our review of the DER action is to determine whether the DER committed an abuse of discretion or an arbitrary exercise of its duties or functions. *Warren Sand and Gravel Co., Inc. v. Commonwealth of Pennsylvania, DER*, 341 A.2d 556, 20 Pa. Commonwealth Ct. 186 (1975); *Doris J. Baughman, et al v. Commonwealth of Pennsylvania, DER, et al*, EHB Docket No. 77-180-B (issued January 26, 1979). The governing regulation is 25 Pa. Code 94.11 which prohibits the construction of a sewer line if the additional flows contributed to the sewage treatment plant will cause the sewer system to become overloaded. Thus the DER's action would constitute an abuse of its discretion if the Garlow Heights Sewage Treatment Plant does not have the capacity to treat the additional sewage from the permitted sewer line.

The surrounding community's perception of the Garlow Heights Sewage Treatment Plant is attributable to the odors which emanate from the plant. Foul odors are responsible for appellants' belief that

4. Section 21.101(c) of the rules as revised on June 12, 1979.

the plant receives more sewage than it can effectively treat. Leona Metro, Frank Leone, Carrie Taylor, Doris Kennedy and Doris Sturgis all live within 1,000 feet of the plant. They testified to the existence of a continuous odor from the plant that appears to worsen in the evenings and in the summer months. Mrs. Metro testified to having to keep her doors closed and Mrs. Sturgis described the odor as overpowering at times. She testified that it compelled the installation of air conditioning in her house. The DER and appellees contend that any odors from the plant are a result of operation and maintenance problems at the plant rather than a consequence of a plant overload.

The DER's regulations on municipal wasteload management define two types of overload, hydraulic overload and organic overload. Hydraulic overload occurs when the average daily flow entering the sewage treatment plant exceeds the average daily flow upon which the permit and the plant design are based. Organic overload is defined as the condition that occurs when the organic portion of the load as measured by the five-day Biochemical Oxygen Demand test expressed in terms of pounds per day exceeds the average daily organic load upon which the permit and the plant design are based. See 25 Pa. Code 94.1.

A comparison of the design parameters of the plant as stated in its permit with the flow of sewage recorded at the plant appears, on its face, to corroborate the appellants' contention. The plant's permit states that the plant was designed to serve 1,200 people and treat 120,000 gallons of sewage per day. The plant presently serves approximately 1,330 people and reports submitted to the Allegheny County Health Department of the average daily flow of sewage through the plant show the average daily flow from May 1976 until July 1978 to range from a low of 86,000 gpd during the month of January 1977 to 133,429 gpd

during January 1978. The reports indicate that an additional 35,000 gpd would have caused an hydraulic overload to occur every month except January 1977. The reports for 6 of the months showed an average daily flow higher than the 120,000 gpd permitted flow.

Appellees dispute the accuracy of the permits statement of the plant's hydraulic capacity and the average daily flow reports submitted to the County Health Department. Nicholas Stratakis, Plum's consulting sanitary engineer testified that an inspection of the plant's primary components showed that, notwithstanding the perameters stated in the permit, the treatment plant can treat 144,000 gpd of sewage.

Nevertheless, we are bound to apply the rate of flow stated in the permit. We can't ignore or change the permit's terms. Plum Borough must apply to the DER for a revision of the terms of its permit. Also, we are bound by 25 Pa. Code 94.1 which requires that a plant's capacity be determined by reference to the rate of flow stated in the plant's permit. (See the definition of hydraulic overload at 25 Pa. Code 94.1.) Also, we are bound to apply the Garlow Heights Sewage Treatment Plant's National Pollution Discharge Elimination System (NPDES) Permit issued to Plum by the United States Environmental Protection Agency under Section 1342 of the Federal Water Pollution Control Act, 33 U.S.C. §401. It provides that the discharge from the plant shall not exceed 120,000 gpd.

The appellees, including Plum Borough, contend that the flow reports submitted to the County Health Department by Plum show significantly higher rates of flow through the plant than actually occur. In its application for a sewer extension permit, Plum represented that the average daily rate of flow is actually only 85,000 gpd. The accuracy of the 85,000

gpd figure is critical since a rate of flow higher than 85,000 gpd would preclude the addition of a sewer extension with a 35,000 gpd load. Plum derived the 85,000 gpd rate of flow figure from flow measurements taken by Stratakis at the plant in May 1977 and October 1978. In May 1977 Stratakis placed a flow meter in a manhole in the sewer line entering the plant. The meter measured the rate of flow from May 11 to May 26 as averaging 86,000 gpd. The flow readings submitted to the county were taken from a permanent flow recorder installed in the ejector pots, a primary component of the plant. As a comparison, during the May 11 to May 26 time period the permanent recorder measured flows averaging 106,000 gpd. Stratakis testified that the reason the permanent flow recorder in the ejector pots read 20,000 gpd higher than the records at the entrance to the plant is that the permanent recorder reads the flow coming into the plant plus flow that has been recirculated back through the plant by the skimmer return line. The skimmer return line is located at the completion of the treatment process to skim scum off the surface and recirculate it back through the plant for additional treatment. It also recirculates 15,000 to 20,000 gallons of treated wastewater back through the plant each day. Thus the rate of flow through the plant is approximately 20,000 gpd higher than the rate of flow which actually enters the plant. From October 17, 1978, until November 2, 1978, Stratakis measured the rate of flow exiting the plant from the chlorine contact tank. The readings corroborated the flow measurements taken in May.

Stratakis has recommended to Plum that they change the operation of the plant so that the skimmer return lines will be activated by the plant operator only upon the building up of scum, which he estimated, will take only about one hour each day. Such a change in operation would decrease the flow through the plant by the amount now being recirculated.

Appellees also contended at the hearing that the additional flow to the plant from the sewer extension line could be less than 35,000 gpd because the home builders are required to install water-saving devices such as flow control devices on showers and faucets which, it has been estimated, can reduce a family's water use by one-third. Plum's application for the sewer extension permit estimated the additional flow at 35,000 gpd. We are unable to judge the amount, if any, that the 35,000 gpd would be decreased by use of the devices and, in any event, Plum's application should be judged on the representations that the application made to the DER.

It is clear that the Garlow Heights Sewage Treatment Plant as it is presently operated with the skimmer return line open does not have the capacity to handle the sewage from the permitted sewer line. It is not clear from the data gathered by Plum how much additional capacity will result from the operational change since the flow read by the permanent recorder on the ejector pots varies from month to month by some 30,000 gpd. In the last eight months for which data was available the flow readings from the permanent recorder were at such a high level that even if 20,000 gpd of recirculated flow was subtracted, the readings would not show sufficient capacity to allow for the addition of 35,000 gpd. Also, the fluctuation in the rate of flow read by the permanent recorder from month to month casts doubt upon whether the 85,000 gpd average during the 15 days in May and 15 days in October can be exceeded

over an entire year.

There is also a scarcity of information on the plant's organic loading. Although required to do so by its NPDES Permit, Plum does not monitor the Garlow Heights Sewage Treatment Plant for efficiency of treatment. In order to determine the plant's treatment efficiency and consequently, whether the plant can effectively treat additional sewage, Stratakis had samples of the plant's discharge analyzed twice a month from June 15, 1977, until November 11, 1977; a total of seventeen (17) samples were analyzed. The analyses included the Biochemical Oxygen Demand ('BOD) test, which measures the amount of organic matter in the effluent and is the parameter used by the DER's wasteload regulations to determine if an organic overload exists, i.e. to determine if the plant can effectively treat the sewage it receives. The results of the BOD tests range from a high of 80 milligrams/liter (mg/l) to a low of less than one mg/l. The specific results are listed in finding of fact no. 30.

BOD limitations are imposed upon the treatment plant's discharge by two permits, the Clean Streams Law Permit issued by the DER and the NPDES Permit issued by the United States Protection Agency. The NPDES Permit imposes upon the discharge a limit on BOD of 30 mg/l averaged over a 30 consecutive day period. The Clean Streams Law Permit was amended on June 21, 1971, to require a maximum BOD of 20 mg/l and 10 mg/l as an average of 5 consecutive days. Since both permits apply, the treatment plant's discharge must meet the more stringent limitation. See Sections 401(a) and 510 of the Federal Water Pollution Control Act, 33 U.S.C. §§1341 and 1370 which expressly provide that a state may adopt effluent standards more stringent than that set by the Federal EPA under the Federal Act.

The discharge samples taken by Plum reveal that the plant's discharge does not comply with the 20 mg/l maximum limitation of the Clean Streams Law Permit. Also, nine of the seventeen discharge samples had a BOD level higher than the 30 mg/l limitation stated in the NPDES Permit.

Also, the organic load that Plum's sewer line permit application projects will be discharged to the stream as a result of the sewer line exceeds the discharge limit stated in the Clean Streams Law Permit. The 20 mg/l concentration limit stated in the Clean Streams Law is equivalent to a discharge of 20 pounds per day of organic load expressed as BOD at a 120,000 gpd. However Plum's sewer line permit application at page 4 of module 6 states that the total load to the stream after the sewer line is connected will be 30 pounds per day of BOD. It also states that the present load to the stream from the plant, prior to the connection, is 17 pounds per day of BOD. If the 17 pounds per day figure is correct, the plant has only a minimum capacity remaining.

The DER engineer who reviewed the sewer extension permit application testified that he was not as concerned as he should have been about the treatment levels afforded by the Garlow Heights Sewage Treatment Plant because it appeared, at the time the review was made, that the sewage plant was going to be replaced by 1980 or 1981 by a new treatment plant which would be constructed to serve the Little Plum Creek Watershed. However, in March 1978 due to a reduction in Pennsylvania's share of federal sewage grant money the proposed new plant lost its funding and the project had to be halted. The reviewing engineer testified that the DER would have given the sewer extension line permit application a "lot more in-depth review" than it received if the DER

had known that the Little Plum Creek watershed plant would be postponed because of loss of Federal funding.

We remand this matter to the DER in order for the DER to give the sewer line permit applicaton the in-depth review that it did not receive initially. Specifically the DER shall:

(a) Quantify the capacity added to the plant by the change in the operation of the skimmer return line, discussed herein;

(b) Determine whether the odor problems existing at the Garlow Heights Sewage Treatment Plant are the result of operational problems which can be corrected or are the result of an organic overload at the plant;

(c) Determine whether the failure of the discharge from the Garlow Heights Sewage Treatment Plant to comply with the BOD effluent limitations stated in the plant's permits are the result of operation problems which can be corrected or are the result of an organic overload at the plant;

(d) Determine if the addition of sewage from the sewer line will cause the organic wasteload measured in pounds per day of BOD discharged from the Garlow Heights Sewage Treatment Plant to exceed the organic wasteload measured as pounds per day of BOD upon which the sewage treatment plant's permit and design are based; and

(e) In the event the permit is reissued to Plum, require Plum Borough to change the operation of the return skimmer line as a condition precedent to receiving the permit.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter of this appeal as it was filed within 30 days of publication of notice of the DER action in the *Pennsylvania Bulletin*.

2. The dismissal of an appeal is not an appropriate sanction in this matter for the late filing of information required to be filed by §21.21 of the Board's rules of procedure.

3. The Board has jurisdiction over the subject matter of this appeal even though the notice of appeal when originally filed did not contain all of the information required by Section 21.21 of the Board's rules of procedure.

4. A party who appeals a DER action of issuance of a permit has the burden of proof.

5. The Board's review of a DER action is to determine whether the DER committed an abuse of discretion or an arbitrary exercise of its duties or functions.

6. The issuance of a permit for a sewer line to convey more sewage to a treatment plant than it has the capacity to treat constitutes an abuse of discretion by the DER.

7. The DER committed an abuse of discretion when it issued a sewer line permit to convey 35,000 gpd of sewage to the Garlow Heights Sewage Treatment Plant without giving the application for the sewer line permit an in-depth review, especially when: (a) the surrounding residents complained about odors from the plant, (b) samples of the plant's discharge showed that the discharge did not comply with the effluent limitations [illegible] plant's permit and (c) a change in the operation of the [illegible] sewer line is necessary to

provide the plant with additional capacity.

ORDER

AND NOW, this 2nd day of November, 1979, it is hereby ordered that:

(1) Water Quality Permit No. 0278434 is set aside and remanded to DER;

(2) DER shall perform an in-depth review on application no. 0278434 which shall include an analysis of the following:

(a) the capacity added to the plant by the change in operation of the skimmer return line,

(b) the cause of the odor problems at the Garlow Heights Sewage Treatment Plant,

(c) the cause of the failure of the discharge from the Garlow Heights Sewage Treatment Plant to comply with the BOD effluent limitations stated in the plant's permits,

(d) whether the additional sewage from the sewer line will cause the organic wasteload measured in pounds per day of BOD discharged from the Garlow Heights Sewage Treatment Plant to exceed the organic wasteload measured in pounds per day of BOD upon which the sewage treatment plant's permit and design are based.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Thomas M Burke

BY: THOMAS M. BURKE
Member

DATED: November 2, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
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MAXWELL SWARTWOOD and
CONCERNED CITIZENS OF FALLS TOWNSHIP

Docket No. 79-068-W

Pennsylvania Sewage Facilities Act

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
FALLS TOWNSHIP and MILNES CO., Intervenors

ADJUDICATION

By Paul E. Waters, Chairman, November 5 , 1979

This matter comes before the board as an appeal from the approval of an Act 537, (Pennsylvania Sewage Facilities Act, 35 P.S. §750.1), plan supplement by Falls Township to accommodate two large housing projects to be funded by HUD. Appellants are citizens living in the general project areas who oppose the plan supplement on grounds that insufficient information has been forthcoming from the intervenor, Milnes Company, owner of the proposed project and that the DER review was inadequate. A supersedeas petition was filed on behalf of appellants, but was denied after hearing on July 11, 1979.

FINDINGS OF FACT

1. The appellants are Maxwell Swartwood and others who have filed this appeal on behalf of themselves and an unincorporated association known as the Concerned Citizens of Falls Township.

2. Falls Township is a duly authorized municipal subdivision located in Wyoming County, Pennsylvania, and is an intervenor appellee in these proceedings.

3. DER is a duly authorized executive department of the State government of the Commonwealth of Pennsylvania and is an appellant in these proceedings.

4. The Milnes Company, Inc., is an intervenor in these proceedings and is the developer and owner of the tract of land involved in this matter.

5. The Wyoming County Housing Authority is an agency or authority created by duly enacted resolution of the Wyoming County Board of Commissioners dated May 18, 1970.

6. The United States Department of Housing and Urban Development, hereinafter HUD, is a duly authorized department of the executive branch of the United States government.

7. The Milnes Company, Inc., intervenor, is the owner of two parcels of land in Falls Township, Wyoming County, Pennsylvania. The parcels are several miles apart.

8. Both parcels are intended for construction of a public housing project sponsored by the Wyoming County Housing Authority and HUD.

9. The public housing project is designed as a twenty-three family project utilizing the scattered site approach to development. There will be twelve units on one site (The Carter Site) and eleven units on the other site (The Lapinski Site).

10. This development is known as a turnkey project and is being developed under the offices of the Wyoming County Housing Authority with the financial support and ultimate approval coming from HUD. Under a turnkey project, the responsibility is on the developer to select the site and prepare the submissions in a manner which satisfies all requirements of the Wyoming County Housing Authority and HUD.

11. The Falls Township Supervisors entered into a cooperation agreement with the Wyoming County Housing Authority regarding this development.

12. The Falls Township Supervisors also passed a resolution authorizing the submission of an application for public housing to HUD by the Wyoming County Housing Authority.

13. The township cooperation agreement and the municipal resolution authorizing the public housing application are requirements of HUD which must be met in order to receive federal funds.

14. Each site for this project will have an on-site sewage treatment facility consisting of its own elevated sand mound which will receive effluent from its own aerobic treatment tank.

15. Each elevated sand-mound system will be located on soils with a limiting zone from 20 inches to 60 inches.

16. In March or April of 1978, The Milnes Company, Inc., applied for and received on-lot sewerage permits from Falls Township for these sites.

17. The 1978 permits were issued without any supplement to the official sewerage plan of Falls Township.

18. On March 2, 1979, these permits were revoked by the township with the consent of Milnes Company.

19. In 1979, Milnes Company prepared and submitted to Falls Township, two proposals for supplementing the official plan to provide for on-lot elevated sand-mound systems for these two sites.

20. On March 12, 1979, the Falls Township Board of Supervisors approved the proposed supplements and forwarded them to the DER for its approval.

21. By letter dated March 13, 1979, DER was notified of appellants' opposition to the proposed supplements.

22. A detailed statement of appellants' objections was submitted to DER by appellants' counsel on April 19, 1979.

23. On April 23, 1979, a conference was held at the DER offices in Wilkes-Barre. Appellants, intervenors and Falls Township were all represented by counsel. DER was represented by three of its employees from the Bureau of Community Environmental Control.

24. As a result of this informal meeting, all parties met at the sites in Falls Township, Wyoming County, on May 2, 1979. New test pits were dug on each site at that time. Soil scientists for DER, Milnes Company, Inc. and appellants were present at that time and examined the test pits on each site.

25. On June 1, 1979, DER notified Falls Township and appellants that the review of the plan supplements had been completed and that the DER concurred with the Falls Township decision to supplement the official plan.

26. On or about June 5, 1979, appellants filed the notice of appeal and petition for supersedeas with the Environmental Hearing Board.

27. On June 22, 1979, and July 9, 1979, evidentiary hearings were held on the supersedeas petition, and on July 11, 1979, the petition for supersedeas was denied by order of Chairman Waters.

28. Present land use for both sites is agricultural, and working farms are immediately adjacent to both sites. Extensive natural wooded areas are near both sites and such areas are hunted extensively. Site number one is located approximately 4.8 miles from the closest elementary school, 2 miles from the closest small convenient store, 4 miles from the nearest fire protection facility, 5 and 6 miles to the nearest recreational areas, and 3 and

4 miles to the nearest churches. The nearest city is Scranton, 15 to 20 miles away. Tunkhannock is the nearest borough, it being the county seat, about 7.5 miles away and Mill City, having a population of approximately 500, is the closest built-up-area, about 4.5 miles away.

29. Site number two is also located in an open space, sparsely populated rural area, as aforesaid, approximately 2.5 miles to the nearest elementary school, 4 miles to the nearest fire protection facility, 2.5 miles to the nearest recreational facility, 2 miles to the nearest convenient store and closest built-up-area is Mill City, 3 miles away. It is 10 to 11 miles to the Borough of Tunkhannock. There is no zoning in Falls Township and there is no public water supply or public sewerage facility for either of the two sites.

30. The spring used both for livestock and for domestic purposes by Maxwell Swartwood is 100 feet from the boundary line which divides his property from site number one and site number one is topographically above said spring. And, two springs run off a portion of site number one directly onto the real property of Swartwood and about an acre and one-half of site number one is a wet marshy area.

31. A boundary line dividing Falls Township from Tunkhannock Township runs through both the Maxwell Swartwood and the Ezra Carter site number one property.

32. Falls Township filed its official plan document for the first time in January of 1973 and since that date the township has never re-evaluated the township and/or the official plan so as to determine whether or not to revise the official plan.

33. Over the past 10 years there has been a population increase in Falls Township, with the construction of a Charmin paper plant in the Wyoming County area, new construction within Falls Township being of a single family dwelling nature on approximately one-acre lots, and about 10-20 houses are constructed per year.

34. The population of Falls Township is approximately 1,650.

35. In adopting the supplements in question their supervisors intended to simply send supplements to DER for their evaluation, approval or disapproval inasmuch as the supervisors "figured we would be putting it into the hands of the professional in DER. . ." The chairman of the board of supervisors indicated: "We felt at that time after consulting with our solicitor

and our sewage inspection officer, we didn't have enough knowledge to either reject or permit it, and we did send it to DER for their rejection or permit."

36. The supervisors did not use any experts or advisors on planning in connection with the supplementary issue and did not consider any of the planning concepts relating to preservation of natural wooded areas, present land use, agricultural lands, open space, location of schools, commercial facilities, or recreational facilities.

37. Falls Township, other than the Mill City area, has never been tested or surveyed to discover the percentage of malfunctioning of on-lot systems.

38. There are no apartment buildings in Falls Township containing more than six apartment units and only one apartment building in the township has as many as four units.

39. The main thing DER looked to in order to determine whether or not a supplement would qualify in this case is the type of sewage system proposed.

40. The Falls Township official plan was complete and filed no later than the month of February 1974. The only indication that DER ever approved the township's official plan, other than an apparent acceptance of the existence of a plan is found in a DER letter of January 8, 1975.

41. The DER official taking action in the instant matter has never discussed with any attorney or read any memorandum or articles concerning the interpretation and application of Article I, Section 27 of the Pennsylvania Constitution. At the time of approving the supplements in the instant matter, he took no responsibilities beyond taking into account his interpretation and application of the law pursuant to Pennsylvania's Sewage Facilities Act.

42. Other than in Tunkhannock Borough, there is no apartment complex in Wyoming County having more than six apartments.

43. Soil scientist, E. Lester Rothermel, having extensive experience with the DER, has indicated that the soils for both of these sites do not qualify for conventional on-lot sewage systems and that, in his opinion, these proposed systems will work.

DISCUSSION

At the outset, we must address DER's contention that it should not have the burden of proof in this proceeding inasmuch as the appeal is from an Act 537 plan amendment approval, which it deems to be similar to a permit grant.[1] The board has previously dealt with this question in *Eagles View Lake, Inc. v. Comm. of PA, DER*, EHB Docket No. 76-086-W, issued April 4, 1978.[2] We there decided that the burden of proof is properly placed upon appellant where the appeal is from an Act 537 denial. There is no reason why the same rule should not apply to an approval, as in this case. Appellants do not seriously contend otherwise, although they do raise some questions about the actual approval date.[3]

Appellants have raised a question to which neither this board nor the DER has ever given a definitive answer. Where there is an Act 537 plan in existence to which changes are desired by a municipality, when must that change be carried out by a revision rather than a supplement?

Before addressing that issue directly, a few words are in order as to why it makes any difference. The basic reason as it relates to this case, is that even though a revision requires the approval of the DER as does a plan supplement, the regulations require a great deal more information to gain that approval than does a plan supplement.

The regulations as they relate to the question before us provide at 25 Pa. Code §71.15(c): "Supplements to plans. Supplements to plans shall conform with the following: (1) If the official plan of the municipality

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1. A permit grant clearly places the burden of proof on appellant by virtue of 25 Pa. Code §21.101(c)(3) which provides:

> "(c) A party appealing an action of the Department shall have the burden of proof and burden or proceeding in the following cases unless otherwise ordered by the Board:
> * * *
> "(3) where a party who is not the applicant or holder of a license or permit from the Department protests its issuance or continuation;"

2. See also *Raymond E. Diehl v. Comm. of PA, DER*, EHB Docket No. 78-037-B, issued May 14, 1979.

3. Although the original plan was submitted to DER on January 19, 1973, there is some question as to when it was approved by DER as the official plan. It is clear, however, that this was done not later than January 9, 1975, based on a DER letter.

adequately provides for the sewage disposal needs of any proposed subdivision as defined in the act, a plan revision shall not be required; however, the municipality shall submit to the Department a supplement to its plan indicating the information required under Section 71.14(b) of this Chapter (relating to contents of plan);".

