COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

1977

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

Chairman.....PAUL E. WATERS

Member.....JOSEPH L. COHEN

Member.....JOANNE R. DENWORTH

Member.....THOMAS M. BURKE
(Appointed 10/25/77 to replace
Member Joseph L. Cohen)

TABLE OF CASES REPORTED IN THIS VOLUME

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 1977.

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.
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> (d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have the power to grant a supersedeas.
>
> (e) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall include time limits for taking of appeals, procedures for the taking of appeals, location at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board.

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

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

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

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

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

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

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

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

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

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

HARMAN COAL COMPANY

Docket No. 75-034-C
Denial of Mine Drainage Permit

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and BOROUGH OF BROOKVILLE, Intervenor

ADJUDICATION

By Joseph L. Cohen, Member, January 3, 1977

This matter is before the board on the appeal of Harman Coal Company, a partnership, from the action of the Pennsylvania Department of Environmental Resources (hereinafter DER) of January 7, 1975, denying appellant's application for a mine drainage permit to operate a strip mine in Warsaw Township, Jefferson County, Pennsylvania. The Borough of Brookville, which owns and operates a public waterworks on the North Fork of Red Bank Creek, downstream of appellant's proposed strip mining operation, has intervened in support of the DER's action.

The parties to this proceeding have raised substantial legal questions regarding the scope of the DER's legal authority to deny strip mining permits, the manner in which the DER reviews mine drainage applications, the extent of the protection of sources of public water supply and questions regarding what has now become the classic confrontation between environmental protection interests and private interests devoted to the development and exploitation of energy resources.

The DER is seeking in this case to prevent the watershed of the North Fork of Red Bank Creek in Jefferson County from being "opened up" to strip mining activity. Appellant, on the other hand, is interested in exploiting a natural resource in the watershed that has an estimated value of 15 million dollars. The intervenor, the Borough of Brookville, is primarily interested in protecting its source of public water supply, the North Fork of Red Bank Creek.

The hearings in this matter were 13 in number, commencing on November 12, 1975, and ending with a hearing on February 24, 1976. The voluminous testimony and documentary evidence received into the record is but one indication of the nature of the dispute between the DER and the Borough of Brookville on the one hand and appellant, Harman Coal Company, on the other hand. The controversy in this matter was heightened by what the Board perceives to be an undue degree of personal involvement on the part of senior counsel for appellant and counsel for the DER in the moral rectitude of the positions of their respective clients.

On the basis of the extensive record in this matter and the briefs of the parties in support of their suggested findings of fact and conclusions of law, we enter the following:

FINDINGS OF FACT

1. The appellant is a partnership, the members of which are John Harman and Kenneth Harman, having its principal place of business in Dayton, Pennsylvania 16222.

2. Appellee is the DER, the agency of the Commonwealth authorized to administer the provisions of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.*, including those provisions relating to mining.

3. The intervenor, the Borough of Brookville, is a municipal corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania.

4. On May 30, 1974, appellant filed with the DER an application for a mine drainage permit to operate a strip mine in Warsaw Township, Jefferson County, Pennsylvania. The application states that appellant has leased 1,000 acres of coal and that it proposes to mine 250 of said acres. According to the application the surface area to be affected by the operation is 349 acres. The application erroneously stated that the seam of coal to be mined was the Lower Kittaning seam. The actual seam of coal proposed to be mined is the Clarion Coal Seam. Appellant rectified this error when it filed an amendment to its initial application as indicated in Finding of Fact No. 9.

5. Appellant's application proposes that any drainage from the mine operation will be to an unnamed tributary to the North Fork of Red Bank Creek.

6. The watershed of the North Fork of Red Bank Creek is approximately 97 square miles in area.

7. On January 7, 1975, more than seven months after appellant submitted its application to the DER, W. E. Guckert, Director of the Bureau of Surface Mine Reclamation of the DER, advised appellant that the DER denied its application and stated the reasons therein as follows:

> "Our Department has reviewed this application for a Mine Drainage Permit and has concluded that the existing surface water on the watershed is of very low alkalinity and low buffering capacity, and it would be unable to absorb any acid mine drainage or siltation produced by strip mining.
>
> "In addition, the water in the watershed is of high quality. The watershed is used as a water supply by the Borough of Brookville and surrounding areas. Moreover, the watershed is a prime recreation and conservation area and is extensively stocked by the Fist [*sic*] Commission. Any siltation and acid mine drainage produced by strip mining would seriously impair these recreational and domestic uses.
>
> "In an inspection made January 3, 1975, several natural springs and rivulets were found flowing through the entire natural area to be mined. In addition, an acid drainage (estimated 4 g/m) was found flowing to Davis Run from an abandoned strip cut on the area to be mined and affected.
>
> "Therefore, we deny this application for a Mine Drainage Permit."

8. Thereafter, on February 4, 1975, appellant filed the appeal in this case.

9. While pursuing this appeal, appellant also was in communication with the DER in an effort to have its application reconsidered. Pursuing this avenue, appellant transmitted to the DER on July 28, 1975, a purported amendment to its initial application. In this amendment, appellant informed the DER that the coal seam intended to be mined was the Clarion Coal Seam rather than the Lower Kittaning. The amendment also advised the DER of the measures that appellant intended to take to control erosion and sedimentation. With regard to the amendment of the application, the parties stipulated in this proceeding that the permit application as amended by the July 28, 1975, submission of appellant to the DER would be considered by the board.

10. The location of appellant's proposed stripping operation is approximately 11 miles north of intervenor's water supply reservoir. The main source of water to intervenor's reservoir is the North Fork of Red Bank Creek.

11. Intervenor's waterworks supplies water for domestic consumption for two boroughs and portions of four townships in the vicinity of the Borough of Brookville. The Brookville water plant serves approximately 6,000 consumers and has 2,426 customers, the sole source of revenue for the plant.

12. The capacity of intervenor's water plant is 1.7 million gallons per day. The plant treats and pumps between 600,000 and 700,000 gallons per day. The average pH of the water at the plant intake is approximately 6.7 to 7.0, except for times of flooding, spring rains, heavy snowfall or flushes when the pH tends to drop to approximately 6.1.

13. When in operation, intervenor's water treatment plant has an intake turbidity which varies from 0 to 200 parts per million. When it exceeds 200 ppm, the plant is shut down.

14. Appellant proposes to conduct its strip mining operation according to the modified block-cut method of mining. According to this method, each previously cut block is filled with the soil and overburden of the next successive block such that the amount of coal and overburden exposed at any one time is limited, thereby reducing the potential for acid production during mining activity.

15. The land on which the proposed mining operation is to occur is owned by various individuals who have written coal leases with appellant that provide for a fixed royalty to be paid by appellant on each ton of coal mined.

17. The estimated value of the coal to be mined is 15 million dollars.

18. From its headwaters that originate in game land No. 54, the North Fork of Red Bank Creek flows southwest for 7 miles to a point east of Richardsville where it begins to flow west for 4 miles to the confluence of Clear Creek. It then turns south and flows for 8 miles to its confluence with Red Bank Creek.

18. The headwaters of the North Fork of Red Bank Creek (those areas upstream from the South Branch of the North Fork) are extremely infertile (i.e., the water is impoverished of nutrients, resulting in very low productivity) with essentially no buffering capacity and of fluctuating water quality.

19. The watershed of the North Fork of Red Bank Creek is approximately 97 square miles of extensive forest stands and numerous acres of mountain laurel. It is located in a region of rugged, heavily wooded landscape composed of undulating hills with moderate to steep slopes traversed by numerous mountain streams that form the many small and irregular shaped valleys within the area. Ninety percent of the land

area is forest, federal, state and private, with some parkland in its outer extremeties. It is a wooded area, scenic, primitive and virtually untouched by development. The only permanent structures on the 20 miles of the North Fork are two camps. There is little agricultural or industrial development in the watershed.

20. The North Fork of Red Bank Creek is surrounded by sphagnum bogs, hardwood and coniferous forest with dense thickets of rhododendron in the valley bottom. The stream is presently free of sewage and industrial waste, including acid mine drainage. There are no planned or existing impoundments or other waterway modifications on the North Fork.

21. The substrate in the North Fork is primarily sandstone, siltstone conglomerates with very little limestone. This type of substrate has very few nutrients and essentially no calcium carbonate. Although the character of the substrate would ordinarily render the North Fork very fragile and infertile, the cumulative effect of its tributaries having better water quality is to improve the quality of the North Fork and enable it to sustain aquatic life.

22. The water quality of the stream fluctuates as a result of interaction between the climate and the vegetation in the area. The climate in the North Fork watershed is temperate to northern temperate. The sphagnum bogs and the headwaters produce organic acid as a result of decomposition of vegetation in the area. When the organic acids are flushed downstream, there is a depression in the pH to a point between 4 and 5, due to the absence of calcium carbonate.

23. Both the North Fork and the unnamed tributary thereof into which drainage from the proposed mine operation will flow have a low buffering capacity (i.e., resistance to pH change). However, the buffering capacity of the unnamed tributary is greater than that of the North Fork.

24. 25 Pa. Code Chapter 93, entitled "Water Quality Criteria" sets forth such criteria based upon water uses which are to be protected and to be considered by the DER in its regulation of discharges.

25. 25 Pa. Code §93.2 sets forth water uses to be protected. In Table 1 thereof is set forth the protected water uses accompanied by their identifying symbols.

26. The protected water uses in the North Fork basin specifically noted in 25 Pa. Code §93.6, Table 13, Zone No. 08.135.29 are cold water fishes, boating and conservation area. These water uses are set forth in Table 1 of 25 Pa. Code §93.2, together with their definitions, under symbols 1.1, 3.1 and 3.5.

27. The North Fork Basin has been classified in regard to its waters as Group A, as that group is defined in 25 Pa. Code §93.5(d), except that it has a different dissolved oxygen requirement and an additional requirement relating to amonia nitrogen.

28. With regard to pH and iron, Group A streams may not have a pH of less than 6.0 nor more than 8.5 and total iron of not more than 1.5 milligrams per liter.

29. There are approximately 11 to 16 million cubic yards of overburden material on the site in the 250 acres of the 349 acres which would be affected by the operation of the proposed mine.

30. The overburden associated with the Clarion Coal Seam is usually high in acid producing potential.

31. Appellant's proposed strip mining operation will affect approximately 70 to 75% of the watershed of the unnamed tributary into which drainage from the proposed mining operation would flow. Seventy-two percent of the flow in the unnamed tributary is from the base flow (i.e., the groundwater contribution) from the proposed mining area. Approximately 27% of the flow of the unnamed tributary is from waters upstream of the tributary at the point where the major portion of the flow is from the groundwater.

32. The amount of rainwater that would reach the groundwater and hence contribute to the base flow of the unnamed tributary would increase for the following reasons:

(1) The backfilled material would contain disturbed overburden, thereby increasing its permiability.

(2) During the period when the vegetation is removed there will be additional discharges to the groundwater by reason of a reduction of transpiration.

(3) During a large rainfall, a temporary increase in the amount of water reaching groundwaters would occur by virtue of the effect of the root material of the revegetated site on the compaction of the soil.

33. The increase in the base flow of the unnamed tributary is not likely to be a permanent phenomenon, but is likely to decrease as the restorative measures required under Pennsylvania law are undertaken. However, regardless of whether the base flow of the unnamed tributary increases, acid mine drainage is likely to be produced as rainwater permeates through the overburden.

34. In and about the site of the proposed mining operation there is Vanport Limestone occurring in isolated blocks. This limestone is thin and discontinuous and

ranges from 5 to 6% by volume in the proposed stripping area.

35. There is insufficient limestone in the watershed of the unnamed tributary to provide sufficient buffering capacity to overcome the effects of acidity that may be created by the mining operation.

36. There is a fault running through the site of the proposed operation with a vertical displacement of approximately 27 to 31 feet. The west side of the fault is thrown down while the east side was thrust upward.

37. The fault breaks the underclay underlying the coal seam and permits the water to move below the coals in the proposed stripping operation into the deep subsurface groundwater.

38. The existence of the fault and the increase in base flow of the unnamed tributary that can be expected to occur if the mining operation is to be carried out will increase the amount of water permeating the backfilled material and reaching the sandstone aquafer existing below the underclay of the coal seam. Such water, if highly acidic, is likely to have an adverse affect upon domestic wells in the area.

39. In the vicinity of the proposed strip mining operation there are old abandoned strippings from which acid seeps eminate and discharge to the unnamed tributary.

40. The unnamed tributary into which the proposed stripping operation will discharge drainage has a greater buffering capacity than does the North Fork.

41. Neither the DER nor the Borough of Brookville conducted any analysis of the overburden at the site of the proposed mining operation. The only analysis of the overburden was contained in appellant's original permit application in this matter. The DER and the borough claims that the analysis performed by appellant lacks validity. They claim that the Carruccio petrographic analysis method of examining overburden and the Ranton-Hidalgo method of determining the acidic properties of the overburden (neither of which methods were employed by appellant) constitute valid tests for determining the acid producing properties of the overburden.

42. Analysis of the soils in the area of the proposed mining activity showed them to be highly acidic in character. Inasmuch as the acidic character of soils is indicative of the overburden pH of which the soils were formed, there is a strong likelihood that the overburden in the area has a high acid-producing potential.

43. Appellant's application does not contain adequate measures to prevent acid discharges from the area to be mined after mining is completed.

44. Acid discharges from the proposed mining operation after completion of such mining would in all likelihood contaminate domestic wells in the area, lower the pH of the unnamed tributary and adversely affect the quality of the North Fork and its uses.

DISCUSSION

This matter has been made unduly complex and burdensome because of the manner in which the DER processed appellant's application for a mine drainage permit. Moreover, when it denied appellant's application, it did so not for any reason associated with the application itself but on the general basis that any mining within the North Fork watershed would be detrimental to the North Fork and its tributaries and be inimical to the uses of these waters as determined by the designation of the watershed in 25 Pa. Code §93.6, Table 13, Zone No. 08.135.29. We rejected this contention in our adjudication in *Doraville Enterprises v. Commonwealth of Pennsylvania, Department of Environmental Resources,* EHB Docket No. 73-433-C (issued October 21, 1975).

While appellant is entitled, as in *Doraville*, to have its application reviewed on the merits and not peremptorily refused on the basis of a policy that has not been reduced to regulation, nevertheless, the evidence in this matter that there exists a high probability of acid mine drainage being discharged into clean waters in contravention of The Clean Streams Law, *supra*, and regulations promulgated thereunder, distinguishes the facts of this case from those of *Doraville*.

Before we address the nature of the evidence in this matter, there are certain legal issues raised by the parties that require resolution. We believe that it would be helpful to the DER and to applicants generally to address these issues seriatim.

I. Scope of Board's Review

The parties have addressed the issue of the scope of review by this Board of an action by the DER. In *Warren Sand & Gravel Company, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources,* 20 Pa. Commonwealth Ct. 186, 341 A.2d 556(1975), Commonwealth Court articulated the scope of our review as follows:

> "...In cases such as this, we are not required to review an administrative decision by DER which was rendered without a due process hearing, because as we view the Administrative Agency Law and section 1921-A of the Code, when an appeal is taken from DER to the Board, the Board is required to conduct a hearing *de novo* in accordance with the provisions of the Administrative Agency Law. In cases such as this, the Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board...." 341 A.2d at 565

Our adjudication in *Rostosky* appeal, 67 D. & C.2d 674 (1974) is consistent with *Warren Sand & Gravel.* Nothing the board has said in *Compass Coal Company, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources and the City of DuBois,* EHB Docket No. 72-190 (issued May 16, 1975)or in*Doraville Enterprises v. Commonwealth of Pennsylvania, Department of Environmental Resources,* EHB Docket No. 73-433-C (issued October 21, 1975) is inconsistent with these prior rulings.

In light of these rulings, even if the stated reasons for denial of a permit application are legally improper, it does not logically follow that the permit application be approved. Especially would this be inappropriate where, as here, the DER did not review appellant's application to determine whether it met the requirements of The Clean Streams Law, *supra,* and the regulations of the DER adopted pursuant thereto. To do so would not only be contrary to the above rulings of Commonwealth Court and this board, but would also be a highly irresponsible action for us to take.

The parties have cited *Compass Coal Company, Inc., supra,* in support of this Board's review function. To the extent that there may be some confusion as to the meaning of *Compass,* we deem it appropriate to clarify our ruling in that matter.

In *Compass,* appellant raised essentially two issues:

(1) The propriety of the stated reasons for the denial of the permit and

(2) That the fact and evidence submitted to the DER do not support the reasons for the denial of the permit.

Thus, we were required to address the question of whether the stated reasons for denial were consistent with The Clean Streams Law and the rules and regulations adopted pursuant thereto. Inasmuch as we found that the reasons for the denial were legally sufficient, we did not address the question of our action if we had ruled that the reasons given were not valid under the existing law. That issue was specifically

addressed in our adjudication in *Doraville*. In *Doraville* we remanded the matter to the DER to determine whether the application met the requirements of the law. Thus, we in effect set aside, rather than reversed, the action of the DER in denying the application for a legally unauthorized reason.

Taking *Doraville* and *Compass Coal* together, we arrive at the following:

(1) Where an appellant raises the issue in its appeal that the stated reasons for the action of the DER are legally insufficient to justify that action, the board will address that question and rule thereon.

(2) If the board determines that the DER asserted legally improper reasons for its action, it will set aside such action.

(3) If the action of the DER that is set aside is the denial of a permit application, this board will not grant the permit application unless it affirmatively appears on the record that appellant is entitled to such permit under the law and rules and regulations.

II. Burden of Proof

In a permit denial proceeding an applicant has the affirmative burden of showing its entitlement to the thing claimed. See 2 AM JUR 2d, ADMINISTRATIVE LAW, §391; accord: *Jones, et al v. Zoning Hearing Board, et al*, 7 Pa. Commonwealth Ct. 284, 298 A.2d 664 (1972); *F. & T. Construction Company v. Department of Environmental Resources*, 6 Pa. Commonwealth Ct. 59, 293 A.2d 138 (1972).

Appellant has the initial burden of producing evidence to show its entitlement to the permit. This burden is not met merely by establishing that the reasons stated for the denial of the permit may be invalid. However, if appellant not only shows that the reasons for the denial of the permit are invalid, but also shows that the DER reviewed the application in question and made a conscious effort not to base its denial upon any infirmity in the application, but upon a general policy not to grant permits in a given area, it can be logically inferred that if the reason for denial is legally insufficient, the permit is otherwise in order. On the other hand, where it appears that the department did not review the application, but merely denied it on the basis of a policy not to grant permits in a certain area, then no inference can be drawn regarding whether the application should be approved.

The DER and intervenor contend that appellant would not have sustained its burden of proof even if it had shown that it met the requirements of the law and the

rules and regulations promulgated pursuant thereto. Such a contention, to say the least, suffers from overbreadth. The DER and intervenor assert that appellant's analysis of our scope and procedure of review is erroneous. They base their contention on *Doraville*. We fail to understand how *Doraville* is inconsistent with appellant's contention. Surely, if appellant had complied with the requirements of The Clean Streams Law and the rules and regulations promulgated thereunder, the burden would have shifted to the department to show why, nevertheless, the permit should not have been granted.

The DER and intervenor in their reply brief set up a straw person. Appellant, as we read its brief, does not contend that failure to state legally sufficient reasons for denial demands reversal of the DER action and the issuance of the permit. Appellant merely argues that the DER has offered no legally sufficient reason for denying its application and, further, that it has sustained its burden of establishing its entitlement to a permit. Of course, merely to fail to state a legally sufficient reason for a permit denial is not a sufficient reason to grant a permit. But we are of the opinion that the burden of proof would shift if appellants were to prove, not only that the stated reasons for the denial of the permit were improper, but that it has met the applicable provisions of law and regulations. In such an instance, the DER and the intervenor would have the burden going forward to show the propriety of the permit application denial.

III. Past Violations at Other Sites

The DER and intervenor assert that 25 Pa. Code §91.26 prohibits the DER from issuing a permit to an applicant in violation of The Clean Streams Law, the rules and regulations adopted thereunder, orders of the DER or permit conditions relating to industrial waste or acid mine drainage discharges. We believe this section of the regulation entitles the DER to withhold the issuance of a permit for noncompliance on other sites. The authorization of the DER to withhold the issuance of a permit presupposes that the application for the permit is in order and should otherwise be granted. The DER and intervenor are not entitled to raise this issue in this proceeding. Section 609 of The Clean Streams Law (35 P. S. §691.609), *supra*, sets forth procedural steps by which a permit may be withheld for failure to correct violations. It is insufficient compliance with this section to note such alleged violations in a pre-hearing memorandum filed in connection with an appeal from a permit denial, especially when nothing in the letter of denial sets forth this as a reason for the action.

Finally, to litigate the issue of uncorrected violations in a proceeding on an appeal from a permit denial is essentially to deprive appellant of due process of law. We do not believe a party should be forced to defend itself on this issue except where the DER has withheld the issuance of a permit for this reason. Otherwise, a party who appeals the refusal to grant a permit application would be forced to defend a subsidiary issue which might then become res judicata insofar as its entitlement to other permits for other sites are concerned. Due process of law, in our opinion, requires that the sanction of withholding a permit should represent a separate and distinct action on the part of the DER, which action can then be appealed to this board.

These considerations lead us to the conclusion that the evidence relating to other alleged violations by the partners of appellant are irrelevant to this proceeding and are not to be considered further. This being our disposition in this regard, we need not address the issue of disregarding the corporate entity.

IV. The Pennsylvania Scenic Rivers Act

The DER and the Borough of Brookville argue that inasmuch as the department has taken certain steps with regard to having the watershed of the North Fork declared "wild" pursuant to the provisions of the Pennsylvania Scenic Rivers Act, Act of December 5, 1972, P. L. 1277, No. 283, 32 P. S. §821.1 *et seq.*, appellant's permit is required to be withheld. They argue that the "pending legislation doctrine" developed in zoning litigation, provides a rationale for requiring the DER to withhold the permit until the General Assembly acts on the State Scenic Rivers Task Force Report. We need not enter into this line of inquiry for the reason that the DER has not submitted to the General Assembly the State Scenic Rivers Task Force Report for legislative action. In the absence of such action by the DER, we consider the invocation of the "pending legislation doctrine" inappropriate under the circumstances.

V. The Authority of DER to Deny Applications for Mine Drainage Permits

Section 3 of The Clean Streams Law (35 P. S. §691.3), *supra*, provides:

> "The discharge of sewage or industrial waste or any substance into the waters of this Commonwealth, which causes or contributes to pollution as herein defined or creates a danger of such pollution is hereby declared not to be a reasonable or natural use of such waters, to be against public policy and to be a public nuisance."

Section 1 of the act defines "industrial waste" as including mine drainage.

25 Pa. Code §99.35(a) prohibits the discharge of acid mine drainage to clean streams.

Section 315 of The Clean Streams Law (35 P. S. §691.315), *supra*, prohibits the operation of a mine or the discharge from a mine into waters of the Commonwealth, unless such operation or discharge is authorized by the rules and regulations of the DER or by a permit issued therefor by the DER. Under this section, the term "discharge from a mine" includes a discharge which occurs after the mining operation has ceased. Thus, a discharge from a mine after operations have ceased is not in conformity with The Clean Streams Law unless authorized by permit or rules and regulations of the DER.

Section 301 of The Clean Streams Law (35 P. S. §691.301), *supra*, provides:

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

Clearly, The Clean Streams Law prohibits discharges of industrial waste which, *inter alia*, cause or contribute to pollution. Moreover, the DER regulations prohibit the discharge of acid mine drainage into clean streams. Taking all these provisions of the law and regulations into consideration, neither the DER nor this board is authorized to permit the discharge of acid mine drainage into clean streams.

An application for a mine drainage permit may be denied if the proposed discharge is likely to cause pollution. *Sanitary Water Board v. Sunbeam Coal Corp.*, 77 Dauphin 264 (1961). The evidence produced by the DER and the Borough of Brookville persuade us that there is a substantial likelihood of pollution from acid mine drainage entering the unnamed tributary of the North Fork, if adequate control measures are not taken to prevent discharges from the mine after completion of the mining.

The surface area to be affected by the operation is approximately 349 acres. The seam of coal proposed to be mined is the Clarion Coal Seam, the overburden of which is highly acidic in nature. Approximately 11 to 16 million cubic yards of overburden would be disturbed by the mining.

The base flow of the unnamed tributary comprises somewhere between 70 and 75% of its flow. The base flow of a stream is that portion of the stream flow attributable to ground water as distinct from surface waters. Thus, if a substantial portion of the watershed of the unnamed tributary is disturbed in such manner as to increase the probability that acid mine drainage will reach the groundwater in substantial amount, threatened pollution to the unnamed tributary becomes a virtual certainty.

Appellant contends that the unnamed tributary has a higher buffering capacity than the North Fork and that its contribution to the North Fork's flow is minimal, approximately 1%. Thus, according to appellant, any damage that might occur to the unnamed tributary would only have a minimal affect upon the North Fork. Regardless

of the accuracy of these contentions, they are beside the point. If acid mine drainage is likely to enter the unnamed tributary either directly from surface discharges or from groundwater flow into the stream in significant amounts, or if such drainage is likely to lower the water quality of the unnamed tributary to an extent incompatible with the water quality criteria applicable to the unnamed tributary, either of these grounds by itself is sufficient to deny a permit to strip mine. While it may be true that the protection of the unnamed tributary is primarily designed for the protection of the North Fork itself, we cannot overlook the fact that the regulations of the DER also protect the tributaries flowing into the North Fork.

The unnamed tributary, insofar as it contributes to the water quality of the North Fork, deserves protection. Unless the tributaries of the North Fork are protected in compliance with the DER regulations, the cumulative effect of permitting acid mine drainage to enter the tributaries of the North Fork will be ultimately to destroy the North Fork as a source of public water supply and for recreation. Thus, the DER cannot be faulted for its cautious treatment of mine drainage applications in the North Fork watershed. In addition to the effect that the proposed mining activity is likely to have on the unnamed tributary of the North Fork, there is also a likelihood that well supplies in the area may be contaminated. That domestic water supplies may be adversely affected by the proposed mining is probable because of the fractures and fissures created by the fault zone at the site. This makes it possible for water seeping through the backfill to enter the sandstone aquifers which supply domestic well water in the area.[1]

Taking all these concerns into consideration, it is clear that any application to strip mine in this area must provide for effective control of acid discharges after mining has been completed. Appellant's application does not demonstrate that after mining is completed no acid mine drainage will enter the waters of the Commonwealth, including the North Fork, the unnamed tributary thereof and the groundwaters in the area.

VI. Pulbic Nuisance

We agree with the DER that the department is not empowered to authorize an operation which creates or constitutes a public nuisance. *Commonwealth of Pennsylvania, Department of Environmental Resources v. Glasgow Quarry, Inc.*, ___ Pa. ___, 351 A.2d 689 (1976). Moreover, §3 of The Clean Streams Law, 35 P. S. §691.3, *supra*, provides:

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1. We think that much of the DER case for refusing to grant the permit application in this instance is based upon speculation, informed though it may be, as to what will happen if the application were granted and mining completed in conformity with existing requirements of law. We think the public interest in preventing water pollution from acid mine drainage and the public interest in increasing energy supplies would both be served if the DER were to conduct or sponsor research to determine whether the restorative processes required under existing law have been effective in preventing discharges of acid mine drainage from occurring in areas where mining has ceased and the required restorative measures taken.

> "The discharge of sewage or industrial waste or any substance into the waters of this Commonwealth, which causes or contributes to pollution as herein defined or creates a danger of such pollution is hereby declared not to be a reasonable or natural use of such waters, to be against public policy and to be a public nuisance."

Thus, if the operation proposed in appellant's application is likely to cause pollution as defined in the act, it is clear that the causing of such pollution would constitute a statutory public nuisance. That acid mine drainage entering the waters of the Commonwealth constitutes a public nuisance is affirmed by *Commonwealth v. Barnes & Tucker Company*, 455 Pa. 392, 319 A.2d 871 (1974), reh. den. (1974). However, if an applicant provides a method for controlling acid mine drainage discharges after mining as well as during mining, the DER must in the exercise of its responsibility determine whether the proferred plan will meet the requirements of The Clean Streams Law and the rules and regulations adopted pursuant thereto. If the applicant meets the requirements of law and the rules and regulations of the DER, presumably no acid mine drainage will be discharged into the waters of the Commonwealth. If this is so, and the effluent limitations and water quality criteria for the watershed are met, it is unlikely that a public nuisance will be created. The essential question then, is whether the application presents a mode of mining which will meet the requirements of the law. Inasmuch as appellant's application does not make adequate provision for the prevention of discharges of acid mine drainage after mining is completed, there is a strong likelihood that both the North Fork and its unnamed tributary will be contaminated thereby and result in the creation of a public nuisance.

CONCLUSIONS OF LAW

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

2. An applicant for a mine drainage permit has the burden of proving its entitlement to such permit. It does not meet this burden merely by showing that the DER refused to grant the application for legally impermissable reasons. It must affirmatively show, in order to meet its burden, that it has met both the substantive and procedural requirements of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.* and the rules and regulations adopted pursuant thereto in relation to the application.

3. There is a distinction between the denial of an application for the issuance of a permit in that an application may not be denied for reasons which would justify merely the withholding of the issuance of a permit.

4. The Clean Streams Law, *supra*, does not authorize the denial of a permit application to operate a mine for the reason that the applicant is in violation of The Clean Streams Law, *supra*, and requirements of permits or regulations on other sites, but only authorizes the withholding of the issuance of such permits until such time as the other violations are corrected.

5. The discharge of acid mine drainage to clean waters of the Commonwealth, including groundwaters, is in violation of valid rules and regulations of the DER (25 Pa. Code §§99.33 and 99.35), adopted pursuant to the provisions of The Clean Streams Law, *supra*, and constitutes a public nuisance.

6. The Clean Streams Law authorizes the denial of an application for a mine drainage permit if the granting of such permit would be likely to cause pollution as defined in said law.

7. Where it is shown that an applicant proposes to strip mine a seam of coal, the overburden of which is highly acidic, and where the waters in the watershed are clean streams, appellant has the burden of showing that its mine drainage plan will not result in the discharge of acid mine drainage to such waters during and/or after the mining operation.

O R D E R

AND NOW, this 3rd day of January , 1977, the action of the Department of Environmental Resources in denying Harman Coal Company its application to operate a strip mine in Warsaw Township, Jefferson County, Pennsylvania, is hereby affirmed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: January 3, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

SUMMERHILL BOROUGH

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 72-343-D

Regionalization Order

ADJUDICATION

By: Joanne R. Denworth, Member, Issued February 2, 1977

The Department of Environmental Resources (department) has made a motion for summary judgment in this case, which, after due consideration, we have decided to grant. Appellant, Summerhill Borough, appealed from an order of the department dated August 25, 1972, ordering it to join with other municipalities to design and operate a joint sewage treatment facility according to a schedule set forth in the order. The order also revoked a permit previously issued to Summerhill Borough by the Sanitary Water Board (predecessor to the Department of Environmental Resources under The Clean Streams Law) to construct a sewage treatment facility for the borough alone. The prior order, which was issued on July 16, 1968, ordered Summerhill Borough to discontinue the discharge of raw sewage into the waters of the Commonwealth—namely, the Little Conemaugh River. The department's 1972 order recited the fact that the sewage facility had not been built and that it had now become necessary for Summerhill Borough to join in a regional sewerage facility. This matter has been continued many times at the request of the parties because of settlement negotiations between Summerhill Borough and the other municipalities with which it is to cooperate on a regional sewerage facility. These negotiations are still continuing. From examination of the papers filed in this appeal and discussion with attorneys for the parties, it is clear that Summerhill does not dispute any of the facts upon which the department bases its order or, in fact, the need for regional sewage treatment. Its complaint on appeal is that it has expended $31,000 on plans for the sewerage facility that it was to construct alone and that it is entitled to be reimbursed for those costs. While we are

sympathetic to Summerhill's plight, we believe that under the law as it has developed, this financial hardship to the borough is not a sufficient basis for attacking the validity of the regionalization order.

FINDINGS OF FACT

1. Appellant is Summerhill Borough, a municipality in Cambria County, Pennsylvania.

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

3. On July 16, 1968, the Sanitary Water Board issued an order to Summerhill Borough directing it to discontinue its discharge of raw sewage into the waters of the Commonwealth within 2 years.

4. Pursuant to that order Summerhill engaged an engineering firm and expended $31,485.45 in engineering fees for design of a sewerage treatment plant for the borough.

5. The department granted a sewerage permit to the borough for construction of a plant on April 14, 1970.

6. By letter dated May 12, 1971, the department advised the borough that its application for a construction grant had not been certified to the federal government because of federal regulations and Commonwealth policy requiring that sewage treatment facilities be developed on a regional basis consistent with "a comprehensive program of watershed management and control".

7. On August 25, 1972, the department issued an order revoking the sewerage permit issued in April of 1970 and ordering the borough to join with six other municipalities in planning and constructing a regional sewage facility.

8. Appellant filed an appeal from that order on September 11, 1972.

9. Since that time the municipalities have formed the Forest Hills Municipal Authority for the purpose of building and operating a regional sewerage facility. This matter has been continued a number of times at the request of Summerhill Borough so that settlement negotiations between itself and the authority could continue.

10. The only outstanding issues between the borough and Forest Hills Municipal Authority are the extent to which the authority will reimburse or seek reimbursement for the $31,000 expended by the borough on the plan for its individual treatment facility, and whether or not the borough, in view of its prior outlay, should be required to guarantee 5% (a proportinate share) of a $170,000 loan for planning for the regional facility

11. The discharge of raw sewage from the borough into the Little Conemaugh River is continuing.

12. The borough does not dispute the basic premise of the order that a regional sewerage system is the best way to solve the areas sewerage problems.

CONCLUSIONS OF LAW

1. The board has jurisdiction in this matter.

2. Summary judgment is appropriate where there is no dispute as to material facts, and it is clear that on the issues in dispute, the moving party must prevail as a matter of law.

3. Where there is no dispute as to the need for a regional sewerage system, the expenditure of funds by Summerhill Borough on planning for an individual sewer system in response to a 1968 abatement order from the Department of Health is insufficient grounds for invalidating a 1972 regionalization order of the department revoking the borough's permit for an individual system and directing the borough to join in the planning, construction, and operation of a regional facility.

DISCUSSION

As sometimes happens, Summerhill Borough is the victim here of change and evolution in social planning policies. When the Department of Health issued its 1968 order, the object was simply to abate pollution, and the borough's plans for its own sewer system were initially considered adequate to do the job. In the early 1970's,however, both the federal and state governments began to adopt and enforce policies promoting regional sewerage facilities because they made more sense economically and environmentally than a series of treatment facilities built to coincide with municipal boundaries. In Pennsylvania, that policy was embodied in the 1970 Clean Streams Law Amendment, to The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §690.1 *et seq.*, requiring the department (then of Health, now of Environmental Resources) to consider, among other things,"water quality managment and pollution control in the watershed as a whole" and "the feasibility of combined or joint treatment facilities", 35 P.S. §691.5 (a) (1) and (3), in taking action authorized by the act. The federal government has implemented a regional policy by making the grant money that it controls (without which almost no treatment facility can be or is built today) available only for regional facilities. See 40 C.F.R. Part 35, §§35.835-2; 35.150.-2.