The regulations further assign certain responsiblities to a municipality seeking approval of a plan supplement and indicate certain considerations which should be made by DER in deciding whether to approve or deny a requested plan supplement.

After a thorough review of all provisions relating to both supplements and revisions,[4] it is our view that the final decision as to which procedure to use should be made by DER on this purely administrative matter. It is clear that DER may rely initially upon the municipality in reaching its decision,[5] but once made, we today decide that this is a discretionary matter properly left to DER to which this board will give wide latitude. The regulations contemplate the use of a plan revision where the changes from the base plan cannot adequately be covered by a supplement. We acknowledge that this line is, of necessity, imprecise and *ad hoc* decisions are called for. Once this administrative decision has been made by DER, this board will, of course, then review the approval or denial itself, whether a supplement or a revision as to its substantive provisions. We turn then to the supplement here in question.

As previously indicated, the township must first approve a plan supplement before it can be passed upon by DER. Appellants have raised questions concerning this approval process of Falls Township. Specifically they argue that the supervisors did not have adequate and timely information and that they literally didn't know what they were doing.[6]

Appellants have argued that DER has a responsibility to consider matters such as school locations and recreational facilities[7] in reaching a

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4. 25 Pa. Code 71.14, 71.15, 71.16 and 71.17.

5. 25 Pa. Code §71.15(c)(i) provides:

> . . ."The municipality shall make the initial determination whether or not a revision to its plan is required, giving consideration to the review comments and recommendations of the sewage enforcement officer who shall submit same within 20 days. Said supplement shall be submitted by the municipality to the Department for its decision as to the adequacy of the supplement."

6. One supervisor acknowledged that there were technical matters which they deemed DER better suited to handle and who gave approval so the entire matter would go to DER for its action.

7. Other issues which are raised, deserving little comment are: The present agricultural use of the land, church locations, stores and fire stations proximity.

decision on whether to approve an Act 537 sewage plan supplement. We disagree. There is no doubt that purely local matters and land-use planning issues remain outside of DER's jurisdiction. There is evidence, however, that no consideration was given by DER to the balancing of social and economic benefits against environmental harm as required by Article I, Section 27 of the Constitution of Pennsylvania.[8] In this regard, the board in reviewing the evidence, has looked for the direct impact of the DER's approval action. After so doing we can only say, as did the Commonwealth Court in *Concerned Citizens for Orderly Progress, et al v. Comm. of PA., DER*, Pa. Cmwlth. 387, A.2d 989:

> ". . .the required balancing of social and economic benefits against environmental harm was not conducted in the instant case. While such an inquiry should have been undertaken, our own examination of the exhaustive record reveals that the environmental impact of the sewage plant and the resulting effluent will be negligible, while the social and economic benefits appear to be significant. In view of such a determination, we refrain from remanding this case..."

We do not here decide that a revision of the township Act 537 plan is unneeded at this time. It well may be.[9] We are here concerned with whether DER has abused its discretion in not requiring it prior to approving the specific plan supplement now before us. We conclude that it has not.

The other major issue of concern to appellants is the sewage disposal method proposed for the two sites. Inasmuch as the soil is not suitable for conventional on-lot disposal, intervenor proposes to use alternate sand-mound systems. The board can well understand appellants' difficulty in challenging these systems, based on the fact that they have apparently been changed in the course of this proceeding. While the technicial construction procedure is still not as clear as we would like, the expert testimony of the township sewage enforcement officer serves as a reasonable basis to

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8. Article I, Section 27 of the Pennsylvania Constitution states:

> "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 properly 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."

See *Payne v. Kassab*, 11 Pa. Cmwlth. Ct. 14, 312 A.2d 86, (1973).

9. Appellants have outlined a number of areas in which the official plan does appear to require revision.

allow DER's plan approval.[10] Appellants raise questions about the fact that no percolation tests were made in the soil where these aerobic sand mounds are to be installed. The problem with this argument is that none are required by the regulations for a plan approval. The regulations regarding the issuance of permits for the construction of alternate subsurface absorption areas are detailed and specific[11] and must of course be complied with. We do not, however, have before us a final decision on whether or not the soil is suitable for any such systems. Indeed, any challenge to such decision properly goes to the Common Pleas Court of Wyoming County. We believe there is no abuse of discretion by DER shown by appellants. Backhoe pits were dug and inspected on the site and the soil was indicated to be likely to qualify for alternate systems.[12] The final determination in this regard is left to the local sewage enforcement officer. For purposes of planning approval, we can find nothing wrong with this procedure. Although appellants urge us to conclude that a DER witness stated elevated sand mounds have no better than a 50-50 chance of success on these sites,

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10. The sewage enforcement officer, who is familiar with the exact systems to be used, was questioned at a township hearing and the testimony was made a part of our record by agreement of counsel.

> "Q. Mr. Geary, if these systems on the two sites are constructed and installed as per the designs, do you have any fear that they will malfunction?
> "A. Of course I can never say for one hundred percent, because we cannot make that kind of a stand. There is always something that could possibly happen. But I am as confident as I can be in my past experience and also within the regulations that it will function properly. I might point out that there are also necessary safeguards built into the system as far as overloading and any other malfunction that might exist before we would have a surface discharge.
> "Q. After the applications for these two permits were made, before they were issued, did you not review these two applications with the Township Engineer, Mr. Longo?
> "A. Yes, I did. I talked with him personally once, and on the telephone on another occasion, right.
> "Q. And did you not on that basis, on the basis of those conversations and on your own initiative require additional information from the Milnes Company?
> "A. That's correct.
> "Q. And was that not supplied to you, did you not request that by your letter dated June 15, 1979?
> "A. That's correct."

11. 25 Pa. Code §§73.101, 73.111, 73.121, 73.131 and 73.141.

12. On each two sites, a number of pits were dug and inspected by a soils scientist. On site no. one, five probes were found suitable for elevated sand mounds. On site no two, pit nos. three through eight were found suitable.

this would be distortion of his testimony.[13]

The final question raised by this proceeding which deserves some mention concerns the tonwship's approval of the plan supplement on March 12, 1979, at a regular township meeting of the board of supervisors. The chairman and two supervisors at the hearing outlined how they came to vote for the plan supplement and their limited knowledge about what the housing project would entail.[14] One would conclude that the township officials, having previously approved the plan supplement, have now had a change of mind. We are faced with an offical act of the township, which has served as a basis for an official act of DER. The supervisors appearing as witnesses would "withdraw" a former official township act. We believe the change of heart, if indeed that is what happened, comes too late and in the wrong manner. It is too late because DER has already acted upon it, as indeed have the intervenor, to the tune of thousands of dollars, the federal government and the Wyoming County Housing Authority. It is in the wrong manner because an official township act by resolution, cannot be "repealed" by testimony at a subsequent hearing.

CONCLUSIONS OF LAW

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

2. The appellant must carry the burden of proof in an appeal from the approval of an Act 537 sewage plan supplement.

3. Appellant has failed to show an abuse of discretion by DER in its approval of the Falls Township Act 537 plan supplement which covers two multi-family housing projects proposing to use alternate sand-mound systems.

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13. See N.T. Page 401, Lines 3 through 14:

> "Q. What, in your opinion—try to evaluate as an expert what kind of percentages are we talking about in terms of chances of malfunctioning?
> "A. I think the chances of them working are greater than they are of not working.
> "Q. So it is a 60-40 percent type of thing?
> "A. I really don't care to put numbers on it. I think the chances of them working are better than them not working.
> "Q. Better than even?
> "A. Yes.
> "Q. You can't be more specific? You can't give us more assurance than that?
> "A. No, I would rather not."

14. The Board of Supervisors of Falls Township met prior to their official meeting and at the office of the solicitor and with his approval, agreed to vote for the supplement with very little or no discussion of the substance of the plan.

4. When DER reviews an Act 537 plan supplement, it should consider all of the direct environmental impacts of any approval thereof. Where, as in this case, it fails to do so, this board must find, as we do, that Article I, Section 27 of the Pennsylvania Constitution will not be violated by DER's decision, to sustain the action.

5. The determination as to whether sewage disposal permits will be issued for the installation of alternate sand-mound systems at the proposed Falls Township projects, must be made by the Falls Township sewage enforcement officer and not DER.

6. When the township, acting through its duly elected supervisors at a regular meeting approved an Act 537 plan supplement, this cannot be later changed by subsequent testimony merely outlining the uninformed basis for the final vote.

7. The question of whether a plan revision is needed in a particular municipality need not be decided when in fact a plan supplement is before the board for review on appeal. Approval of the proposed supplement does not foreclose a subsequent revision order by DER.

ORDER

AND NOW, this 5th day of NOVEMBER 1979, the appeal of Maxwell Swartwood, et al, appellants, is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

BY: PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

DATED: November 5, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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LATHROP TOWNSHIP BOARD OF SUPERVISORS

Docket No. 79-012-W

Pennsylvania Sewage Facilities Act

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ARTHUR KOZLOWSKI, Intervenor

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

By Paul E. Waters, Chairman November 27, 1979

This matter comes before the board as an appeal by Lathrop Township from an order by DER granting the private request of intervenor, Arthur Kozlowski, requiring appellant to revise its official sewage plan to allow for a proposed subdivision known as "Lord's Pond". The private request, initiated pursuant to 25 Pa. Code §71.17 was necessary because the township has refused to revise its sewage plan under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.5, *et seq.*

FINDINGS OF FACT

1. Appellant, Lathrop Township, is a municipality located in Susquehanna County, Pennsylvania.

2. Intervenor, Arthur Kozlowski, is an individual who intends to develop a residential subdivision known as Lord's Pond in Lathrop Township, Susquehanna County.

3. Lathrop Township, appellant herein, has adopted an official plan pursuant to Section 5 of the Pennsylvania Sewage Facilities Act, 35 P.S. §750.5, and the rules and regulations promulgated thereunder, 25 Pa. Code §71.11-71.17, to provide for adequate disposal of sewage in the municipality. The plan concludes that present and projected population of the township is insufficient to support sewage collection and treatment facilities, and recommends on-lot sewage disposal to continue to be the method of sewage treatment.

4. On April 26, 1977, Lathrop Township was requested by Arthur Kozlowski, intervenor herein, to revise its official plan to meet the sewage disposal needs of a subdivision known as Lord's Pond. The proposed sewage disposal system for the subdivision called for individual on-lot systems for each lot.

5. On May 5, 1977, Lathrop Township approved the Lord's Pond subdivision proposal and submitted it to the Department of Environmental Resources.

6. On July 18, 1977, by resolution of the township supervisors, Lathrop rescinded its May 5, 1977, approval stating that it was made under duress and that new information had come to light.

7. The planning module for land development submitted to Lathrop Township and approved by the board of supervisors on May 5, 1977, was approved by the Susquehanna County Planning Commission. By letter from the planning commission dated May 31, 1977, to Lathrop Township, the planning commission suggested that the development be considered as a revision to the official sewage facilities plan for Lathrop Township.

8. On November 1, 1977, Arthur Kozlowski initiated, throug

counsel, a private request pursuant to 25 Pa. Code §71.17 to order Lathrop Township to revise its official plan to meet the sewage disposal needs of the proposed Lord's Pond subdivision.

9. On November 17, 1977, DER requested comments from Lathrop Township regarding the private request for a plan revision. Lathrop Township was requested to provide DER with any environmental, planning, zoning or other objections to incorporating the proposed land development in the official sewage plan.

10. Upon receipt of Lathrop Township's objections, DER, by letter dated February 9, 1978, from David Lamereaux, regional sewage facilities consultant, advised both the township and Mr. Kozlowski that it considered three of Lathrop Township's objections to have merit. DER requested the following additional information from the developer: a) precise slope measurements on the lots; b) evaluation of soil test pits placed in the different soils mapped for the development; and c) clarification of the number of proposed dwelling units or estimated sewage flows.

11. The requested information was submitted by the developer to Mr. Lamereaux, who reviewed the information and determined that Lathrop Township's objections had been adequately addressed.

12. By letter dated August 15, 1978, Mr. Lamereaux advised Lathrop Township of his review of the additional information provided by the developer and requested a response from Lathrop Township if the township had additional objections to the proposed subdivision.

13. Mr. Lamereaux received no response from Lathrop Township to his August 15, 1978, letter.

14. On December 26, 1978, DER issued an administrative order to Lathrop Township pursuant to Section 10 of the Pennsylvania Sewage Facilities Act, 35 P.S. §750.10, requiring the township to revise its official sewage facilities plan to include the Lord's Pond subdivision.

15. The official sewage facilities plan adopted by Lathrop Township calls for the use of subsurface sewage disposal systems as the method of sewage treatment. This is the only method of sewage disposal envisioned in the official plan.

16. There are no public sewers in Lathrop Township. Because of the township's rural character and low population density, the township relies strictly upon on-lot sewage disposal.

17. Lathrop Township has no plans to provide a public sewage system in the area of the Lord's Pond subdivision in the near future.

18. Lathrop Township has no zoning ordinances or subdivision regulations.

19. The Susquehanna County Planning Commission is the legally-authorized planning agency in Susquehanna County.

20. The Lord's Pond subdivision does not conflict with the Susquehanna County subdivision regulations.

21. The plan revision approved by DER for the Lord's Pond subdivision is consistent with the official sewage facilities plan of Lathrop Township, and with the Susquehanna County official plan, and with the comprehensive water quality management plan being prepared by DER.

22. The sewage enforcement officer for Lathrop Township prepared the soils analysis attached to the planning module for land development submitted to the Lathrop Township supervisors as part of the plan revision requested for the Lord's Pond subdivision, and approved by the supervisors on May 5, 1977. With the possible exception of one lot, he determined that all of the lots in the proposed subdivision had soils which were acceptable under DER's regulations for alternate, on-lot sewage disposal systems.

23. The soils on the proposed Lord's Pond subdivision are fairly constant. The limiting factor, if any, in locating an on-lot sewage disposal system on any lot would be slope.

24. The ultimate decision as to the suitability of an area f

an on-lot sewage disposal system is to be made by the sewage enforcement officer at the time of permit issuance.

26. While there are some lot areas which will be precluded because of slope from placement of a sewage disposal system, there is an area on all but one lot which has an appropriate area for this purpose with a slope of less than ten percent.

27. Test pits and slope conditions were investigated on each lot and found to be within DER requirements before the revision order here under appeal was issued.

DISCUSSION

The only issue or matter of any dispute between the parties which we are able to glean from the proceedings in this matter appears to be whether the slope of the land in question is prohibitive to the development of the Lord's Pond subdivision.[1]

There can be no doubt that DER has a responsibility to grant a private request for plan revision and order the same when a municipality fails or refuses to approve the same without a valid reason.[2]

In this case these appellants first raised the question concerning the slope of the land where the Lord's Pond development is proposed. DER investigated the matter and the developer employed a surveyor to provide detailed information regarding the limitations created by the slope. This survey indicated

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1. We are somewhat hampered in our effort to determine the precise position appellant takes with regard to the substantial amount of testimony elicited, because appellant has not favored us with a post-hearing brief.

2. 25 Pa. Code §71.17(b)(d) provides:

> "Upon receipt of a private request for revision or supplement, the Department shall notify the appropriate municipality and shall request written comments from the municipality to be submitted within thirty (30) days.
>
> * * *
>
> "The Department shall render its decision, and inform the person requesting and the appropriate municipality, within 60 days after receipt of all information contained in subsections (b) and (c) of this Section."

that the slopes on each individual lot do not exceed ten percent in an area suitable for on-lot sewage disposal. While we are not inclined to reject the testimony presented by appellant which leads us to suspect that there may be some unsuitable lots, nevertheless, it cannot be said that appellant has carried its burden of proving that there is no reasonable likelihood that most of these lots can properly be permitted for some type of on-lot sewage disposal system. *Eagles View Lake, Inc. v. Comm. of PA, DER*, EHB Docket No. 76-086-W, issued April 4, 1978.

The problems mentioned[3] by various appellant witnesses are uniquely suited for resolution at the permit stage as they relate to matters of land contour and exact location of systems. This matter, we believe, was properly explained by a DER witness[4] as follows:

> "Q. Did you go on to the site to evaluate that information that was provided you?
> "A. Only the slope. The soil information was verified by at least three other individuals.
> "Q. If there is no necessity to correlate the slope limitations and the soil limitations on the individual lot site of this development or on the individual residential properties as proposed, then what other planning would take place when these modules are submitted that you might avoid future potential sewage problem referred to in the DER regulations?
> "A. Mr. Sayers, I'm afraid I don't quite understand your question. Are you asking me why I don't shoot the slope where the test pit is dug?
> "Q. No, I'm asking you if in planning to avoid potential sewage problems there should be some correlation between the severity of slope and the severity of the nature of the soils and if this should be indicated on the map and that actual planning take place. What planning took place in regard to this module and subdivision plan that would indicate that potential sewage problems are avoided in this area?

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3. There is discussion about soils and other water courses on the tract, which may need to be relocated, and the fact that there was no correlation required in advance, concerning the slope and soils information on individual lots.

4. Mr. Lamereaux testifying on recross examination, N.T. Page 189, Lines 4 through 25 and Page 190, Lines 1 through 11.

"A. I was sufficiently satisfied that the soil and the slope information on the lots was adequate. Now, if by chance, the two cannot be obtained in the same area, I think that will be determined at the permit stage. I cannot assume that that is the case in the planning stages.

"Q. Isn't it your attitude that all of the problems with regard to this subdivision can be solved at the permit issuance stage?

"A. No, that is not my attitude at all. I think that I have taken sufficient precautions in the planning stages to get general suitability information."

After a review of all of the evidence presented by appellant, we can find no basis on which to reverse the decision of DER. *Borough of Sayre v. Comm. of PA, DER and David T. and Mary Sheila Henry, Intervenors*, EHB Docket No. 78-063-W, issued January 31, 1979; *Maxwell Swartwood and Concerned Citizens of Falls Township v. Comm. of PA, DER and Falls Township and Milnes Co., Intervenors*, EHB Docket No. 79-068-W, issued November 5, 1979.

CONCLUSIONS OF LAW

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

2. The burden of proof in this appeal from a DER order issued pursuant to 25 Pa. Code §71.17 is upon appellant.

3. DER has not abused its discretion and has properly ordered appellant, Lathrop Township, to revise its Act 537 plan to accomodate the private request of one Arthur Kozlowski for a subdivision in Susquehanna County known as Lord's Pond.

4. Where there is sufficient information indicating a reasonable likelihood that on-lot sewage disposal systems will be effective, the planning can be approved inasmuch as the final determination as to the exact location and the type of disposal system will be made by the sewage enforcement officer at the permitting stage of development.

O R D E R

AND NOW, this 27th day of NOVEMBER 1979, the appeal of Lathrop Township Board of Supervisors is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

BY: PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

DATED: November 27, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

COA PALLETS, INC.	:	
	:	
v.		
	:	DOCKET NO. 78-144-D
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	The Clean Streams Law Pennsylvania Solid Waste Management Act

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

December 17, 1979

This matter is before the board on an appeal filed by COA Pallets, Inc. (COA Pallets) from an order, dated October 16, 1978, which was issued to COA Pallets by an authorized agent of the Commonwealth of Pennsylvania, Department of Evnironmental Resources (DER).

In said order, DER made a finding that COA Pallets had accepted, for storage and disposal on its premises, several hundred drums containing industrial wastes and other pollutants. DER then found that such activity subjected COA Pallets to the provisions of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1, *et seq.*, to the provisions of the Pennsylvania Solid Waste Management Act, (SWM ACT) Act of July 31, 1968, P.L. 788, *as amended*, 35 P.S. § 6001, *et seq.*, and to the provisions of the rules and regulations adopted pursuant to the above mentioned statutes. DER then found that COA Pallets was in violation of

specific provisions of said statutes and said rules and regulations. DER directed COA Pallets to remove all drums, containers, chemicals, industrial wastes and other pollutants, to dispose of them at an acceptable disposal site, and to excavate and to remove all soil which had absorbed any spilled liquid from said containers to an acceptable disposal site.

On November 15, 1978, the appeal of COA Pallets was received by the board.

A hearing on the merits of this appeal was held on April 5 and on April 6, 1979, before Joanne R. Denworth, Esquire, who was then a member of this board.

FINDINGS OF FACT

1. COA Pallets operates a facility for the manufacture of pallets on land which is situate along Boot Road in East Caln Township, Chester County, Pennsylvania.
2. Grey Olliver (Olliver) was the president of COA Pallets at all times relevant to this proceeding.
3. Bruce Donald Beitler (Beitler) has been employed by DER as a solid wastes management specialist since 1971. Beitler, who works out of the Norristown Regional Office of DER, is responsible for the inspection of solid waste disposal sites and for the investigation of complaints with regard thereto.
4. Beitler, upon receiving a complaint that industrial wastes were being stored on the premises of COA Pallets, visited those premises for the first time on September 14, 1977, and discussed the complaint with Olliver.
5. Olliver admitted to Beitler that he and Mr. Jerry Bove had entered into an arrangement under the terms of which Mr. Bove was to be

permitted to store drums containing what Mr. Bove said were industrial waste materials on COA Pallets property, that thereafter Mr. Bove was to collect the materials in the drums, that thereafter Mr. Bove was supposed to remove the drums, that Olliver was to be compensated for extending this storage opportunity, that Mr. Bove deposited many drums on said property during the summer of 1977 and that Mr. Bove never returned to COA Pallets property to remove either the drums or the contents thereof.

6. On September 14, 1977, there were between 800 and 900 fifty-five gallon drums and between 500 and 600 five gallon pails on the property occupied by COA Pallets.

7. The drums were located in three areas, all of which were to the rear of the COA Pallets manufacturing building and all of which were open and unsheltered. The drums were grouped together and were piled in a two-tiered arrangement. Many of the drums had been placed on pallets.

8. Every drum and pail which Beitler examined on September 14, 1977, was filled with material. Many of the drums were open. Many of the drums had been tipped over and the contents thereof had spilled onto the ground.

9. On September 14, 1977, there were strong odors in the area of the drums, which were quite uncomfortable and which irritated Beitler's eyes and his respiratory tract.

10. On September 14, 1977, the ground cover in the area in which the drums were located was discolored and the vegetation appeared to be dead.

11. On September 14, 1977, Beitler and Stephen Pederson, a fellow employee, collected a sample from a drum which had bulged and which was leaking. They placed a sample bottle under the dripping stream and were able to collect the sample. The bottle containing this sample was labeled; it was sealed; it was placed in a cardboard carton; it was taken to a place where it was received by Purolator Courier, a delivery service; it was then delivered to the DER laboratory in Harrisburg.

12. This sample bottle was received at the DER laboratory in Harrisburg. Relevant information with regard to the sample was placed in a log at the laboratory. This sample was then analyzed for the presence of organic compounds by means of infrared spectrophotometry, ultra-violet spectrophotometry and gas-chromatographic mass spectrophotometry.

13. This sample contained benzine and other organic compounds of various natures.

14. Beitler and Pederson returned to that portion of COA Pallets property where said drums and pails were situate on September 22, 1977; they collected a sample from one of a series of between 80 and 90 drums which were gray in color, with white labels on which it was noted that the material inside each drum was sodium copper cyanide.

15. This sample was obtained by removing a screw-on cap from one of the drums and drawing liquid therefrom into a sample bottle. Following the taking of this sample, the procedure described in finding of fact no. 11, *infra*, was again followed.

16. This sample bottle was received at the DER laboratory in Harrisburg. Relevant information with regard to the sample was

placed in a log at the laboratory. This sample was, per the written request of Beitler and Pederson, analyzed for pH, and for the presence of aluminum, cadmium, chromium, iron, nickel, lead, copper, zinc and cyanide.

17. The results of these analyses were as follows:

pH	10.4
Aluminum	500 parts per billion
Cadmium	Less than 10 parts per billion
Chromium	170 parts per billion
Iron	240,000 parts per billion
Manganese	180 parts per billion
Nickel	1,630 parts per billion
Lead	Less than 50 parts per billion
Copper	10,750 parts per million
Zinc	2,375 parts per million
Cyanide	19,750 parts per million

18. Beitler returned to that portion of COA Pallets property where said drums were situate on March 22, 1978. He noted a small stream of material which originated in the area where the drums were placed and it was running in a northerly direction. He took a sample of this stream at a point which was at least 50 feet away from where the drums were situate. Following the taking of this sample, the procedure described in finding of fact no. 11, *infra*, was again followed.

19. The sample bottle was received at the DER laboratory in Harrisburg. Relevant information with regard to the sample was placed in a log at the laboratory. This sample was, per the written request of Beitler,

analyzed for alkalinity, brochemical oxygen demand (B.O.D.), chemical oxygen demand (C.O.D.), pH, specific conductance and turbidity, and for the presence of chlorides, iron, ammonia nitrogen, nitrite nitrogen and NO_3 nitrogen.

20. The results of these analyses were as follows:

Alkalinity	160 parts per million
B.O.D.	36 parts per million
C.O.D.	1,056 parts per million
pH	7.2
Specific conductance	700
turbidity	20
Chlorides	242 parts per million
Iron	23,750 parts per million
Ammonia nitrogen	8.16 parts per million
Nitrite nitrogen	.714 parts per million
NO_3 nitrogen	.02 parts per million

21. As the result of information which was present on the sides of some of the drums, DER was able to identify some of the entities which had generated the material which was contained in those drums. Representatives of most of these entities came to the COA Pallets property, identified the material as wastes having been generated by their companies and arranged to have that material disposed of in a proper fashion.

22. Several months prior to the date of this hearing, the 80 to 90 drums, the labels upon which indicated that each contained sodium copper cyanide, were removed by persons unknown to DER. DER was never able

to determine what entity generated the material in those 80 to 90 drums or to where that material was removed.

23. COA Pallets cooperated with DER to the extent that it discontinued the two tier arrangement of said drums, that it transported several leaking drums to an area on its property where it had made an excavation, that it lined that excavation with a plastic liner and that it segregated the drums.

24. On April 4, 1979, Beitler returned to COA Pallets property and found that all the pails which had been stored there were gone and that approximately 300 drums remained.

25. On April 4, 1979, it was observed that these remaining drums were rusting. The pallets upon which some of these drums had been placed were rotting and breaking, which caused those drums to be not properly secured. Some of these drums were uncovered, and, with the addition of rain and snow, were overflowing. The liquid in the remaining drums was discolored and it gave off a chemical odor.

26. On April 4, 1979, the soil in the area wherein the drums are stored was even more discolored than it was in 1977 and 1978.

27. DER did not sample the liquid in any of the remaining drums on April 4, 1979.

28. On April 4, 1979, it appeared that the drum the contents of which were sampled on September 14, 1979, and other drums similar to that drum were still on COA Pallets property.

29. At all times between September 14, 1977, and April 4, 1979, chemical wastes were contained in the drums and pails which were stored on COA Pallets property.

30. DER never conducted any scientific tests of the soil upon which these drums and pails are and/or were situate.

31. According to soil maps and other written soil data, the soil upon which these drums are and/or were situate is Conestoga silt loam, which is a well-drained, deep soil.

32. Although DER never tested or monitored the groundwater in the area of COA Pallets property, it can reasonably be stated that some of the chemical wastes contained in any drum or pail stored on COA Pallets property which leaked, overflowed or was tipped or could leak, overflow or be tipped in the future have reached or will reach the groundwater under the soil on COA Pallets property.

33. COA Pallets has never received a permit from DER under the terms of which the storage of these chemical wastes was authorized.

34. DER has never approved the storage of these chemical wastes on COA Pallets property.

DISCUSSION

We have made a finding of fact that at all times between September 14, 1977, and April 4, 1979, chemical wastes were stored on property of COA Pallets at first in drums and pails and later only in drums.

This finding was based upon our several findings that:(1) benzene and other organic compounds were found to exist in a sample drawn from a leaking drum on September 14, 1977; (2) that many different chemicals, including large quantities of iron and cyanide, were found to exist in a sample drawn from a drum on September 22, 1977; (3) that a significant amount of iron and ammonia nitrogen and nitrite nitrogen were found to exist in a sample drawn from a samll stream of material which originated in the area where the drums and

pails were placed; (4) that the ground cover in the area in which these drums and pails are or were located was discolored and that the vegetation in the area appeared to be dead; (5) that this material in the drums and pails had a strong chemical odor which was irritating to the eyes and to the respiratory tract; (6) that information found on the sides of some of the drums enabled DER to identify and to contact some of the entities which had generated the materials which were found in those drums and pails; and (7) that representatives from those entities came to the storage site, identified the material as wastes and arranged for the proper disposal of same.

This first mentioned finding was buttressed by the testimony of Beitler that he was advised by Olliver, president of COA Pallets, on September 14, 1977, that Jerry Bove, the man who brought these drums and pails to COA Pallets property, told Olliver that those drums and pails contained industrial wastes. Although Jerry Bove could never be located and although Olliver refused to testify with regard to this matter at the hearing, we conclude that the statement attributed to Bove was properly received in evidence as a declaration against penal and pecuniary interest of both Bove and COA Pallets. See *Commonwealth v. Nash* 457 Pa. 296, 324 A.2d344 (1974); *Rudisill v. Cordes,* 333 Pa. 544, 5A.2d 217 (1939).

Counsel for COA Pallets, an extremely able trial lawyer, contends that because DER took no more samples of the contents of any drum being stored on COA Pallets property after March 22, 1978, and that because DER did not definitely prove that either of the drums the contents of which were definitely chemical in nature remained on the property on and after the date when DER issued the instant order to COA Pallets, we do not have a sufficient factual base from which we can conclude that chemical wastes were stored on this property on and after that date.

We cannot agree with this contention. We have found that on April 4, 1979, the soil in the area where these drums were being stored was even more discolored than it was on September 14, 1977, that on April 4, 1979, the liquid in the remaining drums was discolored and, most significantly, that the liquid in the remaining drums gave off a strong chemical odor.

We hold that DER produced evidence sufficient to create a presumption that chemical wastes continued to be stored on property of COA Pallets subsequent to the date when the instant order was issued. COA Pallets completely failed to rebut that presumption.

We have also made findings of fact that: (1) on April 4, 1979, almost six months after the order which is the subject of this appeal was issued, approximately 300 drums containing chemical waste remained on COA Pallets property; (2) These drums are rusting; (3) Some of these drums are not properly secured; (4) Some of these drums are uncovered; (5) Some of these drums are overflowing; and (6) That it can reasonably be concluded that quantities of chemical waste contained in some of these drums will reach the groundwater under the soil on COA Pallets property.

We must now decide whether DER had the authority, given the truth of all of the above findings, to order COA Pallets to remove the drums containing chemical waste from its property, to dispose of them at an acceptable disposal site and to excavate and remove all soil which had absorbed any spilled waste to an acceptable disposal site.

We begin with an examination of the provisions contained in the SWM Act, *supra*. In Section 9 (14) of that Act, 35 P.S. § 6009 (4), it is provided, as follows:

> "§6009. Prohibited Acts
>
> "It shall be unlawful for any person, municipality, county, or authority to:

* * *

"(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 3 (3) of the SWM Act, *supra*, 35 P.S. 6003 (3), the term "solid waste" is defined as follows:

"§6003. Definitions

* * *

"(3) 'Solid Waste' means garbage, refuse and other discarded materials including, but not limited to, solid and liquid waste materials resulting from industrial, commercial, agricultural and residential activities."

We have no difficulty in holding that the chemical waste being stored on COA Pallets property is "solid waste" within the meaning of the above statutory provision. There is no proof that this material was used or useful in any operation conducted by COA Pallets. It is clear that this material was discarded liquid waste from industrial activities.[1]

We have made a finding of fact that Olliver, president of COA Pallets, admitted to Beitler that he and Jerry Bove had entered into an arrangement under the terms of which Bove was to be permitted to store this solid waste on COA Pallets property, that thereafter Bove was to remove this solid waste and that Olliver was to be compensated for permitting said property to be so utilized. Although Olliver refused to testify with regard to this issue at the hearing, we hold that the statement attributed to him was properly received in evidence as an admission against the interest of COA Pallets,

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1. This material would also be "industrial waste" as that term is defined in Section 1 of The Clean Streams Law, *supra*, 35 P.S. § 691.1 and in Section 75.1 of the rules and regulations of DER which are issued under Section 6 of the SWM Act, *supra*, 35 P.S. § 6006, at 25 Pa. Code § 75.1.

Olliver's principal. See *Western Union Tel. Co. v. N.C. Direnzi, Inc.*, 442 F. Supp. 1 (D.C. Pa., 1977); *Pennsylvania R. Co. v. Brooks*, 57 Pa. 339 (1868). Unfortunately for COA Pallets, Bove disappeared before he removed this chemical waste and COA Pallets was placed in a position of having to store this solid waste on a more permanent basis than was contemplated.[2]

The next question is has COA Pallets stored this solid waste contrary to the rules and regulations of DER or in such a manner as to create a public nuisance.

In Section 75.28 of the rules and regulations of DER, issued under the SWM Act, *supra*, 25 Pa. Code § 75.28, it is provided, in relevant part, as follows:

> "§ 75.28. General Standards for Storage of Solid Waste.
>
> "(a) The storage of all solid waste shall be practiced so as to prevent the attraction, harborage or breeding of insects or rodents and to eliminate conditions harmful to public health or which create safety hazards, odors, unsightliness and public nuisances.
>
> "(b) A sufficient number of containers shall be provided to contain all waste materials generated during periods between regularly scheduled collections.
>
> "(c) Individual containers or bulk containers utilized for the storage of solid waste shall have the following physical characteristics:
>
> (1) Constructed in such manner as to be easily handled for collection.
>
> (2) Constructed of rust and corrosion resistant materials.
>
> (3) Equipped with tight-fitting lids.
>
> (4) Constructed in such manner as to be watertight, leak-proof, weather-proof, insect-proof and rodent-proof.
>
> "(d) Individual containers shall be used and maintained so as to prevent public nuisances.

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2. The fact that Bove breached his contract with COA Pallets by failing to remove this solid waste does not absolve COA Pallets from responsibility with regard to this solid waste because COA Pallets was not blameless with regard to the arrangement whereby this solid waste was placed on its land. See. *Philadelphia Chewing Gum Corp. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 35 Pa. Cmwlth 443, 387 A.2d 142, 150, 152 (1978).

* * *

"(e) Disposal containers shall be acceptable for storage of solid waste."

We hold that COA Pallets has violated this regulation in several particulars which are as follows: DER has demonstrated that the solid waste contained in these drums has either leaked or overflowed therefrom, that some of the drums are and have been uncovered, that some of these drums are not secured on pallets in a manner which will prevent them from tipping and leaking, that the solid waste contained in these drums gives off an irritating chemical odor, that at least at one time cyanide was present in at least one such drum, that the solid waste contained in some of these drums has reached the groundwater and that there is a reasonable likelihood that addtional quantities of the solid waste contained in some of these drums will reach the groundwater.

We next need to inquire as to whether COA Pallets has violated this regulation in that it has maintained a public nuisance by reason of the manner in which this chemical solid waste has been stored on its property. In *Elias v. Department of Environmental Resources*, 1 EHB 176 (1972) (EHB Docket No. 72-153), affirmed as modified, 10 Pa. Cmwlth 489, 312 A.2d 486 (1973), we stated that "A public nuisance is the doing of or the failure to do something which injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public, and as a nuisance which causes hurt, inconvenience, or damage to the public generally, or such part of the public as necessarily comes into contact with it in the exercise of a public or common right. It is a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency, or morals of the citizens at large, resulting either from an act not warranted by law, or from neglect of a duty imposed by law."

We are convinced that both prior to and subsequent to the date when the instant order was issued there was a significant and, indeed, real danger to the safety and health of the public caused by the improper storage by COA Pallets of hundreds of 55 gallon drums filled with chemical solid waste. It cannot be denied that anyone coming into contact with this chemical solid waste could suffer injury and it is also true that contamination or the potential of contamination to the groundwater caused by the leaking of this chemical solid waste thereto could adversely affect the public health. We hold, therefore, that COA Pallets has maintained a public nuisance on its property.

DER has the power, under and by virtue of the provisions contained in Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, added December 3, 1970, 71 P.S. 510-17, to order such a nuisance as is here present to be abated and removed. DER has properly exercised such power in that portion of its order to COA Pallets of October 16, 1978, in which DER directed COA Pallets to remove all drums and containers, chemicals, industrial wastes, and other pollutants which have been deposited on the site of COA Pallets.

Before we address the remaining directives contained in said order we will deal with certain other issues which have been raised by DER.

DER contends that COA Pallets has violated Section 7 (a) of the SWM Act, *supra*, 35 P.S. 6007 (a), in that COA Pallets has used its land as a solid waste processing or disposal area of a solid waste management system without first obtaining a permit from DER.

COA Pallets has certainly not utilized its land to process this chemical solid waste[3] and there is no proof that it ever intended so to do. Further

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3. In Section 75.1 in the rules and regulations of DER, *supra*, 25 Pa. Code 75.1, the term "processing of wastes" is defined as "any technology applied for the purpose of reducing the bulk of solid waste materials or any technology designed to convert part or all of the waste materials for reus "

more, although by reason of the inattentiveness of COA Pallets some of this chemical solid waste was "disposed of" when it leaked or spilled from the drums and pails, it cannot be stated or implied that this land is a solid waste disposal area.

It is clear that this land was utilized as a solid waste storage area. We cannot point to any general requirement that one must have a permit to store solid waste on his land, although it can be argued that when one is storing "hazardous waste" on his land, as that term is defined in Section 75.1 of the rules and regulations of DER, *supra*, 25 Pa. Code § 75.1, such a permit is necessary.[4]

Since we have already held that DER has the right to require COA Pallets to remove this chemical solid waste from its property, we need not now decide whether COA Pallets was also in violation of the SWM Act for failing to have a permit.

DER next contends that COA Pallets has violated Section 9 (1) of the SWM Act, *supra*, 35 P.S. §6009 (1), by permitting the dumping or depositing of these solid wastes onto the surface of the ground without first obtaining a

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4. In 25 Pa. Code §75.1 the term "hazardous waste" is defined as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (A) cause, or significantly contribute to an increase in mortality or an increase in serious, irreversible or incapacitating reversible illness; or (b) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of or otherwise managed".

We would have no difficulty in holding that any drum in which there was contained cyanide in the concentration present in the drum the contents of which were sampled on September 22, 1977, contained "hazardous waste".

It can be argued that by virtue of the language contained in 25 Pa. Code § § 75.31 (c)(4) and 75.31 (d), any site upon which "hazardous waste" is to be stored should be a site for the use of which a permit must be issued.

permit from DER. By reason of the cavalier manner in which this chemical solid waste was stored, some of it was deposited on the surface of the ground. Although it can be argued that COA Pallets was required to secure a permit for the reason that it knew or should have known that such improper storage would lead to leaking or spillage, we are not confident that this is the type of dumping or depositing of solid waste with which the legislature was concerned when it enacted Section 9 (1) of the Act. Again, we need not decide this issue in light of our earlier holding in support of this order.

The second statute to which , according to DER, COA Pallets is subject by reason of its chemical solid waste storage activity is The Clean Streams Law.

DER directs our attention to the provisions contained in Section 402 of The Clean Streams Law, *supra*, 35 P.S. § 691.402, as follows:

> "§691.402. Potential Pollution.
>
> "(a) Whenever the board[5] finds that any activity, not otherwise requiring a permit under this act, including but not limited to the impounding, handling, storage, transportation, processing or disposing of materials or substances, creates a danger of pollution of the waters of the Commonwealth or that regulation of the activity is necessary to avoid such pollution, the board may, by rule or regulation, require that such activity be conducted only pursuant to a permit issued by the department or may otherwise establish the conditions under which such activity shall be conducted, or the board may issue an order to a person or municipality regulating a particular activity. Rules and regulations adopted by the board pursuant to this section shall give the persons or municipalities affected a reasonable period of time to apply for and obtain any permits required by such rules and regulations.
>
> "(b) Whenever a permit is required by rules and regulations issued pursuant to this section, it shall be unlawful for a person or municipality to conduct the activity regulated except pursuant to a permit issued by the department. Conducting such activity without a permit, or contrary to the terms or conditions of a permit or conducting an activity contrary to the rules and regulations of the

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5. By virtue of the provisions contained in Section 1901-A of the Administrative Code, *supra*, 71 P.S. 510-1(22), DER assumed the duties of the Sanitary Water Board, which is the "board" referred to in this provision.

board or conducting an activity contrary to an order issued by the department, is hereby declared to be a nuisance."

DER found, and we certainly agree, that the storage of these chemical solid wastes by COA Pallets created a danger of pollution of the waters of the Commonwelath, in this case the groundwaters.

DER has, in accordance with this statutory provision, established the conditions under which the storage of such substances could be conducted. As we have seen, the Environmental Quality Board regulated the storage of solid waste when it adopted Section 75.28 of the rules and regulations of DER, 25 Pa. Code §75.28. As we have already held, COA Pallets has violated this regulation. Furthermore, the Environmental Quality Board adopted Section 101.3 of the rules and regulations of DER, 25 Pa. Code § 101.3, in which it is provided, in part, as follows:

"§101.3. Activities utilizing polluting substances.

"(a) All persons and municipalities engaged in an activity which includes the impoundment, production, processing, transportation, storage, use, application or disposal of polluting substances shall take all necessary measures to prevent such substances from reaching waters of the Commonwealth, directly or indirectly, through accident, carelessness, maliciousness, hazards of weather or from any other cause."

COA Pallets has violated this regulation by reason of the improper manner in which this chemical solid waste has been stored. COA Pallets has conducted a regulated activity contrary to established rules and regulations of DER. As such, COA Pallets has committed a public nuisance, as declared in Section 402 (b) of The Clean Streams Law, *supra*, 35 P.S. § 691.402 (b).

DER had the right to issue an order to COA Pallets to abate this nuisance under and by virtue of the provisions contained in Section 610 of The Clean

Streams Law, *supra*, 35 P.S. § 691.610[6] and under and by virtue of the provisions contained in Section 1917-A of the Administrative Code, *supra*.

The only remaining questions are whether DER had the right to require COA Pallets to dispose of this chemical solid waste at a site approved by DER and whether DER had the right to require COA Pallets to excavate all soil that has absorbed any spilled liquid from these containers and to remove such soil to a site approved by DER.

If DER did not have the right to require COA Pallets to dispose of this material at a site approved by DER, there could again be created the very problem which DER sought here to abate and there could be created a far more serious problem. If 300 fifty-five gallon drums of chemical solid waste could

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6. Section 610 of The Clean Streams Law provides as follows:

"§691.610. Enforcement orders

"The department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. Such orders shall include, but shall not be limited to, orders modifying, suspending or revoking permits and orders requiring persons or municipalities to cease operations of an establishment which, in the course of its operation, has a discharge which is in violation of any provision of this act. Such an order may be issued if the department finds that a condition existing in or on the operation involved is causing or is creating a danger of pollution of the waters of the Commonwealth, or if it finds that the permittee, or any person or municipality is in violation of any relevant provision of this act, or of any relevant rule, regulation or order of the board or relevant order of the department: Provided, however, That an order affecting an operation not directly related to the condition or violation in question, may be issued only if the department finds that the other enforcement procedures, penalties and remedies available under this act would probably not be adequate to effect prompt or effective correction of the condition or violation. The department may, in its order, require compliance with such conditions as are necessary to prevent or abate pollution or effect the purposes of this act. An order issued under this section shall take effect upon notice, unless the order specifies otherwise. An appeal to the board of the department's order shall not act as a supersedeas: Provided, however, That, upon application and for cause shown, the board or the Commonwealth Court may issue such a supersedeas. The right of the department to issue an order under this section is in addition to any penalty which may be imposed pursuant to this act. The failure to comply with any such order is hereby declared to be a nuisance."

be deposited in an area over which DER had no control there could be an extremely serious health hazard created. It is absolutely essential that DER be permitted to have control over the disposition of this material and we urge COA Pallets to permit no further action with regard to such disposition without first securing approval therefor from DER.[7]

The final issue in this matter is whether DER rightfully required COA Pallets to excavate and to properly dispose of all soil on its property which has absorbed any spilled liquid from these containers.

It is clear that chemical solid wastes from these drums and pails reached the soil on COA Pallets property in the area where these drums and pails were stored. This was apparent by reason of the continuing discoloration of the ground cover.

If DER had performed appropriate testing of this soil, we would have been given insight into whether this soil was so adversely affected by the discharge of these chemical solid wastes as to then create or as to potentially create a health hazard.

Until such time as DER can prove that it is environmentally necessary for there to be excavation and proper disposal of any soil on COA Pallets property, we will not affirm that portion of the order of October 16, 1978, in which such action was directed.

CONCLUSIONS OF LAW

1. This board has jurisdiction over the parties to this appeal and of the subject matter hereof.

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7. We are, to say the least, dismayed over what appears to be the unauthorized disposition of 80 to 90 drums which did contain or may have contained cyanide. See finding of fact no. 22, *infra*.

2. COA Pallets stored "solid waste" on its property as that term is defined in Section 3 (3) of the SWM Act, 35 P.S. §6003 (3).

3. COA Pallets stored this solid waste on its property pursuant to an arrangement negotiated by its president, for pecuniary gain, and a third person.

4. COA Pallets has violated the provisions contained in Section 9 (4) of the SWM Act, 35 P.S. § 6009 (4), by reason of the facts that COA Pallets (a) stored solid waste on its property contrary to the provisions contained in Section 75.28 of the rules and regulations of DER, 25 Pa. Code § 75.28 and (b) created a public nuisance by reason of such storage.

5. COA Pallets has created a danger of pollution of the waters of the Commonwealth by reason of the improper manner in which it stored chemical solid waste on its property.

6. COA Pallets has violated the provisions contained in Section 101.3 of the rules and regulations of DER, 25 Pa. Code § 101.3, by failing to take all necessary measures to prevent the chemical solid wastes stored on its property from reaching waters of the Commonwealth.

7. COA Pallets has, by such violation of Section 101.3 of the rules and regulations of DER, maintained a public nuisance on its property, per the provisions contained in Section 402 (b) of The Clean Streams Law, 35 P.S. § 691.402 (b).