Section 203 of The Clean Streams Law authorizes the department to issue:

> "...appropriate orders to municipalities where such orders are found to be necessary to assure that there will be adequate sewer systems and treatment facilities to meet present and future needs or otherwise to meet the objectives of this act. Such orders may include, but shall not be limited to, orders requiring municipalities to undertake studies, to prepare and submit plans, to acquire, construct, repair, alter, complete, extend, or operate a sewer system or treatment facility, or to negotiate with other municipalities for combined or joint sewer systems or treatment facilities. ..."

The order issued to Summerhill Borough was clearly authorized by this section. Similar orders have been upheld by this board as well as courts of appeal. See e.g., *Commonwealth v. Westmoreland-Fayette Municipal Sewage Authority*, 16 Pa. Commonwealth Ct. 254, 329 A.2d 304 (1974); *City of Uniontown v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 72-203, issued June 18, 1973; *Borough of Delmont* (and other related cases), EHB Docket No. 72-246, issued April 1, 1974; *Frailey Township v. Commonwealth of Pennsylvania , Department of Environmental Resources*, EHB Docket No. 72-271, issued March 9, 1973; *In the Matter of City of Chester*, EHB Docket No. 72-256, issued January 31, 1973. In this case, unlike *Township of Monroe v. Commonwealth*, 16 Pa. Commonwealth Ct. 572, 328 A.2d 209 (1974), there is no dispute as to the present need for sewage treatment, much less the future need. The discharge of raw sewage that was going on in 1968 was not abated within two years of the earlier order and is still continuing. Furthermore, there is no disagreement about the desirability of a regional rather than a local facility. In this situation the financial hardship to the borough is simply an inadequate ground for invalidating the department's order. See, *Ramey Borough v. Department of Environmental Resources*, 15 Pa. Commonwealth Ct. 601, 327 A.2d 647 (1974), aff'd 351 A.2d 613 (1976). The department's order should become final so that the regional authority can proceed to abate existing pollution. If the borough has a remedy for recovery of its $31,000, it does not lie with this board.

ORDER

AND NOW, this 2nd day of February, 1977, the appeal of Summerhill Borough is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: February 2, 1977
vf

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

BETHLEHEM STEEL CORPORATION

Docket No. 75-017-W
" 75-134-W

General Reasons

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

BY: Paul E. Waters, Chairman, February 2, 1977

These matters come before the board as appeals from the refusal of the Department of Environmental Resources, hereinafter DER, to grant appellant, Bethlehem Steel Corporation, an extension of a variance, and a prior appeal from a refusal of the DER to withdraw the original order, by which the variance was granted. Appellant seeks to have the order withdrawn based on a finding that the furnace emissions in question are "insignificant", and therefore, not subject to control under the DER regulation §123.1 and the Air Pollution Control Act, *infra*.

FINDINGS OF FACT

1. Appellant is Bethlehem Steel Corporation, a business corporation which owns and operates a plant in Steelton, Pennsylvania, known as the Steelton Plant, which is engaged in the manufacture of rails, reinforcing bars, and other specialty steel products.

2. In conjunction with the steelmaking operation, Bethlehem operates three draw furnaces, two forge draw furnaces and one rail draw furnace, referred to collectively as the forge mill and rail department draw furnaces.

3. The function of the three furnaces is to heat the steel that is placed therein for purposes of treating the steel, which heating causes emission of air contaminants into the outdoor atmosphere in the form of an oily mist engendered by the driving off of the oil that the steel had previously been immersed in as part of the quenching operation.

4. Emissions from the three furnaces constitute fugitive air contaminant emissions in that they are not emitted through a stack or flue.

5. The operations are conducted on Bethlehem's property which is a contiguous tract of approximately three miles east to west and approximately 500 yards at its widest point north to south. The tract is adjacent to the Susquehanna River on its southern boundary. The community of Steelton is adjacent to the tract's northern boundary. Uninhabited land now in the process of development for industrial use by Dauphin County Redevelopment Authority adjoins Bethlehem's western boundary. The eastern boundary of the tract is adjacent to the Harrisburg airport.

6. On September 19, 1972, Bethlehem submitted a petition for variance for the air contaminant emissions from the draw furnaces at issue in this appeal. As part of this petition, Bethlehem stated its intention to control emissions from the three furnaces by installing hoods to capture the emissions and duct the captured emissions to a thermal afterburner to consume the oily smoke.

7. On September 24, 1973, the department issued variance order #73-757-V, which was an order granting a temporary variance, from the provisions of the act and the applicable regulations, until May 22, 1975, and also requiring the installation of the control equipment to be completed by May 22, 1975. This order was not appealed.

8. A test (Rossnagle) which Bethlehem claims gave it, for the first time, an indication of the character of the emissions, was completed on October 12, 1973. Despite this fact, it was not until November, 1974, that Bethlehem wrote to the department requesting that the emissions be construed as of minor significance. This request was denied by letter of December 20, 1974, wherein the DER refused to withdraw or alter the variance order.

9. Based on the data contained in the letter of November 21, 1974, to the DER allegedly derived from the Rossnagle tests done at the request of Bethlehem, uncontrolled operation of the three furnaces in question would emit over a thousand pounds of particulate matter during each week of operation. (Calculated as follows: 7 pounds per hour per furnace for a 5-hour period = 35 pounds per furnace for each 12-hour cycle. There are two 12-hour cycles in each 24-hour period, 2 cycles x 35 pounds per cycle = 70 pounds per furnace per day. With three furnaces in operation, total pounds per day emitted = 3 furnaces x 70 pounds per furnace per day = 210 pounds per day for 3 furnaces. Since this is a 7-day operation, multiply 210 pounds per day x 7 days = 1,470 pounds of particulate matter emitted into the atmosphere for each week of operation.)

10. The estimates as to particulate matter emissions from the furnaces contained in the November 21, 1974, request for the withdrawal of the variance order were based on the Rossnagle testing report, which report was never admitted into evidence and the figures, therefore, were never authenticated at the hearing.

11. The primary ambient air quality standard for suspended particulate matter as established by EPA and the DER regulations is 75 micrograms per cubic meter as an annual geometric mean. Sampling in the Steelton area by the department shows that the primary ambient standard for particulate matter was exceeded during calendar years for which figures were available—1971, 1972, 1973 and 1974. Specifically, the annual geometric mean of suspended particulate matter in micrograms per cubic meter, as measured by the department's air sampling station located between Hoffer and Chamber Streets in Steelton, was as follows:

1971 - 114 micrograms per cubic meter

1972 - 97 micrograms per cubic meter

1973 - 124 micrograms per cubic meter

1974 - 123 micrograms per cubic meter

12. The ambient air sampling at the Steelton station, as compared to other stations conducted at 88 other locations throughout the Commonwealth, show that the 1973 annual geometric mean at Steelton was exceeded by only seven of the 88 locations. Four of those seven were in the highly industrialized Beaver Valley and a fifth was in the highly industrial Monongahela Valley.

13. The ambient air sampling done by Bethlehem in the Steelton area confirms that there is and has been during the period 1971 to 1974, an ambient air quality problem with regard to suspended particulate matter in that the primary and secondary standards have consistently been exceeded.

14. The facilities which are the subject of this proceeding, namely, a rail draw furnace and two forge draw furnaces are located about 350 feet from the western boundary of the tract which adjoins the industrial development site and about 1,000 feet from the northerly boundary which adjoins Steelton Borough.

15. The emissions of said furnaces which enter into the atmosphere are often carried by the prevailing winds in a southeasterly direction and are dispersed on Bethlehem's property. The emissions are not visible at any point crossing Bethlehem's boundary lines.

16. The emissions from the rail draw furnace result from the placement of oil-quenched rails into the furnace which is heated by natural gas to 770° to produce desired metallurgical qualities in the rails by heat treating. The entire rail heat treating operation is performed on a 12-hour cycle, twice daily, (9 a.m. to 9 p.m. and 9 p.m. to 9 a.m.), seven days a week. The peak emissions occur for about one hour in the early part of each cycle while the oil is being volitalized. The emissions exit from 52 ports at the top of the furnace. They are not visible exiting from the ports except during the early part of the furnace cycle.

17. The furnace operators do not wear any masks or other devices to protect them from such emissions and they have not complained about them. The DER's employee personally viewed the emissions without a respirator in the forge furnace building and experienced no adverse effects from them.

18. The DER had ordered Bethlehem to install control equipment on the furnaces here involved. The control equipment contributes nothing to the production of Bethlehem's products. The equipment available would cost more than $360,000 to install and about $20,000 annually to operate and would control about 99 percent of the furnace emissions. The average emissions from the rail furnace after the control equipment is installed and operating will be .035 pounds per hour. The peak emissions after control will be .18 pounds per hour. The allowable rate of emission under the DER regulation §123.13 is 3.43 pounds per hour after control. It was stated in the DER's letter transmitting the "clarification" to Bethlehem that the DER "will rarely, if ever [require the installation of control equipment to] exceed the control efficiencies" prescribed in regulation §123.13.

19. Subsequent to the DER's issuance of said "clarification", Bethlehem requested the DER to modify its existing order requiring control equipment to be installed on said draw furnaces. Bethlehem asked the DER to apply the "minor significance" exception to control on the basis of the time weighted average method of emission measurement stated in the DER's "clarification"; but Bethlehem's request of the DER to apply the "minor significance" exception to the installation of control equipment was refused by the DER.

20. The tests conducted by Bethlehem of the emissions from said rail furnace were performed on April 21, 22, 23 and 24, 1975, and totaled 24 hours sampling time. The tests were conducted according to standards prescribed by the DER and EPA. The time weighted average method of measuring the extent of particulate emissions was employed to calculate the test results for comparison to the DER and EPA emission requirements. The emission rate of 3-1/2 pounds per hour from said rail furnace is computed on the basis of a time weighted average.

21. The readings obtained from Bethlehem's "Station B" monitor are consistently lower in measurements of particulate matter for equivalent periods of time than are readings from the DER's Hoffer Street monitor.

22. All of Bethlehem's operations were shut down for two-week vacation periods in August 1971-1974. Plant operations of steelmaking were suspended after the flood in June, 1972. The particulate readings from the DER's Hoffer Street monitor for periods of vacation or shutdown due to flood when no operations were

being conducted in the Steelton plant were higher than the annual geometric mean for the Hoffer Street Station during the years 1971, 1972, 1973 and 1974.

23. On February 3, 1976, appellant placed in service, new pollution control equipment on its electric arc furnaces, which are not the subject of these appeals. This system cost about $13,000,000.

24. The electric furnaces discharged emissions of about 3,600 pounds daily as compared with total daily emissions of about 214 pounds for all three furnaces here involved (rail and forge). The electric furnaces are located closer to the DER's Hoffer Street monitor than the rail and forge draw furnaces. In the first five months of full operation, namely, March 1, 1976, to July 31, 1976, the controls for said electric furnaces operated under a permit issued by the DER. They collected particulate matter at the rate of 669 pounds per hour. These new controls effected a further reduction of furnace emissions which were in addition to amounts collected prior to their installation.

DISCUSSION

A brief review of the procedural history of this case will be helpful in our effort to extract the controlling issues presently before us for resolution.

On September 19, 1972, the appellant, Bethlehem Steel Corporation, pursuant to the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, *as amended*, 35 P. S. §4001 *et seq.*, and the regulations of the DER, submitted a request for a variance to the DER. The request concerned a rail mill and two forge-draw furnaces, which had uncontrolled emissions from the manufacturing process. On September 24, 1973, the DER issued a temporary variance and imposed a time schedule requiring completion of the control plan proposed by appellant on or before May 22, 1975. Appellant did not appeal from the issuance of the September 24, 1973, order. It is this fact which we believe holds the key to the legal problems which we are now called upon to address. The matter would be open and closed but for the fact that on November 19, 1974, the DER issued a "Clarification of §123.1". The regulation, 25 Pa. Code, Section 123.1, concerns fugitive emissions and states in effect that certain insignificant emissions need not be controlled.

The Air Pollution Control Act, *supra*, itself contains a similar provision.[1] Appellant argues that the memorandum issued by the DER on November 19, as a "clarification" in fact convinced them, for the first time, that they should not have to control the emissions in question inasmuch as they were "insignificant". Based on this belief, appellant sought a determination by the DER that control of their emissions were not necessary, and in effect sought to have the variance order of September 24, 1973, withdrawn. The DER refused the request by a letter of December 20, 1974, and appeal 75-017-W was filed within 30 days thereafter.

The DER contends that the appeal is untimely, and previously raised this question by a motion to quash which was denied by the board.[2] At a subsequent hearing on a petition for reargument on this jurisdictional question, the board denied the request without prejudice. Clearly the question of jurisdiction can be raised at any time. See *Hafeta, et al v. Redevelopment Authority of The City of Wilkes-Barre*, 19 Commonwealth Ct. 202 (1975). The board was reluctant to dismiss this appeal raising important questions and requiring appellant to make large expenditures of money, if indeed there was no legal or factual justification for such outlay, as alleged by appellant.

It is now evident that this appeal can only be upheld if the board overrules or ignores the decision of our Commonwealth Court in *Commonwealth of Pennsylvania, Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corporation*, 348 A.2d 765 (1975). There the court said: ". . .We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise, would postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law. . ."

The key question is whether the "clarification" issued by the DER changes any rights or obligations of appellant, Bethlehem Steel. Although the answer to that question has been elusive insofar as the board is concerned, up until now, it

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1. 35 P. S. §4002 provides:

> "It is hereby declared to be the policy of the Commonwealth of Pennsylvania to protect the air resources of the Commonwealth to the degree necessary for the (i) protection of public health, safety and well-being of its citizens; (ii) prevention of injury to plant and animal life and to property; (iii) protection of the comfort and convenience of the public and the protection of the recreational resources of the Commonwealth; and (iv) development, attraction and expansion of industry, commerce and agriculture." (Emphasis supplied).

2. At that time, the board acted in the mistaken believe that the "clarification" in question, was an amendment to regulation §123.1.

is clearly in the negative. We reach this conclusion in two ways. As a factual matter, a reading of the plain language reveals that it does not change, or purport to change the meaning or effect of regulation §123.1 or the underlaying statute.[3] As a legal matter, the"clarification"is not a regulation amendment and therefore has the effect of a policy or guideline only. As we said in *Swartley and Swartley v. Bucks County Department of Health*, EHB Docket No. 73-262-B, issued July 24, 1974: ". . .The guidelines, or policies and procedures, have no legal status—they are only guidelines. . ." In short, appellant was in the exact same legal position on December 20, 1975, when its request to the DER for a withdrawal of the order was denied, as it was on November 18, 1974, before the " larification" was issued. See *Standard Lime and Refractories Company v. Department of Environmental Resources*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971). The test of whether an action of the DER is appealable to this board within the meaning of §1921-A of the Administrative Code turns on whether the action "...effects personal or property rights...". It is clear that the refusal of the DER on December 20, 1974, to withdraw a prior variance order pursuant to department guidelines did not change any rights of appellant.

In *Commonwealth of Pennsylvania, Department of Environmental Resources v. New Enterprise Stone & Lime Co., Inc.*, ___ Pa. Commonwealth Ct. ___, 359 A.2d 845 (1976), the Court said:

> ". . . We note that, while the word "decision" is not defined in the Code, administrative agency laws generally refer to the term "decision", as including a determination which can be classified as quasi-judicial in nature and which affects rights or duties. 1 Am Jur 2d Administrative Law §138. Here, the refusal by the DER to modify the outstanding agreement with New Enterprise lacks the elements which would suggest that a "decision" had been made in the technical sense of the word because the rights and obligations of New Enterprise have not been altered.[5] We believe, therefore, that the DER's determination was not appealable and that the EHB properly dismissed the appeal. . . ."
> (Footnote omitted)

See also *George Eremic v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-283-C, issued June 16, 1976.

Turning to the other appeal filed by Bethlehem to EHB Docket No. 75-134-W from a refusal by the DER to grant an extension to the variance, we have no difficulty concluding, in light of the foregoing, that the denial was proper. The variance was granted until May 22, 1975, and appellant sought to have it extended until May 22, 1977. Section 141.11(b) requires that:

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3. Obviously it could not legally change either, but if it *attempted* to do so, possibly we could find that the DER misled the appellant and on that basis allow the appeal.

". . .

"(b) Petitions shall include or be accompanied by all of the following:

(1) The name, address, and telephone number of the petitioner and any other person authorized to receive notices.
(2) The type and location of the operations causing the emissions for which a temporary variance is sought, including a description of the process or activity giving rise to such emissions.
(3) The quantity and nature of the emissions.
(4) Each provision of this Article from which a temporary variance is sought.
(5) A detailed plan setting forth all steps the petitioner proposes to take to reduce emissions to a level permitted by this Article, including a schedule indicating the dates upon which each intermediate step would be completed, and the date upon which full compliance with the standards and requirements of this Article would be achieved.
(6) The reasons why the petitioner feels full compliance with the standards and requirements of this Article cannot be attained at any time prior to the date of full compliance set forth in the plan of the petitioner.
(7) All other information and data which the Department may reasonably require."

This information was not provided.

Appellant makes no secret of the fact that the extension request was really based on the hope that the original order would be modified or withdrawn by the DER or this board. There was no real effort made in the petition, to comply with the regulations regarding extension of variances.

The burden of proof is, of course, upon appellant to show entitlement to an extension of a variance. We find that burden has not been carried,[4] and the appeal to EHB Docket No. 75-134-W from the DER refusal to extend the variance must be dismissed.

Realizing that everything we say from here on is merely *dicta*, we nevertheless believe it would be a disservice to the parties if we declined to discuss the merits of this case based on the extensive testimony, and thorough briefs filed in the matter.

The policy of the Air Pollution Control Act, *supra*, is expressly declared to protect the air resources "to the degree necessary" to protect the public, and for the attraction and expansion of industry. These obviously can be competing objectives as indeed they are in this very case. It is the regulations to which one must then look for further guidance.

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4. Appellant also sought a supersedeas of the order, which in effect would have been the same as an extension of the variance. This petition was denied.

Section 5 of the act (35 P. S. §4005) authorizes the Environmental Quality Board to prescribe regulations and to establish "maximum quanities of air contaminants" which may be emitted in controlling "air pollution". Section 4 of the act (35 P. S. §4004) grants the DER certain powers to be exercised "not inconsistent with any provision of this Act". These grants of authority to the board and to the DER are necessarily subject to the definition of "air pollution" and the policy provisions contained in the act.

Chapter 123 of Title 25 of the DER's rules and regulations is entitled "Standards for Contaminants". Regulation §123.1(a) entitled "Prohibition of certain fugitive emissions." 25 Pa. Code §123.1(a) proscribes "... emission into the outdoor atmosphere of any fugitive air contaminant ... except from: . . . (9) Other sources and classes of sources determined by the Department to be of minor significance with respect to the achievement and maintenance of ambient air quality standards or with respect to causing air pollution. ..." (Emphasis supplied)

The effect of this regulation is to exclude from the requirements of control, those emissions which are of "minor significance". This exclusion is wholly in accord with the provisions of the act which define "air pollution" and declare policy. The exclusion properly implements the intent of the General Assembly as expressed in the "degree-necessary" provisions discussed before.

The DER is given the discretion to determine whether or not emissions are "insignificant". Our function is merely to determine, on review, whether that discretion has been abused.[5] In addition, inasmuch as appellant seeks to bring itself within an exception, appellant has the burden of proof on the issue of the "insignificance" of the emissions under §21.42 of the board rules.

The real problem which appellant faces, is the fact that the DER has merely ordered it to do what it (appellant) proposed to do to control fugitive emissions. The statutory declaration of policy which was cited in taking this appeal should have been cited as a reason why no controls were needed on the three furnaces in question when it originally proposed the controls to the DER in 1972. Even after the DER, in effect, found the emissions to be significant and issued its order of September 24, 1973, still appellant had thirty days to raise the very same statutory argument it now makes.

5. See *Manns v. Pennsylvania Liquor Control Board*, 217 A.2d 848 and *Williams v. Commonwealth of Pennsylvania, State Civil Service Commission*, 327 A.2d 70.

It is apparent that appellant waited for more than a year after it knew, or should have known, it was being ordered to control insignificant emissions before taking any action to correct the situation. Neither the law nor the pertinent regulations have been changed. Whether the DER is correctly interpreting them, is now, as it was then—up to this board and the courts to finally decide.

We are impressed with the strides that appellant has already taken in an effort to reduce or eliminate the emissions from other sources at the plant here in question. It is agreed by stipulation that more than twelve million dollars has already been spent in its effort to clean the air and, not coincidentally, to comply with the law.

Our first concern, of course, is for the health, safety and comfort of the persons who must breathe the air in close proximity to the appellant's plant. We believe even if the worst is drawn from the testimony, we still find nothing convincing to show that the emissions in their impurist form, are harmful in the least.[6] In fact, the problem emissions are described as an oily mist containing no toxic substance. Even this seemingly innocuous by-product of the quenching operation is not discernable beyond the boundaries of the appellant's plant. No residents of the area appeared to testify that the emissions present any problem of any kind to their habitation. There were no citizen complaints brought before the board, as per item seven of the guidelines.

The area surrounding the plant is, to a large extent, owned by the appellant. Only the area to the north would appear to be of major concern if the emissions were alleged to be harmful because of their quality. It is the peak rate of the emissions not the quality which is the crux of the DER objections to a finding that the emissions are insignificant. If a time weighted average is used, over the 12-hour cycle, the emissions are at the rate of 3.5 pounds per hour. When this is considered along with the fact that appellant has just completed the elimination of an emission of 669 pounds per hour from its electric arc furnaces the significance can be viewed in that respect. Obviously, each emission to the outdoor atmosphere must be considered relative to all others in order to properly determine the significance of the quantity.[7] Item four of the guidelines permits this con-

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6. The workmen do not protect themselves in any way from the emissions and the DER inspectors did not find it necessary to do so when exposed directly to the emissions in question.

7. The contents of each separate source emission must be analyzed if quality is the test being made, but this as previously indicated, does not appear to be a problem.

sideration, but it is the cyclical nature of these fugitive emissions and the overall ambient air quality,[8] that also cause concern to the DER. In this regard we are not surprised that appellant was confused as to how the DER reached its conclusion. A witness for the DER testified at our first hearing that it did not ever consider time weighted averages in arriving at its decision on whether to exclude certain emissions from control.[9] At a subsequent hearing, this same witness indicated that all of the guidelines were considered, and one of them clearly provides for time

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8. The guideline also indicates that the DER will ask, in making its determination of "significance":

> "a. Does the fugitive emission, by itself or in combination with other plant emissions or emissions from other sources, interfer with the achievement and/or maintenance of ambient air quality standards?
>
> "b. Does the fugitive emission, by itself or in combination with other plant emissions and/or other emissions from other sources, cause air pollution, . . ."

9. Notes of Testimony, Pages 118-119.

> ". . .
>
> "Q Are you saying that the time weighted average using the 24 hours is a positive way to do it and in doing that you still get an amount of emissions that is significant, or are you saying that is the wrong way to do it?
> "A That is an improper way to do it, particularly in this case where maximums are not given. Number four indicates the maximum, minimum and time weighted. We did not have a maximum available.
> Time weighting is a technique where the evidence indicates to you the nature of the furnace, and the maximum is appreciably above the time weighted average. That time weighting is not an acceptable technique.
> "Q On what basis do you make that statement that is an improper way to use it when the peak is substantially above the average? On what basis do you make that statement?
> "A The concentrations.
> "Q You are not answering my question. Is that some regulation.
> "A No.
> "Q Where did you get that information?
> "A From the mechanisms between source emissions and ambient atmosphere concentrations, from the recognized--
> "Q Just common sense?
> "A Yes; if it's discharged at a rate over one hour, the neutrological molding would give you much higher concentration.
> "Q How is the public or Bethlehem Steel supposed to know they can't do it that way?
> "A I believe that they have been advised they cannot do it that way. We have never accepted in this region this method. That is the reason I speak to this time weighted average as an acceptable approach to insignificance.
> "Q I am assuming you are saying maybe some other regions do?
> "A I am saying I have no knowledge. To my knowledge it has not been accepted anywhere in the state.". . .

weighted averages.[10]

The strongest evidence of all, supporting the DER's decision, is found in the fact that the ambient air quality of the Steelton area undeniably was very poor when it issued its order on September 24, 1973. The most surprising fact to us, in this regard, is that the particulate matter readings from air monitors was still higher than the primary air quality standard on certain days during a major flood and other times, when the appellant's plant was not in operation.

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10. Notes of Testimony, Pages 358-360.

". . .

"Q Is it your position that the peak emissions then would disqualify this source from minor significance?

"A Yes.

"Q How do you square that conclusion with Part 4 of the clarification which states that time-weighted averaging is a valid criterion?

"A I do have the clarification statement available. I will take a moment to refer to that.

MR. DICE: "I think that is Exhibit A-16.

THE WITNESS: "The preface to all the criteria, one through eight, which includes four, indicates that all available and relevant information will be used by the department when implementing the regulation.

Examples include Number 4 which indicates the maximum, minimum and time-weighted average rate of emission per unit time. Then the rest of that criteria merely indicate the unit of time used to describe that the mass emission rate should be the time duration of the nominal peak; that is, pounds per second, pounds per minute, equivalent rated pounds per hour, indicating discretion on units.

The preceding paragraph above the criteria, which would be relevant to all the criteria; some fugitive emissions may be so minor as to require no control at all, while others may require control systems with efficiencies similar to those required of process emissions under 123.13 of the regulations.

Criteria 4 indicates that maximum, minimum, and time-weighted average can and will be considered where that is appropriate to determining insignificance. Obviously, it is at least my opinion that the intent of that statement is very strongly consider, if information is available in that direction, the requirements of 123.13.

BY MR. TOMALIS:

"Q But that still doesn't square with time-weighted average -- does it? -- when you have a source with a peak emission.

"A Perhaps I can explain.

"Q How do you square that with Part 5 of the criteria with reference to cyclical?

"A Cyclical can be synonymous with time-weighted average because cyclical can in fact be the reason that emission rates do in fact vary, as the department recognizes they vary in this case.

I don't fully understand what you are asking, in that I don't see any conflict between the opinion that these are significant and Number 5 which I will read." . . .

It is clear that appellant's plant is to a large extent an unknown quantity in the total Steelton air quality picture today, and it is undoubtedly not the only reason for poor air quality recorded there.

This is a case on which reasonable minds can easily differ. It is a borderline case if ever there was one. Although we would not have found the DER's decision to be a clear abuse of discretion in 1973, we are inclined to believe that under the present day circumstances, our decision may have been different.

The standards used by the DER to determine whether particulate emissions are "significant", leaves a great deal to be desired[11] from the standpoint of one not privy to the weight given each of the eight items which are considered by the DER.[12] To fairly judge the conclusion, one should be able simply to read the statute and the regulation (without the guidelines), analyze the basis for determination and decide whether they are required to control certain emissions. If that determination must be made on a case by case basis, as argued by the DER, then we believe it would be far better if either the rules of the game were more explicit, or the burden of proof would be upon the DER to show the necessity for control of emissions which are deemed "significant". Nevertheless, under the present statute, regulations and guidelines, looking at all of the evidence, we believe the DER's decision when made in 1973, was based on substantial evidence. If however, the matter

11. We urge the DER to consider institutioning a procedure whereby the question of the significance of given emissions can be raised and determined on a case by case basis.

12. The guidelines under the "Clarification of §123.1" provide:

". . .

"1. Exact source configuation and location; nature of the surrounding area, i.e., topography, development, etc.

"2. Chemical and physical nature of the emission, including particle-size distribution in the case of particulate matter.

"3. Visible characteristics of the emission.

"4. The maximum, minimum, and time-weighted average rate of emission per unit time; the unit of time used to describe the maximum emission rate should be the time duration of the nominal peak emissions, i.e., pounds/second or pounds/minute, and the equivalent rate in pounds/hour.

"5. A complete description of the process or operation and the cyclical nature of the fugitive emission, where such is the case.

"6. Ambient air quality data.

"7. Citizen complaints.

"8. Complete description of emission control system, if any, and its efficiency compared to that of best available technology.". . .

were to be decided on the present record today without regard to the DER's findings, we might well have reached a different conclusion because of the tremendous reduction in emissions that appellant has achieved from other sources.

Perhaps this will be sufficient to cause the DER to review its decision in light of the new information which it did not have and could not have had in 1973 when the order in question was issued.

CONCLUSIONS OF LAW

1. The board has no jurisdiction of the subject matter of the appeal to EHB Docket No. 75-017-W inasmuch as it was filed beyond the 30-day appeal period for the variance order of September 14, 1973, and the letter of December 20, 1974, from the DER to appellant refusing to withdraw or alter the variance order, is not an appealable action of the DER within the meaning of 71 P. S. §1710.2 or 1921-A of the Administrative Code, Act of April 9, 1929, P. L. 177 *as amended* 71 P. S. §510.21.

2. The appellant has failed to carry its burden of proof in the appeal to EHB Docket No. 75-134-W.

O R D E R

AND NOW, this 2nd day of February, 1977, the appeals of appellant, Bethlehem Steel Corporation are hereby dismissed.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

CONCURRING OPINION

BY: Joanne R. Denworth, Member

I concur in the result in this case on the ground of jurisdiction. I would emphasize that the issue is the effect of the "clarification" issued by the department, apparently in response to a general request by Bethlehem for a statement as to the meaning of "minor significance" in regulation 123.1 (a) (9). I

would not say that a policy guideline such as this "clarification" is of no effect; although it clearly could not controvert the meaning of a statute or regulation, see *Commonwealth v. Harmar Coal Company*, 452 Pa. 77, 306 A.2d 308 (1973). However, it can only be of prospective effect in the sense that it can only be used by the department and the courts as an aid to interpreting and applying the law in cases decided after its issuance. See, by analogy, *Consolidation Coal Company v. Commonwealth*, EHB Docket No. 72-297-D, issued January 30, 1976. The "clarification" could not and did not change the law, and thereby give Bethlehem a new right to attack an earlier enforceable, unappealed order of the department granting the variance that Bethlehem previously sought. The facts here suggest that Bethlehem attempted to make the department bear the burden of its own failure to raise the issue of minor significance at the right time.

I do not agree with all of the conclusions in Chairman Waters' opinion concerning the significance of these emissions; however, my disagreements are immaterial since the issue of jurisdiction is controlling.

Joanne R. Denworth

JOANNE R. DENWORTH
Member

DATED: February 2, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

CONCERNED CITIZENS FOR ORDERLY PROGRESS, *et al* AND BOARD OF SUPERVISORS OF UPPER MT. BETHEL TOWNSHIP	EHB Docket No. 76-102-W EHB Docket No. 76-105-W
v.	Article I Section 27 Pennsylvania Constitution
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and EMERALD ENTERPRISES, LIMITED, Intervenor	The Clean Streams Law

ADJUDICATION

BY: PAUL E. WATERS, Chairman, February 24, 1977

This matter comes before the board as an appeal from the issuance on July 8, 1976, of a sewage permit by the Department of Environmental Resources, hereinafter DER, to Emerald Enterprises, Limited, hereinafter Emerald, for the operation of a sewage treatment plant in Upper Mount Bethel Township, Northampton County, Pennsylvania. A similar permit previously issued by the DER for the same treatment plant was set aside by the board which by its adjudication dated February 6, 1976, ordered the DER to obtain more detailed information regarding the discharge area and/or require the permittee to specifically design a monitoring procedure to check the efficiency of the Max Planck system and such other information deemed necessary, consistent with that adjudication.

FINDINGS OF FACT

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

2. On February 11, 1976, the Environmental Hearing Board, hereinafter board, set aside Permit No. 4875402 and ordered the DER to obtain more detailed information regarding the discharge area, to require the permittee to specifically design a monitoring procedure to provide information on the efficiency of the Max Planck system and to obtain such other information it deemed necessary consis-

tent with the board's adjudication.

3. The permit was reinstated on July 8, 1976.

4. Under the special conditions of the permit, the effluent shall not contain more than:

a. More than 20 mg/l of five-day biochemical oxygen demand, (BOD), as a five-day consecutive average of values and not more than 40 mg/l of five-day BOD at any time;

b. more than 0.5 mg/l of ammonia-nitrogen during the months of June through October and not more than 1.5 mg/l of ammonia-nitrogen during the remaining months of the year based on a seven-consecutive day average of values and not more than 1.0 mg/l of ammonia-nitrogen at any time during the months of June through October;

c. more than 16 mg/l of suspended solids as a seven-consecutive day average of values and not more than 32 mg/l of suspended solids at any time;

d. more than 0.5 mg/l of total soluble phosphate as PO_4 as a seven consecutive day average of values and not more than 1.0 mg/l of total soluble phosphates as PO_4 at any time;

e. less than 6.0 mg/l of dissolved oxygen at any time.

5. The DER made no findings respecting social or economic justification for the project.

6. The DER has no personnel in its offices in Reading or Harrisburg capable of reviewing reports respecting social or economic justification in connection with the issuance of a permit for sewage treatment facilities.

7. Neither the DER nor the permittee did any specific studies of rock fracture patterns.

8. Although the nature of alluvial soils in the bog area is a factor in determining groundwater storage, no specific subsurface tests were made to identify such alluvial material or the character of it.

9. The amount of pumping and drawdown and its effect on groundwater tables may be affected by rock fracture patterns but no specific tests were made of rock fracture patterns.

10. The stream and small bog are a natural discharge area.

11. Pumping tests conducted by Buchman, Inc. for the permittee in November, 1976, on the well expected to produce 35 gpm would only produce 27 gpm at a drawdown level of 195 feet for 36 hours.

12. Should the dam fail, the resulting flooding could temporarily put the treatment plant out of commission.

13. If the treatment plant is temporarily out of commission due to flooding, it could take three to seven weeks to reestablish the microorganisms

necessary to provide the level of treatment required by the permit.

14. Recognizing that during April through September, the natural flow in the receiving stream may decrease, a land treatment system was incorporated into the wastewater treatment system proposed by the permittee.

15. The proposed ground discharge system was previously described by the permittee as the Max Planck system but in fact is it not the Max Planck system.

16. The DER and permittee did not fully study the question of eutrophication or its impact on the unnamed tributary.

17. No provision has been made by the permittee to harvest or remove nutrient laden vegetation in the bog area to reduce the release of nutrients into the water of the bog and the unnamed tributary.

18. To reduce the total concentrations of nitrogen-nitrate to comply with federal drinking water standards would require dilution of the treated sewage by a factor at least two to one.

19. The permit reissued by the DER is identical to the permit previously issued in 1975, except that:

> (a) A five day average of 20 milligrams per liter BOD and suspended solids were changed by lowering the average requirement therefrom to 14 milligrams and 16 milligrams respectively within a seven day average.
> (b) An additional requirement for total soluble phosphates was added as agreed to by the permittee.

20. The revised requirements are more stringent than those previously required in the original permit.

21. No major changes in the plans were made by the permittee since the previous adjudication.

22. Prior to the reissuing of the permit in question, the DER independently sampled the water quality of the unnamed tributary and various wells located thereabout in April and June of 1976.

23. The April and June, 1976, tests concerning the water quality of the unnamed tributary revealed that while the chemical quality of the stream is good, the biological quality of the stream is not, in that the amount of fecal coliform exceeds drinking water standards.

24. Only minimal uses of the unnamed tributary are being made since the present quality of the water fails to meet bathing or drinking standards and the unnamed tributary does not support any population of fishes.

25. Richard Kraybill, the DER geologist, did a field investigation on April 23, 1976, and on June 28, 1976, and based on that investigation as well as the topography and geology of the site, found that the stream and small bog area are natural discharge areas.

26. The permittee is required to submit daily samples of the treated effluent to the DER for the purposes of showing compliance with the requirements of the permit.

27. The present plans call for the existing well to provide for additional stream flow during dry weather conditions, and a second well to be drilled to help provide water for water supply purposes to the project.

28. In addition, the permittee will be required to add, in addition to those two, one or two more wells , to fulfill the project water need.

29. The land area in question appears to be capable of supplying the additional well or wells needed to meet the water demands of the project.

30. There is sufficient land available (81 acres) for placement of the additional well or wells, sufficiently far enough away from the existing lake to prevent a significant interaction with the lake.

31. Also proposed as an addition to the treatment facility is an overland flow treatment which encompasses running of the treated effluent through a perforated pipe laid parallel to the bog and stream.

32. The effluent would then pass through the pipe, through the bog and into the stream during dry weather periods further enhancing the quality of the treated effluent.

33. The project engineer inappropriately labeled the overland flow system the "Max Planck System" in the previous appeal proceeding.

34. The overland flow system was added solely at the behest of the DER and was not necessary to meet the standard waste water quality required by the DER in the opinion of permittee.

35. Economic and social justification for private development upon application for permitted sewage treatment facilities is normally only required from the developer by the DER when the project is located in a conservation area.

36. This project is not located in a conservation area.

37. The mobile home park facility will provide housing for those individuals who would normally rent apartments but would prefer to rent mobile homes due to the fact that they would be building equity in the property in which they

were living.

38. The proposed project is located approximately 40 minutes from Allentown and Bethlehem, 20 minutes from Easton and 50 minutes from Newark.

39. The permittee as part of the plans for the park, will construct tennis courts, a recreation hall, a stocked lake, an 18-acre ecology area and will provide a tree-lined border as well as underground electrical wiring.

40. The permittee at a meeting with the appellant township, produced testimony concerning the socio and economic impact of the mobile home park on the community as well as the financial impact on the school system, and said information was considered by the township in approving the project.

41. Appellant's Exhibit No. 5, a portion of the park plans, contained a water plan on which the number 150 appears next to a proposed well.

42. The above entry was an error and should have read 150 gallons per unit per day, inasmuch as the township ordinance requires that capacity per unit.

DISCUSSION

Again we are faced with the practical application of the abstract legal guidelines set out for us in *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973), to an actual sewage effluent disposal problem. We do not intend to rehash our former decision in this matter. Although wide latitude was permitted appellant at the hearing, we will here concern ourselves only with what we deem to be new issues, properly raised within the context of our prior adjudication to EHB Docket No. 75-161-W.[1]

At the outset, it is argued that Upper Mount Bethel Township, one of the appellants, is estopped from pursuing this appeal because it was the township, which previously approved the plans allowing the permittee, Emerald Enterprises, Limited, to construct and operate the mobile home park in question. It is true that the township approved the plans which came before this board in a previous appeal in which the township was not a party. As indicated, that proceeding ended with a remand to the DER for further action on the permit application, specifically, with regard to the planned discharge area. Some changes were made in the permit and it was reissued. It is from the reissued permit that this appeal is taken. Although we might have considered the estoppel question properly raised, as to the township in the prior proceeding, clearly, it cannot be barred

1. Although testimony was admitted regarding the possibility and results of flooding if the impoundment on the property failed for whatever reason, we deem this issue clearly outside of the scope of this adjudication.

from raising questions with regard to the reissued permit which contains some changes—no matter how slight. Since we are allowing the appeal, we do not deem it a productive expenditure of time to extract some issues and to prohibit the township from arguing them, while permitting others, in light of the fact that Concerned Citizens, the other appellant, has the full capacity to raise the very same questions and, indeed, has done so.

Much has been made of the fact that the effluent from the proposed treatment plant will be of less than drinking water quality. This is undeniably true—but we think irrelevant. Obviously there could be no sewage treatment plants in Pennsylvania if the standards were those suggested by appellant's argument.

We are concerned about the nutrients which may become concentrated in the stream and bog area over a period of years due to accelerated plant growth. Eutophication is a natural occurrance under these circumstances and will likely be present near the plant discharge area.[2] Any problem with regard to the concentration of nitrogen and phosphorous in the bog and stream area could be eliminated by harvesting the excess plant growth. This would prevent return of nutrients to the soil and water when the foliage dies each year after accelerated growth. We believe there should be a requirement placed in the permit for this reasonable environmental control measure required under the Constitution.

Let us turn now to the constitutional amendment which is the underpinning for the many propositions and deficiencies which appellant has ably brought to our attention for review.

Article I, Section 27 of the Pennsylvania Constitution[3] provides, as interpreted by *Payne v. Kassab, supra*, that three matters must be examined when the state acts in carrying out its trust for the people. What has commonly become known as the "Payne test", asks the following questions. First, was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? We believe the statutory arguments, with

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2. For reasons which are unknown to the board, Emerald has not indicated, in more than a general way, where the actual discharge point will be located.

3. Article I, Section 27 provides:

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

the exception of The Fish Law, *infra*, have been finally disposed of in our pre-adjudication. We again can find no clear violation of statutes which appellant cites.[4] The Fish Law of 1959, Act of December 15, P. L. 1779 30 P. S. 200 provides that:

> ". . . No person shall allow any substance of any kind or character, deleterious, destructive or poisonous to fish, aquatic organisms, amphibians and reptiles, to be turned into or allowed to run, flow, wash or be emptied into any waters within this Commonwealth but nothing herein contained shall be deemed to repeal or supersede any of the provisions of the act of June 22, 1937 (P. L. 1987, No. 394), known as 'The Clean Streams Law'"

It is the last sentence which we deem dispositive of the appellantis argument. Undoubtedly, there will be, as previously found by the board, some deleterious effect upon aquatic organisms in the unnamed tributary to the Allegheny Creek. The permit which is here under attack was issued, not under The Fish Law, but under The Clean Streams Law. If, as we have held, there was no violation of The Clean Streams Law and regulations, then The Fish Law, by its own language cannot supersede the former statute, or restrict any permit issued thereunder.

Secondly, has a reasonable effort been made to reduce the environmental harm to a minimum? It is this requirement upon which appellant makes its major thrust in accord with our previous adjudication. Appellant is more concerned with what Emerald and the DER have failed to do, than with what has been done in this regard. There will be a large quantity of water needed to successfully carry out the mobile home project. The presently existing well and a lake on the premises are not deemed sufficient for this purpose. It will, therefore, be necessary to augment substantially, the present water supply in order to carry the project to completion.[5] Appellant believes that the treatment plant effluent elimination area, which is a bog, will be converted from a discharge to a recharge area because of the water draw which must be pumped to meet project and treatment plant requirements. Based on this prospect, appellant argues that Emerald and the DER have not gathered enough information and geological data to disprove their reversal theory or possibility. A number of highly qualified experts gave their differing opinions on the subsurface strata, and the need for extensive test borings, and air mapping to discover fracture patterns.

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4. The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1 *et seq.*, Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.1 *et seq.*

5. The amount is estimated to be 197,000 gallons per day needed to maintain the quantity flow required by the permit.

Appellants argue that more such data is needed before Emerald should be permitted to proceed. Appellee, however, through their experts and using geologic study data have made judgments in the manner usually done with a project of this size. We believe that this is all that they need do at this time. Again, the question which we answer, is not whether additional helpful data could be compiled, but whether the appellees have acted reasonably in going ahead with what they now have. We believe they have.[6]

At the heart of our concern when this matter was remanded previously, was our uncertainty about the long-range water quality consequences of a discharge to the stream and the bog area in the event of recharge to groundwater.[7] We are now satisfied that the area in question is in fact a discharge area.

The prospect that the area will be converted from a discharge to a recharge area is clearly speculative on this record. In fact one of appellant's key witnesses testified that it would be necessary to draw more water from the existing well than it presently produces in order to cause this conversion. Obviously any future wells will have to be properly located to avoid the above indicated result. This, however, need not be resolved at the present stage of the proceeding. If it is a problem at all, it is an enforcement problem. Finally in this regard the requirement for daily samples of the effluent by Emerald and periodic sampling by DER together with the monitoring wells which are called for in the plans, we believe to be reasonable steps to reduce environmental harm to a minimum. We have already outlined a reasonable measure needed to prevent the nutrient buildup about which appellants have complained.

Our final consideration is whether the third *Payne* test is applicable to this case and if so, in what way. We previously indicated that there were serious doubts about its applicability. Although the Pennsylvania Supreme Court has since that time passed upon the Commonwealth Court decision,[8] no additional light has been shed on the dilemma we outlined. It was unnecessary for the board to squarely face this issue in our previous adjudication only because the matter was remanded for other reasons. We now believe that the apparent inconsistency between *Delaware Valley Community College et al v. Fox*, 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975) and *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973), can be resolved. This can be done by construing the cases to mean that where local decisions are called for, the state has no proper role in balancing the benefits and harm of a given project. This rule presents an interesting problem of application because the Township of Upper Mt. Bethel in which the project is to be located, is a party appellant.

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6. We do not mean to suggest that environmental harm has been eliminated—only that a reasonable effort to reduce it to a minimum has been made.

7. We said in the prior adjudication: "Many of the appellants depend entirely upon their wells for a water supply and if this tributary the groundwater there might be unforeseen degradation of drinking water in the area.

8. *Payne v. Kassab*, ___ Pa. Commonwealth Ct. ___, 361 A.2d 263 (1976).

Although we have held that the appellant is not estopped from participation in this proceeding, the board nevertheless is not authorized to examine or reexamine the very 'benefit' question over which the township had complete jurisdiction through zoning and other municipal laws. In short, we find no Clean Streams Law violations, and this is the major area of state-wide interest which the board is properly called upon to review.

The social and economic impact shortcomings about which appellants raise their major objections,[9] are matters that we believe were properly left by the court, for local decision-makers—not DER or this board.

CONCLUSIONS OF LAW

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

2. DER has not violated The Clean Streams Law or any statute or regulation in granting the permit here in question.

3. In light of Article I, Section 27 of the Pennsylvania Constitution and in order to reduce the environmental incursion to a minimum, the permit issued in this case should contain a condition that requires permitee, Emerald Enterprises, to cut and remove the foilage, underbrush, branches and growth in the bog and nearby stream channel of the unnamed tributary to Allegheny Creek, at least once each year to prevent pollution from an excess nutrient buildup.

4. Any further socio-economic or environmental impact study required pursuant to Article I, Section 27 of the Pennsylvania Constitution in order to determine whether enviornmental harm which will result from the project clearly outweighs the benefits to be derived, had to be done to the satisfaction of Upper Mt. Bethel Township and not the DER, inasmuch as all statutes and regulations of the DER have been complied with.

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9. Need for low and moderate income housing, tax base consequences, strain on social services.

ORDER

AND NOW, this 24th day of February, 1977, the department shall add a condition to Permit No. 4875402 issued to Emerald Enterprises, Limited, requiring at least annual cutting of foilage in and around the treatment plant discharge area to prevent nutrient buildup in the soil and nearby stream. The action of the department in issuing the permit is otherwise sustained and the appeals in this matter are hereby dismissed.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: February 24, 1977

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

PENN'S WOODS WEST CHAPTER OF TROUT UNLIMITED

Docket No. 76-037-C

Mine Drainage Permit

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and WEST PENN COAL AND CONSTRUCTION COMPANY

ADJUDICATION

By Joseph L. Cohen, Member, issued March 2, 1977

This matter is before the board on the appeal of Penn's Woods West Chapter of Trout Unlimited from the action of the Pennsylvania Department of Environmental Resources (hereinafter DER) of February 24, 1976, in granting the West Penn Coal and Construction Company (hereinafter West Penn) permit No. 3375SM43 for a strip mine operation to be conducted in Stewart Township, Fayette County, Pennsylvania. The permit authorizes a discharge of drainage from the operation to Hillen Run. Hillen Run is a tributary of Big Piney Run which flows into Glade Run. Glade Run at its confluence with Little Dunbar Creek forms Dunbar Creek. Dunbar Creek is a popular trout stream, approximately three miles of which are under special regulations of the Pennsylvania Fish Commission restricting the fishing to "fly fishing only".

Appellant claims that the proposed strip mine operation will degrade Hillen Run by discharges of iron greatly in excess of the concentration of iron now in the stream. The increased iron content, according to appellant, will render Hillen Run inhospitable to aquatic insects that form part of the biomass available to the fish in Dunbar Creek. Further, appellant claims the proposed mining operation is likely to result in additional acid being discharged into Hillen Run which will eventually add to the amount of acid reaching Dunbar Creek. Intervenor, West Penn, claims that there will be no adverse impact upon Hillen Run, Big Piney Run, Glade Run and Dunbar Creek from the proposed strip mine operation.

The board held three days of hearings in this matter. Both the appellant and intervenor submitted briefs in support of their proposed findings of fact and

no proposed findings or conclusions or briefs in support thereof. On the basis of the foregoing, we enter the following:

FINDINGS OF FACT

1. Appellant is a conservation organization, Penn's Woods West Chapter of Trout Unlimited, 165D Churchill Road, Turtle Creek, Pennsylvania, the primary purpose and interest of which is the protection and enhancement of the cold water streams of the Commonwealth, particularly those located in southwestern Pennsylvania.

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

3. Intervenor is West Penn Coal and Construction Company, a partnership, Dry Tavern, Rices Landing, Pennsylvania.

4. In response to an application for a mine drainage permit from intervenor, the DER on February 24, 1976, granted and issued to West Penn permit No. 3375SM43 for the operation of a strip mine in Stewart Township, Fayette County, Pennsylvania. The permit authorized intervenor to conduct a strip mining operation on 40 acres of land in the township and to discharge the drainage therefrom to Hillen Run. The seam of coal to be mined is the Lower Freeport Seam.

5. The special conditions of the permit provided, *inter alia*, for the removal and storage of topsoil, the construction of mine drainage treatment facilities, the construction of diversion ditches for surface water, the maintenance of a crop-line barrier, automatic dispensing machines for the treatment of discharges, conditions relating to changing geologic conditions, and blasting protection. The permit also contained a prohibition against returning tipple refuse to the strip pits.

6. The permit contained additional special conditions which provide:

> "1. There shall be no auger mining within the limits of this Mine Drainage Permit.
>
> "2. Any discharge from settling basins designed for siltation below the toe of spoil shall have a pH between 6.0 and 9.0 and an iron concentration of less than 7.0 ppm. Collection basin shall be of sufficient dimensions to insure siltation shall be kept to a minimum at all times.
>
> "3. If during the course of strip mining coal the permittee pollutes, degrades or in any manner destroys the water quality in Dunbar Creek, strip mining shall cease until the pollution caused by the permittee has been abated. Strip mining shall resume when the District Mine Inspector and the Central Office is satisfied that the permittee has successfully and permanently abated the source of pollution."

7. On February 25, 1976, West Penn accepted the conditions contained in the permit.

8. Dunbar Creek is a popular trout stream approximately three miles of which are under special regulations of the Pennsylvania Fish Commission. These regulations

specify that the designated stretch of the stream is for "fly fishing only".

9. Hillen Run, Big Piney Run and Glade Run, tributaries to Dunbar Creek, cannot buffer significant amounts of acid discharges from mining operations.

10. The mining operation under the permit would discharge any of its drainage to Hillen Run which, although having a pH of slightly less than 5, supports aquatic insect life, an important part of the food chain for the trout which inhabit Dunbar Creek.

11. Hillen Run flows into Big Piney Run, which drains a reclaimed strip mining operation on the Lower Kittanning Seam known as the Mashudda Strip. Due to the infiltration of minerals into Big Piney Run conditions of toxicity exist in that stream such that it is devoid of aquatic insect life.

12. Dunbar Creek holds stocked trout over from year to year and supports natural reproduction of both brown and brook trout.

13. Because of the high fishing pressure on Dunbar Creek, the Pennsylvania Fish Commission stocks the stream annually with over 15,000 trout, a significantly higher number than is stocked in the average trout stream in the Commonwealth.

14. The Pennsylvania Fish Commission stocks Dunbar Creek with 170 to 174 pounds of trout per acre. The average stream in the Commonwealth receives between 80 and 90 pounds per acre.

15. In June of 1974, the Penn's Woods West Chapter of Trout Unlimited, in conjunction with the Pennsylvania Fish Commission, commenced the construction of a mine acid reclamation project on Big Piney Run upstream of its juncture with Glade Run. This project consists of two low-flow jack dams charged with limestone.

16. The mine acid reclamation project is designed to neutralize the acidity in the tributaries below it and increase the zone of fish habitation in Glade Run above its confluence with Little Dunbar Creek.

17. The efficiency of the mine acid reclamation project decreases as additional iron precipitates on the limestone and as the water entering the facility increases in acidity.

18. The overburden associated with the Lower Freeport Seam of coal is generally non-acid producing.

19. There is a strip mining operation in the vicinity of the tract of land to be mined by West Penn under the permit that is the subject matter of this proceeding. This mining operation covers 400 acres and has been operated since June of 1969. This operation, conducted by the Purko Mining Company, discharges drainage to Glade Run and Dunbar Creek. The mining company has mined various seams of coal in this operation,

including the Lower Freeport Seam. Although the discharges from the treatment ponds of the Purko Mine were alkaline in nature, waters draining from the spoil of the back-filled portion of that operation, where mining had occurred on the Lower Freeport Seam, were slightly acidic in nature.

20. West Penn's mining operation will intercept a perched water table. This will result in the backfilled overburden coming into contact with groundwater during the winter and spring of the year. Inasmuch as the overburden associated with the Lower Freeport Seam of coal is generally not acid producing, the likelihood that groundwater will become contaminated by acid mine drainage is remote. Hillen Run is fed by the perched water table on West Penn's mining site.

21. Although the analysis of the overburden conducted by the DER after the permit was issued tend to show that most of the strata does not contain significant pyritic material, there is some indication that at least one strata of the overburden contains significant amounts of acid and iron. However, the overburden as a whole does not contain significant amounts of pyritic material and is highly unlikely to generate significant amounts of iron or acid.

22. The treatment facilities proposed in West Penn's permit application are such as will prevent any discharge during the mining operation from having a pH of less than 6 or more than 9 and an iron content greater than 7 milligrams per liter.

23. A discharge from the mining site to Hillen Run of mine drainage with an iron concentration of 7 parts per million will degrade Hillen Run and not permit it to have a sufficiently low iron content to enable aquatic insects to reproduce and flourish therein.

24. To maintain the present water quality of Hillen Run with regard to iron concentration, a discharge into Hillen Run may not have an iron content in excess of 4 parts per million.

25. Subsequent to the issuance of a permit, the existence of the acid mine reclamation project became known to the DER. Thereafter the DER geologist, Edward J. Steele, conducted tests on overburden samples, purportedly from a test hole on the West Penn site, taken by Angerman Associates, an engineering firm employed by intervenor. Geologist Steele conducted a leachate test and a microscopic examination of the overburden supplied by Angerman Associates. In the conduct of these tests geologist Steele did not use methods generally accepted by the DER or by the geology profession. Nevertheless, the manner in which these tests were conducted indicates that they were conducted in a good faith attempt by the DER to determine whether the permitted operation would endanger the reclamation project.

26. These analyses tend to show that there will be no acid discharges from the West Penn operation after it is completed and the necessary restorative measures are taken.

27. Discharges from intervenor's mining operation will not degrade Hillen Run if the pH limits set forth in the permit are maintained and the iron concentration of the discharge does not exceed 4 milligrams per liter.

DISCUSSION

At the conclusion of appellant's case in chief, the intervenor moved to dismiss the appeal. The motion was based on §21.42 of the rules of practice and procedure before the board. This rule, in pertinent part, 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 or proceeding in the following cases unless otherwise ordered by the board:
>
> * * *
>
> "(c) Where a party who is not the applicant or holder of a license or permit from the Commonwealth protests its issuance or continuation."

Appellant claims that the DER and/or the Commonwealth had the burden of proof by virtue of the adoption of Article I, Section 27 of the Pennsylvania Constitution. In support of appellant's position regarding the burden of proof, it cites *Commonwealth of Pennsylvania, et al v. Precision Tube Company, Inc.*, 24 Pa. Commonwealth Ct. 647, 358 A.2d 137 (1976). Inasmuch as appellant has met its burden in this matter, we see no reason to pass upon this contention.

Unlike the appellant in *Pennsylvania Council of Trout, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-044-D (December 17, 1976), appellant in the matter now before us has met its burden, at least in regard to the concentrations of iron as may be discharged into Hillen Run. It is clear that a discharge containing a concentration of iron of 7 milligrams per liter will degrade Hillen Run and render it inhospitable to aquatic insects. This, in turn, would have the effect of reducing the biomass available to the fish in Dunbar Creek and result in lower trout population than now exists.

When appellant proved the likelihood of environmental harm to Hillen Run and Dunbar Creek, the burden shifted to the intervenor and the DER to show compliance with the requirements of *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973). *Payne* requires, *inter alia*, that environmental damage be minimized. The DER did not adhere to that requirement when it permitted the discharge from intervenor's operation to have an iron concentration of 7 milligrams per liter. Intervenor's witness, Edward J. Steele, geologist for the DER, admitted that such a discharge would degrade Hillen Run.

It is unclear why the DER did not place the iron content limit of the discharge at 4 milligrams per liter as suggested by its own Bureau of Water Quality Management. The explanation, tendered by intervenor's witness to the effect that the special condition in the permit preventing degradation of Hillen Run is sufficient protection for that stream, does not survive scrutiny. The logic of this explanation would imply that Hillen Run would first be required to sustain a concentration of iron greater than now exists in the stream before the iron concentration of the discharge would be required to be reduced. This is somewhat analogous to "locking the barn door after the horse has escaped." Under Article I, Section 27 of the Pennsylvania Constitution and The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.*, the DER must discharge its responsibility in a preventive manner. It is insufficient concern for its environmental responsibility for the DER merely to step into a matter at the point where the stream is already degraded.

We are not persuaded, however, that West Penn's mining operation will have an adverse effect upon the pH of Hillen Run, Big Piney Run, Glade Run and Dunbar Creek. We do not believe that there is a likelihood of an acid discharge of any significant quantity from West Penn's strip mine operation. The bulk of the credible testimony in this matter points to discharges having a pH of more than 6. For this reason, we deem it inappropriate to set aside the issuance of the permit to West Penn.

CONCLUSIONS OF LAW

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

2. A person appealing the grant of a mine drainage permit has the burden of proof and the burden of proceedings unless otherwise ordered by the board under §21.42 of the rules of the board.

3. Where appellant proves that a permissable discharge containing not more than 7 milligrams per liter of iron will degrade the present quality of a given stream and hence will render it toxic with regard to aquatic insects, and where it further proves that such aquatic insects constitute an available biomass to fish in another stream to which the first is tributary, appellant has met its burden under §21.42 of the rules; hence, a motion to dismiss by intervenor predicated on appellant's alleged failure to meet its burden will be denied.

4. The DER did not act in accordance with the requirements of *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973), where it authorized a discharge of mine drainage containing a concentration of iron that would degrade the receiving

stream and render it toxic to aquatic insects.

5. Where a condition of a mine drainage permit may be corrected by board action on the basis of clear evidence, the board will not remand the matter to the DER but will itself modify the permit condition.

O R D E R

AND NOW, this 2nd day of March , 1977, the appeal of Penn's Woods West Chapter of Trout Unlimited from the action of the DER in granting West Penn Coal and Construction Company, Dry Tavern, Rice's Landing, Pennsylvania, mine drainage permit No. 3375SM43 for the operation of a strip mine in Stewart Township, Fayette County, Pennsylvania, is hereby sustained in part and denied in part. Additional special condition No. 2 of said permit is amended to read:

> "2. Any discharge from settling basins designed for siltation below the toe of spoil shall have a pH between 6.0 and 9.0 and an iron concentration of less than 4.0 ppm. Collection basin shall be of sufficient dimensions to insure siltation shall be kept to a minimum at all times."

Except as modified by this order, mine drainage permit No. 3375SM43, issued to West Penn Coal and Construction Company by the DER is hereby declared to be a valid and subsisting permit and to authorize the permittee to conduct strip mining operations in Stewart Township, Fayette County, Pennsylvania in accordance with the permit so modified.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: March 2, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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112 Market Street
Harrisburg, Pennsylvania 17101
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In the Matter of:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 74-270-CP-C

v.

Complaint for Civil Penalties

KOPPERS COMPANY, INC.

ADJUDICATION

By Joseph L. Cohen, Member, issued March 2, 1977

On December 16, 1974, the Pennsylvania Department of Environmental Resources (hereinafter DER) filed with the board a complaint for civil penalties against Koppers Company, Inc. (hereinafter Koppers). The complaint alleged that Koppers discharged industrial wastes into Chartiers Creek from three separate discharge points from September 13, 1973, and continuing thereafter, all in violation of The Clean Streams Law (hereinafter CSL), Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.* A hearing in this matter was held on August 14, 1975. On the basis of the aforesaid hearing and the briefs filed by the parties, we enter the following:

FINDINGS OF FACT

1. The plaintiff is the Pennsylvania Department of Environmental Resources, the agency of the Commonwealth charged with the administration and enforcement of the CSL.

2. Defendant is the Koppers Company, Inc., a Delaware corporation, qualified to do business in Pennsylvania, with offices at 1201 Koppers Building, Pittsburgh, Pennsylvania 15219.

3. Koppers owns and operates a chemical facility for the production of resins in Bridgeville, South Fayette Township, Allegheny County, Pennsylvania.

4. Flowing through the Koppers property on one side of the plant is a surface stream, Millers Run. Flowing along the property on the other side of the plant is a surface stream, Chartiers Creek of which Millers Run is a tributary. The confluence of Millers Run and Chartiers Creek is on the plant property below the plant proper.

5. There are three outfalls on the Koppers property, 001, 002 and 003. Outfall 001 is a 33 inch concrete storm sewer that carries storm water runoff and other natural drainage from approximately 17 acres of Koppers and adjacent property to Chartiers Creek. This outfall is not connected to any industrial process or industrial waste treatment system. Outfall 002 is a 6 inch cast iron pipe which, during all relevant periods, discharged boiler blow-down from two steam generating boilers into Chartiers Creek. Outfall 003 is a storm sewer serving approximately 18 acres of property, the effluent from which is discharged into Millers Run. The discharges from outfall 003 consisted of natural drainage, blow-down from two boilers and from barometric condensers on its vacuum still and bearing cooling water.

6. At no time did Koppers hold or obtain a permit from the DER for the discharge of effluents through outfall 001, 002 or 003. At no time prior to the termination of the discharges from these outfalls did Koppers provide for the treatment of the effluents discharged therefrom to Chartiers Creek and Millers Run.

7. The source of the effluent from outfall 002 into Chartiers Creek was condensate blow-down from Koppers steam generator boilers No. 201 and 202 which were placed into operation in 1952.

8. During the period from September 13, 1973, to and including September 16, 1974, boiler Nos. 201 and 202 were operated for 358 days. These boilers generated a steady blow-down throughout a 24-hour period. The volume of blow-down discharge from outfall No. 002 averaged between 20,000 to 25,000 gallons per day.

9. The water used by Koppers to feed into the boilers was obtained from a municipal water supply. This water was treated by Koppers for use in the boilers by the addition of certain substances designed to increase the efficiency of the boilers' operation. The additives included alkalies and a suspending agent to prevent the precipitation of salt into the boilers. The suspending agent was a compound known as "Liquid Treat CL" manufactured by the Betz Company.

10. The effluent from outfall 002 varied in temperature between 160° and 180° Farenheit and in pH from 10.6 and to 11.7. The effluent also contained measurable amounts of iron, chrome, copper and nickel. On at least one occasion the total solids content of the effluent was 1505 milligrams per liter.

11. During the period from September 13, 1973, to and including October 31, 1974, Koppers discharged blow-down from its boiler Nos. 2 and 4 through outfall 003 to Millers Run on 69 separate days. The blow-down contained additives placed in the boiler water by Koppers to elevate the pH and remove oxygen from the water. The characteristic of the blow-down water as effluent discharged by Koppers through outfall 003 did not substantially vary over time. These characteristics included a pH of 11 or greater, measurable amounts of total iron, total chrome, total copper, total nickel, low five-day BOD values and approximately 9,000 milligrams per liter of alkalinity.

12. Although the boiler blow-down discharged to outfall 003 had the characteristics of high pH and very high alkalinity, the total amount of blow-down from the boilers being discharged to outfall 003 was not the same for each of the 69 days on which boiler blow-down constituted part of the effluent from this outfall. Except for February 7, 1974, when both boilers were in operation for 12 hours, no two of the boilers were in operation on the remaining 68 days. The weighted daily average of the number of hours of boiler operation was 17.1 hours.

13. The volume of all effluent discharged by Koppers from outfall 003 varied between 30,000 and 60,000 gallons per day. All discharges from outfall 003 terminated on October 31, 1974.

14. Chartiers Creek from above outfall 001 to below outfall 002 was not an acid stream during any time period relevant to these proceedings.

15. Millers Run is affected by acid drainage from abandoned coal mine workings. Neither party introduced any evidence tending to show the pH or alkalinity of any part of Millers Run during the period of the discharge from outfall 003 for the period September 13, 1973, to and including October 31, 1974.

16. Prior to 1963 the American Cyanamid Company owned and operated the plant, the discharges from which are the subject matter of this proceeding. In 1959, American Cyanamid Company constructed a waste water treatment system at the plant, including a sewer system for the collection of chemical process flows and the conveyance of these to a pretreatment facility. From the pretreatment facility the system was designed so as to discharge the pretreated waste into a municipal sewage treatment system owned and operated by the Allegheny County Sanitary Authority (hereinafter ALCOSAN).

17. In addition to this chemical waste and collection treatment system, American Cyanamid also constructed at the same time a storm water system for the

collection of such water apart from the chemical wastes. The storm water collection system was designed to discharge flows through outfalls 001 and 003 to Chartiers Creek and Millers Run respectively.

18. Both the chemical waste collection sewer and pretreatment system and the storm water collection and discharge system were constructed in 1959 on the basis of an engineering and construction report prepared in 1957 for the American Cyanamid Company by Stillson and Associates, an engineering consulting firm.

19. While the report provided for the collection, treatment and discharge of the chemical wastes generated in the operation of the plant to the ALCOSAN system, certain other waste water flows involved in the plant operation were listed in the report for discharge to the surface water streams next to the plant (i.e. Millers Run and Chartiers Creek). The report listed, *inter alia*, flows to these surface waters as consisting of steam condensate, boiler blow-down and boiler-feed water softening backwash. Copies of the 1957 report prepared by Stillson and Associates were given to representatives of ALCOSAN sometime in 1957.

20. In 1963 the plant in question was purchased by Koppers from the American Cyanamid Company and, thereafter, was operated by defendant.

21. Prior to September 13, 1973, the Commonwealth inspected the Koppers facility on at least four occasions in 1960 and on April 21, 1970, December 30, 1970 and May 21, 1971. With the exception of the discharge of fly ash through outfall 003 in early 1971, there is no indication in the reports of inspections by the DER and its predecessor, the Commonwealth Department of Health, of Clean Streams Law violations on the part of Koppers.

22. In June of 1971, Koppers filed an application for a National Pollution Discharge Elimination System (hereinafter NPDES) permit with the Army Corps of Engineers for outfall Nos. 001, 002 and 003. The application was filed pursuant to the Federal Water Pollution Control Act (hereinafter FWPCA), 33 U.S.C. §1251 *et seq*. Contemporaneously, Koppers filed a copy of the permit application with the DER and requested certification of the discharges by the DER. The permit application contained analysis and identification of the discharges from outfalls 001, 002 and 003. Neither the DER nor the federal government took any action with respect to the permit application until the fall of 1973.

23. On September 13, 1973, Robert Shilcosky, an environmental protection specialist for the DER, inspected the Koppers facility. The inspection was made pursuant to a complaint by a game inspector. Present at all times during this inspection was Robert Bouson, senior plant engineer for Koppers. During the inspection, Shilcosky was advised that Koppers had plans to eliminate the discharges from outfalls 001, 002 and 003. On October 22, 1973, Shilcosky wrote to Koppers stating that industrial wastes were being discharged from these outfalls without a permit

from the DER and that the discharges must be abated immediately.

24. On October 30, 1973, Templeton Smith, Esquire, of Koppers' legal department and Robert Shilcosky had a telephone conversation regarding state permit requirements for proposed abatement facilities to be installed by Koppers. The substance of this conversation, as understood by Mr. Smith, was set forth in a letter from Mr. Smith to Mr. Shilcosky under date of October 30, 1973. Both in that telephone conversation and the subsequent letter, Mr. Smith requested of Mr. Shilcosky that appropriate application forms for Clean Streams Law permits be forwarded to Koppers. Mr. Shilcosky forwarded the forms as requested.

25. On February 4, 1974, Region III of the EPA issued a public notice of intent to issue an NPDES permit to Koppers. Attached to the notice was a copy of a draft NPDES permit. The draft permit was also circulated to the DER for the purpose of obtaining its certification as is required by §401 of the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.* The draft permit contained proposed interim effluent limitations for outfalls 001, 002 and 003.

26. By letter of January 30, 1974, the DER issued its certification of the discharge from these outfalls to the EPA. The certification contained the requirements for more stringent effluent limits than those in the draft permit and an additional condition requiring Koppers to submit a permit application to the DER within 90 days after issuance of the NPDES permit. The application for a permit to DER was to be for the construction of facilities to achieve the effluent limitations specified by the DER. The original certification of the DER was subsequently amended by it on March 18, 1974, to specify that it was made only with respect to the final effluent limits in the draft NPDES permit.

27. Region III of EPA issued Koppers a final NPDES permit on March 31, 1974. This permit contains a condition for the submission within 90 days by Koppers of a permit application to the DER for the construction of facilities to treat the effluent 001, 002 and 003 to the degree necessary to be within the limits set forth in the NPDES permit.

28. During the period from October 30, 1973, until March 26, 1974, Robert Shilcosky had received no communication from Koppers with respect to the status of Koppers' intention to abate the discharges from outfalls 001, 002 and 003. On March 26, 1974, Shilcosky wrote to Koppers requesting such a status report.

29. On April 16, 1974, Koppers replied to Shilcosky by letter announcing its intention to eliminate the discharges and use the water internally at the plant. Attached to this letter were three DER forms designated "project status schedule cards", which Koppers had filled out for the outfalls in question. However, Koppers did not respond to questions relating to the dates for submission of preliminary plans and final plans and application to the DER.

30. On June 6, 1974, Eric Pearson, Esquire, counsel for the DER, wrote to Koppers informing it that, pursuant to the condition in the NPDES permit, Clean Streams Law permit applications covering the discharges were due to be submitted to the DER by July 1, 1974.

31. Subsequent to the June 6, 1974, letter, Pearson was contacted by John Anderson of Koppers and informed that Koppers planned to eliminate the discharges by July 1, 1975. Pearson responded to Koppers in a letter of June 20, 1974, informing it that, in view of the plans to eliminate the discharges, no permit application was required to be filed by Koppers relative to the outfalls in question. The letter also stated, in an apparent response to an inquiry by Koppers, that the DER could not sanction the continued discharges to Chartiers Creek and Millers Run pending the installation of abatement facilities unless Koppers agreed to make payments to the Clean Water Fund of Pennsylvania for the previous and continued future violations of The Clean Streams Law.