8. DER had the right to issue an order to COA Pallets to abate the nuisance which it created and maintained under and by virtue of the provisions contained in Section 1917-A of the Administrative Code, 71 P.S. § 510-17 and under and by virtue of the provisions

contained in Section 610 of The Clean Streams Law, 35 P.S. 691.610.

9. DER properly exercised its discretion in this matter by issuing an order to COA Pallets to remove all drums and containers, chemicals, industrial wastes and other pollutants which are on its property and to dispose of them at a site approved by DER.

10. DER can not require COA Pallets to excavate soil on its property and to remove such soil to a site approved by DER, until such time as DER can prove, by scientific testimony or other appropriate measures, that such soil has been contaminated and constitutes a present or potential health hazard.

O R D E R

AND NOW, to-wit, this 17th day of December, 1979, it is ordered that the appeal of COA Pallets, Inc. from that portion of the order issued to it by the Commonwealth of Pennsylvania, Department of Environmental Resources, dated October 16, 1978, under which COA Pallets, Inc. is required to remove all drums and containers, chemicals, industrial wastes and other pollutants which have been deposited on its site and dispose of them at a site approved by said department is dismissed.

It is further ordered that the appeal of COA Pallets, Inc. from that portion of the order issued to it by said department on the above date under which COA Pallets, Inc. is required to excavate and remove soil on its property which may have absorbed chemical solid waste is sustained.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

THOMAS M. BURKE
Member

Date December 17, 1979

COMMONWEALTH OF PENNSYLVANIA

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ALLEGHENY COUNTY SANITARY AUTHORITY : Docket No. 78-053-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR DER MOTION TO QUASH APPEAL

Appellant, Allegheny County Sanitary Authority, (Alcosan), on or about October 28, 1978, filed an application with the Department of Environmental Resources (DER) for partial reimbursement of the cost of operating its sewage treatment and collection facilities during the year 1976 as provided for by Act 339, the Act of August 20, 1953, P.L. 1217, *as amended*, 35 P.S. Section 701, *et seq*, (Act 339).[1] The DER by letter dated March 31, 1978, informed Alcosan that certain of the sewerage collection facilities described in its application, including the Turtle Creek and Chartiers Creek interceptors were ineligible for funding. The letter stated that Alcosan had previously been informed that those facilities were ineligible for funding by letter dated August 16, 1960. Alcosan filed an appeal from the DER's March 31, 1978, letter asserting that it is aggrieved by the DER's refusal to "include all of the interceptor sewer facilities of the Authority as eligible for participation under Act 339 for the year 1976".

The DER has filed a motion to quash appeal contending that Alcosan is precluded at this time from contesting DER's determination of ineligibility of these collection facilities because the determination was made by the Department of Health, the predecessor agency to the DER, by an August 16, 1960, letter to Alcosan and Alcosan's failure to appeal the August 16, 1960, action of the Department of Health caused the decision to become final, precluding Alcosan from contesting it at a later date. The DER also contends that Alcosan was aggrieved in

1. Act 339 provides, *inter alia*, that the Commonwealth will pay a maximum of 2% of the cost of operating, maintaining, repairing, replacing and other expenses relating to sewage treatment plants.

July 13, 1961, and July 18, 1961, when the Department of Health awarded Alcosan payments under Act 339 which did not include subsidies for the collection facilities in question and thus Alcosan should have appealed at that time. Alcosan has opposed the DER's motion to quash; and both parties have submitted briefs in support of their respective positions.

The DER in its brief cites *Standard Lime and Refracteries Co. vs. DER*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971) and *DER v. Wheeling-Pittsburgh Steel Corp.*, 22 Pa. Commonwealth Ct. 380, 348 A.2d 765 (1975), affirmed at 473 Pa. 432, 375 A.2d 320 (1977), for the proposition that failure to exhaust available administrative remedies renders an agency decision final and immune from a subsequent attack on the merits.

The Commonwealth Court in *Bethlehem Steel Corporation vs. Comm. of Pa, DER*, ____ Pa. Commonwealth Ct.____, 390 A.2d 1383 (1978) recently addressed the question of finality of an administrative decision and its affect on a subsequent related proceeding before the administrative agency. The Commonwealth Court limited the applicability of its decision in *Wheeling-Pittsburgh* to instances where a party attempts to collaterally attack a final DER order in a proceeding to enforce the order. The Court stated that the doctrine of *res judicata* should be applied to decide whether a person is barred from disputing an earlier DER determination "in an entirely new proceeding before the DER". For *res judicata* to come into play, four elements must be present: (1) identity of the thing sued for; (2) identity of cause of action; (3) identity of the parties; and (4) identity in the quality of the parties for or against whom the claim is made. *Bethlehem Steel Corp. vs. DER, supra,* and, *Primrose Mining Inc. vs. DER,* EHB Docket No. 77-184-B (issued October 4, 1978).

We are unable to say, based on the record before the board, that the first element, the identity of the thing sued for, is the same in this appeal as in the original Department of Health action. Appellant contends that the Department of Health's determination was only for the year 1959 and should not in any way be interpreted as a decision on applications for funding submitted in subsequent years. Alcosan, as all other applicants for funds, must submit a separate application for each year that it seeks reimbursement. We agree that the August 16, 1960, letter constitutes a final action of the Department of Health and that the Department of Health's determination of eligibility for funds for the year 1959 can no longer be challenged. However, we are unwilling to say that the decision is also determinative of the eligibility of the sewage facilities operating during 1976.

Appellant also asserts that the application for funds for 1976 is distinct, unique and different from the application which was rejected in 1960. We are unable to tell from the record before us whether or not the differences in the applications are significant enough to cause a change in the "identity of the thing sued for". Also, we are cognizant of the fact that 17 years have passed since the decision was made, during which time the DER has adopted regulations governing the eligibility of sewerage facilities (September 2, 1971) and later amended those same regulations (April 7, 1975). We are unable to tell whether the DER is applying the same legal and factual criteria in evaluating the eligibility for funding of sewerage collection facilities. An appeal should be dismissed before hearing only when a case is clear and free from doubt and all doubts must be resolved against the moving party. *Davis v. Pennzoil Co.*, 438 Pa. 194, 264 A.2d 597 (1970). Thus, we are of the view that the appellant should have the opportunity to show why the sewage facilities described in its October 28, 1977, application are eligible for funding under Act 339.

O R D E R

AND NOW, this 1st day of February, 1979, it is hereby ordered that DER's petition to quash appeal is denied.

The DER shall file a pre-hearing memorandum in accordance with the requirements of the board's Pre-Hearing Order No. 1 dated April 29, 1978, within 15 days after receipt of this order.

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H. L. KENNEDY : Docket No. 78-035-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION & ORDER
SUR APPELLANT'S PETITION FOR DISCOVERY

Appellant, H. L. Kennedy, on March 31, 1978, filed with this board a request for a subpoena for the production of certain documents from the Department of Environmental Resources (DER). The DER, on April 24, 1978, filed an answer objecting to the issuance of the subpoena on the basis that the documents requested are irrelevant to this appeal, confidential and not identified with the requisite specificity. Both parties have submitted briefs in support of their positions and the matter is now before the board for disposition.

The appeal is from the DER's refusal to issue a mine drainage permit to appellant to conduct a surface mining operation in the Big Sandy Creek Watershed of Wharton Township, Fayette County. The DER's denial letter states in part:

> "...As we discussed with you at our April 16, 1976, meeting, part of our review of the potential environmental effects of your operation consisted of a study undertaken by Frank T. Caruccio of Cargeid International under contract with the Department. As you are aware, this study consisted of, among other things, an analysis of core samples from the area of your proposed operation.
>
> "Based on our review, we must deny your permit application #3374SM74. Your proposed operation has the potential for causing pollution, including acid mine drainage, to the surface and groundwaters and, therefore, threatens the protected uses and water quality of the receiving stream. In addition, your proposed operation threatens the environmental and recreational values of the area."

Appellant's discovery request focuses on three areas, the study by Frank T. Caruccio, the disposition by the DER of other applications for permits to mine in Wharton Township, and water quality reports on the Big Sandy Creek and Meadow Run Watersheds.

I. Caruccio Study.

In paragraph 1 of its request, appellant asks the DER to produce:

> "1. Copies of all reports prepared by Dr. Frank T. Caruccio and/or Cargied International concerning surface mining operations in Wharton Township, Fayette County. It is noted that two reports specifically deal with the proposed Kennedy Strip site operation and the Appellant believes there were at least 15 sites studied and/or reported on by Dr. Caruccio and/or Cargied International."

The DER initially objects to furnishing appellant with the reports prepared by Frank T. Caruccio (Caruccio reports) other than those reports which relate to the site for which appellant has sought the mine drainage permit (Kennedy site) for reason that the reports are irrelevant to this appeal.

Section 21.15(d) of the board's rules of procedure states that the scope of discovery shall be consistent with the rules of practice in the Courts of Common Pleas of the Commonwealth. Pennsylvania Rule of Civil Procedure (Pa.R.C.P.) 4007(a) provides that the scope of discovery is limited to "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." Thus, matters which are clearly irrelevant are not discoverable. "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." *Pennsbury Village Condominium v. DER*, EHB Docket No. 76-028-C (Opinion and Order issued July 12, 1976).

In this case, the DER contends that it did not rely on the Caruccio reports, other than those which specifically analyze the Kennedy site, in making its decision. Even so, we are not prepared to say that the Caruccio reports are manifestly irrelevant to this case. Given the DER's pre-hearing memorandum which indicates that the DER will present much watershed oriented evidence including testimony of aquatic surveys, hydrologic surveys and hydrogeochemical surveys of the watershed, we are unable, on the record before us, to state that the Caruccio reports on the watershed are irrelevant. If there is any doubt as to whether discovery is within Rule 4007(a), the discovery should be allowed. *Yoffee v. Golin*, 90 Dauph. 39, 45 D & C 2d 318 (1968) and *Cagliandi v. Tozzi*, 44 D & C 492 (1968).

The DER also asserts that the Caruccio reports, except for those which analyze the Kennedy site, result from test borings and drillings taken by applicants other than appellant and that under §4(a)(1) of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 §1396.4(a)(1), information which results from test borings and drillings is confidential and thus privileged. Section 4(a)(1) of the Surface Mining Conservation and Reclamation Act provides, in part, that:

> "The information resulting from test borings, shall be deemed confidential information and shall not be deemed a matter of public record."

The purpose of the confidentiality provision is to assure that the information derived from the test drillings and submitted to the DER is not disclosed to the economic competitors of the applicant.

Privileged information is protected from discovery by Pa.R.C.P. §4007(a) which defines the scope of discovery and Pa.R.C.P. 4011 which places limitations upon discovery. Rule 4007(a) provides that discovery is limited to "any matter not privileged..." and Rule 4011 provides that: "No discovery or inspection shall be permitted which...(c) relates to matter which is priviliged..." Priviliged information includes records and other confidential information which are protected from disclosure by statute. 5A ANDERSON PENNSYLVANIA CIVIL PRACTICE §4011.223 and GOODRICH AMRAM §4011(c):1. In *Appeal of Hilton*, 199 Pa. Super. 586, 186 A.2d 635 (1962), the Pennsylvania Superior Court held that Section 4(e) of the County Assessment Act, Act of June 21, 1939, P.L. 626, 72 P.S. 5452.4 exempts certain information from discovery. Section 4(e) lists as a duty of the Board of Property Assessment, Appeal and Review the requirement "[t]o establish and maintain in its office records of cubical contents of buildings, surveys, maps, sales and assessments and with the exception of the cubical contents, records and sales records, to permit inspection thereof by the public at all times during office hours". The Court stated that "the records of the Board which are not made subject to public inspection under Section 4(e) of the County Assessor's law are of a confidential nature and protected from discovery under the procedural rules and the law". Id. 199 Pa. Super. 586 at 590. See also *Marks Appeal*, 121 Pa. Super. 181 (1936).

It appears that when the legislature decides that the public interest favors withholding certain information from public disclosure, the Court will respect

the legislature's decision and treat the information as privileged under Pa.R.C.P. 4011(c). Hence, the DER need not produce the information contained in the Caruccio reports which results from the test borings submitted by applicants other than appellant. However, any information from the Caruccio reports which the DER relied on in formulating the decision to deny appellant's application shall, notwithstanding the fact that it might be deemed confidential by Section 4(a)(1) of the Surface Mining Conservation and Reclamation Act, be produced as such information will, in any event, be (or should be) disclosed at trial.

II. Applications for Permits to Mine in Wharton Township.

In paragraph 3 of its request, appellant asks the DER to produce:

> "3. Copies of all mine drainge permit applications which were filed with the Department of Environmental Resources concerning strip mine operations in the Big Sandy Run and Meadow Run Watersheds of Wharton Township, Fayette County, Pennsylvania and some indication as to how many of the said applications were granted; how many were denied; and how many are still pending."

The DER in its brief has stated that it will provide appellant with a list of names of the applicants who have requested approval to conduct surface mining in the Big Sandy Creek Watershed of Wharton Township. However, it objects to producing the actual mine drainage applications because it believes the applications are irrelevant to this appeal and constitute confidential information under Section 4(a)(1) of the Surface Mining Conservation and Reclamation Act. With respect to relevance, appellant is alleging that the DER has discriminated against appellant in its review and issuance of permits to mine in the Big Sandy Creek Watershed of Wharton Township, apparently to the extent that the discrimination constitutes a violation of the equal protection clause of the 5th and 14th Amendments of the U. S. Constitution. We agree with the DER that this is an extremely difficult allegation to prove; however, as we stated in *U. S. Steel v. DER*, EHB Docket No. 72-397 (Opinion and Order issued October 31, 1974), the burden of proving facts which support appellant's contention should not be made more difficult by withholding this information; especially when producing these documents will impose little or no burden upon the DER.

Some of the information given in the applications results from test borings and thus have been declared confidential by Section 4(a)(1) of the Surface Mining Conservation and Reclamation Act. For the reasons previously stated herein, the DER is permitted, under Pa.R.C.P. §4011(c) to withhold that information from discovery.

III. Water Quality Reports.

Appellant in paragraph 2 of its request asks the DER to produce:

> "2. Copies of all reports, surveys or analysis or other documents relating to certain water quality reports concerning Big Sandy Run and the Meadow Run Watersheds of Wharton Township, Fayette County, Pennsylvania."

The DER objects to producing the documents requested by paragraph 2 of appellant's request for subpoena on the basis that the appellant has not specified the information sought with sufficient specificity to enable the DER to respond. Discovery will be refused when the scope of the inquiry is not clear and is vague (5A ANDERSON PENNSYLVANAIA CIVIL PRACTICE §4011.101) or is not limited by time (5A ANDERSON PENNSYLVANIA CIVIL PRACTICE §4011.98).

Appellant, at page 13 of its brief, has agreed to limit the request to:

> "...all water quality reports and analyses pertaining to the Big Sandy Creek Watershed and the Meadow Run Watershed conducted for or on behalf of DER between the time Kennedy submitted his application to DER (December 19, 1974) and the time DER denied the application (February 15, 1978) and all water quality reports pertaining to the Big Sandy Creek and Meadow Run Watershed consulted or referred to by DER in connection with its review of Kennedy's application without regard to when, by whom or for whom such reports or analyses were prepared."

We believe that this limitation on appellant's request enables the DER to identify the information requested and thus adequately meets the DER's objection.

O R D E R

AND NOW, this 6th day of February, 1979, it is hereby ordered that a subpoena is issued to appellant, H. L. Kennedy to require the production of the following documents from the DER:

1. The documents requested by paragraph 1 of appellant's March 19, 1978, letter requesting subpoena; except that the DER need not produce information which results from the test borings of applicants for permits other than appellant unless the DER relied on the information in formulating its decision to deny appellant's application for permit.

2. All water quality reports and analyses pertaining to the Big Sandy Creek Watershed and the Meadow Run Watershed conducted for or on behalf of DER between the time Kennedy submitted his application to DER (December 19, 1974) and the time DER denied the application (February 15, 1978), and all water quality reports pertaining to the Big Sandy Creek and Meadow Run Watersheds consulted or referred to by DER in connection with its review of Kennedy's application without regard to when, by whom or for whom such reports or analyses were prepared.

3. The documents requested by paragraph 3 of appellant's March 19, 1978, letter requesting subpoena, except that the DER need not produce that information which results from the test borings of the applicants.

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UNITED STATES STEEL CORPORATION : Docket No. 78-162-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

The Department of Environmental Resources (DER) has filed a motion to dismiss an appeal by United States Steel Corporation (USSC) from a denial of an application for a determination of minor significance under 25 Pa. Code §123.1(a)(9) for emissions from three blast furnace casthouses.

The DER, in its motion, contends that the application does not, as a matter of law, satisfy the requirements of 25 Pa. Code §123.1(a)(9) because USSC admits in its application that the fugitive emissions from its blast furnaces are uncontrolled. Paragraph 5E of the application form asks the applicant to give a "Description of Control Devices, Control Measures, Etc." for the source. In response, USSC answered "None".

25 Pa. Code §123.1(a)(9) provides:

> "(a) No person shall cause, suffer, or permit the emission into the outdoor atmosphere of any fugitive air contaminant from any other source than the following:
>
> * * *
>
> (9) Sources and classes of sources, other than those identified in paragraphs (1) - (8) of this subsection, from which the operator has obtained a determination from the Department that fugitive emissions from the source, after the appropriate control meet the following requirements:
>
> (i) the emissions are of minor significance with respect to causing air pollution; and
>
> (ii) the emissions are not preventing or interfering with the attainment or maintenance of any ambient air quality standard. (Emphasis supplied.)

USSC replies to the DER's motion to dismiss by averring that:

> "...the gases and fumes from the blast furnace operation are directed to a venturi scrubber. Some residual fugitive emissions during certain phases of blast furnace operation are not captured by the existing air pollution control equipment. Appellant is minimizing and further controlling these residual emissions by appropriate improvements in operating practices and procedures as indicated in Paragraph 9 of Appellant's application. By utilizing effectively the existing air pollution control equipment and by improving operating practices and procedures, Appellant has satisfied the 'after appropriate control' requirement of §123.1(a)(9) and is otherwise entitled to a determination that any such residual fugitive emissions are of minor significance."

The motion to dismiss and USSC's reply thereto sets at issue such factual questions as the types of emission control devices and/or practices used by USSC at the blast furnace casthouses, whether the devices and/or practices satisfy the "after appropriate control" prerequisite of §123.1(a)(9) and the mixed question of law and fact of what is meant by "appropriate control".

Since we find that there are factual issues which must be decided before we can determine whether the DER acted properly in denying USSC's application for minor significance, we must deny the DER's motion to dismiss. "An appeal should be dismissed before hearing only when a case is clear and free from doubt and all doubt must be resolved against the moving party." *Davis v. Pennzoil Co.*, 438 Pa. 194, 264 A.2d 597 (1970).

ORDER

AND NOW, this 9th day of April, 1979, the DER's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

DATED: April 9, 1979

pmg

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LACKAWANNA REFUSE REMOVAL INCORPORATED d/b/a NORTHEASTERN LAND DEVELOPMENT COMPANY

Docket No. 79-024-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

This matter concerns the most serious of environmental issues, the disposal of hazardous wastes.

Lackawanna Refuse Removal Incorporated (Lackawanna), until March 2, 1979, was authorized by Solid Waste Permit No. 100920 to operate a landfill (Old Forge Landfill) for the disposal of solid wastes in Old Forge Borough and Ransom Township, Lackawanna County. On March 2, 1979, the Commonwealth of Pennsylvania, Department of Environmental Resources, (DER) issued an order to Lackawanna suspending the solid waste permit and requiring immediate cessation of the landfill's operation. The order also required Lackawanna to perform the following acts at its landfill:

> "c. Lackawanna Refuse Removal Incorporated shall on March 6, 1979 at 9 A.M. and under the supervision of the Department of Environmental Resources begin to excavate through the wastes contained in Pit #5 or areas thereof to be designated by the Department. Said excavation is for the purpose of ascertaining the location of 55 gallon drums or other containers of Hazardous Waste deposited in the landfill.
>
> "d. Lackawanna Refuse Removal Incorporated shall sample, or permit the sampling by the Department, of any containers discovered during the excavation process described in c above.
>
> "e. Lackawanna Refuse Removal Incorporated shall remove and dispose of any or all drums containing hazardous waste in a manner approved by the Department.
>
> "f. Lackawanna Refuse Removal Incorporated shall remove and dispose of any soil that has been determined by the Department to contain or be contaminated by Hazardous Waste deposited at this site. Said disposal of the soil material must be in a manner approved by the Department."

Lackawanna, on March 5, 1979, filed an appeal from the DER order with this board and simultaneously filed a petition for supersedeas. Hearings were held on the supersedeas request in Harrisburg on March 21, 1979, in Wilkes-Barre on March 27, 28 and 29, 1979, and again in Harrisburg on April 23, 1979. Appellant and the DER have each filed a memorandum of law.

The order was issued because the DER determined that Lackawanna was in the business of surreptitiously hauling and disposing of 55-gallon drums containing wastes and emptying tank trucks containing 5,500 to 6,500 gallons of liquid wastes at the landfill without DER's approval. 25 Pa. Code 75.26 prohibits the disposal of liquids and hazardous wastes in a landfill until the method of disposal, suitability of the site and plan of operation have been approved by the DER.

Edward Cherkoski, a foreman for Lackawanna whose duties included the loading and driving of trucks, estimates that over 100,000 55-gallon drums containing liquid and solid wastes have been buried at the Old Forge landfill since September 1, 1978. He testified that 6 or 7 truckloads of drums, 60 to 80 drums per load, were buried there each day from September 1, 1978, until December 1978 when he quit working for Lackawanna.

Most of the drums were hauled from the Simon Wrecking Company yards in Williamsport and Reading. Others were picked up at the Chamberlain Munitions plant in Scranton, the Avco Chemical Company plant in Williamsport and the Textile Chemical Company.

Donald Sandly was hired by Peter Iacavazzi, the President and owner of Lackawanna, to drive a tank truck. During the same period of time, September 1978 until January 1979, he hauled liquid wastes from the Simon Wrecking Company yards in Reading and Williamsport and the Avco Chemical Company plant in Williamsport to either the Old Forge landfill or a yard used by Lackawanna in Scranton to house and maintain its trucks and other equipment (Scranton yard). All his trips were made at night. Sandly was instructed to stop in transit at the Skyline Diner to call Iacavazzi. He would then be told to take the load to either the Old Forge landfill or the Scranton yard.

If Sandly drove his tank truck to the landfill he would turn off its lights as he left the highway and proceeded to a designated area. He would open a valve and let the wastes flow into a previously dug trench which would later be covered with dirt. When he took the truck to the Scranton yard, he would park

it and leave. On one instance he watched Peter Iacavazzi attach a hose to the drain valve on the truck and drain the green colored liquid waste into a sewer drain in the floor. When the liquid backed up, some spilled onto Sandly's shoes, decomposing leather on the soles.

Sandly also hauled 55-gallon drums to the landfill. The procedure was the same. The trips would be at night. He would stop, in transit, at the Skyline Diner and call Iacavazzi for instructions on where to take the drums. When instructed to deliver them to the landfill, he would put out the lights upon approaching the landfill, drive to a pre-determined spot and roll the drums off the back of the truck. Usually the drums would be immediately buried by another Iacavazzi employee operating a bulldozer.

Jack Hunsinger also worked for Lackawanna during the period from September 1, 1978, until January 1, 1979. He also drove a tank truck hauling liquid wastes from the Simon Wrecking Company lots in Williamsport and Reading and the Avco Chemical Company plant in Williamsport. He made two trips per night, five days a week. He would also stop in transit and call either Iacavazzi or a foreman employed by Lackawanna known as "Birdie" for instructions on whether to take the waste to the Old Forge landfill or the Scranton yard, depending on whether or not such a person as a DER inspector was present at the landfill. Once, Hunsinger did arrive at the landfill from a plant in Philadelphia with a load to dump when DER inspectors were there. He left quickly when another Lackawanna employee yelled "Get going". The DER inspector followed and a 65-70 m/p/h chase of a tank truck by a jeep ensued.

Hunsinger also hauled wastes from the Scranton yard to the Old Forge landfill, and he also discharged liquids from his tank truck to sewer drains. He also hauled loads of 60-80 55-gallon drums to the landfill.

Richard Chercoski started working for Lackawanna in November 1977 as a tractor-trailer driver. In September of 1978, he started hauling 55-gallon drums filled with liquid and gaseous wastes to the Old Forge landfill from the Simon Wrecking Company's Reading and Williamsport yards.

Petitioner disputes the evidence on waste drum dumping and tank truck waste discharge at the landfill only as to quantity. It contends that no more than 11,000 waste drums were buried from August 16, 1978, until December 24, 1978.[1]

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1. Petitioner entered into the record a ledger statement showing that it received $115,507 for disposing of the waste drums from August 16, 1978, until December 24, 1978.

Petitioner argues that a supersedeas should be granted because the DER did not sustain the allegations in its March 2, 1979, order that the wastes buried at the landfill were "hazardous".

Hazardous waste is defined by 25 Pa. Code 75.1 as:

> "A solid waste or a combination of solid wastes which, because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of or otherwise managed."

Petitioner is correct when it contends that the DER is unable to identify the contents of the buried drums. Nevertheless, sufficient evidence was presented for us to conclude that the drum wastes and tank truck wastes buried at the landfill present a potential hazard to human health and the environment.

Although the drivers were unable to identify the wastes, they were able to read the warning labels on the drums. Some were marked with a skull and cross-bones, others were marked "HAZARDOUS", "POISONOUS" and "FLAMMABLE".

Also, it is clear from the surreptitious nature of the transport of these wastes that Lackawanna was attempting to keep the identity of the disposal operation a secret. The midnight dumps described by Sandly, Hunsinger's 70-mph tank truck-jeep chase, the in transit phone calls to insure no one from DER would be at the site when the truck arrived, as well as the instructions to the drivers by Iacavazzi to say, if they were stopped, that the waste was a detergent, were all part of a concerted effort to conceal the operation.

The employees were exposed to the wastes when handling the drums and emptying the tank trucks. Its toxic character is apparent from its effect on them. They are the first victims of the operation. Hunsinger testified to having his eyes burned by the wastes and not being able to open his eyes the next morning. His eyes remain blurry. Edward Cherkoski complains of a burning pain in his side from working with the wastes. He states that his "kidneys or whatever it is on my sides are like on fire, like if you take a knife and scraped me or a fork internally."[2] Fumes from the wastes caused Sandly to have headaches and a

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2. Notes Of Testimony, page 333, lines 13-15.

shortness of breath.[3] Richard Cherkoski also suffered from headaches from the fumes.

Two accidents resulting from handling these wastes vividly illustrate the toxicity of these wastes as well as their threat to the public health.

On the night of September 1, 1978, Edward Cherkoski was dumping a load of drums off the back of his truck. One of the drums burst as it hit the ground releasing a gaseous cloud. Edward Cherkoski described what took place.

"Q. What did you do when you arrived at the dump?"

"A. I backed up to a big pit that Birdie had dug out, like a trench. He told us to dump the load there -- for me to dump the load there. There were a lot of trucks behind me. Anyway, I backed up. I started raising the body, and a drum opened up. I was in the tractor now, this tractor-trailer. I was watching my body go up, and this drum broke loose in the trailer and the drum split open.

Out of that drum came a white fog. It would take your breath away. I was afraid to get out of the truck, because it creeped right towards the front of the tractor, and I couldn't get out of the truck."

"Q. Were you inside the van at this point?"

"A. I was in the tractor. This was with a dump trailer. I was in the cab. I was afraid to get out, because this cloud just enveloped the whole truck. I had never seen nothing like this in reality. It looked like death to me."

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3. BY MR. KRILL:

"Q. You said you smelled fumes from the tank truck?"

"A. Yes."

"Q. Were these fumes always the same?"

"A. They varied. Sometimes it was stronger; sometimes they were -- they were all pretty bad."

"Q. What did it smell like?"

"A. Nothing I ever smelled before. I did not have any idea what they were, but they were strong."

"Q. What effect, if any, did the fumes have on you?"

"A. At the time, I didn't realize it, but I was walking away with a headache just about every night. It would bother my eyes and a headache the next day and that night."

"Q. Was there any effect on your breathing?"

"A. After a period of time, yes; after about two weeks, I was noticing a shortness of breath, but I never realized what it was."

"Q. Did you every experience this kind of shortness of breath before you started dumping these wastes?"

"A. No."

Notes of Testimony, page 238, lines 20-25
page 239, lines 1-14

"Q. You said, "It would take your breath away." What effect did it have on you?"

"A. Right then and there, I couldn't breath. I got awful headaches. I still get the headaches from it."

"MR. KENNEDY: We are going to object to that as a medical conclusion."

"THE EXAMINER: Objection overruled."

"BY MR. KRILL:

"Q. Mr. Cherkoski, after this cloud came out of one of the drums, what happened to the cloud?"

"A. It started going down the mountain towards Old Forge. It finally blew away from my tractor in about an hour or so. Well, it was more than that. We were up there a long time. It stayed right there.

"When I saw it starting to thin out, I jumped out of my truck. I fell on the ground. I almost crawled my way out of there.

"We waited up on the bank. It seemed to go down into the valley. It got away from my tractor. When it did that, I was able to get back in my truck and drive to the bottom of the dump.

"I got down there, and the cloud started coming down. This was already late at night, because we waited a long time up in the dump for that cloud to go to be able to even get in the pit.

"We got down there, and Pete Iacavazzi was down at the bottom."

"Q. Did you have any discussion about that incident with Mr. Iacavazzi?"

"A. Yes, I did. I told him. I said, 'What the heck is this stuff?' I said, 'Geez, I have never seen nothing like this in my life.' I said, 'My head is busting.' I said, 'I can't breath.' The smell by then had starting coming down the dump.[4]"

On the same evening Mrs. Tony Cusumano, who lives in Old Forge Borough, approximately 1/4 mile from the entrance to the landfill, had put her children to bed and was watching television when the chemical odor enveloped her house. It caused her eyes to burn and her 4-year-old daughter to cry from a burning sensation in her nostrils. The odor became so bad that the Cusumano's left their home and spent the night elsewhere. John Victor, a police officer for Old Forge Borough, was on duty the night of September 1, 1978, when calls complaining about a strong odor in the borough were placed to the borough communication center and relayed to him. He proceeded to the area of the borough permeated by the odor,

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4. Notes of Testimony, page 302, lines 3-25, page 303, lines 1-25 and page 304, lines 1-3.

which he described as horrendous, and traced it to the Old Forge landfill.[5]

The release of gas from the drum occurred at approximately 7:30 p.m. It was still present in the Borough of Old Forge after midnight.

The second incident occurred at Simon Wrecking Company's Reading yard on or about December 17, 1978. This time a drum burst during the loading of a truck for shipment to the landfill. Edward Cherkoski relates the details:

> "THE WITNESS: When I hit it with the bulldozer, one of the drums that were buried in this dirt broke and something came out of there that you couldn't see, and I passed out on the bulldozer, and I couldn't catch my breath, and I thought my heart stopped and thank God the bulldozer was automatic.
>
> "I had it in reverse after I hit the pile, and it built up the transmission fluid enough to start backing up out of the smell. Whatever that was, it was like hitting a stone wall.
>
> "I went into Simon's office then. They took me in the office. They gave me some aspirins, and they were giving me air and everything, and they were worried about --"
>
> "MR. KENNEDY: Your Honor, at this point, I would object to this testimony on the grounds that there is no evidence that any of what the witness is talking about here ever got to the dump at Northeastern.
>
> "It is very interesting what he is talking about, but there has been no foundation that what he is talking about ever got to the dump."
>
> "THE EXAMINER: Objection overruled.
>
> "You were about to put this stuff on the truck to take it up to the dump; is that correct?"
>
> "THE WITNESS: Yes. When this drum broke wasn't the first time, in other words. You know what I mean. When I went over to the pile, I had trailers loaded already when that drum broke, but that wasn't the first time I just hit the pile.
>
> "Some of the stuff that was in that pile went to the dump already. It was loaded on the trucks to go to the dump. Then I hit that barrel. Holy God, you wouldn't --"
>
> "BY MR. KRILL:
>
> "Q. What did it smell like?"
>
> "A. Like rotten eggs. It was funny; I never smelled nothing like that. I never in my life, and I still don't know. It is like rotten eggs. It is hard to describe it because you couldn't see nothing. It was just you walked in and it was just like walking into a wall."

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5. "THE WITNESS: We went into the area, like, one call came from Clark Street in Old Forge, and we went to that area, and got a whiff; and another call was from Gray Street; you could smell it there.

"Then, we proceeded to another section of town, and there was no odor. So, we came back to the general area, and just kept working in that area until it seemed like the only possible place it could be coming from was up at the landfill site."

Notes of Testimony, page 547, lines 17-25.

"Q. Did you lose consciousness when that happened?"

"A. Yes."

"THE EXAMINER: It was invisible?"

"THE WITNESS: It was invisible. Honest to God, I never saw nothing like that. It was just I was on the dozer and you couldn't see nothing. It was just like if somebody went like this to you and you just couldn't breathe, and that is fact; that is the truth."

"BY MR. KRILL:

"Q. Was anyone working with you on that occasion at the Simon site?"

"A. Yes, they were."

"Q. Who was it?"

"A. Jack Hunsinger and one other kid. Some of it got splashed on Hunsinger, whatever was in that barrel."

"Q. On that occasion, did anyone else come in contact with that material either in liquid form or gaseous form?"

"A. Yes, another driver. I wouldn't care to mention his name right now.

"After I come out of Simon's office, the other kid, his lips were purple, his skin had a purplish complexion and he was walking around in a daze. I don't know if I could say this in front of -- could I?"

"THE EXAMINER: Say it."

"THE WITNESS: I was in the office a couple of hours there, and when I come back, I walked in front of the truck and my head was busting. I felt pains in my chest and my sides.

"I needed to take a leak, but the other kid was like in a fog and he walked over and I said, 'What the heck is going on?' He is looking at me like this, really gone; he's just in a daze. He didn't even know where he was at.

"I told him, I says -- I don't want to mention the driver's name. If you want, you can talk to him. I asked him, I said, 'What's wrong with you?' I said, 'You're all purple.' I said, 'Go look in the truck mirror.' He walked over and his lips were real purple and his skin was purplish."

"BY MR. KRILL:

"Q. Do you know where this person was when you hit the drum with the bulldozer?"

"A. He was standing about — he was on the left side. I was on the pile this way. He was about 25 feet to my left, 20 feet to my left at the bulldozer."

"Q. So, how close was he to the drum that burst?"

"A. About 20, 25 feet. That was him. I think Hunsinger was closer than that. He was sort of towards the front of the bucket on the dozer."

"Q. After you regained conciousness on that occasion, what did you do? Did you haul your truck back to the landfill?"

"A. Yes, but it took us almost all night. I was sick and everything. I was throwing up. It was like the dry heaves. It took me almost all night to get back home.[6]"

Mr. Cherkoski's testimony of the December 17, 1978, release of toxic gas was corroborated by Jack Hunsinger. Petitioner offered the testimony of two present employees to dispute the severity of the December 17, 1978, incident. However, neither employee was present when it occurred.

Thus, although the Lackawanna employee witnesses were unable to identify the wastes as toxic, they were able to describe in rather vivid terms the actual affect of the wastes on themselves.

Section 21.16(d) of the board's rules sets forth the criteria under which a supersedeas will be granted or denied. It states:

"(d) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors: (a) irreparable harm to the petitioner, (b) the likelihood of the petitioners prevailing on the merits, (c) the likelihood of injury to the public. In all cases, a supersedeas will be denied in cases where nuisance or significant (more than de minimis) pollution or hazard to health or safety either exists or is threatened during the period while the supersedeas would be in effect."

The threat of harm to the public from burying these hazardous wastes in the ground is real. The potential for release of these toxics into the surface or groundwaters constitutes an imminent threat to the public health. The DER has taken samples, for purpose of analysis, of seepage occurring in an area where drums are buried. The samples contain phenals, toluene, chromium, cadmium, lead, mercury, zinc, copper, silver, barium, cyanide, arsenic, nickel, tetrachloroethylene, styrene, alpha-terpeneol, butanoic acid, pentanoic acid and hexanoic acid. This seepage or leachate would not result from the burying of residential or commercial garbage. All of these substances are toxic in sufficient quantity. Some are skin absorbative, biocumulative or carcinogenic.

Petitioner produced two chemists who testified that the concentrations of these substances in the samples are not lethal. However, petitioner misses the point. These samples indicate that the hazardous wastes buried in the landfill are starting to seep out of the ground and are entering the groundwaters. It would be suicidal to allow Lackawanna to continue operating this landfill until the leachate emanating therefrom become "lethal". In contrast,

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6. Notes of Testimony, pages 319-323.

the closing of this landfill has not affected residential garbage pickup. The residential garbage is being disposed of at other landfills.

Nor has petitioner shown a likelihood of success on the merits. Rather, the evidence shows that Lackawanna has operated a willful and malicious hazardous waste disposal operation contrary to the terms 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 terms of its permit.

The harm to petitioner is financial; the loss of income from the landfill operation and the possibility, although we are unable from the evidence to judge is likelihood, of foreclosure on the landfill from default of the mortgage.

The criteria set forth in Section 21.16(d) is subject to a balancing process. Here, since we find a substantial possibility of harm to the public if there is a delay in enforcing the order, we deny petitioner's request for supersedeas.

The potential harm to petitioner from the continuation of the closure of its landfill is not sufficient when balanced against the harm to the public to warrant a supersedeas. We cannot subordinate the public health to the financial interests of Lackawanna. We stated in *DER v. Crucible, Inc.*, EHB docket no. 73-342-B (Opinion and Order sur Petition for Supersedeas dated December 5, 1973) that

> "...Alternatively, if the injury to the public were substantial, then we would (as indicated by §21.16(b) of our Rules or Procedure) not grant a supersedeas at all, no matter what the showing of harm to the petitioner, short of a hearing on the merits to determine not merely whether the petitioner has a <u>likelihood</u> of winning on the merits, but whether the petitioner <u>will</u> win."

Therefore, considering the substantial possibility of harm to the public from the improper and illegal burial of toxic and hazardous wastes, the potential for harm from the toxic and hazardous wastes already buried and the need to stop the "midnight dumps" at the Old Forge Landfill, the petition for supersedeas is denied.

ORDER

AND NOW, this 10th day of May, 1979, it is hereby ordered that the petition for supersedeas filed by Lackawanna Refuse Removal Incorporated is denied.

ENVIRONMENTAL HEARING BOARD

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DATED: May 10, 1979

COMMONWEALTH OF PENNSYLVANIA

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ANDRE GREENHOUSES, INC.

Docket No. 78-137-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
ON PETITION FOR RECONSIDERATION
EN BANC

On October 31, 1978, appellant Andre Greenhouses, Inc. filed an appeal from a letter dated October 3, 1978, from Robert W. Schlosser, Air Pollution Control Engineer, Region I of the Department of Environmental Resources (DER). The letter stated:

> "Dear Mr. Gothright:
>
> Your letter of September 15, 1978, to the Department of Environmental Resources on the above-captioned matter has been referred to me for reply.
>
> It is the position of the Department of Environmental Resources that the burning of high sulphur oil in a greenhouse boiler does not qualify for an exemption under §4.1 of the Pennsylvania Air Pollution Control Act. This position is consistent with the lack of exemption for such activities in §123.11 and 123.21 of the Environmental Quality Board's rules and regulations.
>
> Very truly yours,
>
> Robert W. Schlosser
> Air Pollution Control Engineer"

On October 16, 1978, DER sent another letter to appellant as follows:

> "Dear Mr. Gathright:
>
> Confirming our telephone conversation of October 12, 1978 with Mr. N. Rao Kona, Regional Air Pollution Control Engineer, all combustion units in the Southeast Pennsylvania Air Basin must comply with the requirements of amendments to Chapter 123 of the Rules and Regulations of the Department of Environmental Resources effective October 1, 1978.
>
> No provisions are made for the waiver of these requirements and the Department will enforce them uniformly.
>
> Sincerely,
>
> Robert W. Schlosser
> Air Pollution Control Engineer"

In its notice of appeal Andre challenges the regulations newly adopted by the Environmental Quality Board (EQB) amending 25 Pa. Code Chapters 121 and 123 to make certain sulfur emission standards applicable to suburban portions of the Metropolitan Philadelphia Interstate Air Quality Control Region (MPIAQCR).[1] The board has ruled in *Scott Paper Company v. Commonwealth of Pennsylvania, DER*, EHB Docket no. 78-107-D, issued December 1, 1978, that the board does not have jurisdiction to hear appeals from the promulgation of regulations by the Environmental Quality Board.

In this case as in the *Scott Paper* case, appellant filed a petition for supersedeas along with its notice of appeal asking that the board restrain the department from the "implementation" of the regulations until such time as their validity is determined. DER filed a motion to quash this appeal on November 9, 1978. On December 5, 1978, Chairman Waters issued an opinion and order denying the motion to quash the appeal. On December 21, 1978, DER filed a petition for reconsideration *en banc*. The board gave the parties further opportunity to file briefs on the question of jurisdiction. At appellant's request, the board granted a continuance until May 18, 1979, on the grounds that the Governor had declared an energy emergency, which had the effect of preventing the implementation of the new sulfur-in-fuel requirements for the MPIAQCR. On May 17, 1979, appellant filed a brief in opposition to appellee's petition for reconsideration.

In his opinion denying DER's motion to quash this appeal, Chairman Waters distinguished this case from the *Scott Paper* case on the ground that "DER made a decision independently of EQB in this case but did not in *Scott Paper*, therefore, there was no adjudication or appealable action in that case as there is here". DER claims that there is no distinction in fact between this case and *Scott Paper* since both appellants are appealing from the promulgation and implementation of regulations adopted by the EQB. We agree with DER that a DER letter issued in response to an inquiry concerning the application of the regulations and stating simply that the regulations will be applied evenly without exemption is not an appealable event. *Standard Lime & Refractories Company v. Department of Environmental Resources*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971). Consequently, DER's letter of October 16, 1978, clearly does not constitute an appealable action of the DER. Insofar as Andre's appeal challenges the promulgation and implementation of the regulations and their validity as applied to Andre, we hold, in accordance with *Scott Paper Company*, that the board has no jurisdiction to consider Andre's claims. Under Pennsylvania law, a regulation

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1. The MPIAQCR is a federally established air quality control region under the federal Clean Air Act in which the state has responsibility for establishing point source emission standards to satisfy federal ambient air standards.

of general applicability may not be challenged upon its promulgation but only upon its application and enforcement or other proceeding. This principle cannot be circumvented simply by asking the department whether it intends to apply the law and getting the answer that it does.

A problem here is that Andre is making several different claims in its notice of appeal and in the papers that it has filed subsequent to the notice of appeal. In its answer to DER's motion to quash the appeal, Andre states that its appeal is not from the letter of October 3, 1978, "but, as stated in the appeal notice, it was taken from the implementation of 25 Pa. Code, see 121 *et seq.*, as applied to appellant". In paragraph 2 of its answer Andre denies that the department's letter is not an action from which an appeal lies, but states, "rather, it is appellant's position that the rules and regulations conceivably require him to use a higher grade of sulfur content in his fuel oil than what he has previously been using, which regulations were effective October 1, 1978, as promulgated by the Pennsylvania Environmental Quality Board, and gives rise to his right of appeal, said board being a local agency from whose action an appeal lies." If these are the bases for Andre's appeal, then an appeal clearly does not lie.

In its notice of appeal from DER's letter of October 3, 1978, appellant raised a number of issues including:

> "Appellant has been determined to be purely agricultural by innumerable governmental and regulatory agencies and should be considered exempt under the specific terms of the above referred to Act of Assembly. A partial list of governmental determinations of Appellant's being solely agricultural is attached hereto as Exhibit 'B'."

Thus, appellant claims to be exempt from the operation of the regulations under Section 4.1 of the Air Pollution Control Act, which provides:

> "The Environmental Quality Board shall not have the power nor the authority to adopt rules and regulations relating to air contaminants and air pollution arising from the production of agricultural commodities in their unmanufactured state but shall not include the use of materials produced or manufactured off the premises of the farm operation."

It is difficult to know what the exact meaning of this provision is, but it does provide appellant with a colorable claim of exemption from any regulation on the ground that appellant is, as alleged in paragraph 5 of its notice of appeal, "solely engaged in the growth of flowers and is neither engaged in the wholesale or retail of said flowers". It is true, as DER contends, that the recently promulgated regulations amending Chapter 123 do not contain any exemptions or definitions relating to the production of agricultural commodities. However, where an appellant has a colorable claim to an exemption provided by the governing statute, it would appear to be

appropriate to ask the agency administering that act for determination as to whether or not appellant's activity might be exempt from regulation. The department's determination that the exemption provided by statute is or is not applicable does constitute appealable action in our view. However, it is only this determination and not the "promulgation" or "implementation" or "validity" of the regulations that can be appealed from. Consequently, the hearing in this matter must be limited to the narrow question of whether industrial boilers used in the operation of a greenhouse are exempt from regulation under Section 4.1 of the Air Pollution Control Act. We expect that this determination is largely a question of law, but there may be facts that would be brought out at a hearing that would be relevant to a resolution of this issue. It seems unlikely that the legislature in adopting Section 4.1, intended to exempt industrial boilers where they are used in connection with an agricultural activity. However, where an appellant has an arguable claim to exemption from regulation under the statute, appellant should be entitled to a determination of that question prior to going to the expense of complying with the regulations.

The department's motion to quash was properly denied. However, as discussed in this opinion, the board's jurisdiction in this appeal is limited to determining whether or not appellant is exempt from Chapter 123 of the department's regulations by virtue of Section 4.1 of the Air Pollution Control Act.