32. Koppers refused the demand for civil penalties made by Pearson on behalf of the Commonwealth.

DISCUSSION

We must determine whether the discharges from outfalls 001, 002 and 003 violate The Clean Streams Law, and if so, the amount of civil penalties that may be appropriately assessed by us against defendant, Koppers Company. Inasmuch as the discharges from outfall 001 contained surface water runoff only, *Commonwealth of Pennsylvania, Department of Environmental Resources v. Precision Tube Company, Inc.*, 24 Pa. Commonwealth Ct. 647, 358 A.2d 137 (1976) requires, as the DER recognizes in its brief, dismissal of that count in the civil penalties complaint based upon discharges from this outfall. Likewise, storm water runoff discharged from outfall 003 did not constitute violations of the CSL.

With regard to outfalls 002 and 003, Koppers argues that (1) none of the discharges from these outfalls were in violation of the CSL, (2) the DER civil penalties action is barred by the statute of limitations, and (3) in the alternative, if these contentions are incorrect, only nominal damages should be assessed against Koppers for the reason that harm to Chartiers Creek and Millers Run had not been shown.

The DER, on the other hand, contends that civil penalties of substantial nature should be assessed against it. In support of its contention, the DER claims:

(1) The discharges from outfalls 002 and 003 did violate the CSL;

(2) Even though specific harm to the waters of the Commonwealth was not proved, harm to such waters may be presumed from unpermitted discharges that exceed effluent limitations set forth in the regulations of the Environmental Quality Board (hereinafter EQB);

(3) Koppers' conduct in discharging from outfalls 002 and 003 was "willful";

(4) The assessment of civil penalties of a substantial nature would act as a general deterrent to violations of law by the defendant and others similarly situated; and

(5) The cost to the Commonwealth involved in the "surveillance" of the violations in question should be considered.

Clearly, the CSL makes unlawful the unauthorized discharge of industrial waste into the waters of the Commonwealth. Sections 301 and 307 of the CSL, 35 P. S. §691.301 and §691.307 (1967-1977 Supp.). Moreover, 25 Pa. Code §91.5[1] provides:

> "Unless a provision of this Article explicitly exempts a discharge from permit requirements, no provision of this Article shall be construed as authorizing a discharge of industrial wastes or any other wastes without a permit."

Thus, unless otherwise exempted by regulation, discharges of industrial wastes into the waters of the Commonwealth are unauthorized without a permit therefor.

Do the discharges from outfalls 002 and 003, other than surface water runoff from outfall 003, constitute industrial waste as defined in the CSL? Section 1 of the CSL (35 P. S. §691.1) defines industrial waste as follows:

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1. This regulation was never included in the Pennsylvania Code; however, it was proposed by the EQB at 3 Pa. B. 186 (January 27, 1973) and adopted at 3 Pa. B. 765-6 (April 28, 1973).

> "'Industrial waste' shall be construed to mean any liquid, gaseous, radioactive, solid or other substance, not sewage, resulting from any manufacturing or industry, or from any establishment, as herein defined, and mine drainage, silt, coal mine solids, rock, debris, dirt and clay from coal mines, coal collieries, breakers or other coal processing operations. 'Industrial waste' shall include all such substances whether or not generally characterized as waste."

This section of the CSL also defines "establishment" as follows:

> "'Establishment' shall be construed to include any industrial establishment, mill, factory, tannery, paper or pulp mill, garage, oil refinery, oil well, boat, vessel, mine, coal colliery, breaker, coal processing operations, dredging operations, except where the dredger holds an unexpired and valid permit issued by the Pennsylvania Water and Power Resources Board prior to the effective date of this act, quarry, and each and every other industry or plant or works."

Clearly, boiler and atmospheric condensor blow-down and bearing cooling water constitute "industrial waste" as defined in the CSL. Thus, the discharge of such materials into the waters of the Commonwealth without a permit is violative of the CSL.

Koppers' argument that a storm sewer constitutes "waters of the Commonwealth" for the purposes of §307 of the CSL overlooks the precise languange of §307 (35 P. S. §691.307). This section, in pertinent part, provides:

> ". . . For the purposes of this section, a discharge of industrial wastes into the waters of the Commonwealth shall include a discharge of industrial wastes by a person or municipality into a sewer system or other facility owned, operated or maintained by another person or municipality and which then flows into the waters of the Commonwealth. . . ."

Inasmuch as outfall 003 is neither owned nor operated nor maintained by a person other than Koppers, said outfall did not constitute "waters of the Commonwealth". But, even if outfall 003 were considered waters of the Commonwealth, Koppers would not be aided thereby. Discharges of industrial wastes to waters of the Commonwealth are prohibited by §307 of the CSL if unpermitted by EQB regulations or not authorized by a permit from the DER.

In 1971 the DER received copies of Koppers' NPDES permit application to the federal government. This application contained information concerning the nature of the discharges from outfalls 002 and 003. In light of this information, we find it difficult to understand why the DER at that time did not ascertain that Koppers was discharging industrial wastes from these outfalls without the necessary permit from the DER. However, we find nothing in the record to suggest that either the DER or its predecessor misled Koppers in any manner in regard to the status of the discharges from outfall 002 and 003 under the CSL. There were no official pronouncements or rules and regulations of either agency or legal opinions for the attorney general or members of his staff, including attorneys for the DER, interpreting the

CSL in any manner that would arguably exclude boiler and condensor blow-down or bearing cooling water from the definition of industrial wastes in the CSL. Moreover, the courts of this Commonwealth have construed the term "industrial waste" as defined in the CSL in broad and comprehensive terms. See *Commonwealth v. Harmar Coal Company*, 452 Pa. 77, 306 A.2d 308 (1973) appeal dismissed, 415 U. S. 903 (1974); *Commonwealth v. Seechan Limestone Industries*, 52 D. & C.2d 10 (C.P. Lawrence County, 1970), aff'd, 200 Pa. Super. 782, 286 A.2d 406 (1972). Under such circumstances we find it singularly puzzling that Koppers could have been misled as to the legality of the discharges from outfalls 002 and 003.

While we are reluctant to say there are no circumstances under which the DER may be estopped from making a claim for civil penalties, we are of the opinion that defendant has not proved sufficient facts to warrant the application of the principles of estoppel.

Estoppel is an affirmative defense which must be proved by the party asserting it with clear, precise and unequivocal evidence. *Blofsen v. Cutaiar*, ___ Pa. ___, 33 A.2d 841 (1975); *Ham v. Gouge*, 214 Pa. Super. Ct. 423, 257 A.2d 650, 652 (1969); *Hertz Corp. v. Handy*, 197 Pa. Super. Ct. 466, 178 A.2d 833, 837 (1962). "The essential elements of estoppel are 'an inducement by the party sought to be estopped to the party who asserts the estoppel to believe certain facts to exist--and the party asserting the estoppel *acts in reliance on that belief*.' (Emphasis in original). *Sabino v. Jundo*, 441 Pa. 222, 225, 272 A.2d 508, 510 (1971)." *Blofsen v. Cutaiar, supra*, 333 A.2d at 843. Koppers, as the folowing discussion shows, has not sustained its burden of proving these elements.

We must agree with the DER that no facts exist in the record upon which to predicate an estoppel.[2] Koppers has shown no inducement by the DER to Koppers to believe that certain facts exist. Moreover, there is no showing that Koppers acted in reliance upon a belief induced by the DER. *Hertz Corp. v. Handy, supra.*

Defendants cite *United States v. Pennsylvania Industrial Chemical Corporation*, 411 U. S. 655 (1973) in support of its contention that the DER can be estopped from pursuing its civil penalties action. That case is distinguishable on its facts from the matter presently before the board. In *Pennsylvania Industrial*

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2. Cf. *Commonwealth of Pennsylvania, Department of Environmental Resources v. Flynn*, EHB Docket No. 74-138(issued October 31 ,1974), aff'd 21 Pa. Commonwealth Ct. 264, 344 A.2d 720 (1975); *Commonwealth of Pennsylvania, Department of Environmental Resources v. Bednar*, EHB Docket No. 73-351 (January 25, 1974).

Chemical Corporation, the U. S. Army Corps of Engineers, charged with the enforcement of the Rivers and Harbors Act of 1899, 33 U.S.C. §401 *et seq.*, adopted by rule and regulation, a policy of only requiring permits under the provisions of that act for discharges to navigable waters which were likely to impede navigation. This policy was adopted despite federal court decisions that interpreted the Rivers and Harbors Act of 1899 to prohibit the dumping of refuse into navigable waters unless permitted by the United States Army Corps of Engineers, regardless of whether the discharge was substantially impeding navigation. Thus, the very agency that was charged with the administration of the act in question adopted a policy, set forth in regulation, that was capable of misleading defendant into the belief that its discharges, since they did not impede navigation, did not violate the Rivers and Harbors Act of 1899, *supra*. We have no set of circumstances in the matter now before us comparable to the facts in *Pennsylvania Industrial Chemical Corporation*. Further, the Supreme Court in that case held only that the district court should have allowed defendant to offer evidence in support of its contentions that it was affirmatively mislead by the Army Corps of Engineers. It did not rule that the defense had been established.

Koppers, in the case presently before us, was not precluded from presenting evidence in support of its contention that the DER actively misled it into believing that the discharges in question were not violative of the CSL. However, it produced no substantial evidence that, if believed, would support its contention. Failure on the part of the inspectors of the DER over the course of time either to notice or to cite Koppers for discharges from the outfalls in question is insufficient, standing alone, to raise an inference that the DER affirmatively misled Koppers. Even if the DER had knowledge of the dishcarges from these outfalls, its failure to take action prior to September 1973 could have been an exercise of prosecutorial discretion [see *Frawley v. Downing*, No. 1476 C. D. 1975 (Pa.Commonwealth Ct., October 8, 1976)]. In any event, the facts of this case do not fall within the principle of *United States v. Pennsylvania Industrial Chemical Corporation, supra*.

Koppers contends that by virtue of 25 Pa. Code §91.14(b) the DER was authorized to permit the discharges complained of during the construction of abatement facilities. Koppers then argued that the DER wrongfully refused it a permit to discharge during construction of such facilities. However, 25 Pa. Code §91.14(b) provides:

"In some cases time may be required within which to prepare plans and construct treatment works by a party responsible for stream pollution before abatement can be consummated. The Department, *upon application by the party and when in its judgment the public interest warrants*, may grant a limited extension of time during which the discharge of waste shall be permitted, if the party responsible therefor continues work on corrective measures." (Emphasis added)

Nowhere in the record does it appear that the defendant made an application to the DER for a permit authorizing the discharges that are the subject matter of this proceeding to continue pending the completion of abatement facilities. Not having made an application contemplated by the aforementioned regulation, Koppers is in no position to claim that a permit for these discharges was improperly refused by the DER.

Had Koppers made an application pursuant to 25 Pa. Code §91.14(b) and had the DER refused such application, Koppers could have appealed such refusal to this board within the requisite appeal period. Had it done so, the propriety of such refusal could have been determined. Inasmuch as Koppers made no such application there is no need to consider whether the appeal period has run on a hypothetical refusal by the DER to grant Koppers such a permit.

Koppers claims that, if a permit were granted for the discharges pursuant to 25 Pa. Code §91.14(b), no civil penalties could be imposed for discharges authorized by such permit. The DER claims, however, that such a contention construes 25 Pa. Code §91.14(b) in a manner that is inconsistent with the provisions of the CSL. Hence, according to the DER we should reject Koppers' contention in this regard as being violative of the provisions of the CSL. We must disagree with the DER interpretation.

Under §307 of the CSL, discharges of industrial wastes into the waters of the Commonwealth are authorized if pursuant to rules and regulations of the EQB or to a permit issued by the DER. Thus, clearly, if a permit were issued to Koppers pursuant to 25 Pa. Code §91.14(b), both conditions of §307 of the CSL would be met. Koppers would have been in possession of a permit under and pursuant to the regulation of the EQB. See *Committee for Conservation of Jones Fall Sewage System v. Train*, 539 F.2d 1006 (Cir. 4, 1976).

A discharge authorized by a permit from the department pursuant to a valid regulation of the EQB cannot constitute a violation of the CSL and, hence, cannot form the basis of a civil penalty action before this board. Thus, when in June of 1974, the DER, through its counsel advised Koppers that the DER could only allow continued discharges until completion of abatement facilities upon conditions of civil penalties payments to the Clean Water Fund for previous and continued violations of the CSL, it proceeded from a misreading of the CSL and applicable EQB regulations.

The DER may not condition the granting of a permit upon the payment of "civil penalties" into the Clean Water Fund either for past or future "violations". If a proper application had been made in this case, the DER would have been required to pass upon the merits of the application. If it satisfied the requirements of 25 Pa. Code §91.14(b), the department would have been obliged to issue a permit to Koppers. The DER would still have had an action for civil penalties with regard to discharges prior to the permit issuance. However, discharges pursuant to the permit taking place after the issuance of the permit would not be violations of the CSL. Hence, no action for civil penalties would lie with regard to such discharges.

We agree with the DER that Koppers' contentions based on §8(b) of the CSL are not applicable to the facts of this case. Nevertheless, regardless of the applicability of that section of the law to this matter, it is our opinion, as stated above, that the DER may not condition the granting of a permit pursuant to a proper application therefor upon payments into the Clean Water Fund.

We also believe that the rule stated in *Department of Environmental Resources v. Leechburg Mining Company*, 9 Pa. Commonwealth Ct. 297, 305 A.2d 764 (1973), upon which Koppers relies has been substantially undermined by the recent decision of the Supreme Court of Pennsylvania in *Commonwealth of Pennsylvania, Department of Environmental Resources v. Bethlehem Steel Corporation*, No. 5 May term, 1977 (Pa., filed November 24, 1976). In *Bethlehem Steel*, slip opinion at page 11, footnote 25, the court made the following observation:

> "In *Department of Environmental Resources v. Leechburg Mining Co.*, 9 Pa. Commonwealth Ct. 297, 305 A.2d 764 (1973), DER brought a claim based on a consent order along with separate claims based on the underlying violations which led the DER to seek the original order. The court limited DER to enforcement of the consent order. Assuming that the Commonwealth Court's decision can be squared with the provision in the Air Control Act that "the existence of or exercise of any remedy shall not prevent the department from exercising any other remedy . . . ." 35 P.S. §4010(e) (Supp. 1976), it does not bar this action. DER here only seeks to enforce the consent order; separate claims are not involved. See *Department of Environmental Resources v. Leechburg Mining Co., supra.*"

Insofar as the statute of limitations is concerned, we adhere to our ruling in *DER v. Rushton Mining Company*, EHB Docket No. 72-361-CP-D (issued March 12, 1976).

Having concluded that the discharges from Koppers' outfalls 002 and 003 violate the CSL, we must address ourselves to the question of the amount of civil penalties that should be assessed in this matter. In doing so, we are controlled by §605 of the CSL [35 P. S. §691.605 (1976-1977 Supp.)] which provides:

> "In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act or a rule or regulation of the board or an order of the department, the board, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was wilful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000), plus five hundred dollars ($500) for each day of continued violation. In determining the amount of the civil penalty the board shall consider the wilfullness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors. . . ."

Under §605 of the CSL we have considered the following factors in assessing civil penalties:

(1) General deterrence of violations by the defendant and others similarly situated. *DER v. Federal Oil & Gas Company v. James V. Joyce*, EHB Docket No. 74-071-CP-C (issued July 1, 1975);

(2) "Willfulness of the violation". *DER v. Rushton Mining Company*, EHB Docket No. 72-361-CP-D (issued March 12, 1976);

(3) "Damage or injury to the waters of the Commonwealth or their uses". *DER v. Rushton Mining Company, supra*;

(4) "Cost of restoration" including the costs to the Commonwealth in the investigation and surveillance of violations. *DER v. Berks Associates, Inc.*, EHB Docket No. 72-309 (issued July 31, 1973).

This case is not an appropriate one upon which to predicate the amount of civil penalties upon considerations of deterrence or willfulness. In regard to the deterrent effect of a civil penalty assessment, we must look to the facts of the case to determine what conduct would likely be deterred by the imposition of a substantial civil penalty.

Koppers, at all times relevant to this proceeding, took meaningful steps to abate the discharges from all three outfalls. These steps were at least in the planning stage at the time that the initial violation was observed on September 13, 1973. A little more than a year later, the discharges from the outfalls had ceased. Koppers had installed equipment which enabled it to recycle the effluent and utilize it in its productive processes. During that period, it is true that Koppers could

have either shut down its plant or made application to the DER to permit the discharges until such time as the abatement equipment had been installed and working. Closing the plant was not a realistic alternative in the circumstances of this case. The DER did not press Koppers to do so. Its interest was to encourage the company to facilitate the installation of the abatement equipment.

The alternative to closing the plant was to continue to discharge the effluent from outfalls 002 and 003. The only circumstance in which Koppers could have continued the discharges without being in violation of the CSL was to obtain a permit from the DER for such discharges. Its failure to apply to the DER for permission to discharge from the outfalls in question until abatement equipment could be installed is certainly a mistake on the part of Koppers. However, in light of the expressed position of the DER that it would not allow such discharges except upon payment into the Clean Water Fund, Koppers' error does not appear egregious to us. Under such circumstances, it does not seem reasonable to us to apply the "deterrent effect" principle in this matter.

Concededly, the discharges from outfalls 002 and 003 are intentional in nature. This fact, standing alone, is insufficient to characterize conduct as willful. We are of the opinion that "willfulness" is a term of ambiguous reference and depends for its meaning upon the context in which it is used. Under the circumstances of this case, we would be required to find that Koppers continued to discharge industrial wastes into the waters of the Commonwealth, despite its knowledge that it was violating The Clean Streams Law by so doing, in order to find Koppers' conduct willful.

The facts of this case do not permit us to make such a finding. Rather, it is apparent from the record that both Koppers and the DER were somewhat confused as to the requirements of the CSL. To find that Koppers acted in a willful manner in regard to the violations of the CSL would require that we find that its knowledge of these requirements was somewhat superior to that of the personnel of the DER. For, it is clear that not only was the DER in error with regard to the necessity for Koppers to apply for a discharge permit for a system that would not discharge into the waters of the Commonwealth, but also in regard to whether the DER could condition the grant of permission to continue a discharge on the payment of money into the Clean Water Fund. We should expect that the DER would have a superior knowledge of the CSL than does Koppers. In such a case, we find it impossible to charge Koppers with willfulness in this matter.

We are of the opinion that, contrary to the contentions of the DER, the position of DER expressed in the letter of June 20, 1974, was not an action appealable to this board, but merely a negotiating position of the DER. Therefore, although not necessary to the disposition of this matter, we find that the letter has no legal effect as being immune from collateral attack.

Insofar as the cost of restoration is concerned, the DER cites *DER v. Berks Associates, Inc.*, EHB Docket No. 72-309 (issued July 31, 1973) as sanctioning inclusion of the cost of investigation or surveillance of violations in the "cost of restoration" factor. In *Berks Associates*, we found that the Commonwealth had extended $8,680.45 "in monitoring, testing and various activities relating to determining the magnitude of the danger to the public from said spill, and protecting the public from said danger". Nowhere in the record does it appear that the DER took any restorative measures whatsoever in regard to Chartiers Creek or Millers Run after September 1973.

Berks Associates, Inc., supra, authorizes the inclusion of the costs of investigation or surveillance of violations within the "cost of restoration" factor where the investigation and surveillance is related to measures taken to restore the waters involved or protect the public from a danger caused by an unauthorized discharge into waters of the Commonwealth. It does not address the question of whether civil penalties could be assessed for the "cost of restoration."

Although there may be circumstances in which we would sanction the inclusion of the costs of surveillance and inspection of discharges as a factor in the assessment of civil penalties, this is not the appropriate action in which to do so. In this regard, we note that except for the initial inspection in September of 1973, in which the discharges were discovered by Mr. Shilcosky, the two subsequent inspections were conducted only after negotiations between Koppers and the DER broke down over the issues of payments by Koppers into the Pennsylvania Clean Water Fund. We think that the costs of surveillance and inspection of discharges should be included as a factor in the assessment of civil penalties only if such costs are incident to a bona fide monitoring program by the DER or under circumstances authorized by *Berks Associates, Inc., supra.*

Moreover, even if such costs would be held to be relevant by this board, the DER offered no evidence as to what these costs were. With no such evidence in the record, we cannot predicate a finding in this regard. It is a well-known principle of administrative law that findings of fact by administrative agencies must be supported by substantial evidence. *A. P. Weaver & Sons v. Sanitary Water Board*, 3 Pa. Commonwealth Ct. 499, 284 A.2d 515 (1971). We, therefore, cannot consider the cost of surveillance and inspection as a factor in assessing civil penalties in this proceeding.

Finally, with regard to damage or injury to waters of the Commonwealth or their uses, we can presume that discharges of industrial waste in excess of EQB regulations, damage the waters of the Commonwealth. The extent of such damage is not revealed in the record. The record does disclose that there are discharges from old, abandoned mines into Millers Run and there these discharges are acidic in nature. However, the pH of Millers Run was not determined. Therefore, it is not possible to ascertain whether discharges having a pH of 10 or above improved the quality of Millers Run rather than degraded it.

Moreover, we cannot assume that the discharges of blow-down from outfall 003 had a uniform impact upon the quality of Millers Run. Of the 69 days on which boiler blow-down constituted part of the effluent from this outfall, only on one of these days, February 7, 1974, were both boilers in operation. On the remaining 68 days, no two boilers were in operation on the same day. Furthermore, the number of hours of boiler operation varied substantially during this period of time. Finally, inasmuch as the boilers were not in constant operation for this time, we cannot overlook the fact that there may have been an opportunity for Millers Run to recuperate from the discharges of blow-down during the period when no blow-down was being discharged from outfall 003. Under such circumstances, the impact of the discharges of blow-down into Millers Run is especially difficult to assess.

Nor are we convinced that the high total solid content of a discharge recorded on August 21, 1974, is indicative of the discharges from outfall 002. We observe that there was no indication of total solid measurement on September 13, 1973, or on September 6, 1974. It is also interesting to note that all three samples from outfall 002 were consistent only with regard to their high pH value.

We would be disposed to have assessed greater civil penalties in this matter if it appeared to the board that substantial harm was being inflicted upon Chartiers Creek and Millers Run as a result of Koppers' discharges. Such harm could have been shown by relating the quantity and quality of the discharges to the quality of the streams and their rate of flow. While we know, for example, that Chartiers Creek is not acid, we have no way of determining the impact of the relatively non-continuous discharges from outfall 003 on Chartiers Creek. Without evidence regarding the deleterious impact of given discharges on the quality of the streams in question we have no valid method of assessing the degree of harm caused by the discharges in

this case. And, inasmuch as "harm to the waters of the Commonwealth" is an element in assessing civil penalties, we should have a modicum of information, at least, with regard to the quality and flow of the streams in question in relation to the quality and flow of the discharge.

We are of the opinion that this is a case where more than nominal civil penalties are not warranted. For that reason, we assess civil penalties in the amount of $1,000.

CONCLUSIONS OF LAW

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

2. Discharges of surface water runoff into waters of the Commonwealth do not constitute a violation of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.*

3. Boiler and atmospheric condenser blow-down and bearing cooling water constitute industrial waste within the definition thereof of the CSL.

4. The discharge of industrial waste without a permit therefor or not authorized by EQB regulations violates the provisions of the CSL.

5. Estoppel is an affirmative defense which must be proved by the party asserting it with clear, precise and unequivocal evidence.

6. The party asserting an estoppel must act in reliance upon the belief of the existence of certain facts induced by the party sought to be estopped.

7. There can be no estoppel where there is no action in reliance upon an induced belief.

8. A discharge authorized by a permit from the DER pursuant to a valid regulation of the EQB cannot constitute a violation of the CSL and, hence, cannot form the basis of a civil penalty action.

9. The DER may not condition a grant of a permit on the payment of money to the Clean Water Fund.

10. There is no statute of limitations applicable to actions for civil penalties under the CSL.

11. In order to predicate an assessment of civil penalties upon the "willfulness of the violation" the conduct of the defendant must be intentional and done despite knowledge of its illegality.

12. Where it is unlikely that the assessment of a civil penalty will have a deterrent effect upon the specific unlawful conduct involved, the board will not consider the deterrent effect of the penalty in determining its amount.

13. Costs of investigation or surveillance of violations will not be considered in a civil penalties action apart from the cost of efforts to restore the waters of the Commonwealth or to protect the public from the danger caused by an unauthorized discharge into such waters, unless such costs are incurred in connection with a bona fide monitoring program or under circumstances authorized by *DER v. Berks Associates, Inc., supra.*

14. Harm to the waters of the Commonwealth will be presumed from the discharge in violation of the CSL, but the extent of that harm must be shown before a substantial civil penalty can be assessed.

O R D E R

AND NOW, this 2nd day of March, 1977, pursuant to the provisions of §605 of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §690.1 *et seq.*, a civil penalty in the amount of $1,000 is assessed upon Koppers Company, Inc., for its unlawful discharges into Chartiers Creek and Millers Run from its plant in Bridgeville, South Fayette Township, Allegheny County, Pennsylvania.

This amount is due and payable into The Clean Water Fund immediately. The Prothonotary of Allegheny County is hereby ordered to enter these penalties as liens against any private property of the aforesaid defendants with interest at the rate of 6 per cent per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: March 2, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

SAMUEL PERSKY, et al

Docket No. 76-038-D

Order for installation of sewer lines

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
& ABINGTON TOWNSHIP, INTERVENOR

ADJUDICATION

By: Joanne R. Denworth, Member, Issued March 7, 1977

This is an appeal by residents of Abington Township from an order of the Department of Environmental Resources (department) directing Abington Township (Abington), intervenor, to construct a sewage collection system in the Washington Lane area of the township. Appellants contend that there is no public health need that would support the department's order, even though they admit that there are a limited number of malfunctioning on-lot sewerage systems in the area. Appellants whose primary concern is to avoid the cost of a sewage collection system, which will be assessed against them individually, also contend that the department had an obligation to consider the availability of federal funds prior to issuing the order and in establishing a schedule for compliance with it. At the hearing in this matter the examiner excluded testimony on the issue of federal funds as irrelevant but said that the board might reconsider that ruling if the appellants succeeded in establishing that there was no urgent public health need for the collection system that the department ordered.

In an earlier opinion and order in this matter issued May 26, 1976, after a supersedeas hearing, the board granted Abington's petition for supersedeas of the department's order, but denied the township's request that appellants be required to file a bond to protect the township against the increase cost of construction that might be caused by delay. That order stated that if the department's order was upheld by the board, the township would have 13 months from the date of receipt of new bids to complete construction of the sewer lines ordered.

FINDINGS OF FACT

1. Appellants are Samuel Persky, Ruth Fowler, Harris J. Nadley, Elizabeth M. Pratt, Charles McCafferty, Samuel H. High, residents of the Washington Lane area of Abington Township, and the Rydal Sewer Group, an unincorporated group of residents.

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

3. Intervenor is Abington Township (Abington), with offices at 1176 Old York Road, Abington, Pennsylvania.

4. "Washington Lane" is a completely developed residential area of Abington Township that includes approximately 60 homes. It is unsewered. The residential areas surrounding it are sewered.

5. Complaints regarding unsanitary conditions in the Washington Lane area of Abington have been received by Abington officials. Edwin H. Rogers, Health Officer, who is responsible for the enforcement of public health ordinances in Abington, including those dealing with on-site systems, receives and investigates such complaints.

6. The Reynolds Septic Tank Service informed Mr. Rogers of an overflowing cesspool at the Leon Reibman residence, 1380 Barrowdale Road in December, 1973, and Mr. Rogers requested that corrective action be taken in a letter to the Reibmans dated December 13, 1973.

7. Mr. Rogers received additional complaints from residents of Barrowdale Road regarding sewage effluent running down into Washington Lane and creating health and safety hazards in December, 1974.

8. Although Mr. Rogers issued citations dated June 27, 1975, and May 26, 1976, to the Reibmans directing them to correct the problems created by the overflowing cesspools, the problem still is not corrected.

9. Mr. Rogers' records showed that he had observed visibly malfunctioning on-lot sewerage systems at five other properties at different times, including the Malis residence (1354 Panther Road), the Frankel residence (1301 Frog Hollow Road), the Dorak residence (1027 Washington Lane), and the Wilson residence (1353 Barrowdale Road).

10. The Department of Environmental Resources also made field investigations of visibly malfunctioning on-site systems.

11. In a letter dated March 6, 1974, Edward Prout, Sewage Facilities Consultant for the department, stated that he and the township's enforcement officer had made a preliminary visual survey of the Washington Lane area and concluded that 20 out of approximately 43 homes surveyed showed signs of pre-

vious overflow or malfunction.

12. Don Mangalardi, then of the Norristown Regional Water Quality staff, performed a field investigation of the Washington Lane area at the request of Christian T. Beechwood, Regional Sanitary Engineer, in August, 1974, and found evidence of visible malfunctions at four residences.

13. A department field investigation of five residences of the Washington Lane area in April, 1975, revealed evidence of visible malfunctions at four of those residences.

14. Obvious erosion around an on-site system, extreme growth of vegetation, back-up in homes, overflowings in yards, and odor are signs of visible malfunctions.

15. The absence of a visible malfunction does not mean that an on-site system is properly functioning.

16. Harry Hild is employed as Chief Plumbing Inspector and Sewage Enforcement Officer by Abington and is familar with the on-site disposal systems in the Washington Lane area.

17. Most of the systems in the Washington Lane area are cesspools; some may be as much as 50 years old.

18. The capacity of the on-site systems in the Washington Lane is inadequate to serve needs generated by the present number of residents and the lifestyle of these residents.

19. The department will not approve cesspools today because they are a safety hazard and do not properly renovate sewage.

20. If a cesspool is functioning properly, it should require pump-outs every two to five years.

21. An ordinance passed by Abington in 1975, required that all cesspool and septic tank cleanout services submit monthly reports to the health officer.

22. Frequent, large cleanouts of a number of systems reflected in Abington records kept in 1967 and reports submitted in 1974, 1975, and 1976 pursuant to the cesspool cleanout ordinance, indicate that on-site systems are not properly functioning.

23. The Washington Lane area is underlain by crystalline rocks of a metamorphic or igneous nature.

24. The degree of permeability controls the water-bearing characteristics of this type of rock.

25. Because of the interlocking crystalline structure of igneous or metamorphic rock, primary permeability is low, and groundwater movement is controlled by secondary openings--the joints, faults, fissures, and physical fracture zones--in the rock.

26. Permeability of the rock structure determines the rate of groundwater flow, which in turn affects the height of the groundwater.

27. Where there is little primary permeability in the parent rock, the water table could rise close to the surface and interfere with the functioning of an on-site system.

28. Topographical slopes in the Washington Lane area are relatively steep (7% to 15%); elevation drops 110 feet over a short distance.

29. Streets have been cut below ground surface to level out the topography, thus making the effective slope of residential lots much steeper.

30. The rock structure in the area of the observation wells drilled by C.V.M. Industries, Inc., was found at two and one-half (2 1/2) to nine (9) feet; similar depth to rock was observed by C.V.M. Industries in work near test well 2 and at Abington Hospital, which is a mile and a half away from this area.

31. Because of such shallow depth to bedrock, most on-site systems in the Washington Lane area are installed in bedrock; consequently, sewage is being discharged into secondary openings of the rock where groundwater flows without undergoing renovation.

32. Mr. MacPhee, consulting geologist and owner of C.V.M. Industries, Inc., has observed what he believes to be direct discharges of effluent in embankments along Washington Lane.

33. The Montgomery County Soil Survey, prepared by the United States Department of Agriculture, and utilized by Mr. MacPhee and John Zwalinski, department soil scientist, notes the Washington Lane area as Madeland with parent soils of the Glen-elg or Manor associations.

34. Soils of the Glen-elg or Manor association are classified as having severe limitations for on-site disposal, due to steep slopes, shallow depth to rock, variations in percolation rate, and seasonably high water tables in low areas.

35. Use of elevated sand mound alternate systems as an interim measure at several problem dwellings was investigated by the department and found to be possible, from a soils standpoint, without considering slopes, area limitations and cost.

36. The elevated sand mounds would protrude four feet above the surface of the ground; on small lots they have been observed to be as much as 2800 square feet in area.

37. The elevated sand mounds would not blend inconspicuously into the landscaping of the Washington Lane area.

38. The Washington Lane area was designated as a ten-year growth area in the Abington Act 537 Plan prepared in 1971; a "ten year growth area" was an area which would need sewers within ten years.

39. Raymond McCoach of Betz Environmental Engineers, who was involved in the preparation of the Abington Act 537 Plan, and Mr. Bolenius, Abington wastewater treatment plan superintendent, designated the Washington Lane area as a critical area and recommended to Abington in 1971 that it be sewered as soon as possible.

40. Designation of critical areas was derived from information concerning pump-outs, citizen complaints and requests from owners.

41. Collector sewer lines for the Washington Lane area were part of Permit 4674434, approved by the department.

42. In determining the most cost effective means to sewer an area, a detailed field survey is performed.

43. Abington's attempts to award contracts for the construction of collector sewers in the Washington Lane area have been deferred, due to advice of C.C. Collings & Company, its financial advisors, that it would be difficult to obtain financing because of pending litigation.

44. Abington solicited the aid of the department in its attempts to install sewers and the department undertook various investigations.

45. Although the department encouraged Abington to install sewers, it believed on advice of counsel that it did not have direct evidence to require the installation of sanitary sewers.

46. The department advised Abington that data from a groundwater study would be needed to support an order requiring the installation of sanitary sewers in Washington Lane.

47. Abington engaged C.V.M. Industries, Inc., consulting geologists, to perform the groundwater study in July, 1975.

48. Alexander MacPhee, who prepared the groundwater study, received a Bachelor of Arts degree in geology from Lehigh University where he pursued approximately 56 hours of course work in geology, including courses in soils and groundwater geology and field investigations, and has been self-employed as a consulting geologist for the past 14 years.

49. Mr. MacPhee's work as a consulting geologist involves interpreting groundwater, soil, and rock properties for structural and use purposes. Over the past four years he has performed approximately 28 studies of suspected subsurface contamination by sewage, six of which were similar to the work performed for Abington.

50. The scope of the study was outlined in a proposal submitted to Abington and the department; it was to monitor groundwater quality at locations in public rights-of-way and where wells would not be affected by particular on-site systems.

51. Paul Yaniga, Norristown Regional Office's geologist, reviewed the proposal.

52. Mr. Yaniga holds a bachelor's degree in earth sciences and a master's degree in geology; he has reviewed 400 to 600 groundwater studies and drawn conclusions from laboratory results as to sources of contamination during his employment with the department.

53. The C.V.M. Industries proposal was generally acceptable to the department, provided it was revised to contain sampling for the nitrogen series, which would be indicative of waters degraded by malfunctioning on-lot systems, and to modify well installation procedures.

54. A revised proposal was submitted by C.V.M. Industries and approved by the department.

55. The monitoring wells were constructed and installed in accordance with department specifications and recommendations.

56. The wells were sealed and capped so that there was no danger of contamination by outside sources. Sterile plastic (PVC) pipe was used.

57. Well locations were determined by Messrs. MacPhee and Yaniga through a "desk top" survey utilizing topographic maps and hydrogeologic data. Property boundaries, roads, accessibility, and steepness of slopes were limiting factors on where the wells could be located. Because of the political controversy surrounding the sewer issue, the wells had to be located in public rights-of-way.

58. Although it is more desirable, it is not essential that a background well be located at a topographic high or that groundwater flow from the background well to the test wells. The background well could have been located somewhere else in the same rock type or existing data for the undegraded water in the same formation utilized.