ORDER

AND NOW, this 23rd day of May, 1979, upon reconsideration of the department's motion to quash this appeal, the denial of that motion is reaffirmed as limited by the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Joanne R. Denworth

BY: JOANNE R. DENWORTH
Member

DISSENTING OPINION

I would grant the DER's motion to quash appeal since I do not believe that the DER letter of October 3, 1978, constitutes an adjudication appealable to this board. The letter has no legal effect on appellant as it does not change appellant's responsibilities under the law. If appellant was required to comply with the DER's regulations before the letter, it still must comply with them now. If appellant is, as it contends, exempt from the requirements of the regulations by Section 4.1 of the Air Pollution Control Act, the letter does not affect that exemption.

In reality, appellant is asking this board for a declaratory judgment of its obligations under the Air Pollution Control Act. We have no jurisdiction to entertain such an action.

This case is controlled by the decision of the Commonwealth Court in *Standard Lime & Refracteries Company v. Department of Environmental Resources*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971), where the court held that "A letter from a governmental department head that in his opinion the appellant has not complied [with the Air Pollution Control Act] and therefore the matter will be referred to the agency's counsel, is not an adjudication from which an appeal may be taken." Id. 379 A.2d at 386.

If the DER, at a later date, commences an enforcement action for non-compliance with the Air Pollution Control Act, appellant can at that time present its contention that it is exempt from the air pollution control regulations as a producer of agricultural commodities. As of the present time, there has been no action by the DER which aggrieves the appellant.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

cc: Bureau of Litigation
K. W. James Rochow, Esquire
Drew S. Dorfman, Esquire
Howard T. Gathright, Esquire
Steven C. Braverman, Esquire

DATED: May 23, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

Docket No. 78-071-CP-B

v. :

SHARON STEEL CORPORATION :

OPINION AND ORDER SUR
PRELIMINARY OBJECTIONS TO
COMPLAINT FOR CIVIL PENALTY
AND PRELIMINARY OBJECTIONS TO NEW MATTER

This opinion and order is dispositive of Preliminary Objections filed by defendant, Sharon Steel Corporation (Sharon) to a Department of Environmental Resources (DER) Complaint for Civil Penalty and of Preliminary Objections filed by the DER to the New Matter in Sharon's responsive pleading to the Complaint for Civil Penalty.

The DER's complaint for the assessment of civil penalties against Sharon is pursuant to Section 9.1 of the Pennsylvania Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001 *et seq*, (APCA). The complaint alleges that Sharon has violated and continues to violate the DER's fugitive emission regulation, 25 Pa. Code §123.1(a) by allowing particulate matter to be emitted into the outdoor atmosphere during the operation of a hot metal transfer station at its facilities in Farrell, Mercer County, Pennsylvania. The complaint requests that the board assess a maximum civil penalty from October 26, 1972, until the present.

In its brief, Sharon frames the issues presented by its preliminary objections as follows:

A. Is the act a statute providing for the imposition of criminal penalties and is the board, therefore, without jurisdiction of the subject matter of this proceeding because it is not empowered to grant Sharon a jury trial or to impose criminal penalties?

B. Is the act a statute providing for the imposition of civil penalties as to which Sharon is entitled to a jury trial which the board is not empowered to grant?

C. Is the delegation to the board by the legislature of the power to assess indefinite and variable civil penalties an unconstitutional delegation of judicial power to the board?

D. Is the delegation to the board by the legislature of the power to assess civil penalties not subject to adequate legislative standards an unconstitutional delegation of legislative power to the board?

E. Does the applicable statute of limitations [12 P.S. §44] bar all claims imposing penalties for violations of a penal act occurring more than two years prior to the filing of the complaint?

F. Are the claims asserted in the complaint barred by laches or have such claims been waived by the Commonwealth?

G. Should the complaint be dismissed for all violations occurring prior to August 28, 1977, for failing to allege concurrent violations of 25 Pa. Code §123.13?

H. Should Sharon's motion for a more specific pleading with regard to certain conclusions in paragraph 8 of the complaint be allowed?

Sharon has framed its initial objection as jurisdictional. It argues that the DER has no jurisdiction to assess a civil penalty because Section 9.1 of APCA, which provides for the assessment of a civil penalty for the violation of a provision of APCA or its regulations, creates criminal liability without the right to trial by jury afforded by Article I, Section 9, of the Pennsylvania Constitution and the Sixth Amendment to the United States Constitution.

Sharon's argument has been rejected by the board as well as the courts in the recent past. In *Comm. of Pa, DER v. Wheeling-Pittsburgh Steel Corp.*, EHB Docket No. 77-026-CP-W (Opinion and Order issued August 4, 1977) we held that a civil penalty action under Section 9.1 of the APCA is not a criminal action. In *Comm. of Pa, DER v. Harmar Coal Co.*, EHB Docket No. 73-196-B (Opinion and Order Sur Objections to Interrogatories issued February 7, 1974), we held that the DER is permitted to use pre-trial discovery in a civil penalty action as Section 605 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.605 *et seq.*, is not a criminal statute. We held

in *Comm. of Pa., DER, v. Froehlke*, EHB Docket No. 72-341 (issued July 31, 1973) that the standard of proof in a civil penalty action is by the preponderance of the evidence, rather than, as plaintiff argued, beyond a reasonable doubt because a civil penalty action is civil in nature, not criminal.

The Third Circuit Court of Appeals in *Frank Irey, Jr., Inc. v. Occupational Safety and Health Rev. Commission*, 519 F.2d 1200, (3rd Cir. 1975) affirmed 430 U.S. 442 (1977), held that the civil penalty provision of the Occupational Safety and Health Act of 1970, 29 U.S.C. §666 (OSHA) is civil in nature, notwithstanding the punitive aspects of the high penalties which can be assessed for willful violations. The Court opined:

> "[A] deliberate and conscious refusal to abate a hazardous condition may bring about a situation where a heavy civil penalty might be needed to effect compliance with safety standards. In any event we have now come too far down the road to hold that a civil penalty may not be assessed to enforce observance of legislative policy. See, for example, Oceanic Stream Navigator Co. v. Stranahan, 214 U.S. 320 (1909), and Hepner v. United States 213 U.S. 103 (1909)." Id. at 1204.

See also *American Smelting and Refining Co. v. Occupational Safety & Health Rev. Com.*, 501 F.2d 504 (8th Cir. 1974); *Beal Construction Co. v. Occupational Safety & Health Rev. Com.*, 507 F.2d 1041 (8th Cir. 1974); *Atlas Roofing Co., Inc. v. Occupational Safety and Health Rev. Com.*, 518 F.2d 990 (5th Cir. 1975); *Bloomfield Mechanical Contracting, Inc. v. Occupational Safety and Health Rev. Com.*, 531 F.2d 451 (10th Cir. Jan. 21, 1976).

In *U.S. v. J.B. Williams Co., Inc.*, 498 F.2d 414 (2nd Cir. 1974) the Second Circuit Court of Appeals held that a suit by the United States to recover civil penalties for an alleged violation of a Federal Trade Commission cease and desist order did not impinge on the defendant's Sixth Amendment guarantee of a trial by jury. The Court stated:

> "When Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word. This seems to us the clear intendment of Hepner v. U.S., 231 U.S. 103 (1909); U.S. V. Regan, 232 U.S. 37 (1914); and Helvering v. Mitchell, 303 U.S. 391, 398-405 (1938). Cf. U.S. v. St. Regis Paper Co., 33 F.2d 688, 693 (2nd Cir. 1966) . . . In the face of a long line of contrary authority, appellants have not directed our attention to any civil penalty provision that has been held sufficiently 'criminal' in nature to invoke the protections of the Sixth Amendment." Id. at 421.

Thus, the precedent case law makes it clear that this board has jurisdiction to assess a civil penalty under Section 9.1 of APCA as Section 9.1 is a civil, not a criminal, remedy and that the imposition of a civil penalty does not violate the provisions of Article I, Section 9 of the Pennsylvania Constitution or the Sixth Amendment of the United States Constitution.

Sharon's second argument also questions our jurisdiction over this proceeding. Sharon argues that the board lacks jurisdiction to assess a civil penalty under Section 9.1 because Sharon is entitled to a jury trial as a matter of law and the board has no authority to grant a trial by jury.

Article I, Section 6 of the Constitution of Pennsylvania provides that:

> "Trial by jury shall be as heretofore, and the right thereof shall remain inviolate."

Article I, Section 6 guarantees the right to trial by jury in those actions where a right to jury trial existed at the time of the adoption of the Constitution. *Von Swartow v. Commonwealth*, 24 Pa. 131 (1854); *Schwab v. Miller*, 302 Pa. 507, 153 A. 731 (1931); *Watson Appeal*, 377 Pa. 495, 105 A.2d 576 (1954), cert. denied, 348 U.S. 879 (1974), rehearing denied, 348 U.S. 879 (1954); *DER v. Wheeling-Pittsburgh Steel Corp.*, 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975), affirmed 473 Pa. 432, 375 A.2d 320 (1977), cert. denied, ___ U.S. ___, , 98 S.Ct. 514 (1977). The legislature may withhold the right to a jury trial in instances where a jury trial would not have been provided in 1776 or in actions which did not exist in 1776. *PUC v. W. J. Dillner Transfer Com.*, 191 Pa.Super. 136, 155 A.2d 429 (1959). In *Dillner*, the Court stated:

> "Due process does not require a jury trial in all classes of actions. The constitutional provision that 'trial by jury shall be as heretofore, and the right remain inviolate,' means that in all proceedings where a jury trial was demandable at the time of the adoption of the constitution it could not be taken away by statute, but where new proceedings are established by law the remedy afforded must not necessarily be a jury trial if there is a proper right of review before a regularly constituted judicial tribunal. See also: *Byers and Davis v. Cmwlth*, 52 Pa. 89, 94, 95, 963; *Rhines v. Clark*, 51 Pa. 96, 101. *Dillner Transfer, supra*, at 150. (Emphasis added)"

Defendant contends that it must be provided a jury trial because the civil penalty action is analogous to actions which existed at the common law. Defendant analogizes the civil penalty action to a trespass action because it is intended to enforce a right for damages arising out of a violation of a statute and to a nuisance action because it is intended to abate activities declared to be a nuisance at the common law.

A civil penalty action, although possibly analogous to common law actions, is a relatively recent development in law. The Commonwealth Court in *DER v. Wheeling-Pittsburgh Steel Corp., supra*, ruled that a defendant in an action to enforce an administrative order under Section 10 of the APCA is not entitled to a jury trial because the proceedings are "wholly a creature

of recent statutory law." The Pennsylvania Supreme Court in *Tax Review Board of City of Philadelphia v. Warner*, 398 Pa. 381, 157 A.2d 879 (1960) held that the appellant was not entitled to a jury trial on the issue of the assessment of city water and sewer services by the Tax Review Board because:

> "Such a board was unknown to the common law and was not part of the law of the land when the Constitution of Pennsylvania was adopted. In *Commonwealth v. Bechtel*, 384 Pa. 184, 120 A.2d 295, 298, this court said, as it has often said before: 'Constitutional guarantee of trial by jury does not prevent the legislature from creating or providing modes or tribunals other than a jury trial for the determination or adjustment of rights and liabilities which had not been triable by jury prior to the Constitution' ". Id 157 A.2d at 881.

The United States Supreme Court in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977) held that the Seventh Amendment to the Constitution of the United States does not prevent an administrative agency, without a jury, from assessing a civil penalty for violation of the Occupational Safety and Health Act. The court's decision followed from its conclusion that Congress does not violate the Seventh Amendment when it assigns the initial adjudication of new statutory rights to an administrative agency.

Since a cause of action for assessment of a civil penalty by an administrative agency is a recent development that did not exist at the common law, no provision for a trial by jury existed at the time of the adoption of the Pennsylvania Constitution to be preserved by Article I, Section 6.

Sharon also contends that Section 9.1 is unconstitutional. It argues that Section 9.1 authorizes the board to assess variable and indefinite civil penalties and thus constitutes an unconstitutional delegation of power from the legislature. Sharon faces a very heavy burden of proof. The Pennsylvania Supreme Court has stated that "Nothing but a clear violation of the Constitution will justify the judiciary in nullifying a legislative enactment. Every presumption must be indulged in its favor, and one who claims an Act is unconstitutional has a very heavy burden of proof." *Loomis v. Board of Education*, 376 Pa. 428, 431, 103 A.2d 769, 770 (1954).

Initially, Sharon argues that the board is exercising power reserved to the judiciary by Article V, Section 1 of the Pennsylvania Constitution.[1]

1. Article V, Section 1 of the Pennsylvania Constitution states:

> "The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. . . ."

The only case cited to us by defendant as precedent for its argument is *Commonwealth v. Graber*, 39 D. & C. 489 (1940), a 1940 Pike County Court statutory appeal. The *Graber* court held Section 942 of the Game Law, the Act of June 3, 1937, P.L. 1225, 34 P.S. 1311.942 to be unconstitutional as an improper delegation of judicial power. Section 942 empowered the Pennsylvania Game Commission to determine the value of any trees and shrubbery unlawfully injured on commission property and to impose a fine based on the value. Judge Shull, who decided the *Graber* case, wrote:

> "There is no question that this statute delegates, to the employees of the Game Commission, power of a type which under our Constitution the legislature has no power to delegate . . . . A penalty or part of a penalty may be based upon the value of property which may have been taken or destroyed, and such penalties may be provided by the legislature, but the function of determining the value is purely judicial and must be performed by the court. . . ." Id. 39 D. & C. at 491.

If *Graber* correctly states the law on administrative imposition of penalties as it existed in 1940, it does not state the law as it exists today. The trend in Pennsylvania is toward the increased use of judicial powers by administrative agencies. The Environmental Hearing Board is empowered to assess civil penalties for violations of The Clean Streams Law, *supra*, as well as the Air Pollution Control Act, *supra*. The Tax Code, Act of April 9, 1929, P.L. 343, *as amended*, 72 P.S. §1702, allows the Department of Revenue to assess a special tax for violations of the law. Similarly, the Banking Code, Act of May 5, 1921, P.L. 374, *as amended*, 7 P.S. 6056, empowers the Attorney General to collect one hundred dollars ($100.00) for each day a person licensed under the act fails to file an annual report with the Pennsylvania Securities Commission.

Variable monetary penalty provisions also appear in the Pennsylvania insurance laws. The Casualty and Surety Rate Regulatory Act, Act of June 11, 1947, P.L. 538, 40 P.S. §1181 *et seq.*, provides that the Insurance Commissioner may "impose a penalty of not more than fifty dollars ($50.00) for each such violation [of the Act], but if he finds such violation to be wilful he may impose a penalty of not more than five hundred dollars ($500.00) for each such violation." 40 P.S. §1196. This language is repeated in the Penalties Provision of the Fire, Marine and Inland Marine Rate Regulatory Act, Act of June 11, 1947, P.L. 551, 40 P.S. §1235. The Public Utility Code also provides for civil penalties for violation of the Act. Act of May 28, 1937, P.L. 1953, *as amended*, 66 P.S. §1491. Practically all administrative agencies today combine legislative powers (rule-making) and judicial powers (adjudication).

The United States Supreme Court long ago upheld the constitutionality of a statute which empowers an administrative agency to assess monetary penalties. The court, in *Helvering v. Mitchel*, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 947 (1938) held that civil penalties of 50% of tax deficiencies may be imposed by the Internal Revenue Service without invoking the judiciary despite the contention that such penalties were criminal in nature.

The Illinois Supreme Court recently passed on this issue in *City of Waukegan v. Pollution Control Board*, 57 Ill.2nd 170, 311 N.E.2d 146 (1974). The court, in an opinion which Professor K. Davis characterizes as likely to become a leading case in the nation on separation of powers[2], held that the authority given the Illinois Pollution Control Board to impose a penalty of ten thousand dollars ($10,000.00) was not a delegation of judicial power in violation of the separation-of-powers provision of the Constitution of Illinois or in violation of the Constitution of the United States. The Illinois Court stated that separation of powers means "the whole power" of one of the branches of government may not be lodged in the same hands that exercise the whole power of another branch of government. The Court reasoned:

> "It has been generally recognized that separation of powers does not forbid every exercise of functions by one branch of government which conventionally is exercised by another branch. Professor Frank Cooper (1 F. Cooper, State Administrative Law 16 (1965)) observes:'[T]he real thrust of the separation of powers philosophy is that each department of government must be kept free from the control or coercive influence of the other departments.' He also indicates that it may be irrelevant if an agency has legislative or judicial characteristics so long as the legislature or the judiciary can effectively correct errors of the agency. The notion was stated more fully in 1 K. Davis, Administrative Law Treatise 68-69 (1958):
>
> > 'In the organic arrangements that we have been making in recent decades in the establishment and control of administrative agencies, the principle that has guided us is the principle of check, not the principle of separation of powers. We have had little or no concern for avoiding a mixture of three or more kinds of powers in the same agency; we have had much concern for avoiding or minimizing unchecked power. The very identifying badge of the modern administrative agency has become the combination of judicial power (adjudication) with legislative power (rule making). But we have taken pains to see that the agencies report to and draw their funds from our legislative bodies, that the personnel of the agencies are appointed and reappointed by the executive, and that the residual power of check remains in the judiciary.' See also Davis, A New Approach to Delegation, 36 U.Chi.L.Rev.713 (1969).
>
> The Supreme Court of the United States has never considered that the powers in government are held in rigidly separated compartments. Professor Davis (1 K. Davis, Administrative Law

2. K. Davis, Administrative Law Treatise Supplement, §2.13, p. 36 (June 1970).

> Treatise sec. 2.12, at 131) has observed: 'The Supreme Court of the United States has never held that judicial power has been improperly vested in an agency, although the question has come up in [many] cases * * *.' Nor has the court expressed alarm or undue concern about conferring a power to impose monetary penalties on an administrative body." Id. 311 N.E.2nd at 148.

Quasi-judicial powers are important components of today's administrative agencies. They do not constitute an unconstitutional exercise of judicial power. Today, courts are concerned with the adequacy of legislature-imposed guidelines and procedural safeguards rather than the characterization of the functions of administrative agencies.

Defendant also contends that the authority given to the board to assess a civil penalty constitutes an unconstitutional delegation of legislative power.

The principle of unconstitutional delegation of legislative power states that the power conferred upon the legislature to make laws cannot be delegated by that branch of government to any other body. However, while the legislature cannot delegate the power to make law, it may, where necessary, confer authority and discretion on an administrative agency so long as the authority and discretion are limited by prescribed standards. See *Water and Power Resources Board v. Green Springs Co.*, 394 Pa. 1 , 145 A.2d 178 (1958). Here defendant contends that the board's power is not subject to adequate standards.

We believe that defendant misapplies the principle as the board does not perform any duties which can be considered "legislative" in character. The board has not been delegated any rule-making or even administrative powers. Its duties are totally quasi-judicial. Moreover, the board's powers are limited by standards which the Pennsylvania Commonwealth Court has previously held to be adequate to sustain the constitutionality of the APCA. In *Bortz Coal Co. v. Air Pollution Control Commission*, 2 Pa. Cmwlth. Ct. 441, 279 A.2d 388 (1971), the Commonwealth Court sustained as valid the APCA in the face of a challenge that the APCA constitutes an unconstitutional delegation of legislative authority. The court held "that a careful reading of the Air Pollution Control Act, *supra*, indicates a sufficiently clear, definite and reasonable delegation of the powers to the Commission." Id. 279 A.2d at 393.

The decision in *Bortz* was based, in part, on the protection afforded by the appeal provisions of the APCA. The court stated:

> "If the regulatory agency sets forth unreasonable standards or fails to establish any standards of air pollution, the citizens are protected through the appeal provisions of the Act. Certainly the *possibility* of such an unreasonable determination should not be the basis for a holding that there has been an unlawful delegation of power. As stated before, we hold that there is not an unlawful delegation of powers in the Air Pollution Control Act." Id. 279 A.2d at 394.

The board's decisions are, of course, subject to judicial review, which, as recognized by the *Bortz* court, also constitutes a check on the board's discretion.

We therefore hold that the Environmental Hearing Board's statutory authority to assess a civil penalty does not result from an unconstitutional delegation of powers.

Defendant raises by preliminary objections the two-year statute of limitation of the Act of March 26, 1785, 17 P.S. §44 as a defense to DER's claims of violation occurring prior to June 23, 1976. 12 P.S. §44 provides in relevant part as follows:

> "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; . . ."

We have, in prior cases, expressly held that 12 P.S. 44 does not apply to the civil penalty statutes administered by the board. The opinion by Member Denworth in *DER v. Rushton Mining Co., et al*, EHB Docket No. 76-361-CP-D, (issued March 12, 1976, gives an excellent explanation of why 12 P.S. 44 has never been interpreted to apply to civil penalty statutes and the reasons why the civil penalty provisions are not construed as "forfeitures" or "penal" within the meaning of 12 P.S. 44. See also *Comm. of Pa, DER v. Koppers Co., Inc.*, EHB Docket No. 74-270-CP (issued March 2, 1977) and *Comm. of Pa, DER v. Delmar Coward*, EHB Docket No. 76-148-CP (Opinion and Order Sur Plaintiff's Preliminary Objections dated March 8, 1977). See also *Comm. of Pa, DER v. Wheeling-Pittsburgh Steel Corp.*, EHB Docket No. 77-026-CP (Opinion and Order issued August 4, 1977) wherein we stated:

> "Defendant further contends that the two year statute of limitations, Act of March 26, 1785 Sm.L. 299, 12 P.S. §44 is applicable to this case and no penalty may properly be assessed for any violation for a longer period as claimed in the complaint. Inasmuch as the argument is based on the premise that the action is criminal in nature, we must overrule this preliminary objection, because of our previous conclusion on that contention."

Therefore, we dismiss defendant's preliminary objection based on a two-year statute of limitation.

We note that a two-year statute of limitation for civil penalty actions was recently adopted in Pennsylvania. However, it is not applicable to this matter since it did not become effective until after this civil penalty complaint was filed. See Section 5524 (5) of the new Judicial Code, Act of July 9, 1976, P.L. 586, 42 Pa. C.S. (effective June 27, 1978).

Defendant also files a preliminary objection in the nature of a demurrer based on the doctrine of laches. Defendant contends that the DER "inexcusably delayed" filing the complaint and thus allowed defendant to accumulate astronomical penalties.

Defendant's contention is more appropriately raised in its New Matter as a defense to the allegations raised in the Complaint.[3] We cannot accept as true, without a hearing, the facts supporting defendant's allegation of "inexcusable delay". See *Commonwealth v. Folcroft Landfill Corporation*, 1 Pa. Cmwlth Ct. 356, ___ A.2d ___ (1971).

In its brief the DER correctly states that the doctrine of laches is an equitable doctrine and thus cannot be invoked to defeat a civil penalty action. See *Pennsylvania Turnpike Commission v. Atlantic Richfield Co.*, 31 Pa. Cmwlth Ct. 212, 375 A.2d 890 (1977); *General State Authority v. Kline*, 29 Pa. Cmwlth Ct. 232, 370 A.2d 402 (1977); *Graybill v. Juniata County School District*, 21 Pa. Cmwlth Ct. 630, 347 A.2d 524 (1975). Nevertheless, we believe that the same facts which, if proven, would allow for a finding of laches, could also mitigate against the assessment of a penalty.

In sum, we deny defendant's demurrer based on the doctrine of laches because it relies upon unproven factual averments.