59. The background well in Washington Lane was located down-gradient from a sewered area near the border of the non-sewered area. Thus, it was largely out of the zone of influence of suspected contamination.

60. The study was based on the established principle of comparing data from background wells with data obtained from test wells.

61. A surface water point was also sampled but data obtained from it wasn't relied upon greatly by Mr. MacPhee. Although surface water points are breakouts of groundwater, data obtained from them is valid only if there are no external sources of contamination.

62. Sampling for the study was performed by Quality Control Laboratory.

63. Edwin Harrington, supervisor of Water and Waste Water Programs for Quality Control Laboratory, took samples from the background well, tests wells, and surface monitoring point in Washington Lane on October 14, 1975; October 30, and November 3, 1975; November 17, 1975; and December 2, 1975. The samples were taken and transported according to standard laboratory procedures.

64. Samples were analyzed for coliform, fecal coliform, nitrate, nitrite, ammonia, chlorides, and total phosphates utilizing standard analytical procedures.

65. Nitrates, nitrites, and ammonia were expressed as nitrogen, which is common practice for regulatory purposes. The nitrogen values must be multiplied by 4.43, 3.29, and 1.216, respectively, in order to express the values as nitrate, nitrite, and ammonia.

66. The biweekly sampling period of two months was selected to cover fluctuations in precipitation, to allow the water table to pass through the wells, to alleviate pumping, and to smooth out eccentric readings.

67. It is not necessary to disinfect wells if they are properly constructed.

68. Mr. MacPhee concluded that test wells 2 and 4 had a significant elevation of measured parameters over the background well.

69. Because of the location of the background well, there was a significant difference in concentration of contaminants between areas with sewers and areas without sewers; consequently Mr. MacPhee concluded that malfunctioning on-lot systems were contaminating the groundwater.

70. Mr. Beechwood informed Abington that a decision to issue an order would be based upon 1) whether the study showed a meaningful increase in pollution and 2) the department's final judgment.

71. The C.V.M. Industries report was reviewed by Mr. Beechwood, Mr. Yaniga, and the Division of Water Supply and Sewerage in Harrisburg.

72. After summarizing the Quality Control results for each well and surface monitoring point. Mr. Beechwood averaged the data as follows:

a. The average concentration of phosphates in the background well was 1.44 mg/l, while the average concentration in well 2 was 5.05 mg/l, in well 4 was 7.28 mg/l and in the surface point was 12.15 mg/l.

b. The average concentration for nitrates (NO_3-N) was 6.2 mg/l in the background well, 13.15 mg/l in well 2, 40.1 mg/l in well 4, and 14.45 mg/l in the surface point.

c. The average concentration of ammonia (NH_3ON) in the background well was 0.075 mg/l, 0.98 mg/l in well 2, 0.96 mg/l in well 4, and 0.78 mg/l in the surface point.

d. The average concentration of chlorides in the background well was 56 mg/l, 12 mg/l in well 2, 83.5 mg/l in well 4, and 29 mg/l in the surface point.

73. Mr. Beechwood concluded that there was an increase in phosphates, nitrates, and ammonia, in wells 2 and 4 as compared to the background well. Such an increase is not naturally occurring.

74. Mr. Beechwood's assessment of the data indicated that the groundwater was being polluted by on-site systems. This was substantiated by other evidence of soil limitations, depth to bedrock, type of systems, topography and complaints from residents.

75. Mr. Yaniga's review of the C.V.M. study concluded there was apparent groundwater degradation from contamination by phosphates, nitrates, and ammonia, most probably from malfunctioning on-lot systems.

76. At Mr. Beechwood's request, Raymond McCoach of Betz Environmental Engineers, prepared estimates of sewer assessment costs for properties in Washington Lane.

77. Because property and unit prices were similar in both areas, sewer assessment costs for another area of Abington (Mill Road Circle) were used to estimate costs for Washington Lane; those costs were approximately $25 to $35 per front foot.

78. Mr. Beechwood discussed the costs of repair or updating existing on-lot systems or installation of new systems with Sewage Facilities Consultant Edward Prout; these costs ranged from $1000 to $6000, excluding maintenance.

79. The department does not perform detailed economic assessments prior to issuing permits or orders to construct sanitary sewers where construction of sewers is ordered for public health reasons.

80. In making its decision to issue the order to Abington, the department considered Abington records of on-lot systems, the Abington Act 537 Plan, soil maps, type and depth of soil to bedrock, and evidence of visible malfunctions, as well as the C.V.M. Industries report.

81. Orders to implement sewage facilities plans are issued by the department where growth has occurred or where a public health hazard exists.

82. The most cost-effective and permanent overall solution to the pollution and public health problem in Washington Lane is the installation of public sanitary sewers.

83. Dr. Schoenberger, appellants' expert witness, had qualifications in microbiology that the department's witnesses did not have; however, he had limited experience with groundwater studies related to contamination by malfunctioning on-lot systems, as his consulting experience dealt with sanitary landfill leachate problems.

84. Although Dr. Schoenberger criticized the location of the wells in C.V.M. Industries' survey, he did no subsurface investigation of the area himself, nor could he propose alternative well locations within the economic and property boundary restraints placed upon C.V.M. Industries.

85. Dr. Schoenberger observed evidence of visible malfunctions in the Washington Lane area.

86. Dr. Schoenberger raised a number of questions about the inconsistency of the C.V.M. test data in terms of microbiological phenomena (e.g., the high amount of phosphates relative to nitrogen and the dominant presence of nitrates rather than ammonia). However, his testimony was that all of the test wells were contaminated and he could offer no explanation for the presence of these contaminants other than malfunctioning on-lot systems.

DISCUSSION

Preliminarily, the parties rely on two different sections of the board's rule governing the burden of proof to assert that the other party has the burden of proof. Appellants cite a portion of EHB Rule 21.42 which provides:

> "The Commonwealth shall have the burden of proof in the following cases:
>
> . . .
>
> (c) Where it orders a party to take affirmative action to abate...water pollution...
>
> . . .
>
> (e) Where it orders construction of sewage treatment facilities."

The department on the other hand, relies on the portion of Rule 21.42 that provides that a private appellant shall have the burden of proof in cases "Where a party who is not the applicant or holder of a license or permit from the Commonwealth protests its issuance or continuation." The department points out that Abington Township, the recipient of the order, accepted the order (indeed, even sought it) and has attempted to implement the order by the construction of a collection system, which has been delayed by the pendency of this and other litigation. Appellants assert that they are the real parties in interest since they are the residents who will be forced to pay for the collection system. We are inclined to agree with the appellants that the department should have the burden of justifying its order for the installation of sewer lines to the residents who are directly affected by that order. However, that conclusion is of little help to appellants here as we deem the department to have carried the burden of proof by more than substantial evidence.

Section 5 (d) (3) of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §690.1 *et seq.*, empowers the department to "issue such orders as may be necessary to implement the provisions of this act..." §203 also provides *inter alia* that:

> "(a) Whether or not a municipality is required by other provisions of this act to have a permit for the discharge of sewage, if the department finds that the acquisition, construction, repair, alteration, completion, extension or operation of a sewer system or treatment facility is necessary to properly provide for the prevention of pollution or prevention of a public health nuisance, the department may order such municipality to acquire, construct, repair, alter, complete, extend, or operate a sewer system and/or treatment facility. Such order shall specify the length of time, after receipt of the order, within which such action shall be taken.
>
> "(b) ...the department may issue appropriate orders to municipalities where such orders are found to be necessary to assure that there will be adequate sewer systems and

> treatment facilities to meet present and future needs or otherwise to meet the objectives of this act. Such orders may include, but shall not be limited to, orders requiring municipalities to undertake studies, to prepare and submit plans, to acquire, construct, repair, alter, complete, extend, or operate a sewer system or treatment facility..."

In addition to these provisions, section 10 (3) of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750 *et seq.* authorizes the department to order the implementation of official sewage facilities plans. Thus, the department is empowered to order the construction of sewers to prevent pollution or a public health nuisance, particularly where sewer lines are called for by a municipality's official sewage facility plan. The department's very thoroughly prepared case established by direct and circumstantial evidence that there is groundwater pollution attributable to malfunctioning sewerage systems in the Washington Lane area.[1] Whether or not pollution of the groundwater constitutes an *immediate* public health hazard, the presence of overflowing effluent from malfunctioning systems is certainly a public health nuisance. Moreover, it appears to us that the presence of pollution caused by on-lot sewerage systems in addition to the repeated problems of overflowing systems, is enough to sustain the department's order without a showing of an *immediate* public health hazard.

Appellants characterize the department's extensive circumstantial evidence as "speculative". They cite *Bortz Coal Company v. Commonwealth*, 2 Pa. Commonwealth Ct. 441, 279 A.2d 388 (1971); *Commonwealth v. Trask*, 71 D & C 2nd 200 (1974); *Township of Monroe v. Department of Environmental Resources*, 16 Pa. Commonwealth Ct. 575, 328 A.2d 209 (1975); and In the Matter of *LaPlume Township, Lackawanna Township*, 1 EHB 46 (1971), in support of their assertion that the department may not rely on speculative evidence to support an order requiring affirmative action to abate pollution. Although we certainly agree with that proposition, we would not characterize the substantial circumstantial evidence that the department presented concerning soil characteristics, general depth to bedrock, topography, observations of visible malfunctions, cesspool clean-out records and testimony concerning complaints from residents as merely "speculative" evidence of the existence of pollution and a public health problem. Furthermore, the evidence of pollution was confirmed by the C.V.M. groundwater report. The amount and substance of the evidence in this case is in direct contrast to the evidence in the cases cited by appellants. In *Township of Monroe* the Commonwealth Court held that

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1. Groundwater is clearly encompassed within The Clean Streams Law definition of "waters of the Commonwealth", 35 P.S. §691.1, and contamination of the groundwater is therefore pollution that is prohibited by that act. 35 P.S. §691.1, 691.202.

an order for the installation of sewers could not be supported simply by population projections for increased growth where there was no evidence of present pollution or present need for sewers. In *Trask*, this board refused to uphold a cease and desist order to abate a public nuisance where the department presented no evidence of actual pollution or public nuisance. In *LaPlume Township*, this board invalidated a department order to the township for the installation of sewers on the ground that the department had inadequate evidence to support the order. The board did say there that evidence of several malfunctioning systems, was insufficient to support the order for an expensive sewage system in a small, rural community that had not experienced any growth. In that case, however, the department's own witness testified that he had no first-hand knowledge of any sewerage problem in LaPlume Township prior to issuing an order for the installation of sewers, had never been in LaPlume and had not even communicated with officials of LaPlume Township. In the case in hand, the department has clearly taken to heart the obligation imposed upon it by the cases to support its orders with credible evidence, and in the case of an order for the installation of sewerage facilities, by evidence of actual pollution.

Appellants attack the direct evidence of pollution, the C.V.M. report, on several grounds. While they have raised some significant questions about the test data, those questions do not refute the conclusion that the groundwater is polluted by chemicals that are found in connection with domestic waste; nor have they offered any other explanation for the presence of these chemicals in the groundwater. Primarily, appellants claim through their witness, Dr. Schoenberger, that because the samples from the tests wells do not have a relationship of four to one for total nitrogen to total phosphorous as one would expect from domestic sewage, the data is inconclusive as to the cause of pollution.[2] Dr. Schoenberger speculated that the excess phosphorous content of the samples might be due to fertilizer. Apparently, this is an area with some large lawns, which could account for the excess phosphorous. Whatever the explanation, Dr. Schoenberger did not disagree that the groundwater was in fact contaminated, and he could offer no explanation for this contamination other than the malfunctioning on-lot sewerage systems and fertilizer. Dr. Schoenberger also questioned the location of the wells and the relationship of the background well to the test wells. It is true that the background well was also contaminated, though much less severely than the test wells

2. The relationship of phosphorous to nitrogen was generally one to one or one and a half to one.

area and the non-sewered area, may not have been entirely outside the zone of influence from the non-sewered area. Also, it did appear that well number 4 was slightly upgradient from well number 1 and possibly unrelated to it from the point of view of groundwater flow. However, well 4 clearly showed contamination that could only be explained by malfunctioning on-lot systems from the area in question since all of the surrounding areas are sewered.

Appellants' position is that there are only three systems that are continually malfunctioning in the area and that those can be cured by on-lot systems. They cite the department's own investigation of August, 1974, to determine whether or not on-lot systems could be placed on the most troublesome properties. It is clear, however, that the purpose of the department's investigation was to find temporary expedients to alleviate the problem until a permanent sewer system could be installed. Some of the residents in the area already have two or three on-lot systems, all of which are inadequate to the task. The Reibman residence, which has been the most persistent source of problems, in that overflowing sewerage has been observed running down the street from this property, has only one cesspool. It does appear from the department's investigations that an alternative system could be installed on this property, although there are limitations as to lot size. If the problems in this area could be cured simply by installing a second or even third system at this residence, we would agree with appellants that that should be done. However, the cesspool clean-out records, the topography and other evidence showed that this area is simply inappropriate for on-lot sewerage systems.[3] The fact that not all of the residents are having continually malfunctioning systems does not mean that a sewerage collection system is not necessary. We cannot possbily agree with appellant that the malfunctioning and pollution occur only in connection with three systems; but even if we believed that the problems are confined to ten out of sixty homes in the area (which is by no means clear), the evidence is sufficient to conclude that the problems can only be solved by sewer lines.

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3. For example, the property at 1367 Barrowdale Road has three cesspools. The 1967 cesspool clean-out records showed three clean-outs in that year of a total of 3,000 gallons of sludge (see finding of fact number 20). In the August 1974 survey a visible malfunction was observed on this property. Similarly, the property at 1363 Panther Road has three or four cesspools. The 1967 cesspool clean-out records showed 4,000 gallons of sludge removed. The 1974 and 1975 records showed that the systems were cleaned out 8 times between January 1, 1974, and June 24, 1975. The 1976 records showed 3,000 gallons removed April 22, 1976. (Cesspool clean-out records were not kept or required to be kept in the interim between 1967 and 1975.) The residence at 1301 Frog Hollow Road has one septic tank and one cesspool. Visible malfunction was observed there in the August 1974 survey. The 1975 cesspool clean-out records showed that this property had 4,000 gallons removed in March, 4,000 in April and 4,000 in December of 1975. Other properties where no visible malfunctions have been reported show other evidence of disfunction. For instance, at 1381 Panther Road, which has two cesspools, 12 separate clean-outs of a total of 12,000 gallons of sludge were removed in 1967. One property on Barrowdale Road has two septic tanks and two cesspools. A property on Frog Hollow Terrace has two cesspools and in 1967, there were 9 separate clean-outs of a total of 25,000 gallons of sludge.

Appellants' major position is that the department should have taken account of or investigated the availability of federal funds before ordering the installation of sewer lines, and conditioned the timetable for compliance with the order on the receipt of such funds. At the hearing on this matter, appellants' attorney sought to examine the township's and department's witnesses as to the details of federal funding that might be available to pay for these sewer lines. After consideration, it was ruled that such testimony would be excluded as it was believed to be irrelevant to a determination of the validity of the department's order on pollution and public health grounds. Upon reflection, we are more than convinced that our prior position was correct. Although it is true that the department must take account of economic considerations in formulating any order under section 203 of The Clean Stream Law, *Department of Environmental Resources v. Borough of Carlisle*, 16 Pa. Commonwealth Ct. 341, 330 A.2d, 293 (1974), we believe that the requisite economic evaluation was made by the department when it considered the relative economic merits of continued individual on-lot systems, and the costs of additions to and maintenance for those systems, as opposed to the cost of sewer lines. We do not believe the department was required to consider whether or not federal funds were or might be available to pay for the sewer lines where the need for a sewer collection system was demonstrated to prevent pollution and occassional public nuisance. Appellants argue that there is no need for immediate installation of sewers since the water that is being polluted is not used for drinking water.[4] If that were the test for when the department could issue orders to prevent or abate pollution under The Clean Streams Law, the waters of the Commonwealth might never be upgraded. Section 203 authorizes orders to prevent pollution whether or not the particular drops of water in question are immediately flowing into a public drinking water supply. It appears to us that the department's order was a valid order, well-considered in spite of the political pressures that appellants claim are at the root of the department's action here. It may be that the township, which has the responsibility for funding the sewer collection system, may be able to obtain federal funds for it in connection with a larger sewage facility program. We are not certain why these appellants should be spared a normal cost of encroaching civilization any more than others have been; however, we are certain that it is not up to us to decide whether or not they should be so spared.

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4. It must be noted that in view of this and other litigation there is little chance that the installation of these sewer lines will be immediate in any event. In fact, the installation of sewer lines has already been delayed long beyond Abington Township's recognition of the need for sewer lines because of the opposition to their installation.

CONCLUSIONS OF LAW

1. The board has jurisdiction in this matter.

2. Groundwater pollution that is attributable to malfunctioning on-lot sewerage systems is occurring in the Washington Lane area of Abington Township.

3. Taking into account circumstantial evidence such as cesspool clean-out records, soil characteristics and topography of the Washington Lane area, visible malfunctions on on-lot systems, citizen complaints and direct evidence groundwater contamination, the department properly issued the order to Abington Township under sections 5 and 203 of The Clean Streams Law and section 10 (3) of the Sewage Facilities Act, directing the township to install sewer lines in the Washington Lane area.

4. Although the department is required to take account of economic factors in issuing orders under section 203 of The Clean Streams Law, the department is not required to consider the availability of federal funds before issuing an order for the installation of sewer lines where it has evidence of pollution and public nuisance that it can resonably conclude would best be remedied by public sewers.

ORDER

AND NOW, this 7th day of March, 1977, the appeal of Samuel Persky, et al is dismissed. Abington Township shall have 13 months from the date of receipt of new bids to complete construction of public sewer lines in the Washington Lane area in accordance with the department's order of February 27, 1976.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: March 7, 1977
vf

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

ANTHONY J. AGOSTA, *et al*

Docket No. 75-208-W

Solid Waste Management Act
Article I, Section 27

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and the CITY OF EASTON, Intervenor

ADJUDICATION

BY: PAUL E. WATERS, Chairman, March 25, 1977

This matter comes before the board as an appeal from the issuance of a permit under the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001, *et seq*. by the Department of Environmental Resources, hereinafter DER, to the City of Easton. The permit authorized the city to construct a landfill on Morgan Ridge in Williams Township in Northampton County, by using a liner to prevent leachate from contaminating groundwater at the very scenic location. Appellants, Williams Township, a girl scout camp and a large number of citizens, oppose the site on aesthetic and other grounds, relying primarily on the procedure and shortcomings of the DER and Easton in moving to the permit issuance stage with insufficient data.

FINDINGS OF FACT

1. Appellants are Williams Township, a municipality located in Northampton County, the Great Valley Girl Scout Council, Inc., Anthony J. Agosta and 45 other citizens who reside within a few miles of a proposed landfill site.

2. On May 8, 1973, the City of Easton filed an application with the DER containing drawings, modules site plan etc. for a solid waste management permit to be issued under the Pennsylvania Solid Waste Management Act.

3. On October 17, 1973, the DER advised Easton that the technical staff had reviewed the application and raised 28 questions concerning geology and soils and 18 questions concerning operational plans.

4. The City of Easton then retained Dr. Robert J. Schoenberger as its consulting engineer to proceed with the application pending before the DER. By letter dated February 14, 1974, Dr. Schoenberger answered the 28 questions pertaining to geology and soils and the 18 questions pertaining to operational plans and submitted revised drawings and test pit data.

5. The DER reviewed the revised application prepared and submitted by Dr. Schoenberger, and by letter dated March 20, 1974, advised the City of Easton that responses were required for the 24 comments of the technical staff listed therein. Dr. Schoenberger by letter dated June 3, 1974, but not received by the DER until September 9, 1974, again responded in detail to the 24 comments of the technical staff.

6. By letter dated March 3, 1975, Dr. Schoenberger responded to the DER's comments of November 26, 1974. The DER reviewed the revised information and by letter dated May 28, 1975, required that monitoring wells be drilled prior to the issuance of a permit and requested additional information regarding the proposed liner, additions to the drawings, a revegetation plan, and concluded by stating that "upon our receipt of a satisfactory response the review could be completed and the permit issued".

7. Dr. Schoenberger arranged for drilling of the monitoring wells, and then responded to the DER on July 17, 1975, supplying more information and revised drawings.

8. After further technical staff review, the application of May 8, 1973, as amended and revised February 14, 1974, June 3, 1974, March 3, 1975 and July 17, 1975, was approved subject to conditions and permit no. 100985 was issued to the City of Easton on August 27, 1975.

9. Appellants sought a continuance in this proceeding until the question of the effect of the zoning laws of Williams Township could be resolved in county court, but this request was denied by the board. Williams Township requested that the question of the continuance be reargued before the board, *en banc*, and that request was denied.

10. The proposed landfill will be located on a tract of more than 350 acres owned by the City of Easton, and the site itself will utilize approximately 40 acres.

11. The site is not suitable for a natural soil renovation landfill and will be lined with an asphaltic material (AC-20) and constructed with leachate collection facilities to prevent contamination of the groundwater.

12. With one or two exceptions, there is no residential housing located within one-half mile of the proposed landfill site. The majority of appellants live on a ridge on the opposite side of a valley separating their property from the proposed landfill.

13. The proposed landfill is to be located, at least in part, on a substantial incline.

14. The functional life of the liner and the expected date for termination of leachate generation are estimated at various times by the parties, and we conclude that both are unknown factors.

15. No specific steps have been required in anticipation of the landfill producing methane gas.

16. Although there are plans for monitoring wells on site, there is some question as to whether they are properly located on the maps inasmuch as a satisfactory survey has not been made.

17. Bedrock underlays the site at varying depths and this could create special problems in applying the liner in such a way as to prevent its rupture.

18. DER did not require and permittee did not perform what could be characterized as a complete environmental study.

19. There is a suit presently pending in Northampton County Court regarding the issue of zoning in the area of Williams Township in which the proposed landfill is to be located.

20. Chrin landfill is presently operating under a permit from DER in Williams Township and is now used by the City of Easton, intervenor.

21. Throughout the permit issuing process various technical experts in DER expressed grave doubts about the adequacy of submittals and of the site itself, indicating a genuine effort to properly administer the Solid Waste Act.

22. DER issued the permit prior to full compliance with all statutes and regulations, based on its belief that all such requirements will be met before the landfill actually goes into operation.

At the outset, appellants suggest that the burden of proof should be, not upon them as required by the rules of procedure before the board, but rather, because this is a hearing *de novo*, due process demands that it be carried by Easton and/or the DER. While conceding that this is an interesting proposition, we believe the assignment of the burden of proof is completely separate and apart from the determination of whether a hearing is *de novo*, for purposes of the due process amendment in administrative proceedings. See *Hamilton v. Unemployment Comp. Board*, 181 Pa. Super. 113 and *Perelman, et al v. Board of Adjustment of Borough of Yeadon*, 18 A.2d 438. It is, of course, true that the burden of proof under our rules has been assigned to appellants.[1] In *F. & T. Construction Co., Inc. v. Department of Environmental Resources*, 6 Pa. Commonwealth Ct. 59, the court upheld this procedure. See also *Brookhaven-Aston Middletown v. Department of Environmental Resources*, EHB Docket No. 73-026-W, issued August 27, 1973.

The rule makes good sense in light of the fact that there is a presumption that an administrative agency has properly performed its duties. See *Unemployment Compensation Board of Review v. Donald F. Hart, Sr.*, 348 A.2d 497 (1975). In effect, this rule does no more than give meaning, in a practical way, to that presumption. When the DER, pursuant to statutory and regulatory authority, issues a permit, that permit should stand for something in the face of an attack, which baldly asserts that the DER acted wrongfully. We believe there to be no denial of due process in requiring that the party affirming the impropriety or illegallity of an official act, come forward with the evidence to prove those allegations.

Before turning to the merits of the controversy, we note one other issue which has raised its head at every stage of this proceeding and which should now be given a respectable burial. Appellants have consistently maintained that the zoning for the area of the township in question does not now permit the proposed site to be used as a landfill. They argue, therefore, that the permit cannot possibly be in conformity with the law. There is a matter for concern as to whether the zoning question which is presently being litigated by the parties in Common Pleas Court, or the solid waste permit issuance, should be resolved first. Unless the respective forums were to hand down decisions on the exact same day, obviously one issue must be resolved last, and either adverse decision possibly could prevent the landfill from ever coming into existence. Obviously we could reach a

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1. Chapter 21, Article III of the Rules of Practice and Procedure of Title 25 provides at §21.42:

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

circular delay if the court believes administrative remedies must first be exhausted. It may well be that the court will conclude that the Pennsylvania Solid Waste Management Act, *supra*, takes precedence over local zoning ordinances, but be that as it may, it is our view that the zoning question must be resolved by the Common Pleas Court and not the Environmental Hearing Board. All we are deciding on this question, as we have in prior ruling in this case, is that we have no jurisdiction to decide the merits of that zoning issue, and we should do what we can to resolve the issues now properly before us.

Let us now review the record starting as we must with a consideration of *Payne v. Kassab, infra*, and the three tests[2] there outlined for administrative decisions to comply with Article III, Section 27 of the Pennsylvania Constitution as here in question. It is, of course, true as argued by Easton, that the law does not require an environmental assessment in the form required by the U. S. Environmental Protection Agency regarding an impact statement, but there are, nonetheless, clear environmental considerations that must be dealt with before a permit can properly be issued. See *Commonwealth v. Public Utility Commission*, 335 A.2d 860 (1975).

Have all statutes and regulations been complied with? Appellants argue that inasmuch as there is another permitted landfill presently used by Easton, in Williams Township, therefore the issuance of the permit here in question is a violation of statute. While it is true that the act does protect private enterprise by declaring a policy that such landfills be used where "feasible and desirable ", it clearly does not authorize the DER to refuse a municipal permit application on this basis, assuming for the moment, that the proposed site meets all other requirements of the act. The examiner excluded all evidence regarding the Chrin landfill,[3] beyond the fact that it was a permitted site, on the grounds that evidence

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2. See *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973) provides:

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

3. We note that the owners of Chrin landfill have made no objection to the permit.

regarding its adequacy and desirability could be argued *ad infinitum* moving the hearing away from the central and more relevant issues. Inasmuch as the permit here in question was not, and could not be, based on the conditions at another landfill, we deem that ruling properly within the discretion of the board.

The area of major concern is found in §75.34 of the department's regulations, which requires:

> ". . .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."

From the testimony, it is clear, and indeed the DER concedes, that all regulations have not yet been fully complied with by Easton. There has been no proper survey,[4] and the contour map is not drawn to the scale required by §75.23(3) (five feet) among other things.[5] The fundamental question that runs throughout all of the testimony in regard to the above provision is: How much information must be obtained by the DER prior to the permit issuance, and how much can properly be delayed until afterward? This question raises the more subtle, but more important question, of the constitutional due process rights with regard to issues that are foreclosed by the issuance of a permit prior to the submission of important and perhaps controversial data to the DER. The permittee, it is alleged, fully intends to submit additional information and final plans before construction begins. The problem is, that appellants will have already had their day in court and presumably will not get notice or an opportunity to be heard with regard to these later submissions.[6] Our choices are clear if we are to observe the mandate of the constitution and Administrative Agency Law.[7] Either we must require the complete submission of all or practically all data before the solid waste permit is issued, or we must allow notice and a further opportunity for hearing when the balance of the required data, including construction plans, are submitted and approved by the DER. This is true regardless of what name we use to designate the "tentative approval" given by the DER to a permittee. The DER cannot, in our view of the law, issue a

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4. Appellants suggest that the map submitted to the DER contains an error of 400 feet and Easton has not refuted this.

5. Application methods for the liner are not developed in detail.

6. Among the many items that fall into this category are: a. access road plans pursuant to §75.43 and §75.93; b. design requirements for erosion control §75. 71 and surface water management §75.85; c. detailed geologic and groundwater reports §75.81; and e. 50 foot rises called for when 25 foot is maximum allowed.

7. Administrative Agency Law, Act of June 4, 1945, P. L. 1388, §31, 71 P. S. §17103.31.

permit unless it complies with the law and the regulations. Issuing a permit upon the assumption that the permittee will later comply with the law and the rules and regulations invites problems in the application review. When the DER issues a permit, the public and this board have a right to expect that proper review has taken place. Moreover, to grant a permit when all the conditions precedent to its issuance have not been met does not seem to us adequate protection of the public interest.

We observe that most, if not all, of the shortcomings in the present submission to the DER appear to be matters which our advanced technology should be able to resolve. The one possible exception is presented by the severe slope of the land here in question. The site is far from ideal in regard to slope, but the fact that the permittee owns virtually all of the land adjoining the proposed landfill does blunt the impact of this observation.[8] Any problems which would develop on the site are likely to have very little if any impact on the appellants in this proceeding. The water supply apparently is already degraded in at least one nearby well, but in any event, we are satisfied from a view of the premises that there is virtually no danger of the landfill effecting the water supply of appellants who live on a ridge a half mile away from the proposed site.[9]

On the present record, we have no choice but to remand the matter to the DER for further proceedings. Although we question the propriety of issuing permits before all important data is submitted from a legal as well as a practical standpoint, nevertheless, we will defer to the administrative experts in the DER but remand with the requirement that ample notice and opportunity be extended to appellants when a final approval is given to the construction plans so they may seek a hearing before this board, should that be desired. Such proceeding would be primarily concerned with, but not limited to, any new submissions made to the DER.

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8. Appellants invision huge piles of refuse cascading down the mountain slope. We deem their vision to be dramatic but unlikely.

9. It is difficult to see the landfill site from the Girl Scout camp in winter, and we believe it would take great effort to see it from most points during the summer months.

One final observation. The DER has assured us that all relevant information will be provided before Easton gets the final "go ahead".[10] Appellants have gone to great effort to point out a number of matters with which DER and the permittee should be concerned, yet no evidence was given indicating what if any consideration was given to them.[11] The difficulty we face here is that we do not know just what it is permittee intends to do about these matters or if they are to be ignored, why this is proper.

CONCLUSIONS OF LAW

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

2. The Pennsylvania Solid Waste Management Act, Administrative Code and regulations of the department require that notice and an opportunity to be heard regarding the issuance of a permit, be extended to proper parties after all important data is finally passed upon by the department.

3. The Pennsylvania solid waste management permit was issued to the City of Easton on August 27, 1975, and there are still plans and much important information that has not been provided to the DER. The appeal rights of appellant cannot be terminated, before the application process is completed, by the premature issuance of a permit.

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10. DER's witness testified as follows at N.T. page 996 line 4-15:

"Q Well, Mr. Rosso, as you understand it, can the permittee proceed to construct the landfill if the Board would uphold the permit at this time, based on the permit and the drawings as they exist at the present time?

"A Let me be sure. You are saying that if the Board was to uphold this permit, could he built that site with the information that we now have?

"Q Would he be permitted by the department?

"A No, he couldn't do it.

"Q Why not?

"A Because those are not construction drawings. They are not that complete."

11. For example, does their intended disposal of sludge from a sewage treatment plant present any special hazards—such as the anticipated concentration of heavy metals over a period of years?

O R D E R

AND NOW, this 25th day of March, 1977, the above captioned appeal is hereby remanded to the Department of Environmental Resources for further proceedings in accordance with this adjudication.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: March 25, 1977
llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

UNITED STATES STEEL CORPORATION
(Fairless Works)

Docket No. 75-170-C

Denial of Variance Petition

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, April 27, 1977

This matter is before the board on the appeal of United States Steel Corporation (hereinafter USS) from the action of the Pennsylvania Department of Environmental Resources (hereinafter DER) of June 30, 1975, in denying USS a variance with regard to its by-product coke oven batteries at its Fairless Works.

After appellant had filed its notice of appeal and its pre-hearing memorandum, the DER filed a motion to quash the appeal. After the submission of briefs on the complex issues in this matter, we enter the following:

FINDINGS OF FACT

1. Appellant is United States Steel Corporation, 600 Grant Street, Pittsburgh, Pennsylvania 15230. It owns and operates two batteries of by-product coke ovens at its Fairless Works, Fairless Hills, Falls Township, Bucks County, Pennsylvania.

2. Appellee is the DER, the agency of the Commonwealth authorized to administer and enforce the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, *as amended*, 35 P. S. §4001 *et seq.*

3. On or about April 11, 1975, USS filed with the DER a petition for a variance for the by-product coke oven operation at its Fairless Works. The petition requested a variance from the requirements of 25 Pa. Code §123.23, which provides for the desulfurization of coke gases prior to combustion or flaring.

4. Appellant's petition for variance did not contain any plan proposal to be undertaken by it that contemplate compliance with 25 Pa. Code §123.23 within any specified period of time.

5. 25 Pa. Code §141.11(b)(5) provides:

> "A detailed plan setting forth all steps the petitioner proposes to take to reduce emissions to a level permitted by this Article, including a schedule indicating the dates upon which each intermediate step would be completed, and the date upon which full compliance with the standards and requirements of this Article would be achieved."

6. USS claimed in its variance petition that 25 Pa. Code §123.23 was unconstitutional as applied to its by-product coke oven operation and that it was entitled to a variance from the provisions of that regulation.

7. On or about June 30, 1975, the DER notified the appellant that its petition for a variance was denied and set forth as the reasons for the denial the following:

> "The Petition for a variance for the by-product coke oven gas is replete with unsubstantiated averments. The contention that desulfurization of coke oven gas is unnecessary for the attainment of primary or secondary ambient air standards within the Southeast Pennsylvania Air Basin and the Metropolitan Philadelphia Inter-state Air Quality Control Region is unsupported by any scientific data or documentation. Such data would, at a minimum, include:
>
> "(1) description of the number and location of monitoring instruments,
> "(2) description of instrumentation,
> "(3) methods to be employed to calibrate and maintain instruments,
> "(4) assuming items 1 through 3 were satisfied data would have to be collected for a period of one year.
>
> "Even assuming, *arguendo*, the foregoing data were supplied to the Department, nothing in the Petition established that Petitioner could not comply with the standard from which variance is sought. Bald assertions of economic hardship and fuel consumption requirements, unsubstantiated by data, is insufficient grounds for the granting of a variance. The Department has determined that compliance with Section 123.23 of the Environmental Quality Board's rules and regulations can feasibly be accomplished by the installation of available air pollution control devices or equipment.
>
> "Further, the Petition does not proffer a compliance schedule, but seeks an open ended exemption from compliance with a lawful regulation. Neither the Department nor the Environmental Hearing Board has the authority to grant such an exemption. For, *inter alia*, the foregoing reasons the Department must deny the petition for a variance from the byproduct coke oven gas."

8. USS filed its appeal in this matter on July 28, 1975. Thereafter, on November 12, 1975, after USS had filed its pre-hearing memorandum, the DER filed a motion to quash the appeal.

DISCUSSION

USS claims that, as applied to its Fairless Works by-product coke oven batteries, 25 Pa. Code §123.23, which requires the desulfurization of by-product coke oven gas prior to flaring or combustion, is unconstitutional in that it deprives USS of substantive due process and equal protection of the laws as guaranteed by the 14th Amendment of the Federal Constitution and by Article I, Sections 1, 9 and 10 of the Pennsylvania Constitution. It made this claim both in its variance petition and in its appeal. USS also claims that it was entitled to a variance under the provisions of §13.5(a) of the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, *as amended* 35 P. S. §4001 *et seq.*, regardless of the requirements of 25 Pa. Code Chapter 141, relating to the grant of temporary variances.