The basis for DER's complaint is the allegation that defendant has continually violated 25 Pa. Code 123.1 (a) which limits the emission of fugitive air contaminants. Defendant contends that the complaint fails to allege a violation of law because it does not claim a concurrent violation of 25 Pa. Code 123.13 which establishes permissible emission rates for particulate matter.

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3. Defendant has raised the defense of laches at paragraphs 11, 12 and 13 of its New Matter.

The sole basis for defendant's contention that 25 Pa. Code 123.1(a) is not independently enforceable is the Commonwealth Court's decision in *Comm. of Pa., DER v. Locust Point Quarries, Inc.*, 25 Pa. Cmwlth Ct. 270, 367 A.2d 392 (1976) which held, in a criminal case, basically what defendant contends it states: that 25 Pa. Code 123.1(a) is not independently enforceable.

Unfortunately for defendant, however, the Pennsylvania Supreme Court has overruled the Commonwealth Court's decision. In *Comm. of Pa, DER v. Locust Point Quarries, Inc.*, ___ Pa. ___ , 396 A.2d 1205, (1979), the Commonwealth Court decision rendering 25 Pa. Code 123.1(a) ineffectual was held to be erroneous. The Supreme Court after a discussion of the purpose, the legislative intent, and the policy behind the two sections, held that "[c]learly, the prohibition of fugitive emissions was intended to be effective independent of Section 123.13." Id. 396 A.2d at 1209.

Therefore, we hold that defendant's preliminary objection that the complaint fails to state a claim upon which relief can be granted because it did not allege a concurrent violation of 25 Pa. Code §123.13 is denied.

Defendant's final preliminary objection is a motion for more specific pleading. Defendant asserts that paragraph 8 of the DER's complaint which alleges that Sharon's conduct interferes with the attainment and maintenance of national ambient air quality standards and endangers the public health, welfare and safety, is not sufficiently specific so as to enable it to prepare its defense. The first of the two allegations of paragraph 8 — interferes with attainment and maintenance of national ambient air quality standards — is sufficiently specific. The second allegation — endangers the public health, welfare and safety — is a mere conclusion. Nevertheless, we deny defendant's motion. The board's policy on the submission of pre-hearing memorandum insures that defendant will learn what facts the DER intends to prove prior to hearing. Both parties are required to state, in a pre-hearing memorandum, a summary of the facts it intends to present at hearing. Also defendant can, through the prudent use of discovery, acquire the facts necessary to permit it to prepare its defense.

The DER has filed two preliminary objections to defendant's New Matter. (1) The defendant is unable to challenge the constitutionality of the APCA or DER regulation 25 Pa. Code 123.1(a) in this proceeding. (2) Waiver, estoppel, fundamental fairness and laches are not available to the defendant as defenses to a civil penalty action.

The DER is correct when it asserts that the board is unable to rule on the constitutionality of the APCA. An administrative agency is unable, as a matter of law, to rule that its enabling legislation is unconstitutional. *St. Joseph Minerals Corp. v. Goddard,* 14 Pa. Cmwlth Ct. 624, 324 A.2d 800 (1974). However, this is the only tribunal on which defendant has an opportunity to develop a factual record. Thus, defendant must be permitted to enter into evidence the facts which it believes support its allegations that the statute is unconstitutional in order to be able to argue same, if need be, to the appellate courts.

DER also contends that the defendant has waived its right to attack the validity of 25 Pa. Code 123.1(a) in the proceeding because it did not challenge in the Third Circuit Court of Appeals the EPA administrator's approval of the Pennsylvania State Implementation Plan under Section 307(b) of the Federal Clean Air Act. We have, in prior opinions, rejected this contention. *Bethlehem Steel Corporation v. DER,* EHB Docket No. 75-107-D (issued August 2, 1976); *United States Steel Corporation v. DER,* EHB Docket No. 75-170-C (issued April 27, 1977); *West Penn Power Company v. DER,* EHB Docket No. 73-330-D, (issued February 25, 1977 and June 19, 1978),

DER contends that the defenses raised by defendant in paragraphs 11, 12 and 13 of its new matter, i.e. waiver, estoppel, laches and fundamental fairness are equitable defenses and, as such, cannot be raised as a defense to this civil penalty action.

These defenses are based on defendant's contention that it has been prejudiced by a DER "inexcusable delay" in bringing this action. We agree with the DER that these factors are not a defense in the sense that defendant has gained a "prescriptive right to pollute". We stated in *Philadelphia Chewing Gum Co. v. Comm. of Pa, DER,* EHB Docket No. 73-253 (issued July 30, 1976) that

> "Where the state power is found to exist it is not lost by non-exercise, but remains to be exerted as local exegencies may demand."

Nevertheless, we believe that the facts which support laches, waiver, fundamental fairness and estoppel could mitigate against the assessment of a civil penalty and thus can be considered by the board in the determination of an appropriate penalty. We are, in this proceeding, neither abating nor sanctioning future air contaminant emissions from defendant's plant; rather, we are assessing a civil penalty for past conduct.

ORDER

AND NOW, this 6th day of June, 1979, it is hereby ordered that the Preliminary Objections of defendant to the DER's Complaint for Civil Penalty are dismissed and the Preliminary Objections of the DER to defendant's New Matter are dismissed in accordance with the terms of the attached opinion.

ENVIRONMENTAL HEARING BOARD

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Member

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DATED: June 6, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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DORAVILLE ENTERPRISES : Docket No. 76-011-B and 79-002-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

This opinion and order is dispositive of the Motion for Order Sustaining Appeal and Directing Issuance of Permit filed by appellant, Doraville Enterprises, and the DER's Motion to Dismiss Or In The Alternative To Consolidate With Appeal at Docket No. 79-002-B.

This matter was commended by an appeal by Doraville Enterprises (Doraville) from the Department of Environmental Resources' (DER) denial of a mine drainage permit. The denial was issued pursuant to a remand order of the board's adjudication at EHB Docket No. 73-433-C, which adjudication remanded the matter "to DER to review application No. 4073 SM-3, submitted by Doraville Enterprises, in a manner consistent with this adjudication and shall (*sic*) either grant or deny a permit to Doraville Enterprises on or before December 22, 1975". The DER, on December 22, 1975, denied Doraville's mine drainage permit application. Following the DER December 22, 1975, denial action, the parties agreed to continue the appeal pending a further evaluation of the pollution producing potential of the overburden by Dr. Frank T. Caruccio, Cargeid International. After the completion of the evaluation by Caruccio, the DER, by letter dated December 8, 1978, again denied the application for the surface mining permit. The December 8, 1978, action was appealed by Doraville at EHB Docket No. 79-002-B.

The December 8, 1978, letter, after setting forth reasons for the denial, stated, "This denial supercedes and withdraws the prior denial action of the Department dated December 22, 1975". Appellant contends that the December 8, 1978, letter actually "withdraws" the December 22, 1975, permit denial, and thus the board

should order the DER to issue the permit. We reject appellant's interpretation of the December 8, 1978, letter. Even a casual reading of the letter shows that the DER did not intend to issue the permit, but rather intended to deny the permit. The letter, by its terms, supplants the DER's December 22, 1975, letter. We therefore deny appellant's Motion For Order Sustaining Appeal.

The DER moves that the appeal at EHB Docket No. 76-011-B be dismissed as moot because the DER's December 22, 1975, action which is the basis for the appeal at that docket number has been superceded by the December 8, 1978, DER action. In the alternative, the DER moves that the appeal at EHB Docket No. 76-011-B, be consolidated with EHB Docket No. 79-002-B, the appeal from the December 8, 1978, DER letter.

We believe that the appeals at EHB Docket No. 76-011-B and EHB Docket No. 79-002-B should be consolidated. Both appeals relate to the identical issue, the validity of the DER action denying Surface Mining Permit No. 4073 SM-3.

We do not dismiss the appeal at EHB Docket No. 76-011-B even though we find that the December 8, 1978, letter supplants the DER's earlier action in denying the permit because we believe that it is preferable, at least for purpose of appeal, to have a record which includes the documents at EHB Docket No. 76-011-B.

O R D E R

AND NOW, this 7th day of June, 1979, it is hereby ordered that:

(1) Appellant's Motion For Order Sustaining Appeal and Directing Issuance Of Permit is denied;

(2) DER's Motion to Dismiss is denied; and

(3) DER's Motion to Consolidate is granted. The appeal at EHB Docket No. 76-011-B and the appeal at EHB Docket No. 79-002-B are consolidated under the caption of the case, Doraville Enterprises v. Commonwealth of Pennsylvania, EHB Docket No. 79-002-B.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

(carbon copies on next page)

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and

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DATED: June 7, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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DASET MINING CORPORATION

Docket No. 78-102-B
and
78-103-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION TO QUASH APPEAL

This Opinion and Order is dispositive of DER's Petition to Quash Appeal and motions filed by both parties subsequent to the petition.

Daset Mining Corporation, appellant herein, appeals from the refusal of the DER to issue to it surface mining permits for a location in Burrell Township, Armstrong County (Docket No. 78-102-B) and a location in Oliver Township, Jefferson County (Docket No. 78-103-B).

The DER filed a petition to quash each appeal, contending that there had been no final action from which Daset could take an appeal. Daset filed an "Answer to Petition to Quash Appeal and New Matter". The DER filed preliminary objections to Daset's answer and Daset filed a motion to strike the DER's preliminary objections.

Daset's motion to strike is denied. The DER's preliminary objection in the form of a motion to strike is not an inappropriate response to Daset's answer. Further, the DER's preliminary objection is well taken. Although appellant attached a notice to plead to its "New Matter" within twenty (20) days or be subject to a default judgement, it did not label any part of its answer as "New Matter". The new matter is apparently interspersed throughout the answer. In any event it is incapable of being answered. Thus, the DER's preliminary objections are sustained because appellant's "New Matter" fails to comport with Pa.R.C.P. 1030 which requires that all new matter raised in a responsive pleading be pleaded under the heading "New Matter".

We do not, however, require appellant to re-file its Answer to the DER's Petition to Quash Appeal. We have determined that the DER's petition should be denied.

In its petition to quash, the DER asserts that there has not been a final action for the Board to review because the DER has neither denied nor granted appellant's permit application. Rather, the DER contends that it has merely "refrained from reviewing" appellant's application because, it alleges, appellant has failed to conduct existing surface mining operations in conformance with the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P. L. 1198, *as amended* 52 P. S. §1396.1 *et seq.*

The DER's argument is spurious. A refusal to act on a permit application is unquestionably a decision of the DER appealable to this Board under Section 1921-A of the Administrative Code, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq.*

Also we are unable to accept as true, without a hearing, the facts supporting the DER's allegation that appellant has failed to conduct its existing surface mining operations in conformance with law.

ORDER

AND NOW, this 7th day of June, 1979, it is hereby ordered that the DER's Petition to Quash Appeal is denied.

ENVIRONMENTAL HEARING BOARD

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For the Appellant/Respondent/Defendant:

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DATED: June 7, 1979

ma

COMMONWEALTH OF PENNSYLVANIA

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DASET MINING CORPORATION : Docket No. 78-102-B and 78-103-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR PETITION FOR LEAVE TO TAKE DISCOVERY

Appellant, Daset Mining Corporation has filed a petition for leave to take discovery in which it requests permission to depose four individuals and requests the Board to order the Department of Environmental Resources (DER) to produce certain documents. The DER has filed objections thereto.

The DER's initial and most strenuous objection is to appellant's request that a subpoena issue for the deposition of the DER trial counsel of record in this matter. The DER objects on the grounds that the "request is intended for harassment purposes, is sought in bad faith, will cause unreasonable annoyance and oppression to [trial counsel] and to the Department, and relates to matters protected by the attorney-client privilege." The DER also objects that the deposition would involve, by necessity, impressions, conclusions and opinions "of counsel in anticipation of litigation".

Trial counsel are not immune from discovery. 5A ANDERSON PENNSYLVANIA CIVIL PRACTICE §4011.232 and *Erb Estate*, 25 D & C2d 283 (1961). But their depositions are generally taken only under unusual circumstances such as where the attorney has an involvement in the matter separate and distinct from his role as trial counsel. In *Erb Estate* the attorney who was deposed had drafted the will which was the subject of the dispute. Here, appellant wishes to depose the trial counsel because appellant believes that he "knows or should have known that there was no violation during certain of the time periods which [he] alleges a violation to occur".

We recognize that a party asserting that discovery is objectionable has the burden of proving same. 5A ANDERSON PENNSYLVANIA CIVIL PRACTICE §4011.73.

Nevertheless in light of the policy against taking the deposition of trial counsel because of the likelihood that the attorney's knowledge of the matter is derived in whole, or in part, from his client and thus privileged or is protected as attorneys work product, we believe that appellant should assume the burden of showing why it should be permitted to depose the DER trial counsel. We therefore require that appellant, if it wishes to depose DER's trial counsel, shall file with this Board a verified statement detailing why it believes that counsel has an involvement in this matter which is separate and distinct from his role as trial counsel and thus has knowledge of facts which are not protected from discovery by the attorney-client privilege or by the anticipation of litigation limitation and which would be of substantial aid to appellant in the preparation of its case.

In response to the DER's objections to the production of documents requested by paragraphs 9(a), 9(b) and 9(d) of appellant's petition, the DER (a) need only produce those documents in its possession, custody or control, (b) need not produce documents protected by the attorney-client privilege, and (c) need not produce those documents prepared by counsel in anticipation of litigation.

DER's objection to paragraph 9(b) of appellant's petition is overruled. The DER shall produce all correspondence in its possession, custody or control between the DER and Daset or any other third person, corporation, government, including the United States, relating to the subject surface mining application.

The documents shall be produced for inspection and copying at the DER's Bureau of Surface Mine Reclamation office in Harrisburg, Pennsylvania. See *Allegheny Valley Residents Against Pollution v. Commonwealth of Pennsylvania, DER, et al,* EHB Docket No. 74-232-C (Opinion and Order issued June 9, 1977) wherein we stated that "Pa.R.C.P. 4009 permits only the inspection, examination and copying of documents. It does not authorize the transmittal of evidence to any one or any place for examination."

ORDER

AND NOW, this 13th day of June, 1979, it is hereby ordered that:

1. Three subpoenas are attached hereto for the purpose of taking oral depositions of J. Anthony Ercole, John Hulsberg and Henry Foringer.

2. If appellant wishes to take the oral deposition of Gary Waxman, Esquire, it shall submit to this board on or before June 27, 1979, a verified statement detailing why it believes that Gary Waxman has an involvement in this matter which is separate and distinct from his role as trial counsel and thus has knowledge of facts which are not protected from discovery by the attorney-client privilege or by

the anticipation of litigation limitation and which would be of substantial aid to appellant in the preparation of its case.

3. The DER shall produce for inspection and copying documents required by paragraphs 9(a), 9(b), 9(c) and 9(d) of appellant's Petition for Leave to Take Discovery in accordance with the terms of this opinion at the DER's Bureau of Surface Mine Reclamation office, Seventh Floor Fulton Building, Third and Locust Streets, Harrisburg, Pennsylvania at a date and time convenient to both parties on or before July 13, 1979.

4. The DER need not supply any documents that were prepared in the preparation of this litigation or that are specifically within the attorney-client privilege.

5. The DER shall make copying facilities available and may impose upon appellant a reasonable charge for the use of its duplicating equipment.

ENVIRONMENTAL HEARING BOARD

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DATED: June 13, 1979

COMMONWEALTH OF PENNSYLVANIA

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DAVID L. and I. LaVERNE BRECKENRIDGE, et al : Docket No. 79-028-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ONYX MINING, INC., Permittee

OPINION AND ORDER
SUR PRELIMINARY OBJECTIONS
TO NOTICE OF APPEAL

Permittee, Onyx Mining Company has filed Preliminary Objections to Appellant, New Centerville Borough's Notice of Appeal. The preliminary objections are in the nature of objections questioning the appellant's capacity to sue, the Board's jurisdiction to entertain certain issues and a motion for a more specific pleading.

The preliminary objection to the appellant's capacity to sue, which contends that appellant has not set forth any facts which would indicate that it is located close enough to the proposed permitted area to suffer adverse effects therefrom, is denied. A fair reading of the appeal shows that it alleges that the proposed operation will cause a diminution and contamination of water supplies serving its residents.

New Centerville Borough contends in paragraphs 3(a) and 3(g) of its Notice of Appeal that the proposed surface mining operation will have certain harmful effects upon the "residents of New Centerville Borough and the surrounding areas". Permittee argues that appellant lacks standing to represent the rights of residents of "the surrounding area". Permittee's preliminary objection is sustained; appellant, New Centerville Borough, as a matter of law, lacks standing to contest the effect of the surface mining operation on persons other than its own residents. See *Campbell et al v. Commonwealth of Pennsylvania, DER et al*, ___ Pa. Commonwealth Ct. ___, 396 A.2d 870 (1979).

Permittee also contends that this Board lacks jurisdiction over the issue raised by appellant in paragraph 3(e) of its Notice of Appeal, which alleges that the proposed surface mining operation will violate borough ordinances and/or resolutions. We agree that this Board lacks jurisdiction generally to adjudicate the conformance of a surface mining operation to borough ordinances. Appellant's remedy is in a court of general jurisdiction. However, the Commonwealth Court in *Citizens for Orderly Progress et al v. Commonwealth of Pennsylvania, DER and Emerald Enterprises Limited*, 35 Pa. Commonwealth Ct. 192, 387 A.2d 989 (1978), has interpreted Article I, Section 27 of the Pennsylvania Constitution to require the DER, as trustee of the Commonwealth's public natural resources, to address the direct impact of the issuance of a permit by considering, *inter alia*, whether a proposed project conforms with local planning. We are unable to tell at this time, and thus must await the presentation of evidence, whether the subject ordinances should be considered by this Board.

The permittee also contends that this Board lacks subject matter jurisdiction over the allegations raised in paragraph 3(f) of the Notice of Appeal, which contends that the mining operation and/or blasting will result in the diminution of real property values. Permittee's objection is sustained. The Board lacks jurisdiction to revoke a surface mining permit, because the surface mining operation, although proposed to be operated in accordance with the law, might cause a diminution of property values.

Permittee's Motion for More Specific Pleading is denied except as to paragraphs 3(c) and 3(e) of the appeal. Appellant shall amend paragraph 3(c) of its appeal to state with greater specificity how permittee's operation will cause the "colapse or subsidence of surface structure" and paragraph 3(e) of its appeal to specify the ordinances and resolutions referred to therein and to state whether or not any violations of the ordinances or resolutions will occur.

O R D E R

AND NOW, this 18th day of July, 1979, it is hereby ordered that:

1. the appeal of Appellant, New Centerville Borough, is dismissed insofar as it purports to represent the rights of persons in the areas surrounding New Centerville Borough;

2. paragraph 3(f) of Appellant's Notice of Appeal is dismissed; and

3. Appellant shall amend paragraphs 3(c) and 3(e) of its Notice of Appeal in accordance with the terms of this opinion.

ENVIRONMENTAL HEARING BOARD

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Mahlon J. & Lena B. Miller
Virgil C. & Roberta J. Mosholder
C. Gregory Frantz, Esquire

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Gregg M. Rosen, Esquire
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DATED: July 18, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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In The Matter Of:	)	
	)	
BOROUGH OF MERCER AND MERCER BOROUGH SEWAGE TREATMENT AUTHORITY,	)	
	)	
Appellant	)	
	)	
v.	)	
	)	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,	)	Docket No. 79-070-S
	)	
Appelle	)	
	)	
and	)	
	)	
COUNTY OF MERCER,	)	
	)	
Intervener	)	

OPINION AND ORDER SUR MOTION TO DISMISS APPEAL

On May 14, 1979, the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) issued an Order to the Borough of Mercer (Borough) and to the Mercer Borough Sewage Treatment Authority (Authority) in which it was provided that the Borough was not prohibited from constructing, building, allowing or permitting the sewage connection or tap-on of a proposed 4-unit addition to the Mercer County Juvenile Detention Home to the existing Mercer sewage collection system.

It was found in this Order that the Borough owned and operated a sewage collection system and treatment plant the construction and operation of which was authorized by a DER permit, that the Authority was the authorized agent of the Borough for purposes of administering and acquiring projects related to wastewater problems, that on July 20, 1972, DER issued an order to the Borough prohibiting sewage connections or tap-ons to its sewage collection system, that on March 1, 1973, this order was modified to exclude a portion of the

Borough from the prohibition, that the Borough and the Authority are engaged in a program of reducing the flows in the collection system to the sewage plant in order to relieve the hydraulic overload condition (which necessitated said sewer connection ban order), that authorization for the imposition of sewer connection bans by DER is contained in 25 Pa. Code § 94.21, that in 25 Pa. Code § 94.41 it is provided that a sewer connection ban may be modified to allow for the connection of facilities of public need, that the County of Mercer (County) asked DER to modify said sewer connection ban order to allow for the connection of said 4-unit addition to the Mercer County Juvenile Detention Home and that the County had demonstrated to DER that such addition to the Juvenile Detention Home is a facility of public need.

On June 13, 1979, this Board received a notice of appeal of this Order of May 14, 1979, from the Borough and the Authority.

In this notice of appeal the Borough and the Authority made the following contentions:

1. A major contributing factor to the hydraulic overload condition present in the Borough sewage treatment plant is the fact that by reason of defective sewage transmission lines owned by the County there is significant infiltration of those lines, which lead to the sewage treatment plant. The Borough and the Authority have no right to abate such infiltration of its sewage transmission lines. DER has failed to direct the County to abate such infiltration and, as a result, the Borough and the Authority have been forced to refuse sewer connections and tap-ins to numerous applicants since 1973. This Order of May 14, 1979, is unconstitutional as to the Borough and the Authority because it is discriminatory for DER to authorize the Borough and the Authority to permit the connection of the Juvenile Detention Home addition to its sewage collection system in the face of the continued refusal of DER to permit the Borough and the Authority to offer connections to other applicants.
2. The public needs of the Borough for the increased revenue which would be generated if other connections would be authorized outweigh any public need for the connection of the addition to said Juvenile

Detention Home.

3. There was no affirmative determination that public health hazards and/or pollution would be eliminated if this addition is connected to said sewage collection system.

On July 20, 1976, we entered an Order in which we granted a petition to intervene in this matter filed by the County.

On July 30, 1976, we received a motion to dismiss this appeal from DER. In this motion DER avers that since DER did not make it mandatory upon the Borough to allow the connection of this addition to said sewage collection system, but rather provided that the Borough was not prohibited from so doing, neither the Borough nor the Authority are aggrieved by the Order of May 14, 1979.

Under and by virtue of the provisions contained in Section 1921 - A (a) of the Administrative Code of 1929, Act of April 9, 1929, *as amended*, this Board has the power and the duty to hold hearings and issue adjudications under the provisions of the Administrative Agency Law , Act of June 4, 1945, P.L. 1388, now repealed, and substantially re-enacted by the Judiciary Act Repealer Act , Act of April 28, 1978, P.L. 202, effective June 27, 1978, 2 Pa. C.S.A. § § 101 *et seq.*

We have ruled that an appeal to this Board from an action of DER is not viable unless the appeal was from an action which, if unappealed, would constitute an "adjudication", under the provisions of the Administrative Agency Law , *supra*. See e.g. *Upper Moreland Township, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources and Bryn Athyn Borough Authority, et al*, EHB Docket No. 77-198-D, *et al* (June 29, 1978); *George Eremic v. Commonwealth of Pennsylvania, Department of Environmental Resources and Chambers Development Co., Inc.*, EHB Docket No. 75-283-C (June 16, 1976, and December 2, 1976).

The term "adjudication" was defined in Section 2 of the Administrative Agency Law , *supra*, 71 P.S. § 1710.2. Although that section was repealed by the Judiciary Act Repealer Act , *supra*, the definition of the term "adjudication", now set forth in 2 Pa. C.S.A. § 101, is identical to the previous definition of said term. This definition is as follows:

"' *Adjudication*. Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made. . . ."

The Commonwealth Court has held that in order for an action of DER to constitute a final "action" (or "adjudication") from which an appeal can be taken, "the determination of DER must direct compliance with an Act and impose some liability or otherwise effect the obligations or duties of a person." *Gateway Coal Company v. Commonwealth of Pennsylvania, Department of Environmental Resources*, ___ Pa. Commonwealth Ct. ___, 399 A.2d 802, 804 (1979); see also *Standard Lime & Refractories Co. v. Department of Environmental Resources*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971).

Our task of determining whether the Order of May 14, 1979, constitutes an appealable action or adjudication begins with an examination of the regulations dealing with sewer connection bans which are applicable to this proceeding.

DER is not authorized to modify a ban on connections to a sewage collection system, the terminus of which is an hydraulically overloaded sewage treatment plant, for the sole reason that such a modification is necessary to accomodate a facility of public need. DER can modify such a ban only if it is satisfied that there has been compliance with the provisions contained in the following regulations:

In Section 94.41 of the Title 25, Rules and Regulations, Department of Environmental Resources, 25 Pa. Code § 94.41 it is provided, as follows:

"A ban may be modified or removed by the Department, in the exercise of its discretion, in accordance with the following conditions:

"(1) If the permittee has demonstrated that steps have been taken which have resulted in the reduction of the actual loading to less than the capacity provided in the permit, the ban may be modified or removed to allow connections up to the permitted capacity.

"(2) If it is affirmatively demonstrated, through the submission by the permittee and approval by the Department of an application for an amendment to the permit, that the actual capacity of the plant or the sanitary sewer system or any part thereof, or both, is in excess of the capacity provided in the permit and is sufficient to prevent an overload until additional capacity is made available, the ban may be modified or removed to allow connections up to the new capacity.

"(3) If the permittee has demonstrated that steps have been taken which have resulted in the reduction of the overload and that public health will not be endangered and that downstream uses will not be adversely affected, the ban may be modified to allow for limited

approval of connections for the elimination of public health hazards, the elimination of pollution, or the connection of facilities of public need, provided that the program for the reduction of the overload continues in a manner which will result in the overall reduction of overload."

In Section 94.42 of Title 25, *supra*, 25 Pa. Code § 94.42, it is provided as follows:

"The Department will not modify or remove a ban if the projected number of new connections may exceed the available capacity if the ban is modified or removed unless the person or municipality upon whom the ban in imposed presents a program, acceptable to the Department, for limited approval of connections in a manner which will prevent further overload. This program shall give priority to connections in the following order:

(1) the elimination of public health hazards;

(2) the elimination of pollution; and

(3) the connection of facilities of public need."

Although DER did not, in the Order of May 14, 1979, expressly direct the Borough and the Authority to allow the County to connect its proposed Juvenile Detention Home addition to said sewage collection system, DER made two findings therein which have significance.

First, DER found that the Borough and the Authority are engaged in a program of reducing the flows in the collection system to the sewage plant in order to relieve the hydraulic overload condition. Second, DER found that the proposed addition to the Juvenile Detention Home is a facility of public need.

These findings are clearly intended to demonstrate that the requirements for modification of a sewer connection ban, as contained in 25 Pa. Code § § 94.41 and 94.42, *supra*, have been satisfied.

In our judgment, these findings affect the Borough and the Authority, even in the context of the non-mandatory nature of the direction to them in the Order, because they constitute a final determination that there is no environmental or regulatory impediment to the connection of this proposed addition and because they constitute a final determination that this proposed addition is a facility of public need. Furthermore, these findings clearly affect the rights of the County, which, when its petition to intervene was granted, became a party to this appeal and subject to the jurisdiction of this Board. See *Compass Coal Company v. Commonwealth of Pennsylvania, Department of Environmental Resources and The City of DuBois, et al*, EHB Docket No. 72-312 (August 26, 1975).

It can reasonably be argued, in the event of a refusal by the Borough and the Authority to allow such a connection, and in the event of a lawsuit which would almost certainly be brought by the County subsequent to such a refusal, that the County would be entitled to rely on these findings and that the Borough and the Authority would be estopped from denying or contesting the validity of same. Furthermore, it can be reasonably argued that if there can be no appeal from this Order, neither the Borough nor the Authority will be able to test the validity of regulations in which there is established a sewer connection priority to facilities of public need in a situation where a ban is otherwise going to continue to be in existence.

There is another aspect of this Order which must be discussed. It is provided therein, notwithstanding the finding that the Borough and the Authority are engaged in a sewage flow abatement program, that the existing sewer connection ban (but for the connection of said Juvenile Detention Home addition) shall remain in full force and effect. Ordinarily, such a provision would not be appealable because it does not change the status quo. In this case, however, it affects the rights and duties of the Borough and the Authority to the extent that they are barred from allowing other connections even in the face of the flow abatement progress which DER obviously believes that they are making.

We find that the Borough and the Authority should, at the very least, have the opportunity to test the validity of the two findings which we previously discussed. They were made by the administrative agency charged with the responsibility to preserve the Pennsylvania environment and they directly affect the rights, duties and obligations of these parties.

We must note that we have reviewed copies of two letters, written on DER stationery by DER personnel in the Meadville Regional Office of its Bureau of Water Quality Management, dated September 6, 1978, and March 30, 1979. In these letters it is clearly indicated that the Borough sewage treatment plant continues to be hydraulically overloaded, that no significant improvement of this problem has occurred, that no connections whatsoever to the sewage collection system are permitted (including in the Northwest Quadrant of the Borough) unless an applicant for such a connection can demonstrate that it is

entitled to an exception to the ban and that the Authority was directed to submit to DER within 90 days from receipt of said March 30, 1979 letter, a written plan and schedule setting forth the actions to be taken to reduce the overload and to provide the needed capacity to achieve compliance.

We are puzzled by the fact that DER made a finding in its Order of May 14, 1979, that the Borough and the Authority are engaged in a program of reducing the flows in the collection system to said sewage treatment plant in order to relieve the hydraulic overload condition when DER was, apparently, so dissatisfied with the efforts of the Borough and the Authority along those lines that on March 30, 1979, DER directed the Authority to submit a written plan and schedule with regard thereto -- unless between March 30, 1979, and May 14, 1979, an acceptable program was submitted to DER.[1]

In our opinion, the existence of these letters under the present circumstances is but another manifestation of the need for the Borough and the Authority to have the opportunity to challenge the findings made by DER in its apparent attempt to demonstrate that the requirements contained in 25 Pa. Code § § 94.41 and 94.42, *supra*, for a sewer connection ban modification have been met.

Accordingly, we will refuse to grant the Motion to Dismiss filed by DER.

O R D E R

AND NOW, to-wit, this 13th day of September, 1979, it is hereby Ordered that the Motion to Dismiss the instant Appeal, filed by the Commonwealth of Pennsylvania, Department of Environmental Resources, is refused.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

cc: Bureau of Litigation
Zelda Curtiss, Esquire
Joseph J. Nelson, Esquire
Thomas T. Frampton, Esquire

DATED: September 13, 1979

1. We find no evidence from that which has been filed to date which would indicate that such a written plan and schedule was even submitted from and after March 30, 1979.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CHARLESTOWN ARMS CORPORATION :

Docket No. 79-109-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR APPEAL *NUNC PRO TUNC*

This matter is before the Board on a Petition for Appeal *Nunc Pro Tunc*.

Petitioner on April 11, 1979, received an order from the DER requiring it to perform certain work and prepare certain plans for a sewage pump station serving the Caines Creek Condominiums, which were developed by petitioner in Phoenixville, Chester County, Pennsylvania. Petitioner, for reasons unexplained, did not bring the order to the attention of his attorney until June 6, 1979, approximately 25 days after the period to appeal the order to the Board had expired.

Petitioner's attorney initially attempted to resolve the matter through discussions with the DER. When the negotiations failed, he, on July 31, 1979, 111 days after the order was issued, filed this petition for leave to appeal *nunc pro tunc*. The petitioner alleges as a basis

for granting the appeal *nunc pro tunc*, a meritorious defense and the petitioner's failure to notify his attorney of the order until after the appeal period had expired.

The DER, for reasons which are not altogether clear, favors petitioner's request.

This Board lacks jurisdiction to entertain an appeal that is not filed within the 30 day time limit proscribed by our rules unless the appeal meets the criteria of an appeal *nunc pro tunc*. See *Rostosky v. Commonwealth of Pennsylvania, DER*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976). We do not have the discretion to allow an untimely filed appeal that does not satisfy the *nunc pro tunc* common law standards, notwithstanding either a meritorious defense or DER's acquiescence in the appeal. We cannot extend the time for taking an appeal as a matter of grace or mere indulgence. *West Penn Power v. Goddard*, 460 Pa. 551, 333 A.2d 909 (1975).

25 Pa. Code §21.53 of our rules provides that the standards on which the Board may grant leave for the filing of an appeal *nunc pro tunc* are those applicable in analogous cases in the Courts of Common Pleas. Appeals are permitted by the Courts of the Commonwealth *nunc pro tunc* when appellant can show that fraud prevented the filing of a timely appeal or that there was a break down in the court's operation. *West Penn Power Company v. Goddard, supra; City of Pittsburgh v. Pennsylvania PUC*, 3 Pa. Commonwealth Ct. 546, 284 A.2d 808 (1971); and *In re: Annexation of a Portion of the Township of Franklin by the Borough of Delmont*, 2 Pa. Commonwealth Ct. 496, 276 A.2d 549 (1971). The Court in the *Township of Franklin* case said at 2 Pa. Commonwealth Court 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)."

In the past, the Board has permitted an appeal *nunc pro tunc* where the party was actively misinformed by the DER in such a way as to prevent the timely filing of an appeal. *Buckley v. Bucks County Department of Health*, EHB Docket No. 73-414-C (issued July 18, 1975), but has refused to permit appeals *nunc pro tunc* where appellant averred that its appeal should be allowed in the "interest of justice", *Allegheny River Association, Inc. v. DER, et al*, EHB Docket No. 74-280-C (issued August 12, 1975), and where appellants were confused over whether the DER action of certification to EPA of limits in an NPDES permit was an appealable order, *USSC v. DER*, EHB Docket No. 75-167-W (issued January 6, 1976) and *Sharon Steel Corporation v. DER*, EHB Docket No. 75-150-C (issued October 11, 1978).

The Pennsylvania Supreme Court in the recent case of *Bass v. Commonwealth of Pennsylvania, et al*, ___ Pa. ___, 401 A.2d 1133 (1979), relaxed the precedent common law standards of "fraud or break down in court operations". The court permitted an appeal *nunc pro tunc* where the appeal papers, although prepared by the appellant's attorney in time to toll the appeal period, were not timely filed because his secretary

became ill. The Court reasoned that a non-negligent act of a person's attorney should not prevent him from having access to the appellate process.

The *Bass* decision has not, however, relaxed the common law standards of "fraud and court break down" to the extent that it would permit a *nunc pro tunc* appeal in a situation like the present case where the appeal was not filed because the party failed to notify his attorney in time. The Court specifically recognized that the negligence of an appellant, or an appellee's counsel, or an agent of appellant is not a sufficient excuse for the failure to file a timely appeal. *Bass v. Commonwealth, et al, supra,* 401 A.2d at 1135.

Since the petitioner's averments do not satisfy the common law standards for allowance of an appeal *nunc pro tunc,* we lack the discretion under present law to grant the petition.

ORDER

AND NOW, this 8th day of November, 1979, it is hereby ordered that petitioner, Charlestown Arms Corporation's Petition for Appeal *Nunc Pro Tunc* is denied.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

THOMAS M. BURKE
Member

DATED: November 8, 1979

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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LACKAWANNA REFUSE REMOVAL, INC.
d/b/a NORTHEASTERN LAND DEVELOPMENT
COMPANY

Docket No. 79-024-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR RECONSIDERATION
OF BOARD'S MAY 10 OPINION AND ORDER

Petitioner, Lackawanna Refuse Removal Incorporated d/b/a Northeastern Land Development Company, requests that we reconsider our May 10, 1979, Opinion and Order denying a petition for supersedeas from a DER order requiring closure of its landfill in Old Forge Borough, Lackawanna County. The denial was grounded on our finding, after hearing, that Petitioner was surreptitiously disposing of 55-gallon drums containing hazardous wastes and emptying tank trucks of same at the Old Forge Landfill.

The basis for Petitioner's request that we reconsider our opinion and order is an affidavit by one Joseph Scarantino stating that Edward Cherkoski, a past employee of Petitioner, told Scarantino that he lied when he testified as a witness for the DER at the supersedeas hearing. Also, Petitioner asserts that reconsideration should be given

because the DER disposed of the leachate samples that it took at the landfill after it performed a chemical analysis of the samples.

Our decision was not dependent solely on Edward Cherkoski's testimony. The salient points of his testimony were corroborated by other witnesses. The opinion highlighted two incidents which Edward Cherkoski described in detail. One involved the escape of gas when a 55-gallon drum burst while being unloaded at the landfill on the night of September 1, 1978. His testimony of that incident was supported by the testimony of Richard Cherkoski who was also present at the landfill when the gas escaped and it also coincides with the testimony of John Victor, a police officer for Old Forge Borough, who that night investigated complaints of malodorous gas and traced its source to the landfill and that of Mrs. Tony Cusumano whose family was forced to leave their home by the gas. The other incident concerned Edward Cherkoski's very vivid description of his physical reaction to a dehabilitating gas which escaped during a drum-loading operation on December 17, 1978. That testimony was corroborated by John Hunsinger who was also present and was made physically ill by the escaping gas.

The cogent point is that our finding in the May 10, 1979, Opinion and Order that Petitioner engaged in the improper and illegal burial of toxic and hazardous wastes would not change even if Edward Cherkoski's testimony was disregarded. The uncontradicted testimony of Donald Sandly, John Hunsinger and Richard Cherkoski would still remain. Sandly testified that he disposed of tank truckloads of liquid wastes and 55-gallon drums of waste at the site. Hunsinger and Richard Cherkoski both testified that they drove trucks hauling the drums to the landfill and Hunsinger also drove tank trucks to the landfill where he drained the contents onto the ground.

Petitioner's secretary, Paul Iacavazzi, testified that Petitioner was paid to unload some 11,000 55-gallon drums at the site. A chemical analysis of a seepage from the ground in the area where the drums were buried shows the presence of phenols, toluene, chromium, cadmium and other chemicals not present in residential or commercial refuse.

Since the result would remain the same even if Edward Cherkoski's testimony was disregarded, Petitioner's allegations on the invalidity of his testimony do not constitute a sufficient reason to reconsider the May 10, 1979, Opinion and Order.

Petitioners request that the Opinion and Order be reconsidered because the DER disposed of samples from the landfill after it performed a chemical analysis on the samples is denied as being without merit.

O R D E R

AND NOW, this 20th day of November, the Petition for Reconsideration of Lackawanna Refuse Removal, Inc. d/b/a Northeastern Land Development Company of the Board's May 10, 1979, Opinion and order is denied.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: THOMAS M. BURKE
Member

DATED: November 20, 1979

cc: Bureau of Litigation
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COMMONWEALTH OF PENNSYLVANIA

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FRANK RAVOTTI : Docket No. 78-131-B
" 78-134-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

This matter is before the Board on Motions to Dismiss filed by the Department of Environmental Resources (DER) with respect to two appeals taken by Frank Ravotti from actions of the DER. The first appeal, at docket number 78-131, is from an order dated September 12, 1978, to Gilpin Township and the Gilpin Township Sewage Authority requiring them to advertise and award bids and commence construction of sewage collection facilities previously approved by the DER and the United States Environmental Protection Agency. The DER contends that the facilities are necessary to abate untreated and inadequately treated sewage in the Township and that a delay in construction jeopardizes the receipt of federal funds for the project. The DER action that appellant has appealed at docket number 78-134 is related to the DER September 12, 1978, Order, in that it advises Gilpin Township that the further permitting of on-lot sewage disposal systems will be restricted as required by the DER regulations because Gilpin has failed to install the sewage collection facilities which are the subject of the September 12, 1978, Order.

The DER's motion to dismiss requests that we dismiss both appeals because: (1) the Board has no jurisdiction over the appeal at docket number 78-131 as it was not filed within the prescribed 30-day time period; (2) appellant lacks standing to challenge the two DER ions; (3) appellant is foreclosed from attacking the September 12, , Order because he failed to appeal the DER issuance of a permit oving the project and (4) appellant, who has filed these appeals the caption "Frank Ravotti for himself and others", cannot represent the interest of others in this appeal.

The DER's contention that the appeal was not timely filed is based on appellant's statement in its notice of appeal that it received the order on September 13, 1978, 33 days before its appeal was docketed with the Board. In *Rostosky v. Comm. of PA, DER,* 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976), the Commonwealth Court held that this Board lacks jurisdiction to entertain an appeal that is not filed within the statutorily required 30-day time period. See 25 Pa. Code 21.21(a). Appellant, in his answer to the DER's Motion to Dismiss, states under affidavit, that he erred in the Notice of Appeal when he said that September 13 was the date he received notice of the DER Order. His answer states that the Notice of Appeal should have read that Gilpin Township received the DER Order on September 13, 1978, but that appellant did not become aware of it until September 14, 1978. Receipt of notice by appellant on September 14, 1978, would place the filing within the thirty-day appeal period, as the 30 days would be up on October 14, 1978, a Saturday and under 1 Pa. Code 31.12 of the General Rules of Administrative Procedure and Pa. R.C.P. 106 the appeal period would expire on October 16, 1978, the next business day. Thus, we find that the Notice of Appeal was timely filed.

The DER's argument that appellant's appeal of the DER September 12, 1978,

is unpersuasive. DER contends that appellant should have raised its objections by an appeal of the permit issued to Gilpin Township for the construction of these sewage collection facilities. It cites *Comm. of PA, DER v. Wheeling-Pittsburgh Steel Corp.*, 22 Pa. Commonwealth Ct. 280, 348 A.2d 765 (1975), affirmed, 473 Pa. 432, 375 A.2d 320 (1977) *Comm. of PA v. Derry Township*, 446 Pa. 31, 351 A.2d 606 (1976) for proposition that one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have been raised in the proceeding afforded by his statutory remedy. The DER's analysis fails because the permit issuance was not an action which required the installation of the collection facilities, it merely authorized their construction. Thus, the statutory remedy to contest DER's decision that Gilpin Township must construct the sewage collection facilities could not be through the appeal of the permit for the obvious reason that the permit did not compel the construction of the facilities. The existence of this case, itself, corraborates the fact that the issuance of the permit was not an action of the DER requiring construction of the sewage collection facilities; if it had been a final action, requiring installation of the facilities, the DER could have proceeded directly to court for an order to require same rather than having to issue an administrative order requiring its installation.

The DER's third objection, that appellant cannot represent the interests of others in this appeal, is sustained. Appellant is the only person who has perfected an appeal at these docket numbers and we are unaware of any authority permitting a person to represent others who have not perfected an appeal.

The DER's remaining objection, that appellant lacks standing to pursue these appeals is also well taken. Appellant's interest in the outcome

of this litigation is not apparent from the documents appellant has filed with the Board.

Section 1921-A of the Administrative Code, 71 P.S. §510-21 gives a right of appeal to the Board to any person "adversely affected" by an action of the DER. The Board's rule 21.2 defines action as any order, decision etc. "affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person". The question at issue here is whether appellant is adversely affected by the DER's actions toward Gilpin Township. In determining whether an individual is adversely affected or has standing, the Board is guided by the Pa. Supreme Court's decision in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975) where the Court held that a party, to be aggrieved, must show that the interest invaded is substantial, immediate and direct. The Court stated at 346 A.2d 280 that "... it is not sufficient for the person claiming to be 'aggrieved' to assert the common interest of all citizens in procurring obedience to the law".

The Board's rules of procedure require that a Notice of Appeal set forth in separate numbered paragraphs the specific objections to the action of the DER. Here, appellant has filed identical objections to both DER actions. None of the objections allege injury to appellant. Instead, they allege injury to the interests of Gilpin Township. The objections contend that no pollution is occurring, that malfunctioning on-lot sewage systems can be corrected by modern technology, that the Township Authority members have resigned, that the Township Supervisors have diligently procurred alternative methods, that construction of the system is not economically feasible and will cause Gilpin Township to face bankruptcy. None allege that appellant is aggrieved.

Pursuant to our request, appellant filed answers to both motions to dismiss. In the answers, he alleges that he is aggrieved because of his status as a citizen and a taxpayer of Gilpin Township and

he offers the conclusory statement that "grave financial harm will come to he [sic] and other taxpayers of Gilpin Township".

Appellant's status as a citizen and taxpayer of Gilpin Township does not provide him with standing in these matters as it does not provide him with an interest more substantial than "the common interest of all citizens in procurring obedience to the law". He has not alleged that his taxes would be increased because of the DER's actions and it is not apparent from the DER actions that taxes would be increased. The Gilpin Township share of the cost of the sewage collection facilities would constitute a self-liquidating debt, in that it would be paid for by charges assessed against the users of the system, not by tax remedies from the citizens of Gilpin Township. See the Local Government Unit Debt Act, the Act of July 12, 1972, No. 185, 53 P.S. 6780-1 *et seq.*

Appellant also states that "grave financial harm will come" to him because of the DER actions. However he does not set forth any facts which would support the statement. We do not know what series of events would result from the DER actions which could cause appellant to suffer grave financial harm. However, we do not believe that the appeal should be dismissed at this time. Rather, justice would best be served by giving appellant the opportunity to amend his Notices of Appeal by adding the facts which support his allegation that the DER actions will cause him grave financial harm. Thus, we will give appellant 10 days to amend his Notices of Appeal at EHB Docket Nos. 78-131 and 78-134 to state how DER actions would cause him harm.

ORDER

AND NOW, this 30th day of November, it is hereby ordered that:

1. The appeal at EHB Docket No. 78-131-B is dismissed as to any person not named in the Notice of Appeal.

2. The appeal at EHB Docket No. 78-134-B is dismissed as to any person not named in the Notice of Appeal.

3. Appellant shall file an amendment to his Notice of Appeal at EHB Docket No. 78-131-B within ten days of receipt of this order stating the facts which support his allegation that the DER action would cause him grave financial harm.

4. Appellant shall file an amendment to his Notice of Appeal at EHB Docket No. 78-134-B within ten days of receipt of this order stating the facts which support his allegation that the DER action would cause him grave financial harm.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Thomas M Burke

BY: THOMAS M. BURKE
Member

DATED: November 30, 1979