The due process contention of USS is that compliance by it with the requirements of 25 Pa. Code §123.23 is neither required for the maintenance of federal ambient air quality standards relating to sulfur oxides in the Southeast Pennsylvania Air Basin of the Metropolitan Philadelphia Interstate Air Quality Control Region nor for any valid police power purpose.

In its equal protection argument, USS claims that 25 Pa. Code §123.23 requires by-product coke oven emissions of sulfur dioxide to be regulated to a greater extent than are sulfur dioxide emissions from other emission sources. Thus, according to USS, 25 Pa. Code §123.23 has no rational relationship to a valid objective of the Air Pollution Control Act and, hence, results in an unreasonable classification in violation of its rights to equal protection under both the federal and state constitutions.

The DER claims that the USS appeal should be quashed for the reasons that appellant has not complied with the requirements of the DER variance regulations (25 Pa. Code Chapter 141) and that, inasmuch as the DER has not attempted to enforce the provisions of 25 Pa. Code §123.23 against USS, the validity of that provision may not be attacked in this proceeding. Moreover, the DER claims that this board lacks jurisdiction to entertain the claims of USS. The DER bases its jurisdictional contention upon §§307 and 116 of the Federal Clean Air Act, 42 U.S.C.A. §1857 *et seq.*

Inasmuch as a motion to quash implies a lack of jurisdiction on the part of the board, we must examine whether we, in fact, have jurisdiction to hear the matter presently before us. Jurisdiction relates to the competency of a tribunal to hear and determine controversies of the class to which the case immediately presented belongs. 10 P.L.E., Courts §11. The test of jurisdiction is whether the tribunal has the power to enter upon the inquiry, and not whether it may ultimately grant the relief sought. *Ibid.* It cannot be denied, therefore, that this board has jurisdiction to determine whether the DER properly refused to grant USS its variance petition.[1] For this reason, we will treat the DER motion to quash as a motion to dismiss the appeal of USS.

USS admits that its petition for the grant of a "variance" neither conforms nor is responsive to the requirements of 25 Pa. Code §141.11(b)(5), which provides:

> "A detailed plan setting forth all steps the petitioner proposes to take to reduce emissions to a level permitted by this Article, including a schedule indicating the dates upon which each intermediate step would be completed, and the date upon which full compliance with the standards and requirements of this Article would be achieved."

Although appellant claims in its brief of January 5, 1976, filed in opposition to appellee's motion, that its petition was for the grant of a *temporary* variance, we must agree with the DER contention that the variance petition of USS is in reality a petition for a complete exemption from the provisons of 25 Pa. Code §123.23. The variance petition does not contemplate compliance with the sulfur dioxide regulations but, on the contrary, alleges that the regulation is unconstitutional as applied to USS. The allegations of unconstitutionality contained in the variance petition appear to us to be inconsistent with the claim of USS that it is seeking a temporary variance.

If the DER had granted USS a variance for a period of time allowed under 25 Pa. Code §141.5, we could, under the rationale of *St. Joe Minerals Corp. v. Goddard, et al*, 14 Pa. Commonwealth Ct. 624, 324 A.2d 800 (1974), grant a variance for a longer period of time if it appeared to us that the time period set forth in the regulation was arbitrary or unreasonable in a given case. In our opinion, the facts of the case presently before us do not warrant an application of that principle.

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1. See §1921-A of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq.*; §8 of the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, *as amended*, 35 P. S. §4001 *et seq.*; 25 Pa. Code §21.2(1); 25 Pa. Code §141.44.

There is an essential distinction between the facts of *St. Joe* and the instant appeal. In *St. Joe*, the DER granted a temporary variance, but for a shorter period of time than was requested. In the instant appeal, USS was denied a variance. We deem this distinction crucial. The grant of the variance in *St. Joe* presupposed compliance on the part of *St. Joe* with the variance regulations of DER. In the matter now before the board, on the other hand, the variance was denied for lack of compliance with the variance regulation. The failure to comply with the variance regulation by USS is, in our opinion, sufficient to justify the action of the DER in denying it the variance requested. See *Bethlehem Steel Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-077-W (issued October 3, 1975) and *County Commissioners of Delaware County v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 74-261-D (issued October 23, 1975).

The underlying assumption of USS is that there is only one valid reason for denying a variance request: interference with the attainment or maintenance of national ambient air quality standards. To quote appellant, "The only mandatory statutory restriction on the power of the DER and EHB to grant a temporary variance is that the variance must not prevent or interfere with the attainment or maintenance of federal ambient air quality standards." In other words, appellant claims that it is not necessary to satisfy the requirements of 25 Pa. Code §§141.1-141.44, if its activities would not interfere with the attainment or maintenance of national ambient air quality standards within the specified time.

Appellant's position overlooks the provisions of 13.5(a) and 13.5(c) of the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, *as amended*, 35 P. S. §4001 *et seq*. These provisions of the act clearly authorize the provisions of 25 Pa. Code §141.1—§141.44. Section 13.5(a) of the Air Pollution Control Act, *supra*, confers upon the DER the authority to grant temporary variances from the effect of any provision of the act or of any rule or regulation adopted thereunder that limits the emission of any air contaminant. It also confers upon the Environmental Quality Board (hereinafter EQB) the authority to adopt rules and regulations setting forth the terms and conditions subject to which temporary variances shall be granted. Section 13.5(c) of the act specifically preserves the force and effect of the variance regulations (25 Pa. Code §141.1—§141.44) adopted prior to the effective date of §13.5 of the act until such time as the regulations are amended or otherwise modified.

In its answer to the rule to show cause why the appeal should not be quashed, USS contends:

> "To the extent that the Variance regulations (§§141.2 et seq.) of the Environmental Quality Board prohibit the Department of Environmental Resources and the Environmental Hearing Board from granting a variance from compliance with a regulation not necessary for the protection of the environment, said variance regulations exceed the enabling authority of the Environmental Quality Board and are arbitrary, capricious and unconstitutional."

This contention is probably an answer to paragraphs 7 and 8 of the DER motion to quash.[2] Clearly, USS is attempting to enlarge the scope of the variance regulations to cover situations not intended to be covered by them. These regulations do not address themselves and are not intended to address themselves to the question of the validity of the emission regulations from which a variance may be sought. The variance regulations assume the underlying validity of the emissions regulations and are designed to afford one who petitions for a variance time within which compliance may be attained by a source the emissions of which do not meet the requirements of the regulations. This is abundantly clear from 25 Pa. Code §§141.2 and 141.11.

While it is permissible for the EQB to have permitted by rule or regulation variances of a temporary nature for time periods in excess of those set forth in 25 Pa. Code §141.4, as long as the grant of a variance did not interfere with the attainment or maintenance of federal ambient air quality standards, the fact that it has not done so is insufficient, standing alone, to cast doubt on the validity of the variance regulations. Section 13.5(a) of the Air Pollution Control Act, *supra*, specifically authorizes the grant of *temporary* variances. Inasmuch as the Air Pollution Control Act authorizes temporary variances, we are persuaded that 25 Pa. Code §141.1—§141.44, while not as broad as would be permissible under the act, is nevertheless within its intention.

With regard to the assertion that the EQB exceeded its authority in adopting the variance regulations in the form that it did, we must consider whether these regulations are authorized under §13.5 of the act. Clearly, this section authorizes variances of a temporary nature. That these regulations are authorized under §13.5 of the act stems from the following considerations: (1) Section 13.5(c) of the act specifically authorizes the present variance regulations. (2) That subsection also places a specific time limit (for a one-time period not to exceed ten years) on variances granted pursuant to §13.5(b) of the act. (3) §13.5(b) of the act is intended to provide in certain well-defined circumstances for the grant of more liberalized variances than are intended under the other provisions of that

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2. "7. Section 141.4 of the Rules and Regulations, 25 Pa. Code §141.4, prohibits the Department from granting indefinite exemptions.
"8. Since Section 141.4 of the Rules and Regulations is binding on both the Department and this Board, the Appeal asks for relief which cannot be granted as a matter of law."

section. Thus, §13.5(a) of the Air Polltuion Control Act, *supra*, in our opinion, authorizes the adoption of regulations by the EQB that contain specific time limits for variances of less than ten years duration. Under such circumstances, we cannot agree with appellant that 25 Pa. Code §141.1 *et seq.*, is either unauthorized or exceeds the authority granted by the EQB.

Nor do we think that these variance regulations are arbitrary or capricious. As Commonwealth Court has noted:

> ". . . The effect of a temporary variance is twofold: (1) it grants a reprieve from prosecution during the pendency of the temporary variance, and (2) it requires the implementation of an air pollution control scheme which, hopefully, will bring the air pollution contamination sources in question into compliance with the Act and DER standards. Chapter 141 of the Department of Environmental Resources Rules and Regulations, 25 Pa. Code §141.1 *et seq.* . . ."
> *Silver Spring Township v. Commonwealth of Pennsylvania, Department of Environmental Resources*, ___ Pa. Commonwealth Ct. ___, 368 A.2d 866, 868 (1977).

Inasmuch as the variance regulations are intended to provide for the granting of temporary variances that have the effect noted by Commonwealth Court, we cannot say that they are arbitrary and capricious merely because they do not envision the grant of variances of the nature sought by USS. We have no doubt that the EQB could fashion variance regulations which would conform to the desires of USS, but appellant has shown us nothing that would compel the EQB to adopt such regulations. In our opinion, it is a legitimate goal of the variance regulations to provide for a necessary control scheme that would bring a source in compliance with emission control regulations at the end of a specified variance period.

Inasmuch as we are satisfied that USS was not seeking a variance as intended by §13.5 of the Air Pollution Control Act, *supra*, or under the regulations authorized by it, this appeal must be dismissed for the reason that appellant has not complied with the requirements of the variance regulations. If it had and the DER had granted appellant a variance for a time shorter than it requested, we could have granted relief to appellant if we found that as applied to it the variance regulation with regard to time periods were arbitrary, unreasonable or capricious. *St. Joe Minerals Corp. v. Goddard, et al, supra. West Penn Power Company v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 73-330-D (opinion and order issued February 25, 1977). However, as we indicated above, no variance was granted in this matter. USS has not shown its entitlement to a variance either under the act or under the regulation.

Our perception of the appeal is that USS deliberately chose to file a petition for variance which did not comply with the requirements of the act or the regulations for the sole purpose of putting into question the constitutionality of 25 Pa. Code §123.23. However, inasmuch as we have already determined that the variance regulation is authorized by the Air Pollution Control Act and that USS did not comply with the provisions of that regulation, we do not reach the issue of the constitutionality of 25 Pa. Code §123.23. Irrespective of the constitutionality of that regulation, the failure to comply with the provisions of the variance regulation on the part of USS is sufficient ground for upholding the DER action. This board would be subject to justifiable censure[3] if it were to overlook the requirements of a validly adopted and authorized variance regulation for the purpose of reaching a decision on the underlying emission control regulation from which the variance is sought. Such a procedure would, in our opinion, be disruptive of orderly processes of evaluating variance petitions and would tend to undermine the requirements of 25 Pa. Code §141.1—§141.44 which we have held to be properly authorized by the terms of §13.5 of the Air Pollution Control Act, *supra*.

Although we are dismissing this appeal on the grounds of Pennsylvania law, we think that the issues raised by the DER regarding the Federal Clean Air Act should be addressed, notwithstanding that our views thereon constitute dicta. We think such a discussion of the impact of the federal law on our law will be helpful to the parties and others interested in understanding the complex interrelationships existing between the Federal Clean Air Act and the Pennsylvania Air Pollution Control Act.

The DER claims that we lack the jurisdiction to hear and determine issues pertaining to the validity of regulations adopted by the states which are included in state implementation plans approved by the administrator of the Environmental Protection Agency pursuant to §110(a) of the Federal Clean Air Act, *supra*. This contention is premised upon §307(b) of the Federal Clean Air Act, which provides:

> "(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111; any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.

3. We do not use this term in any pejorative sense.

"(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

The DER maintained this posture before the board prior to the United States Supreme Court decision in *United States v. Union Electric Company*, 49 L.Ed.2d 474 (1976) and maintains essentially the same position presently. Prior to *Union Electric*, the DER argued that questions relating to the economic or technical infeasibility of regulations contained in an approval implementation plan could only be raised in a section 307(b)(1) petition for review. Since *Union Electric*, the DER argues that this board lacks jurisdiction to consider the contentions raised by USS for the reason that §110(a)(2)(F) requires that the state implementation plan shall be approved if the administrator of the Federal Environmental Protection Agency determines, *inter alia*, that the plan provides necessary insurances that the state will have adequate personnel, funding and authority to carry out its implementation plan. It also cites 40 C.F.R. §51.11, which provides, in pertinent part:

"(a) Each plan shall show that the State has legal authority to carry out the plan, including authority to:

"(1) Adopt emission standards and limitations and any other measures necessary for attainment and maintenance of national standards.

"(2) Enforce applicable laws, regulations, and standards, and seek injunctive relief.

"(3) Abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons, i.e., authority comparable to that available to the Administrator under section 303 of the Act.

* * *

"(c) The provisions of law or regulation which the State determines provide the authorities required under this section shall be specifically identified, and copies of such laws or regulations shall be submitted with the plan.

"(d)(1) Except as otherwise provided by paragraph (b) of this section, the plan shall show that the legal authorities specified in this section are available to the State at the time of submission of the plan.

"(2) Legal authority adequate to fulfill the requirements of paragraph (a)(5) and (6) of this section may be delegated the State pursuant to section 114 of the Act."

According to the DER, inasmuch as §110(a)(2)(F) of the Federal Clean Air Act, *supra*, requires the administrator of the Federal Environmental Protection Agency to determine whether a state has the legal authority to carry out its implementation plan, the only method by which a party may seek review of state regulations contained in an approved state implementation plan is by petitioning the proper Federal Court of Appeals for review of the administrator's approval of such plan pursuant to §307(b)(1) of the Federal Clean Air Act, *supra*. This contention begs the question of whether the contention raised by USS could be considered in a review proceeding under §307(b)(1) of the Federal Clean Air Act, *supra*. We are of

the opinion that the claim that USS is making with regard to 25 Pa. Code §123.23 is not properly cognizable in a review proceeding under §307(b)(1) of the Federal Clean Air Act, *supra*. As set forth below, our opinion in this regard is based upon *United States v. Union Electric Company*, 49 L. Ed.2d. 474 (1976) and *Train v. NRDC*, 421 U.S. 60 (1975).

Under *Union Electric*, if the proferred state plan meets the minimum requirements of §110(a)(2) of the Federal Clean Air Act, *supra*, the administrator must approve such a plan even though the plan includes more stringent emission limitations than the federal law requires. We think that if under *Union Electric* the administrator is required to approve the state implementation plan if it conforms to the minimum requirements of §110(a)(2) of the Federal Clean Air Act, *supra*, it necessarily follows that the administrator is precluded from disapproving a state implementation plan if it provides for the timely attainment and subsequent maintenance of ambient air standards and also satisfies the other provisions of §110(a)(2) of the Federal Clean Air Act, *supra*. This conclusion is buttressed by the following language in *Train:*

> " . . . Under §110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. §110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." 421 U.S. at 79.

The same arguments that preclude the administrator of the Federal Environmental Protection Agency from considering economic and technical infeasibility in approving or disapproving a state implementation plan also preclude him from considering in that process whether specific regulations not necessary to attain or maintain national ambient air quality standards may be unconstitutional under state law for the reason that they serve no valid state objective. In other words, we find nothing in the Federal Clean Air Act, *supra*, that would permit the administrator to pass upon the validity of a state regulation under the due process or equal protection clause of the 14th Amendment of the U.S. Constitution in the event that the regulation may not be necessary in a particular case for either the attainment or maintenance of federal ambient air quality standards.

The teaching of *Union Electric* and *Train* is that the administrator must approve a state implementation plan that provides for the timely attainment and subsequent maintenance of ambient air standards and also meets the other requirements of §110(a)(2) of the Federal Clean Air Act, *supra*. It follows that the administrator's concern with the legal authority of the state is only to the extent that the state has sufficient legal authority to carry out the implementation plan requirements with regard to the attainment and subsequent maintenance of national ambient air standards. However, if such legal authority is sufficient to the state to attain and subsequently maintain federal ambient air quality standards in a timely fashion, he cannot disapprove a plan for not having greater legal authority than is necessary to satisfy the minimum requirements of §110(a)(2) of the act. Inasmuch as he cannot consider that question, neither could the federal appeals court. *Union Electric v. EPA, supra.*

It is interesting to note that 40 C.F.R. §51.11 does not require the submission to the administrator of judicial authority relating to the interpretation of state laws with regard to their constitutionality under state constitutions. We doubt whether the General Counsel's office of the Federal Environmental Protection Agnecy sends its minions of legal researchers to provide the administrator with legal memoranda based on state legal precedent rendering an opinion on the legality and constitutionality of each statute and regulation contained in a state implementation plan from the viewpoint of the submitting state. This would require the General Counsel's office to be experts on the constitutional law of each of the 50 states. While we have great admiration for that office, we doubt that it would allocate its resources to such an effort. Rather, we think that the Federal Environmental Protection Agency merely looks at applicable state law and regulation to determine whether authority exists on the part of the state to meet its minimum obligation under an otherwise approvable plan.

We cannot follow the rationale of the DER in this circumstance for the reason that it leads to an untoward conclusion. Following the rationale, the courts of Pennsylvania would lack authority to review for constitutionality any act or regulation that Pennsylvania is required to supply to the administrator of the Federal Environmental Protection Agency in connection with an implementation plan that is thereafter approved. Merely to state this implication is to raise serious questions concerning the validity of the underlying assumption that the DER makes regarding our lack of jurisdiction to determine, in an appropriate case, whether a given Pennsylvania air pollution control regulation is valid.

We, therefore, reject the DER contention that the question of a state's enabling authority to adopt regulations more stringent than are necessary to attain and maintain federal ambient air quality standards stands on an entirely different footing from the economic and feasibility questions considered in *Union Electric*. While it is true that this question was not raised in *Union Electric* by the petitioner therein, the rationale of *Union Electric* applies with equal vigor to the question presently before us. It is clear, in our opinion, that both *Train* and *Union Electric* lead inexorably to that conclusion.

As we previously ruled in *Bethlehem Steel Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-107-D (opinion and order issued August 2, 1976), neither §116 of the Federal Clean Air Act, *supra*, nor the supremacy clause of the United States Constitution precludes us from asserting jurisdiction in a proper case over the question of claimed constitutionality under state law or regulations contained in Pennsylvania's approved implementation plan. The DER contention to the contrary does not survive serious scrutiny. We have no doubt that we have jurisdiction in an appropriate case to hear and determine questions of claimed invalidity of state regulations contained in an approved implementation plan. Nothing in §116 of the act nor in the supremacy clause of the Federal Constitution would preclude us from doing so.

Section 116 of the Federal Clean Air Act, *supra*, provides:

> "Except as otherwise provided in sections 119(c), (e) and (f), 209.211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section."

To the preemption contention, there are two answers that we deem conclusive: (1) 25 Pa. Code §§141.1—141.44, not being an emission standard or limitation, would not fall within the provisions of the prohibition of §116 of the Federal Clean Air Act, *supra*. (2) This section of the Federal Clean Air Act must be read in light of the *Train* case. *Train* instructs us that the original approved implementation plan is neither carved in marble nor unsusceptible to revision. On the contrary, the state may seek to have a revision of its plan approved so long as the revision does not jeopardize the attainment or maintenance of federal ambient air quality standards and is otherwise in compliance with the requirements of §110(a)(2) of the act.

Inasmuch as the DER may seek revisions of its approved implementation plan, the basis of its preemption argument falls. The DER cannot hide behind the shield of preemption under circumstances that would allow it to seek a revision of its implementation plan if it chose to do so. At this point, the allegations of USS are not proven. But if they were, we hope that the DER would attempt a revision of its implementation plan to accomodate such a circumstance.

CONCLUSIONS OF LAW

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

2. Jurisdiction relates to the competency of a tribunal to hear and determine controversies of the class to which the case immediately presented belongs. The test of jurisdiction is whether the tribunal has the power to enter upon the inquiry and not whether it may ultimately grant the relief sought.

3. Where a motion to quash does not properly raise questions of jurisdiction, it will be treated as a motion to dismiss the appeal.

4. 25 Pa. Code §141.1—§141.44 (relating to temporary variances), although adopted prior to the enactment of §13.5 of the Air Pollution Control Act, *supra*, is nevertheless validly authorized by that section of the act.

5. The Environmental Hearing Board will uphold the denial of a variance petition where it fails to comply with the requirements of 25 Pa. Code §§141.1—141.44.

6. The Environmental Hearing Board will not pass upon the validity of a state emission control regulation in a situation in which an appeal is taken from the refusal to grant a variance petition and said refusal is based upon failure to comply with the variance requirements.

7. In an enforcement proceeding or in an appeal from an order requiring compliance with an emission control regulation, the Environmental Hearing Board has the jurisdiction to inquire into the validity of such an emission control regulation where it alleged that, although the said regulation is contained in an approved implementation plan, it is unnecessary for the attainment and maintenance of national ambient air quality standards and otherwise has no valid police power objective.

O R D E R

AND NOW, this 27th day of April, 1977, the appeal of the United States Steel Corporation from the action of the Department of Environmental Resources in refusing to grant its petition for a variance for its by-product coke oven operation at its Fairless Works at Fairless Hills, Falls Township, Bucks County, Pennsylvania, is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: April 27, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

MICHAEL PAWK

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 74-052-D

Order to Remove Culvert and Alter Stream Channel

ADJUDICATION

By: Joanne R. Denworth, Member, May 13, 1977.

This is an appeal by Michael Pawk from an order of the Department of Environmental Resources directing him to deepen and widen the stream channel and to remove a 244 foot culvert and fill that he placed in and over West Butler Creek in Butler County in order to provide roadway access for the commercial development of property owned by him and others. This case is complicated by the fact that a permit for a culvert at the location of the present culvert was issued to Mr. Pawk by the Water and Power Resources Board in 1970. (The Department of Environmental Resources is the successor to the Water and Power Resources Board under 71 P.S. §510-1 (1)). Appellant has repeatedly argued that the Commonwealth is estopped by its former authorization of the culvert from ordering the removal of the culvert; however, this is contradicted by the terms of the permit itself, which provide:

> "If future operations by the Commonwealth of Pennsylvania require modification of the structure or work, or if, in the opinion of the Water and Power Resources Board, it shall cause unreasonable obstruction to the free passage of floods or navigation, the permittee shall, upon due notice from the Water and Power Resources Board, remove or alter the structural work or obstructions caused thereby, without expense to the Commonwealth of Pennsylvania, so as to increase the flood carrying capacity of the channel or render navigation reasonably free, easy, and unobstructed, in such manner as the said Board may require; and if, upon the expiration or revocation of this permit, the work shall not be completed, the permittee, at his own expense and to such extent and in such time and manner as the said Board may require, shall remove all or any portion of the incompleted work and restore the watercourse to its former condition. No claim shall be made against the Commonwealth of Pennsylvania on account of any such removal or alteration; (Condition 5)

Furthermore, the Commonwealth argues that the culvert was not built in accordance with the specifications submitted to the Commonwealth, that the fill was never authorized by the Commonwealth and that inadequate information was provided to the Commonwealth at the time the permit was requested.

Though we recognize that the Water Obstructions Act, Act of June 25, 1913, P.S. 555, *as amended*, 32 P.S. 681 *et seq.*, *infra*, authorizes a department order to remove this culvert if indeed it does interfere with the free passage of floods, we are most unhappy at the irresponsibility of government action that this case implies. Our review of the evidence leads us to the inescapable conclusion that this culvert should have never been approved, even assuming that it was built in accordance with the specifications submitted at the time of the initial permit request. At that time, no one from the Water and Power Resources Board went out to look at the property, which apparently was and perhaps still is common practice in reviewing applications for water obstructions. A visit to the proposed site would have revealed at a glance, as it did to the department's expert, Edward Cole, when he visited the site in 1973, that the crown of the proposed culvert would be higher than four of the basements of the houses along the right bank and that, if the culvert were to flow full, it, in combination with the placement of fill on the overbank of the left bank, would create a damming effect and cause flooding problems for the properties on the right bank. Presumably, such an observation would have caused the permitting authority to be sure that any water obstruction placed in the creek had ample capacity to take any increased runoff that might be anticipated and to avoid the flooding of nearby homes. The department blames the appellant for not providing information to the Water and Power Resources Board concerning the basement levels of the houses, though it is not clear that the appellant was required to provide such information by any rule or regulation of the board. Wherever the relative blame lies for the initial installation of the culvert, the fact is the culvert and fill have caused increased flooding in the yards of the properties along the right bank and, on July 25, 1973, flooding of some of the homes themselves. The consequence of appellant's, as well as the Commonwealth's prior actions, is that citizens along theright bank of the West Butler Creek have been exposed to a greater risk of flooding for the past six years and now Mr. Pawk, who went to considerable expense to install this culvert and fill, will have to go to some more considerable expense to remove the culvert and to widen and deepen the channel.

Aside from the question of validity of the original permit, there are several changed factors that significantly effect the conclusion as to the hazard created by this culvert and fill. First, at the time the permit was issued the state was using a formula for determining the adequate capacity of a culvert that is no longer considered the best method for determining needed capacity in a small watershed. Second, increased development of the watershed in the years between 1970 and 1975 has resulted in a greater amount of predicted runoff for a fifty year frequency storm than the pipe, which was slightly less than adequate even under the old formula, can handle.

Another complicating issue in this case is the effect of a consent order entered by the Butler County Court of Common Pleas on November 6, 1970, in a suit for injunctive relief brought by the Water and Power Resources Board against Michael Pawk in October of that year. In that suit the state asked for repair of the culvert and fill. The matter was not litigated, but a consent order was entered directing Mr. Pawk to take certain action to repair the culvert and to stabilize fill upstream from the culvert that had slid into the creek. Mr. Pawk complied with the terms of the consent order. Appellant has argued from the beginning of this case that the Court of Common Pleas of Butler County had continuing jurisdiction over this situation, that the department's order was therefore unauthorized and that this board has no jurisdiction to proceed with this case because of the Water and Power Resources Board's prior election of remedies when it sought injunctive relief from the Butler County Court. We have repeatedly disagreed. (See opinion and orders of the board dated August 12, 1974, December 3, 1974, and May 3, 1976). The Butler County Court also ruled that though it had continuing jurisdiction over the case, jurisdiction was not exclusive and it refused to enter an order staying this action as appellant requested.[1] Appellant has once again argued in its post-hearing brief that the Commonwealth Court decision in *Commonwealth of Pennsylvania, Department of Environmental Resources v. Leechberg Mining Company*, 9 Pa. Commonwealth 297, 305 A.2d 764 (1973), requires the conclusion that the department's order is invalid because the Water and Power Resources Board had previously elected to seek injunctive relief in the

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1. The court's opinion (Memorandum Opinion and Order dated October 30, 1974) noted that "however the Court does not lose its jurisdiction of this action merely because it dismisses the petition for injunctive action, but merely holds the cause in abeyance pending conclusion of appropriate administrative proceedings. (citation) The issue may ultimately end up in this Court." Although we think this appeal in the underlying administrative action is separate from the 1970 injunction suit, we would agree that the matter may well end up in the Butler County Court of Common Pleas if enforcement of the order accompanying this opinion is sought.

Butler County Court of Common Pleas. We reiterate our conclusion that the department's order is not invalid on that ground for two reaons:

1. The earlier injunctive suit was brought to correct specific problems with the culvert and fill—namely, to repair the culvert where it had collapsed and to stabilize certain of the fill area that had slid down into the creek. At that time the Commonwealth apparently thought those measures were adequate to protect the residents along the bank from floods such as the one that had occurred in 1970, when the culvert had partially collapsed. In 1974, in light of the flooding experience of the residents in the summer of 1973, when a number of basements on the right bank of the creek were flooded, the department issued an order directing removal of the culvert and roadway fill and widening and deepening of the creek bed based on the investigations of its hydraulic engineer, Edward Cole, whose observations and calculations demonstrated that the culvert and fill presented a greatly increased risk of flooding to the homes along the right bank of the creek.

2. Though the effect on the permittee is unfortunate, we must conclude from paragraph 5 of the Water Obstructions Act, 32 P.S. §685 *infra*, p.20 and condition 5 of the permit quoted above that the department is authorized to order removal of the culvert (and certainly any unauthorized fill) and alteration of the channel if it has evidence that the same are unsafe or derogatory to the regimen of the stream or interfere with the free passage of flood waters. The department made this determination, in part changing the state's "opinion" of Mr. Pawk's culvert, and issued an order in February, 1974, to remove it and to alter the channel. To the extent that the department was attempting to undo the state's complicity in creating an increased flooding hazard to the homes on the right bank of the creek, we cannot fault it for doing so. In any event the appeal before the board questions the validity of the department's 1974 order, and we have no doubt that this is a question that can be considered apart from the equity action in the Butler County Court of Common Pleas, and that it is appropriately considered before this board. The question before the board is whether the department's 1974 order is supported by evidence, including changed conditions, that the culvert and fill cause an undue risk of flooding to the homes along the right bank of the West Butler Creek.

Following the lengthy skirmishes over jurisdiction in this matter, a number of hearings were held over an extended period of time (June 19 and 20, August 6 and 7, September 9 and 10, October 28, 1975). A view of the watershed

area and the culvert was taken on June 19, 1975. After the conclusion of the last hearing October 28, 1975, the case was further delayed by extensions for the filing of post-hearing briefs and then by briefs and arguments on appellant's renewed motion to dismiss on the grounds that the 1970 suit precluded this action. Then, during the summer of 1976, adjudication of the matter was further postponed with the concurrence of the board member responsible on the representation of appellant's counsel that a dam might be built in connection with another proposed development in the watershed that would take care of the problem at Mr. Pawk's culvert. At that time appellant filed a petition to take additional testimony based on after-discovered evidence concerning the possibility of a dam. The board held the petition in abeyance after discussion with counsel for both parties as to the possibility of settlement. (Order of August 4, 1976). Correspondence submitted by the parties in the fall of 1976 showed that the department had rejected Butler Township's initial submission for the proposed dam as inadequate. Consequently, when the department requested that this appeal proceed to adjudication, the board entered an order, November 3, 1976, denying appellant's petition to take additional testimony and requiring the filing of briefs. Appellant strenuously objects to the board's denial of its request to take additional testimony on the proposed dam. However, unless there is a final approved proposal for a dam that will in fact be built (a major stumbling block, inevitably, is the cost of what the department would require or what the township is prepared to spend), we do not believe there is a basis for further delaying these already lengthy proceedings to take testimony on a possible solution. If in fact the proposed dam is approved in the near future, appellant may seek relief due to the changed circumstances that will prevail in the watershed. If Butler Township is aggrieved by the action of the department in disapproving its dam proposal, it could appeal that decision and receive a hearing on whether or not the department's action was justified. The function of this board is to determine whether the 1974 order of the department to appellant was valid. Further hearings devoted to what is only a possibility of action that may be taken by other parties are unjustified. Further, we believe that it will be of help in any further proceedings that may occur in this matter for the board's findings of fact on this voluminous record to be set forth in a final adjudication.

Consequently, we enter the following:

FINDINGS OF FACT

1. On February 25, 1974, the date of the issuance of the order appealed from in this case, appellant, Michael Pawk, was the owner of certain lands adjacent to both sides of West Butler Creek, a tributary of the Connoquenessing Creek located in Butler Township, Butler County, Pennsylvania. With the exception of a parcel along the left bank downstream from the culvert referred to *infra* he continues to own these lands. His property on the left bank extends approximately 2300 feet from near the mouth of West Butler Creek along an increasingly steep hillside. The Lyndora Hotel, owned by appellant, is located at the downstream end of the creek. A bowling alley has also been built on the downstream parcel. Appellant's property on the right bank consists of five small lots beginning approximately 1000 feet from the mouth of the stream (See Commonwealth Exhibit 4). Prior to being built up by appellant, these properties like the other properties along the right bank, sloped down rather steeply from Lewis Avenue to the West Butler Creek.

2. Beginning in 1968 and continuing into 1969 appellant Pawk through his engineering contractor placed earth and dirt along the left bank of the stream creating an enbankment approximately 40 feet in height extending approximatley 1500 feet along the left bank of the creek. The fill was excavated from the adjacent property owned by Pawk that was being developed by him for commercial purposes.

3. At the time the fill was placed, appellant did not own the property on which it was placed along the creek, but had the owners' agreement to the placement of fill. In October of 1968, Pawk purchased a portion of the filled property owned by Andrew Yaracs, and in June of 1969, he purchased the other portion of the filled property from Minnie Ralston, so that he owned the entire filled area. In 1975, after the issuance of the order and the taking of this appeal, he resold a portion of the filled property to Andrew Yaracs.

4. There are 21 residential properties on the right bank of the West Butler Creek across from the enbankment area that was created by Mr. Pawk in 1968-69.

5. Prior to the creation of the enbankment, there was an extensive level or only slightly sloping area along the left bank of the creek that ranged in depth from 10 to 15 feet across from the residences at the downstream end of the creek to 30-50 feet further upstream across from the houses numbered 8-21 on

Commonwealth exhibit four. Across from the houses number 9-11 it was a very extensive low area of approximately 100 feet that was used by the neighborhood children as a ballfield. The fill eliminated this natural area and creates what the residents across the creek described with some hyperbole as a "mountain" or a "wall".

6. Prior to the construction of the enbankment, waters would naturally flow primarily to the left bank, which was lower than the right bank, whenever certain rainfall events forced the stream to overflow its banks.

7. Subsequent to the placement of fill along the left bank, during high flows the stream inevitably overflows to, and floods only, the right bank area of the stream. The enbankment is thus derogatory to the regimen of the stream as it obstructs the natural flow of the stream during intense rainfall events.

8. Although Mr. Yaracs testified that he did "see the State people for permission" to place the fill on the property and that they "told us that it was our property and that we don't have to worry about a thing", neither appellant nor Mr. Yaracs nor Mrs. Ralston had any written permit from the state for the placement of the fill on the left bank of the stream.

9. All streams must have an overbank section to handle the flood flows resulting from infrequent storms.

10. Prior to the placement of the fill by Mr. Pawk the residents on the right bank experienced no flooding or only minor flooding within several feet of the stream during heavy storms because the left bank of the stream carried flood waters. Since the placement of the fill, the residents testified to increased flooding as follows:

(a) Prior to the placement of fill, neither the yard nor house of the residence designated No. 2 on C-X-4 experienced flooding. Since the fill has been placed on the left bank, the flood waters enter the yard frequently—whenever it rains heavily—sometimes covering as much as sixty feet of the yard. In 1973, as much as three and one-half feet of water entered the house. The only bathroom in the house, which is located in the basement, was consequently flooded, as well as other rooms.

(b) The residence designated 9 on C-X-4 had not experienced flooding (either in the yard or basement), at least since 1926, until approximately 1969, after the fill was placed on the left bank; after that time, the high waters would cover as much as ten feet of the yard surface; in 1973 the barn, located as far as 25 feet from the stream, was subject to a flood two feet in depth.

(c) Prior to the time the fill was placed on the left bank, during heavy rains, the water would enter the yard of the residence numbered 10 no more than two or three feet in depth. In fact, the owner maintained a garden and chicken coop in the yard during that period. However since the fill was placed, the water periodically—once, sometimes twice a year—enters and covers at least 20 to 25 feet of the yard surface. In 1973, the flood waters covered approximately 50 feet of the yard surface.

(d) The residence designated as 11 on C-X-4 had not experienced flooding (either in the house or yard) for at least 25 years prior to 1968 or 1969. Because appellant had built up the yard for the resident an additional three feet above the original level, the yard or house was only subject to a single major flooding incident, which occurred in 1973.

(e) The residence located at point 13 on C-X-4 did not experience flooding prior to 1968. However, since the summer of 1969, the waters filled the yard at least seven times, on one occassion, in 1973, flooding the house, including the bathroom as well as the bedroom used by the owner's son. The 1973 flooding caused the windows in some of the basement rooms to break. There was sixty and one-half inches of water in the basement.

Even when the house is not flooded, the water comes within inches of going into the house; the flood waters cover about 40 feet of the yard surface.

(f) The residence designated as number 14 never experienced any flooding of the yard or house—at lease since the 1920's—until August or September, 1969, at which time flood waters covered 60 feet of the yard surface, extending right up to the back porch. Since that time, flooding of the house occurred at least six times; the residents lost their shed, all the shrubbery, trees and fences in the yard, and part of the lawn. The house itself was flooded to a depth of four feet.

(g) Neither the yard nor house of the residence designated as number 15 was flooded until after the fill was placed on the left bank; during 1972 the yard was flooded and the garden lost. In 1973, the basement which was used as a bedroom for the resident's son, and had been used as a bedroom by previous residents, was flooded. Consequently, the residents do not use the basement any more because they are afraid of a reccurrence of the flooding.

(h) The residence designated as point 16 on C-X-4 experienced no flooding of the house or yard prior to the placement of the fill with the occassional exception of water entering the yard during storms, at which time

the waters never exceeded two inches in depth nor covered more than 15 feet of yard surface. However, in July, 1973, after placement of the fill, flood waters 33 inches deep entered the house itself.

(i) At least since 1919, the residence designated as No. 21 experienced no flooding of either the house or yard until such time as the fill was placed on the left bank. However, in July, 1973, flood water entered the house 10 feet in depth; 15 to 20 feet of water covered the yard surface; the garage was flooded to a depth of two feet.

11. In March of 1968, appellant applied to the Department of Forests and Waters for a permit to place a 78-inch culvert in West Butler Creek in order to enable him to build a roadway over the creek connecting his property on the right bank with his property on the left bank and thereby to provide ingress and egress from Lewis Avenue to the left bank property. The department advised appellant that a 78-inch pipe would be inadequate to pass the flows of West Butler Creek and could not be approved. The department's letter of March 27, 1968, stated:

> "a multi-plate pipe arch having a span of ten feet eight inches and a rise of six feet eleven inches is acceptable or a bridge structure having a span of twelve feet with a clearance of 4.6 feet."

12. Subsequently, appellant revised his application as of January 27, 1970, to provide for a span of ten feet eight inches and a rise of six feet eleven inches. The plans and specifications represented that the culvert would have the capacity to carry 644 cubic feet per second (cfs) of runoff. The plans propose that the pipe would be constructed or placed in the channel at a grade of 1.45%. The plans represented that the projected watershed runoff that would have to be handled by the culvert was 662 or 664 cfs, which represented the projected runoff for a fifty year storm.

13. A permit for construction of the proposed culvert was issued by the Department of Forests and Waters of the Water and Power Resources Board on February 10th, 1970.

14. The permit provided, *inter alia*, that:

> "This permit is issued in response to an application filed in the office of the Water and Power Resources Board on the 22nd day of March, 1968, and with the understanding that the work shall be performed in accordance with the maps, plans, profiles, and specifications filed with and made a part of the application, said plans as revised and filed in the office of the Water and Power Resources Board on January 27, 1970, subject, however, to the provisions of [the Act], and the following conditions, regulations, and restrictions:

"...no changes in the maps, plans, profiles and specifications as approved shall be made without the written consent of the Board.... (Condition 2).

"The [Water and Power Resources] Board ...reserves the right to suspend or revoke [the] permit if in the opinion of the Board the best interests of the Commonwealth will be subserved thereby. (Condition 2).

"...if, in the opinion of the Water and Power Resources Board, [the structure or work] shall cause unreasonable obstruction to the free passage of floods or navigation, the permittee shall, upon due notice from the Water and Power Resources Board, remove or alter the structural work or obstruction caused thereby, without expense to the Commonwealth of Pennsylvania, so as to increase the flood carrying capacity of the channel or render navigation reasonably free, easy, and unobstructed, in such manner as the said Board may require.... No claim shall be made against the Commonwealth on account of any such removal or alteration. (Condition 5).

"Within thirty (30) days after the completion of the work authorized in [the] permit, the permittee shall file with the Water and Power Resources Board, Harrisburg, Pennsylvania, a statement certifying that the work has been performed in accordance with [the] permit and the approved maps, plans, profiles, and specification. (Condition 7).

"Performance of the work authorized shall constitute an acceptance of the various conditions contained in the permit. (Condition 8).

"This permit shall not become effective until and unless the permittee shall file with the Board within thirty (30) days from the date thereof, upon a form furnished by the Board, its written acceptance of the terms and conditions therein imposed." (Condition 10)

15. The formula for determining the projected watershed runoff that was used by both appellant's engineer and the Department of Forests and Waters in 1970 was based upon curve B of an envelope curve. Since 1970, the envelope curve is no longer considered adequate in sound engineering practice for determining runoff for small watersheds because it does not reflect the impact of development. The Department of Environmental Resources no longer accepts, in permit applications, predictions of watershed runoff that are based on this curve.

16. In 1970, a 244 foot culvert was constructed by Pawk in the general location described in the permit. The invert (lowest) elevation of the culvert at the inlet (upstream portion) of the pipe, as constructed, is 1010.27 feet above mean sea level; the invert elevation of the pipe at the outlet is 1003.57 feet above mean sea level. The culvert is 6.92 feet in height.

17. This means that there is a 6.7 foot fall over the 244 foot length of the pipe. The slope of the pipe is therefore 2.74%, as constructed, as opposed to the 1.45% or 1.5% slope represented in the permit. From an engineering

perspective, the grade, as constructed, is "considerably different" from that set forth in the permit drawing. The steep grade creates an "entrance condition" of the structure that significantly reduces the discharge capacity of the culvert.

18. Applying the Manning formula, which is the recognized formula for computing culvert capacity, the capacity of the pipe, as constructed, without taking into account the entrance condition of the pipe and its effect on the pipe efficiency, is 885 cfs.

19. If the pipe had been constructed according to the plans and specifications set forth in the permit application, the capacity would have been 644 cfs; this reflects the fact that the pipe was to be (and was in fact) mitered to fit the slope to increase its efficiency.

20. However, because the pipe was constructed on a 2.74% grade, the inlet conditions reduce the actual carrying capacity of the culvert to 500 cubic feet per second even though the culvert is mitered.

21. The information provided in the permit application, including the plans and specifications filed with the application, did not show either the proximity or elevations of the residences in the area, although it does not appear that the Department of Forests and Waters requested such information on the permit application or in fact. The plan profile and the section submitted by Pawk as part of the permit application showed no contours and no basement elevations; the only cross-sections shown were the one at the inlet and the one at the outlet of the proposed culvert. The plans submitted by Pawk's engineer indicated that the top of the right bank of the stream was higher, rather than lower, than the top of the proposed culvert. An engineer in the department examining the permit application could assume from the sections submitted by Pawk's engineer that the right bank area was sufficiently high so that flooding of homes would not occur when the pipe flowed full.

22. The rational runoff formula is the method used today for estimating the projected watershed runoff from a small drainage area that will enter a culvert at given frequency storms. Applying that formula to this stream watershed under conditions existing in the watershed at this time, Mr. Cole calculated that the projected estimated 50-year frequency storm will produce a runoff of 1,080 cubic feet per second at the entrance to the culvert. A 50-year frequency storm is a rainfall that can be expected, on the average, once in 50 years.

23. The rational runoff formula is Q=ciA, where Q-the design peak runoff in cubic feet per second, c-the weighted runoff coefficient (reflecting the type of ground in the watershed by expressing the ratio of rate of runoff to rate of rainfall), i-the applicable rainfall intensity in inches per hour, and A-the watershed area.

24. In Mr. Cole's calculations, an estimated projection of a fifty-year frequency rainfall of 2.75 inches/hr. (r) was adjusted for the time of concentration for the watershed to obtain the "i" (of 3.4 inches/hr.) necessary to apply the rational runoff formula. The 2.75 inches/hr. (r) was obtained from a rainfall table, a standard method used by engineers for this purpose, which illustrates, *inter alia*, the expected 50-year frequency rainfall, in inches per hour, for western Pennsylvania.

25. The "i" represents the rainfall intensity for the period necessary for the rainfall runoff to flow overland from the farthest reaches of the watershed (or farthest point from the culvert) to the point where the stream rises including channel flow time to the entry of the culvert. The time of concentration for a 50-year frequency storm in this case is 44.8 mins; an appropriate ratio of that figure would be applicable as the concentration time for frequent (or lesser) storms. The "i" for a 50-year frequency storm, as indicated above, is 3.4 inches/hr.

26. Based on these variables, the pipe is incapable of carrying more than a 5-year frequency storm (representing an "r" of 1.6" of rainfall per hour, with an "i" of 1.8 inches per hour); it is clearly incapable of carrying a 50-year frequency storm, as the Q for the watershed runoff is more than double the capacity of the culvert; it is known that a culvert will cause backwater when it does not have the capacity to carry the watershed runoff.

27. The projected estimated storm runoff for each of five different storm frequencies, as calculated by Mr. Cole, and the "r" and "i" figures which form the basis of those conclusions are as follows:

	Q	"r"	"i"
50-year frequency storm	1080	2.75"/hr	3.4"/hr
25-year frequency storm	890	2.4"/hr	2.8"/hr
10-year frequency storm	800	2.0"/hr	2.5"/hr
5-year frequency storm	575	1.62"/hr	1.8"/hr
2-year frequency storm	480	1.25"/hr	1.5"/hr

28. Although the survey of rainfall records from the Butler area presented by appellant suggests that the figures taken by Mr. Cole from the national rainfall charts may be higher than the actual experience of given frequency storms in the Butler area, the survey was not sufficiently reliable to establish the adequacy of the culvert.

29. Even assuming appellant's rainfall figures were approximately correct, the appellant's witness's incorrect application of the rational runoff formula and failure to calculate accurately the capacity of the culvert flowing full lead to the conclusion that the culvert is inadequate for a fifty-year storm upon any of the figures presented.

30. The design capacity of the culvert, in terms of flood frequency, is particularly significant in this case because the elevations of the basements of the houses designated on C-X-4 as 12, 13, 14, and 15 are lower than the crown (highest point) of the culvert. This means that any time that the culvert flows full, at least four houses will have at least some basement flooding. The applicable elevations are as follows:

Crown of culvert:	1017.19' above mean sea level
House No. 12:	1016.6' above mean sea level
House No. 13:	1016.0' above mean sea level
House No. 14:	1016.9' above mean sea level
House No. 15:	1016.3' above mean sea level

31. On July 25, 1973, the basements of these homes as well as several other homes along the right bank were flooded. On that date the highest hourly recorded rainfall at the Butler substation of the National Weather Bureau, which is located on the Connoquenessing across from the end of West Butler Creek watershed, was 1.35 inches. According to Mr. Cole's figures this represents approximately a five to ten-year storm.

32. Recent severe flooding of the yards occurred on June 25, 1975, and July 24, 1975. The highest hourly recorded rainfall at the Butler substation, on those dates was 1.08 and 1.8, respectively.

33. The flooding of homes on July 25, 1973, could have been caused by a surge of water in excess of the height of the pipe or by a blocking of the pipe by debris.

34. The flooding in 1973 could have been increased by runoff from the intermediate high school, which was then under construction at the top of the watershed. A detention basin has since been built there so that runoff from this

source would no longer contribute to the flood waters that need to be carried by appellant's culvert. However, as the detention basin was built by the time Mr. Cole performed his calculations in May of 1975, he did not add any increased runoff for the intermediate school area. Consequently, his figures as recited in Finding of Fact 27 do reflect the presence of the detention basin in developing the amount of runoff from the watershed that can be expected.

DISCUSSION

The Commonwealth succeeded in showing by a preponderence of the evidence that the combination of the culvert and fill in the West Butler Creek has greatly increased the risk of flooding to the homes along this particular portion of the creek. The Commonwealth's difficult, but competent, witness, Edward Cole, had a great deal of expertise in the design of dams, flood control reservoirs, and channel improvements, in investigating water obstructions, and in making detailed analyses of watershed runoff from drainage areas. Before coming to work for the department as a hydraulic engineer in 1973, he had been with the United States Army Corp of Engineers for forty years, the last ten of those years as chief of the Planning and Reports Branch. He is a fellow in the American Society of Civil Engineers. None of his calculations were shown to be incorrect. His observations and calculations showed that with the increased runoff in the watershed area and the capacity of the pipe as constructed, the culvert may be inadequate for a 5-10-year storm and is certainly inadequate for a 50-year storm. This board has recognized that the department may require an applicant to design a culvert for a 50-year frequency storm, and, where life and property may be threatened, even for a 100-year storm. *Precision Tube Company, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 74-271-W, issued August 29, 1975, affirmed _____ Pa. Commonwealth _____, 358 A.2d 134, 139 (1976).

The main thrust of appellant's evidence was to challenge the culvert capacity required by Cole's calculations on the ground that he had used hourly rainfall rates taken from so-called Seelye rainfall charts showing national rainfall patterns for particular frequency storms, rather than using rainfall figures based upon actual rainfall data from the Butler substation located near the end of this watershed on the Connoquenessing Creek. The Seelye charts are commonly used by engineers to obtain the rainfall figures to be used in any formula for determining needed capacity (in the rational runoff formula Q=ciA,

the rainfall figure for any particular frequency storm is the "i" prior to adjustment for time of concentration). These data consist of charts of the United States with bars representing particular hourly precipitation amounts for different frequency storms over the areas of the United States where they occur. The original data developed by Yarnell in the 1930's was based on rainfall data collected over 30 years at 200 rainfall stations in the United States. The charts used by Mr. Cole published in 1935, were based on this data. In order to determine the expected hourly precipitation rate for a 50-year storm in the Butler area it is necessary to interpolate between the lines on the chart where Butler is located to get a figure of 2.75 inches of rainfall, as Mr. Cole did.

Appellant argued through his expert witness, George Wright, that actual rainfall data from the Butler area substation of the National Weather Bureau should have been used to predict amount of rainfall to be expected in the West Butler Creek watershed for a 50-year frequency storm, etc. Mr. Wright had another person survey the records of the Butler Valley substation for the years 1940 through 1975 in order to obtain the highest hourly precipitation for each year. From these figures he used an accepted method called the Gumbel Probability Paper to predict the amount of rainfall that could be expected in the Butler area for each frequency storm. Those figures were considerably lower than Mr. Cole's and when plugged into the rational runoff formula as applied by Mr. Wright, led to a lower needed capacity for the culvert of 507 cubic feet per second for a 50-year storm, 456 cfs for a 25-year storm, 380 cfs for a 10-year storm, 317 cfs for a 5-year storm and 228 cfs for a 2-year storm. (Compare Finding of Fact 27)

Mr. Cole acknowledged that the rainfall curve gives a general prediction as to the probability of any given storm in a particular area and that more specific data from a local rainfall station might produce a more accurate prediction for a particular area. He concluded that such a survey was not necessary in this case however considering the discrepancy between the capacity of the pipe and the projected watershed runoff.[2] While we think that the rainfall figure used by Mr. Cole may be somewhat high based on the evidence presented by the appellant, we are not able to accept appellant's evidence as entirely accurate and must conclude that while the probable rainfall for a given frequency storm

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2. Obviously local rainfall records could not be required to be surveyed in connection with the design of every culvert or opening. Aside from the fact that such rainfall records do not generally exist, it would place far too onerous a burden on an applicant and on the state to require such surveys in connection with every application. Therefore, certainly in the context of an application, general rainfall charts may be used to predict the amount of rainfall that must be carried. Here, however, where we are dealing with an order to remove a culvert previously permitted and installed it may be appropriate to examine the degree to which the rainfall curve bears an accurate relationship to the expected rainfall in this particular area.

may be lower in the Butler area than the figure obtained by Mr. Cole from the rainfall chart, it is probably higher than the figures given by the appellant. Since appellant's figures coincide almost exactly with the capacity of the pipe (500 cfs) flowing full and it was later shown that appellant's witness had incorrectly applied the rational runoff formulas by failing to adjust the "i" for time of concentration, we must conclude that even using appellant's figures, the pipe is not adequate for a 50-year storm.

There are several reasons why appellant's evidence on the local actual rainfall is unreliable. First, it is difficult to assess the accuracy of the survey which was initially performed by a third person at Mr. Wright's direction. This third party allegedly made a survey of all of the rainfall records between 1940 and 1975 for the Butler substation and from those years selected the date in each year upon which the highest hourly maximum precipitation occurred.(Appellant's exhibit GGG) The Commonwealth did not make its own survey to rebut this; however, the Commonwealth points out in its brief that there are a number of days when the records show the Butler substation did not measure hourly precipitation. So, for example, in 1967 and 1969 where appellant's records show the highest hourly precipitation rate as .58 and .72 respectively, rainfall records for March 7 and 23, 1967, show no hourly measurements but a total rainfall of 1.41 inches and .93 inches respectively, and on July 28, 1969, a total precipitation of 2.57 inches with no hourly measurements. Second, the person who made the survey was not made available by the appellant for examination. Third, the actual recorded rainfall data shows the highest hourly precipitation occurring on the hour (ie. between 5 and 6 PM), and therefore not necessarily the highest hourly rainfall that might be expected. Fourth, the rainfall survey presented by the appellant covers 35 years during which appellant's figures show the 1.8 inch storm that occurred on July 25, 1975, to have been the highest hourly precipitation rate experienced on the West Butler Creek. These records may very well not contain examples of what may be a 50-year storm or even a 30-year storm (ie. a storm that may be expected on an *average* of 30 years or 50 years). In sum, we believe that although Mr. Cole's figures for the amount of rainfall that might be expected may be too high, appellant's are too low and that amount of rainfall that may be expected lies somewhere in the middle, which is still more than the pipes can handle.[3]

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3. Perhaps a more probable prediction would be obtained from the revised rainfall charts published by the National Weather Bureau in 1961, (see appellant's exhibit AAA), which one would assume are based on more extensive sampling at stations over the United States for a more extended time than either the 1935 charts or appellant's survey. According to this exhibit, these charts show an expected hourly rainfall for a 50-year storm in the Butler area as two and one-fourth inches, as opposed to two and three-fourths inches shown on the 1935 chart or 2.0 inches shown by appellant's method.

Aside from the question of the appropriate rainfall figure, appellant's witness inaccurately applied the rational runoff formula by failing to adjust the "i" for time of concentration, which was shown to have a significant effect on the amount of runoff calculated by the formula. Further, his calculations as to the capacity of the pipe (which he put at 911 cfs) appeared to have been incorrect, as the Commonwealth points out in its brief that the factors he used result in a total of 844 cfs. He did no calculations to show the capacity as affected by entrance losses caused by the nonconforming slope and did not rebut Mr. Cole's calculations that the carrying capacity of the pipe, as constructed, flowing full is 500 cfs.

Appellant made much of the fact that on July 25, 1975, during the course of the hearings on this matter, a heavy rain storm occurred and the homes that Mr. Cole had said would be flooded were not flooded. Appellant pointed out that the Butler substation recorded a rainfall of 1.8 inches between the hours of 5 and 6 PM on that day. According to Mr. Cole's figures, this would be a ten-year storm and the basements of the four houses below the culvert height would be flooded. Several residents testified that on July 25, 1975, as well as on June 24, 1975, (when the recorded hourly rainfall was 1.08 inches), it rained hard for approximately 20 minutes and then drizzled and that a number of yards along the creek were flooded. Mr. Cole repeatedly made the point that in order to determine what has actually occurred in a particular watershed you must have high water marks, which you can then relate to the rainfall records to get an idea how much rain actually fell. Obviously, particularly in the summertime, it may rain very hard one place and not another even within the same watershed (especially where as here the bottom end of the watershed is a flat, open area and the upper part of the watershed is surrounded by steep hills). The fact that 1.8 inches of rainfall was recorded at the Butler substation does not necessarily mean that 1.8 inches of rain fell in the drainage area above the culvert. Similarly, on July 25 and 26, 1973, when flooding of the homes occurred, it may have rained more than 1.35 inches in the upper portion of the watershed above the culvert, or the flooding may have been caused by a surge of water or a blockage of the pipe as appellant's engineer suggested, and/or the amount of runoff that the pipe had to handle may have been increased by the runoff from the intermediate school site which was then under construction but is now handled by a detention basin. The point is that although the actual recorded rainfall for any particular hour is useful for some purposes, it cannot be used to establish as a fact exactly how much rainfall fell on a particular place unless it was actually measured at that very spot. Mr. Cole used the

rain gauge data to confirm his observations and calculations based on the high water marks left after the 1973 storm, not to prove that any exact amount of water fell in the watershed above the culvert on that date.

Somewhat contradictorily, appellant argued and presented some evidence that there had been constant flooding in the West Butler Creek watershed over the last 40 years and that there was flooding prior to the placement of the fill and culvert by Mr. Pawk particularly downstream in the immediate area around Mr. Pawk's bowling alley and hotel. It was not really disputed that there was and is flooding both downstream and upstream from the area of these particular houses along West Butler Creek.[4] Indeed some of the residents testified that there had been flooding of their own backyards and Mr. Cole stated that there would necessarily be such flooding. The point is that before the placement of this fill and culvert these particular residents along West Butler Creek experienced only minor flooding and no flooding of their homes. Since the culvert and fill have been in place there has been increased flooding of the yards, and in connection with a relatively minor storm, flooding of the basements of a number of houses. We must conclude that the presence of the fill and pipe as constructed constitute a threat to the property and even lives of these residents, and that consequently, the culvert must be removed and the channel altered so as to assure that the stream is capable of passing a 50-year storm without flooding the houses, and, for that matter, the yards. Although the residents must expect minor flooding in low land around the creek, we do not see why they should have to endure frequent flooding of their gardens and sheds as the consequence of appellant's development of his property.

In view of the quite overwhelming evidence that the culvert is inadequate to handle the present projected runoff for a 50-year storm it is clear that the department's order of February 25 , 1974, ordering the removal of the culvert

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4. Some water in some yards along the right bank occurs because in a heavy rainstorm the stream jumps its bank upstream and water may flow across Lewis Avenue and back to West Butler Creek in gulleys down through several of the right bank properties. This condition is caused in part by obstructions such as footbridges placed across the stream by property owners upstream and is not in any way appellant's fault or responsibility. There are two highway culverts upstream from the right bank properties. According to Mr. Cole's calculations, culverts B & C have adequate capacity to pass projected flood waters. Culvert A has an entrance condition that probably makes its capacity inadequate, but Mr. Cole did not calculate that because of his observation that the stream would jump the bank above culvert A in a heavy storm. However, the fact that culvert A might be inadequate if the stream were to flow through it, does not affect appellant's obligation to provide a sufficiently sized channel and waterway opening on his property.

and alteration of the channel to compensate for the loss of overbank is authorized under the applicable statutory law. The Water Obstructions Act gives very broad power to the department for the administration of the act.

Section 1 of the Act (32 P.S. 682), provides, in relevant part, that:

> "...it shall be unlawful for any person...to construct any dam or other water obstruction,[5] or to make or construct or to permit to be made or constructed, any change therein or addition thereto; or to make, or to permit to be made, any change in or addition to any existing water obstruction; or in any manner to change or diminish the course, current, or cross-section of any body of water...without the consent or permit of the Water and Power Resources Board,[6] in writing, previously obtained, upon written application to said board therefor.".[7]

Section 3 of the Act, (32 P.S. 683) provides that each application for the consent or permit required by Section 2 of that Act "shall be accompanied by complete maps, plans, profiles, and specifications of such water obstruction... and such other data or information as the [board] may require."

Section 4 of the Act (32 P.S. 684) specifically provides that the Commonwealth shall have the power to "incorporate in and make a part of" the consent or permit "such conditions, regulations, and restrictions as may be deemed by it advisable." Moreover, Section 4 states that:

> "It shall be unlawful to construct or begin the construction of any such water obstruction...except in accordance with the terms, conditions, regulations, and restrictions of such consent or permit..."

Under Section 7 (32P.S. 687), any violation of the Act constitutes a misdemeanor, subjecting the violator to either or both a fine of $1,000.00 and imprisonment not to exceed one year.

The Department of Environmental Resources, as successor to the Water and Power Resources Board, is authorized to direct the removal or change of any water obstruction or any other change in the course, current or cross-section of a stream (whether temporary or permanent):

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5. The term "water obstruction", is defined by Section 1 of the Act (32 P.S. 681) as including "any dam, wall, wingwall, wharf, enbankment, abutment, projection, bridge, or similar or analogous structure, or any other obstruction whatsoever, in, along, across or projecting into or being in any stream or body of water wholly or partly within, or forming part of the boundry of, this Commonwealth..."

6. Now the Department of Environmental Resources. (See §1901-A and §1908-A (d) of the Administrative Code, 71 P.S. §510-1 and §510-8 (d). The duties of the Water Supply Commission referred to in the original Act were transferred to the Water and Power Resources Board by the Act of June 7, 1920, P.L. 498, as amended by the Act of April 13, 1927, P.L. 207; these duties were in turn vested in the Department of Environmental Resources by the 1970 amendment to the Code.

7. See also §1904-A (2) of the Code, 71 P.S. §510-4 (2),

> "If the [department] shall determine that [a] dam or water obstruction is unsafe or needs repair, alteration or change in its structure of location, or should be removed as being unsafe and not susceptible of repair, or for any reason is derogatory to the regimen of the stream, the [department] shall, in writing, notify the owner or owners thereof to repair, alter, change its structure, or remove the same, as the exigencies of the case may require..." Section 5 (32 P.S. §685).

The Act further provides that neither the express nor implied permission of the Commonwealth to the construction of a water obstruction shall prevent the exercise of these powers by the department.

> "It is the legislative intent that the provisions of this act shall extend to and include all types of water obstructions, regardless of the date when they were constructed and whether or not the same were constructed by permission, express, or implied, of the Commonwealth, or of any authorized agency thereof, and whether temporary or permanent, and to all changes in the course, current or cross-section of any stream or body of water, whether such change be temporary or permanent...." Section 7 (32 P.S. 687).

The department is given broad discretion in issuing orders under the Act:

> "The [department] is authorized and empowered to...issue such orders, not inconsistent with this act, as it may deem necessary and proper for carrying out the purpose of this act." Section 7 (32 P.S. 687).

The department also based its order on §1917-A of the Administrative Code, Act of April 9, 1929, P.L. 1929, *as amended* by the Act of December 3, 1970, P.L. 834, No. 275, 71 P.S. §510-17, which provides that the department shall have the power and duty "to order such nuisances including those detrimental to the public health to be abated and removed". In this case we believe that once it is established that the left bank fill and the culvert create a greatly increased risk of flooding to the homes along the right bank and are in violation of the Water Obstructions Act, the elements of public nuisance have been established within the doctrine that "(a) legislative prescription...is declarative of the public policy and is tantamount to calling the prescribed matter prejudicial to the interest of the public". *Pennsylvania SPCA v. Bravo Enterprises*, 428 Pa. 350, 237 A.2d 342, 348 (1968), citing *PUC v. Israel*, 356 Pa. 400, 406, 52 A.2d 315, 321 (1947). The department has the power to determine that a nuisance exists and to order its abatement. *Elias v. Environmental Hearing Board and Department of Environmental Resources*, 10 Pa. Commonwealth 489, 312 A.2d 486, 488 (1973). Although water obstructions are not declared to be nuisances by the Water Obstructions Act itself (which would clearly authorize an order under §1917-A of the Code), it would appear to us that the creation of increased flooding hazard to a number of homes along a stream is the essence of a public nuisance. *Bravo Enterprises, Inc. v. SPCA, supra.; Borough of Tyrone v. Stevens*, 178 Pa. 543, 36 A 166 (1897).

The left bank fill clearly constitutes an obstruction within the definition of the Water Obstructions Act (which includes "any...well...enbankment, abutment...or similar or analogous structure, or any other obstruction whatsoever...along...any stream or body of water", 32 P.S. §681). The department's order directs appellant to deepen and widen the channel to compensate for the loss of overbank caused by the placement of the fill. Such an order is within the department's power as "necessary and proper for carrying out the purposes of the act" under §7. See, by analogy, *Ramey Borough v. Commonwealth of Pennsylvania, Department of Environmental Resources*, ____ Pa. _____, 351 A.2d 613 (1976) and *Pennsylvania Human Relations Commission v. Alto-Resto Park Cemetary Association*, 453 Pa. 14, 306 A.2d 881 (1973).

There is also no question but that the order to compensate for the loss of overbank may be directed to Mr. Pawk. Although he was not the owner of the property at the time the fill was placed there, it was he who placed the fill through his contractor with the owner's agreement. Section 2 of the Act (32 P.S. 682) would authorize an order against Mr. Pawk as the creator of the fill whether or not he owned the land. However, at the time the order was issued he was also the owner of the property upon which the fill had been placed. Under common-law nuisance prinicples, as well as under the Act, appellant is responsibile as a property owner for maintaining on his property a condition that he created, which has become harmful to the public. *Bortz Coal v. Air Pollution Commission*, 2 Pa. Commonwealth 441, 279 A.2d 388, 384-395 (1971); *Commonwealth v. Barnes and Tucker Company*, 455 Pa. 392, 319 A.2d 871, 884 (1974); *Clearview Land Development Company, Inc. v. Department of Environmental Resources*, 15 Pa. Commonwealth 303, 327 A.2d 202, 205 (1974); Restatement of Torts, §824.

The evidence established that the culvert is unsafe and derogatory to the regimen of the stream within the meaning of §5 of the Water Obstructions Act, and that it interferes with the free passage of flood waters. Consequently, an order to remove it is clearly authorized by the act. The only question is whether either the permit for a culvert or the consent order from the Butler County Court in any way estopped the department from ordering removal of the culvert and the deepening and widening of the channel.

As to the permit, the statute provides in §7 *supra*, that the statute applied to water obstructions whether or not they were constructed "by permission expressed or implied of the Commonwealth or of any authorized agency thereof...". Furthermore, the provisions of appellant's permit quoted above authorize the

department's order for removal of the obstruction if in the opinion of the department it causes an "unreasonable obstruction to the free passage of floods". Appellant consented to the permit conditions, which require that he remove the obstruction at his own expense. While we do not think that he should be required to do so upon any but the most convincing showing of hazard, it is clear that he may be required to do so. Especially may he be so required where it is established that the pipe was installed on a nonconforming slope that diminishes the capacity of the culvert flowing full. Sections 4 and 5 of the Water Obstructions Act, *supra*, authorize the department to order removal where a permitted obstruction is installed incorrectly.

Appellant frequently argued that the work that was done under the terms of the consent decree to repair the culvert was in effect approved by the department and that that estops the department from ordering removal. It is true that appellant, through his engineer Mr. Wright, complied with the terms of the consent order by reconstructing the culvert and stabilizing the fill. Mr. Wright frequently notified the Department of Forests and Waters of the progress of the work, and the department did not disapprove of it. In fact, the letters between the department and Mr. Wright indicate that the department affirmatively approved the procedures for stabilizing the fill. While the prior consent order may estop the state from ordering removal of the fill it previously ordered stabilized, the Commonwealth is not arguing that the previously stabilized left bank fill be removed. Instead, it asks that the stream channel be deepened and widened to compensate for the loss of overbank. So far as the culvert is concerned, there is no question that it would have been more fair to Mr. Pawk to order him to take the culvert out, back in 1970, rather than now; however, it is apparent that the nonconforming slope and the inadequate capacity of the pipe were not discovered until Mr. Cole began his investigations. The state cannot be estopped by what it did not know—especially where life and property are threatened as a consequence of its ignorance. See *Commonwealth v. Western Maryland R. R. Co.*, 1377 Pa. 312, 105 A.2d 336 340-41 (1954), cert. den. 348 U.S. 857.

Appellant has not raised any question as to the validity of the provisions of the Water Obstruction Act. It is questionable whether he could since the validity of that Act has been upheld in *Water and Power Resources Board, etc v. Green Springs Co.*, 394 Pa. 1, 145 A.2d 178 (1958). We address that issue only so far as to say that within the limits of reasonableness the state must be empowered to order removal of water obstructions, even if previously permitted, if they are shown to constitute a threat to peoples' lives and property. Here we find the department's order to be well supported by evidence and we must

sustain it. We express the hope, however, that the department will do its utmost to assist appellant in developing a sound and economic design for the channel and a bridge, if, as the testimony suggested he could, he chooses to replace the culvert with a bridge.

CONCLUSIONS OF LAW

1. The left bank embankment was constructed by the appellant in violation of Section 2 of the Water Obstruction Act of June 25, 1913, P.L. 555, *as amended*, 32 P.S. 682.

2. The maintenance of the embankment constitutes a threat to the lives, safety and health of the public and a public nuisnace.

3. The department is authorized by Section 5 of the Water Obstruction Act, 32 P.S. 68, and Section 1917-A of the Administrative Code, 71 P.S. 510-17, to direct that the stream be restored to its original flood-carrying capacity prior to the construction of the fill.

4. The department is authorized by both the act and the code to direct the order to the appellant because he was the owner of the embankment at the time the order was issued and because he constructed the unlawful embankment.

5. The maintenance of the culvert constitutes a threat to the lives and property of residents along the right bank.

6. Although a permit for the culvert was issued by the Water and Power Resources Board, the department is authorized by Section 5 of the Act, 32 P.S. 685, and Section 1917-A of the Code, 71 P.S. 510-17, to compel the appellant to remove the culvert at his own cost where it is shown to be installed at a non-confirming slope and to be inadequate to carry flood waters.

7. The Commonwealth is not estopped by the prior consent decree from ordering removal of the culvert and alteration of the stream channel.

O R D E R

AND NOW, this 13th day of May, 1977, the appeal of Michael Pawk is dismissed. Appellant shall take action as required by paragraph 1 of the order by August 15, 1977 , and shall comply with the terms of paragraph 2 of the department's order by September 15, 1977 .

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: May 13, 1977
vf

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In the Matter of:

ALAN WOOD STEEL COMPANY

Docket No. 73-368-B

AIR POLLUTION ABATEMENT PLAN

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

PROPOSED ADJUDICATION

By Robert Broughton, Hearing Examiner, May 26, 1977

This case is an appeal by Alan Wood Steel Company (Alan Wood) from a decision of the Department of Environmental Resources (department) denying approval in part of Alan Wood's proposed plan for the control of particulate emissions from its coke oven plant in Conshohocken, Montgomery County, Pennsylvania.

On June 1, 1972, the department issued Air Pollution Abatement Order No. 72-548 (Order No. 72-548 or more frequently simply order) to Alan Wood. This order was arrived at after negotiation, was consented and agreed to by Alan Wood, and must be regarded as a contract between Alan Wood and the department. Said order required Alan Wood to take certain interim measures to control visible emissions from its coke oven operations and further provided for "final standard" as follows:

> "On or before July 1, 1976, Alan Wood shall operate its by-product coke ovens in such manner that there shall be no visible emissions other than water mist or vapor in excess of No. 1, Ringelmann or twenty (20%) percent equivalent opacity for a period or periods aggregating more than three (3) minutes in any one hour from charging, coking, and pushing operations of any battery of by-product coke ovens."

this standard will hereinafter be referred to as the "order standard".

Alan Wood was required by the terms of the order to submit to the department for approval an air pollution abatement plan setting forth the steps to be taken to achieve compliance with the standard described in Paragraph 5. Within the schedule of the order, Alan Wood submitted to the department a document entitled "Alan Wood Steel Company, Coke Ovens, Air Pollution Abatement, Docket No. 72-548" (hereinafter). [illegible] for the control of charging emissions, the

control of pushing emissions, and the rebricking, inspection, and patching of coke oven doors.

By letter dated October 11, 1973, the department notified Alan Wood of its disapproval of that portion of the plan that concerned the control of pushing emissions, and its approval of the portions concerned with charging and door emissions. Alan Wood appealed the department's disapproval of the pushing emissions portion of the plan to the Environmental Hearing Board.

Six days of evidentiary hearings before Robert Broughton, Esquire, hearing examiner, were conducted on October 22, 23 and 24, November 18 and 19, and December 23, 1974. Alan Wood presented five witnesses for its direct case: Richard Jablin, Director of Engineering and Environmental Control, William F. Kemner, Manager of Environmental Control, Stanley H. Piotrowski, Superintendent-Coke and Chemical Plant, William J. Morris, an independent consultant trained in visual emission observation, and Lewis Felleisen, Chief-Technical Support, Environmental Protection Agency Air and Water Division, Region III. The bureau presented three witnesses: James K. Hambright, Chief, Division of Abatement and Compliance, Robert J. Clark, Air Pollution Control Engineer, and Bernard Bloom, previously Special Technical Consultant of the Allegheny County Health Department. In rebuttal, Alan Wood called as a witness Thomas DiLazaro, Air Pollution Control Engineer of the bureau presently on leave of absence. The board observed the operation of the batteries on October 23, 1974.

In the course of a hearing on the merits of the department's disapproval, Alan Wood amended its plan to include certain elements designed to predict "green" pushes that might be in violation of the order standard.

After the record was initially closed, brief-writing was delayed, and the entire case came up for decision at a time when Alan Wood's amended procedure had been tried out for a considerable period of time. The board therefore reopened the proceedings, to take additional opacity readings and a second visit to the plant was made by the hearing examiner on December 11, 1975. A visit was made at the same time by the hearing examiner's successor on the Environmental Hearing Board, Joanne R. Farnworth, Esquire. Hearings were subsequently held to introduce the opacity records from that visit and inspection, on January 20, 1976, and March 3, 1976.

The reopening of the record to take additional readings was subject to enough adverse comment—both official and unofficial[1]—that a word or two explaining the action seems in order at this time. The situation at the time the record was re-

1. A formal objection was made at the January 20, 1976, hearing. A letter was also written by one strike force attorney to the general Chairman of the Pittsburgh District, United Steelworkers of America. A [illegible] meeting in Washington, D.C., specifically to [illegible].

opened was that, as of the last hearing before that action Alan Wood had just initiated a pre-push rating sytem (discussed in some detail below) whereby it was attempting to look at certain indicators of whether or not the coke in an oven was completely coked out and likely or unlikely to produce significant emissions prior to pushing. If there were indicators of probably significant emissions then that oven would not be pushed until it had been coked for an additional period of time. A very rudimentary "study" had been presented at the final hearing, on December 23, 1974, which the department rightly argued was not based on sufficient time or data to be really meaningful.

Nevertheless it was suggestive—suggestive enough that when the hearing examiner studied the notes and material preparatory to the writing of a proposed opinion, he felt that the only reasonable conclusion possible was to remand and require additional study by the department and Alan Wood of the entire proposal, including the pre-push rating system. Such a remand would have meant that any possible new hearings on a possible future disapproval by the department, in whole or in part, would have started from scratch, however. It appeared that might delay a solution to the problem almost indefinitely. It was thought that reopening the record would resolve the matter somewhat faster. Although there is no specific provision for such a procedure in the board's rules, the propriety of taking additional evidence that the examiner believes will be useful to the resolution of a matter is supported by section 35.128 of the general rules of administrative procedure, 1 Pa. Code §35.128, which provides:

> "§35.128. Additional evidence.
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> "At any stage of the hearing the agency head or the presiding officer may call for further evidence upon any issue, and require such evidence to be presented by the party or parties concerned or by the staff counsel, either at that hearing or at the adjournments thereof. At the hearing, the agency head or the presiding officer may, if deemed advisable, authorize any participant to file specific documentary evidence as a part of the record within a fixed time, expiring not less than ten days before the date fixed for filing and serving briefs."[2]

Two other factors entered into the decision to reopen. First, the hearing examiner, at least, had little confidence in the method of accumulating time during

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2. By virtue of Rule 21.1 (c) of the rules and regulations of the Environmental Hearing Board, the general rules apply to proceedings before the Board.

which emissions over 20% lasted—a reading every 15 seconds, with the assumption made that the instantaneous reading was continued for 15 seconds. This is known as "EPA Method 9", and will be discussed more fully below. See the testimony of Bernard Bloom, an air pollution engineer and expert on coke oven air pollution problems with the Environmental Protection Agency (EPA), December 23, 1974, Tr. 169-171. Since all the opacity readings in the record, by whichever party submitted, used EPA Method 9, there was little in the way of what were felt by the hearing examiner to be trustworthy opacity readings in the record upon which to base any conclusions.

Second, despite a general tendency to agree with James K. Hambright, Chief, the department's Division of Abatement and Compliance, Bureau of Air Pollution and Noise Control, that the Order standard is tough enough to require that every aspect of Alan Wood's operation be controlled to the maximum extent possible, (see Commonwealth Statement No. 1 Finding of Fact No. 9) the Board is somewhat predisposed against requiring large expenditures for heavy equipment unless that is really necessary. The most elegant solution to a problem, after all, [3] is the simplest. Rather than bludgeoning the emissions out of existence, Alan Wood is attempting to devise a fairly sophisticated information system to prevent them. While it was realized that trying out the simpler system would mean a postponement of installation of equipment beyond July 1, 1976, (the date when the Order standard was to become effective), it also appeared that Alan Wood would probably not miss the standard by very much, if it did miss, so that the increased air pollution would not be catastrophic.

As will be seen from this opinion the December 11, 1975, visit and the subsequent hearings did clarify a lot, although it did not completely resolve as much as we hoped it would. It did help us, however, to devise some criteria for resolving the remaining questions—hopefully clearly enough to obviate the necessity for further litigation. If this is true than the case is probably farther along at this time than it would have been without the reopening.

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3. If anything about a coke oven can really be called elegant.

FINDINGS OF FACT

1. Appellant is Alan Wood Steel Company.

2. Alan Wood is an integrated steel manufacturer operating a plant on the east and west side of the Schuylkill River near Conshohocken, Montgomery County, Pennsylvania. Its facilities include two operating batteries of coke ovens, blast furnaces, sinter plant, basic oxygen furnace and rolling mills, with total production of approximately one million tons of steel annually.

3. As part of the steel-making process, Alan Wood operates coking facilities on the west side of the Schuylkill River in Upper Merion Township.

4. At these coking facilities, coal is transformed into coke through destructive distillation in a horizontal retort (coke oven) in the absence of air.

5. Each of the two operating coke oven batteries (Battery No. 3 and Battery No. 4) at Alan Wood contains 55 ovens arranged in slot type configuration much like a row of books with its long axis horizontal. The ovens are 10 feet tall, 40 feet long and an average of 18 inches wide (about 17 1/2 inches at the pusher end and 18 1/2 inches at the coke end).

6. Alan Wood's batteries are of the Koppers regenerative type design, and are approximately eight to ten years old. Batteries #3 and #4 were installed in 1966 and 1967 respectively.

7. Between each oven and at each end of each row of 55 ovens is a brick heating wall containing 26 flues that heat the oven indirectly through the wall.

8. At operating capacity, the flues are heated to approximately between 2300° Farenheit (F) and 2500° F, depending on the duration of the coking cycle (which in turn depends on the level of production).

9. Coal is removed from coal storage bins and carried to the coke ovens via a "larry car".

10. The coal is then placed (charged) in the ovens through lids in the roof of the battery above each oven.

11. The charge to each oven is 11.9 tons (English) of coal. Because of the design of the flues, if less coal is charged, damage to the oven--and ultimately increased air pollution--is likely to result. Therefore variations in production rate must come from variations in the duration of the coking cycle (the shorter it is, the more ovens can be pushed per day; the longer it is, the fewer ovens can be pushed).

12. After the oven is charged, the "coking cycle" starts. During the coking cycle the coal goes through various stages of carbonization, a chemical and physical transformation in which volatile by-products, or gases, are driven off and the coal agglutinates into larger lumps of almost pure carbon.

13. The volatile materials are exhausted from the ovens through stand-pipes (or ascension pipes) that are connected to a collector main—one running the length of each battery—the connection being made through a curved pipe called a "gooseneck". From the collector main the gases are piped through a crossover main to the by-product chemical plant. Collectively all this is referred to as the "offtaking piping"; the term usually being limited to the connections from the oven to the collector main. The by-product coke oven gas is an important source of energy for Alan Wood. Other by-products are collected as "coal tar" and used as a basis for various chemical products.

14. The "push" occurs at the completion of the coking cycle when a pusher machine drives a ram through the length of the oven, discharging the coke "cake", approximately 8 1/4 tons of coke, from the oven through a "coke guide" across the coke-side bench to the receiving car (or "hot car" or "quench car"). The coke is then transported in the hot car to a nearby quenching tower, where it is cooled by water sprays.

15. The "coke side" of the battery is the side out of which the coke is pushed. The hot car is located on this side to receive the hot coke. The "pusher side" of the battery is the side from which the coke is pushed. The pusher car, with its pushing ram, is located on this side. At Alan Wood, the collector main is located on the pusher side.

16. During the carbonizing period, gases evolving from the coal produce inside the oven a pressure of approximately 30 to 50 millimeters of water at the outset, diminishing through the cycle. Overall oven pressure is controlled by a valve—called an "askania valve"—located in the crossover main. Alan Wood attempts to maintain a pressure of 5 millimeters of water in the collector main.

17. At the extreme ends of the slot type ovens are the push side and the coke side doors, located above the benches that run along the sides of the battery.

18. After the coal is coked, the oven is "taken off" the collecting main and the doors are removed on both ends of the oven by a door machine and door extractors.

19. After the push, the doors are closed—or replaced—by machine. Since the doors at Alan Wood are luted typed doors, a "luteman" applies a compound called

"luting material", somewhat the consistency of fairly wet clay, around the perimeter of the door to contain leaks.

20. After the luting has been applied, the oven is ready to be recharged.

21. Alan Wood's two batteries are significantly smaller than those in most major steel plants. The typical installation in Pennsylvania includes 70 to 100 ovens per battery, with ovens 12 to 20 feet high, charging up to 20 tons of coal per oven. With more ovens operating, such batteries typically have five to six push operations and an equal number of charge operations per hour. Each push represents approximately 12-14 tons of coke, instead of 8 1/2 tons at Alan Wood.

22. The possible emissions in coke oven battery operations include charging emissions, door emissions during the coking cycle, pushing emissions, topside emissions during the coking cycle, and stack emissions during the coking cycle. Stack emissions typically occur on older batteries when cracks in the oven walls permit the escape of volatiles to the heating flues—a problem that does not occur at Alan Wood because of the age of the batteries and the Company's comprehensive maintenance program.

23. Of these possible emissions, it is generally agreed that charging emissions are potentially the greatest in volume, consisting of clouds of smoke varying in color, that rise when the coal hits the hot oven walls. Emissions during the coking cycle are primarily related to door leaks, although stack emissions and "topside leaks" from various elements of the offtake piping and brickwork on top of the oven are included here. Pushing emissions are second in volume, though much less than charging, and include abraded coke particles in a range of particle sizes, and gases that evolve from combustion of coal and volatilization of incompletely coked coal fractions during removal from the oven. There is considerable dispute, and relatively little in the way of hard facts, over the exact relative magnitude of these emissions. Approximate relative magnitudes are sufficient for our purposes.

24. By all accounts pushing is not the major contributor to total coke oven emissions, although it cannot be called trivial. The Environmental Protection Agency (EPA) in February 1972 published a "Compilation of Air Pollution Emission Factors" for various industrial sources, which reports an emission factor of 0.6 pounds of particulate from pushing operations per ton of coal charged in by-product coke plants. A United Nations publication reports 0.49 kg of emissions per metric ton of coal charged in pushing. Finally, German studies with a hooded hot car have produced an estimate of 0.46 pounds per ton of coke in pushing emissions. The

board has little confidence in the meaningfulness of any of these factors, since, as Bernard Bloom stated (December 23, 1974, Tr. 163-167, and March 3, 1976, Tr. 185) the emission factor will differ with the greenness of the push. Pushing emissions are so variable—especially when partially controlled, as at Alan Wood—that no average emission factor can have meaning for very many pushes.

25. Pursuant to the Air Pollution Control Act,[4] the Pennsylvania Department of Health (predecessor to the Department of Environmental Resources) issued an Order to Alan Wood in 1970 dealing with sources of particulate and visible emissions, including the coke oven batteries. In compliance with this Order, the substantive provisions of which were agreed to by Alan Wood, various steps were taken including work to control charging emissions through modification of the larry car, to introduce sequential charging, and to improve the operation of the ascension pipes and goosenecks.

26. In 1971, while this program was in progress at Alan Wood, the bureau called a meeting of all coke oven operators subject to its jurisdiction to demand compliance with a substantially more extensive and stringent proposed order. After extended negotiations, the bureau and Alan Wood agreed to the issuance of Order No. 72-548 dated June 1, 1972.

27. Order No. 72-548 provides interim and final standards for visible emissions from Alan Wood's coke oven batteries. The interim standards are not relevant here. The final standard, contained in paragraph 5 of the order, is quoted in full in the beginning of this adjudication.

28. Order No. 72-548 was based upon a determination by the department that emission or air contaminants from the charging, coking, and pushing operations at Alan Wood's by-product coke ovens caused air pollution in violation of the provisions of the Air Pollution Control Act, *supra*, and Chapter 123 of the regulations of the department. Said order was based upon a further determination that emissions from the charging, coking, and pushing operations at Alan Wood's by-product coke ovens are inimical to public health, safety, and welfare and unreasonably interfere with the comfortable enjoyment of life and property. The order, including this language, was not appealed from. Indeed, the Order, as already noted, was consented to and agreed to by Alan Wood.

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4. Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001 *et seq.*

29. Alan Wood was required by the terms of said order to submit to the department for its approval, on or before August 31, 1973, an air pollution abatement plan setting forth the steps to be taken to achieve compliance with the standard described in paragraph 5.

30. On August 29, 1973, Alan Wood submitted to the department a document entitled "Alan Wood Steel Company, Coke Ovens, Air Emission Abatement, Docket No. 72-548" (hereinafter plan).

31. Said plan contained provisions for the control of charging emissions, the control of pushing emssions, and the rebricking, inspection, and patching of coke oven doors.

32. Part II of the plan outlined Alan Wood's intent to control visible emissions from pushing operations by use of the following operating techniques referred to in the hearings and sometimes in this adjudication as the "Clean Push Program"):

> "1. All ovens shall be coked for the full operating cycle of 16-1/2 hours charge to charge. Ovens will be dropped from the schedule during upsets to avoid a decrease in coking time.
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> "2. Oven heating controls will be maintained in good operating condition and flue temperatures will be monitored frequently.
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> "3. The present patching and maintenance program will be continued. Records will be kept of repairs.
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> "4. Goosenecks will be kept clean to allow free passage of gases from the oven to the collecting main.
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> "5. Door refractories will be maintained in first class condition to avoid this cause of 'green ends'."

33. By letter dated October 11, 1973, the department notified Alan Wood of its disapproval of that portion of the plan that concerned the control of pushing emissions. That letter (since its specific contents are relevant to certain of the issues) is quoted in part:

> "In review of the proposed abatement program, the Department finds that:
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> I. Control of Charging Emissions - The proposed control plan is acceptable to the Department.
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> II. Control of Pushing Emissions - The company's proposal for a program of control based on best operating practice is not acceptable to the Department.
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> III. Coke Oven Doors - The proposed maintenance program used in conjunction with luted doors should control emissions from this source.
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> "It is expected that any system utilized to control air pollution from coke oven operations will provide for full compliance with all applicable Occupational Health Standards.
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> "Alan Wood Steel Company has not submitted an abatement program which can be approved by the Department. Failure to submit an approved plan can be construed as a violation of the order.

"Please revise your plan where needed as indicated in this letter and resubmit it to the Department on or before October 6, 1973."

34. In his testimony Mr. Hambright expanded on the bureau's reasons for rejecting Alan Wood's Push Program, testifying: "In order to achieve compliance, Alan Wood will have to achieve the most effective control it can attain over each aspect of its coke oven operations. The more control that can be achieved over pushing emissions, the more latitude that remains for emissions from charging operations, door leaks, and stack emissions . . . . Over a period of time, the ovens may gradually deteriorate and it will become increasingly difficult for the company to achieve clean pushes." (Commonwealth Statement No. 1)

35. Alan Wood appealed the department's disapproval of the pushing control portion of the plan. This adjudication relates that appeal.

36. Subsequent to disapproval by the department, and in the course of the hearings on the merits of the department's disapproval, Alan Wood amended its plan to include a pre-push rating and recoking program consisting of the following elements:

> "In every case where a) excess gas comes off the gooseneck when dampering off an over; b) the lidsman removing the lids sees that the top of the oven looks black; c) a heater discovers a very low temperature on a particular wall adjacent to an oven ready to be pushed; or d) the pusher or door machine operator sees a very dark color on the ends of the oven after pulling off the doors, the foreman would be consulted, the doors would be replaced, and the coal would be recoked."

37. In August and September, 1974, the department and Alan Wood independently took opacity readings of pushing emissions at Alan Wood with qualified smoke readers. These opacity readings are inconclusive because they were based on the use of EPA Method 9, which requires smoke reading at 15 second intervals rather than a continuous reading, which we conclude is a more precise method for reading fugivtive emissions such as these. Although these tests are not completely reliable, they did indicate that at a coking cycle in the range of 22-25 hours, Alan Wood's pushing emissions with opacity greater than 20% ranged at the highest average between 1 to 2 minutes per hour.

38. At the view and opacity readings taken by the board's order on December 11, 1975, there were three qualified smoke readers: Robert Clark of the department, William Morris of Roshagel, Associates, Jr., for Alan Wood, and Francis Boinski of Betz Laboratories for Alan Wood. Because of the slow demand for steel and, consequently, coke at that time, the ovens were being run on a 36 hour coking cycle. The observations of each of the smoke readers, who all used a continuous smoke reading method at the request of the examiner, were as follows:

"Battery 3

Mr. Clark: average of 12.7 seconds per push ≥ 30% opacity.

Mr. Morris: average of 21.2 seconds per push > 20% opacity.

Mr. Boinski: average of 32.0 seconds per push > 20% opacity.

"Battery 4

Mr. Clark: average of 16.8 seconds per push ≥ 30% opacity.

Mr. Morris: average of 23.5 seconds per push > 20% opacity.

Mr. Boinski: average of 32.0 seconds per push > 20% opacity."

Mr. Clark's readings were over 30% opacity so as to allow for the 7 1/2% margin of error that is permitted for smoke reader certification.

39. At the December 11th view, the department also had a smoke reader reading door emissions. His observations were as follows:

"BATTERY #	TIME	NUMBER OF MINUTES ≥ 30% OPACITY
3	9:15 - 10:15	26.5
	10:15 - 11:15	8.1
	2:15 - 3:15	52.9
4	8:15 - 9:15	11.3
	11:15 - 12:15	29.6
	1:15 - 2:15	47.5"

40. Charging emissions can probably be reduced, by use of stage and a great deal of care, to less than 100 seconds in any one hour, per battery.

41. Door emissions can probably be reduced, by use of a very great deal of care, to 15 to 20 seconds in any one hour, per battery.

42. Pushing emissions at Alan Wood can probably be reduced, through careful application of the Clean Push Program as described in the testimony in conjunction with the pre-push rating and recoking program, to less than 60 seconds in any one hour.

43. Air pollution control technology capable of capturing and containing air contaminants generated during pushing operations is available for retrofit to working coke ovens.

44. One such control system, a "hood", is a movable device attached to a manifold along the side of the battery. The device encloses the push area and the hot car that receives the coke cake. The key elements of pushing control through a hood system are containment of the pushing emissions, volumetric air flow through the manifold to the propellant, and cleaning of the captured gas by an electrostatic precipitator or scrubber at the end of the exhaust process.

45. An alternate control system, a "shed", is a fixed garage-like structure that covers the entire coke side of the battery and exhausts emissions to a scrubber or

scrubbers (or other device for taking particulate matter out of the gas stream). Shed systems exist at Inland Steel, Bethlehem Steel in Burns Harbor, Indiana, Zollverein in West Germany, and Great Lakes Carbon Company at St. Louis, Missouri, and are currently under construction at other coke plants.

46. An advantage of the shed as a means of control is not only the complete containment of pushing emissions, regardless of the degree of opacity, but also the control of coke side door emissions.

47. It is possible for a positive control system to reduce pushing emissions over 20% negiligibly close to zero.

48. A hood or shed, or any other control device, would not be "free" in terms of environmental, energy, or economic costs. Any such control device would cost several million dollars to install, and would require substantial amounts of energy to operate. Production of the energy will produce some non-trivial amount of air and/or water pollution. There was insufficient evidence to arrive at a firm figure for either energy or dollars, but both appear to be substantial enough to warrant looking carefully at other alternative ways to solve the problem of pushing emissions prior to installing equipment.

DISCUSSION

This case presents one primary issue: Was the Department of Environmental Resources acting reasonably in denying approval of Alan Wood's proposed Clean Push Program , as it was framed initially or as it was amended during the hearing?

Approval might reasonably be denied if the probability of compliance with the relevant standard is low. The relevant standard is, we believe, the standard contained in paragraph 5 of the consent order of June 1, 1972, agreed to by Alan Wood and the department and quoted in full at the beginning of this adjudication. The possibility of applying a different standard was discussed by both parties, and will be discussed later in this adjudication.[5]

The basic standard of paragraph 5 of the order calls for emissions over 20% opacity to be not more than 3 minutes in any hour. Within the context of this case, several different modes of uncompliance may be identified: (1) Pushing emissions over 20% by themselves might exceed 3 minutes; (2) Pushing emissions over 20% by themselves might be less than 3 minutes, but total emissions over 20% might exceed 3 minutes because of emissions from other sources (each of which was also less than 3 minutes)[6]; (3) Pushing emissions over 20% might be less than 3 minutes, but the total would exceed 3 minutes even if pushing emissions were zero, because emissions over 20% from one or more other sources exceed 3 minutes.

Since we are dealing with predicting the future, which no one can know with certainty, we cannot deal with certainties, but must deal with probabilities, and we must frame the issues in those terms. We might decide that the department was unreasonable if the probability of compliance with the standard is high enough with Alan Wood's proposed Clean Push Program that it would be unreasonable at this time to insist on the slightly greater probability of compliance that might result from some other program.

But the probability of compliance must be treated separately for each of the cases analyzed above. If we could say that the probability was very high that pushing emissions over 20% would by themselves exceed 3 minutes, then we would have

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5. Alan Wood argued for an "as good as possible" standard if we found that the order standard as literally written was unattainable by any means. As indicated in part by Finding of Fact No. 44, *supra*, we are satisfied that the order standard is attainable.

The department argued that the regulations, §123.1 and §123.41 would be applicable even given order no. 72-548. We disagree, with some limitations on our disagreement. The question will be discussed at some length below.

6. For example, door emissions might be 1 1/2 minutes, charging emissions 1 1/2 minutes, and pushing emissions 1 minute, for a total of 4 minutes.

no problem holding that the department was reasonable in denying approval of Alan Wood's pushing proposal. And the hearing and litigation process would not have taken so long.

But things are never that simple. The evidence showed that case (3) represents the current situation—pushing emissions over 20% do not now exceed 3 minutes, but door emissions over 20% would cause total emissions over 20% to exceed 3 minutes even if pushing emissions and charging emissions were zero. Neither party believed this would be the ultimate situation. The department felt that the probable situation would be case (2)—other emissions over 20% would not exceed 3 minutes, but would be great enough that pushing emissions would have to be kept as close to zero as possible in order to keep total emissions over 20% under 3 minutes (See Finding of Fact No. 33).

It is difficult to say how low the department felt pushing emissions over 20% could be kept with Alan Wood's proposal, but it does seem fair to say that the department did not think pushing emissions over 20% would themselves add up to more than 3 minutes. At least if that was its reason for denying the plan approval no one suggested it. Nor did the evidence tend to suggest it. Indeed the evidence tended to suggest a range of one to two minutes.

Alan Wood felt that pushing emissions over 20% could be kept below about one minute (their expressed ultimate expectation was 30-40 seconds) and that a determined effort would put other emissions under 2 minutes. As indicated in the Findings of Fact the board is satisfied that equipment to collect the emissions could be installed which could bring pushing emissions over 20% opacity negligibly close to zero.

Therefore, if other emissions could indeed be kept below 2 minutes the range of dispute is between a total of 2 minutes of emissions over 20% (1 minute less than the standard) and 4 minutes of such emissions (1 minute more than the standard). That is an oversimplification, however, since the 2-4 minutes includes all sorts of emissions, and therefore requires a consideration of not only the nature of pushing emissions but also the nature of other emissions from the battery, even though Alan Wood's plan for controlling these has been approved.

Those emissions are: (1) Leaks (generally denominated "topside emissions") from charging ports, goosenecks, and assorted points on the topside of the ovens. (2) Emissions from the waste heat stacks. (3) Emissions connected with the process of charging the ovens. (4) Door leaks. Topside emissions, stack emissions, and door leaks are classified as emissions "during the coking operation" of a battery.

Of these, only door leaks and charging emissions were testified to as constituting significant problems. That testimony was confirmed by the two visits taken to the plant by the hearing examiner and one by board member, Joanne R. Denworth. Topside leaks were generally not significant and stack emissions were generally non-existent. Furthermore, the Alan Wood batteries are not very old, and are in good condition. Maintaining them free of topside leaks should not present any serious problem. Stack emissions should be similarly maintainable at an approximate zero level with no great difficulty. Stack emissions are caused by (a) something going wrong with the combustion system, so that fuel is carbonized instead of being completely burned, resulting in black emissions from the waste heat stack; or (b) leaks of volatile matter from the coal being driven from the oven through cracks in the wall into a flue, resulting in an overly rich fuel mixture, which again leads to incomplete combustion and black emissions from the waste heat stack. Reducing these is a maintenance problem, and Alan Wood's maintenance program was accepted by the department as being adequate to keep stack emissions at virtually zero. It is worth noting that many of the actions proposed for control of pushing emissions (which are designed to keep the heating system operating efficiently) would also tend to limit stack emissions.

Charging emissions present a greater problem. Even Alan Wood anticipates about 1.7 minutes of emissions over 20% from charging. Alan Wood proposed stage charging, with a jumper pipe, as its method of control of charging emissions, and the department accepted this.

Staged charging is basically an operating technique whereby the coal is discharged from the larry car one hopper at a time, all the charging holes being covered except the one being used. The idea is to keep the inside of the oven under negative pressure relative to the outside atmospheric pressure (suction), so that the large volumes of smoke generated when the coal first hits the hot oven walls will be contained and delivered to the collecting main instead of escaping to the outside air. Suction is provided by a steam aspirator in the gooseneck of each oven. Maintaining that suction requires that all other openings into the oven be kept closed, and also that some way of providing suction at the end of the oven away from the collecting main be provided.[7] The latter, in Alan Wood's case,

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7. The reason for this is that when the coal is being poured in from one of the middle hoppers (in Alan Wood's case the middle hopper) it may block the air passage between the top of the coal and the top of the oven. If no alternate pathway is provided, then volatile matter being driven off the coal in the end of the oven away from the collector main will be expelled into the outside air.

is being provided by a jumper pipe that connects the third hole on the oven being charged to the third hole on the adjacent oven, which has been nearly completely coked, and therefore has relatively little gas evolving.

Alan Wood's problem with charging is in maintaining suction. Partly this is a problem of overall collector main pressure. Both times the hearing examiner was at the plant there were difficulties with collector main pressure. The first time the problem was with the main fans, a problem corrected shortly after that visit. The second time the problem was that the askania valves in the crossover mains did not adjust quickly enough when steam was turned on for aspiration just prior to charging. That resulted in a sudden rise in pressure in the collector main, and a sudden volley of leaks from many doors along the battery where the charging was to take place. That is a specific problem that undoubtedly will have to be solved in order to meet the final standard.

Generally, the impression from both the testimony and the visits, as well as from the literature[8] is that the main problem with effective stage charging is keeping the suction high enough. One problem is that any emission at all is almost certain to be greater than 20% opacity at the point of highest opacity. The point of highest opacity will ordinarily be right where the leak occurs, before the plume has dispersed at all. It is this fact that led to the contention on the part of Alan Wood that charging emissions should be read only against the sky, viewed across the top of the larry car. We are not satisfied that Exhibit J-3, the letters from counsel for Alan Wood to the department is sufficient evidence to justify a finding that that specific method of reading charging emissions was part of the agreement embodied in order no. 72-548. These letters will be discussed more fully below. For the moment, suffice it to say that just as a matter of contract law there does not appear to us to have been a meeting of the minds on that subject. The failure of the department to reply to the letter in question is subject to too many possible interpretations for us to conclude that it signified agreement to bind the Commonwealth.

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8. See, e.g., Munson, John G., Jr.,; Lewis, Robert E.; Weber, George T.; and Brayton, William E., "Charging Emission Control By Use of Stage Charging", 24 Journal of the Air Pollution Control Association 1059 (Nov. 1974); Clark, Frank M., "Stage Charging on a Single Collector Main Battery: A Total System Concept" paper presented to the 1975 Ironmaking Conference.

It does seem clear, however, that variations in techniques for measuring opacity may make considerable difference in the measurements obtained. The techniques should therefore have stability, in the sense that the obligations of Alan Wood under the order do not shift substantially without the sort of procedural safeguards that attend a change in regulations or legislation.[9] Presumably the techniques for measuring compliance with the order should also be related to the purposes of the order and of the Air Pollution Control Act, *supra*. This question will be discussed below, with measurement techniques for charging, doors, and pushing discussed together.

Doors present another major problem for Alan Wood. Alan Wood's batteries have luted doors, which means that the doors are sealed by having workers manually trowel a luting compound—somewhat the consistency of fairly moist clay—into a groove around the perimeter of the door. Luted doors are contrasted with self-sealing doors, which seal when a metal-to-metal contact between the door and the door-jamb clogs up with coal tar released—volatilized—during the coking process.[10] Luted doors, where the luting—and thus the basic sealing process—takes place before the charge, should theoretically allow much better control of door leaks than self-sealing doors.

The weakness of luted doors is that as the luting compound is heated, simultaneously being subjected to pressure from inside the oven, it tends to dry, and crack as it does so. Most such cracks will in time seal themselves with coal tar released from the coal being coked in the oven in the same way as a self-sealing door. But that takes time, and if the 3-minute standard (and the purposes of the Air Pollution Control Act, *supra*,) is to be met it is required that such leaks be resealed more quickly. That can be done in most cases by taking an approximately one-inch steel bar with a curve on one end and using the convex surface of the curve to tamp the

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9. In some other areas, for example, measurement techniques are specified in the regulations. See 25 Pa. Code §§139.4, 13-.11-139.14. With respect to opacity readings, the regulations do specify a general technique, but nothing specific enough to be clarifying in this situation. §123.43 of the regulations provides as follows:

> "Visible emissions may be measured using:
> (1) any device approved by the Department and maintained to provide accurate opacity measurements; or
> (2) observers, trained and qualified to measure plume opacity with the naked eye or with the aid of any devices approved by the Department."

10. It should be noted that this is an oversimplification of the number of possible sealing types possible. Some new ideas are summarized in H. W. Lownie and A. O. Hoffman Study of Concepts for Minimizing Emissions from Coke Oven Door Seals, EPA-650/2-75-064, July, 1975. Jones & LaughlinSteel Corporation is trying a nitrogen filled channel seal experimentally at its Pittsburgh Works. The above two basic types—buted and self-sealing—are sufficient for our purposes here. However, Mr. Bloom's testimony relative to a number of plants with self-sealing doors that are about leakless should also be noted (December 23, 1974, Tr. 172-175).

still damp luting compound into place in such a way that it re-seals. (The hearing examiner experimentally did this himself once on the December 11, 1975, visit to the plant.) In extreme cases new and/or additional luting compound may need to be applied.

All of this requires manpower, and that takes money. On at least one occasion when the department had an inspector at the plant such manpower was not present. (See Commonwealth Statement 5, p. 5.) The same was true during the December 11, 1975, visit to the plant taken by the hearing examiner. At that time there was one luterman and one pusher-helper on the pusher side of the ovens, with only the latter being available, part-time, for reluting and tamping. On the coke side of the oven there were two workers, neither of whom had any significant time available for reluting or tamping. Testimony was that there was one person "floating" between the two sides with the job of doing the tamping and reluting for the entire plant. He was not up to the task. Granted that the entire plant was not in full scale operation at the time, it would appear that where the potential for air pollution does not decrease in the same proportion as production, Alan Wood would perceive that and refrain from cutting back such personnel proportionately. The fact that Alan Wood either did not perceive that, or did not act on whatever perception it had, is one of the big reasons making the board hesitate to believe that Alan Wood can consistently make operating and maintenance procedures effective for control of pushing operations.

Nevertheless it remains true that if sufficient manpower is applied to the problem very few door leaks[11] need continue for longer than several seconds.

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11. The exception being leaks that occur when there is a major blockage of gas passage from the oven into the collector main, or a major gas blockage elsewhere.

Given the ease of curing door leaks, we have to find that door emissions can be reduced at Alan Wood, to easily less than 30 seconds and probably less than 20, provided Alan Wood can bring the problem of excessive oven pressures under control. We do so find, even given some lingering doubt as to Alan Wood's perceptive ability, and/or strength of will to reduce them to 20 seconds.

With respect to pushing, Alan Wood's plan—denominated by the Clean Push Program —is based on the proposition that the overwhelmingly largest proportion of emissions from pushing are caused by incompletely coked coal. The baking of coal to make coke may be analogized to the baking of a cake. It cooks from the outside in, and if it is underdone there may be problems when it is taken out of the oven. With coke the degree of underdoneness is termed the degree of "greenness", and the problems when it comes out of the oven are much more dramatic. "Green" coke has a lot of volatile matter in it which, when it hits the atmosphere upon being pushed, goes up as a cloud of smoke.

Certain points of difference between our analogy are instructive. A cake is baked at 300°-400° Farenheit, surrounded by an atmosphere of normal air. One heat source, usually, heats up the entire chamber. A little water, and some aroma, may escape into the kitchen, but mainly the changes taking place involve the binding of water and the setting of various protein molecules in such a way to make the cake stick together. Coke is baked at 2300°-2500° Farenheit. If it were surrounded by an atmosphere containing oxygen the coal would be burned—oxydized to CO_2 —instead of converted to coke. A great deal of material is driven from the coal in the process of coking—approximately one third of the total weight of the coal charged. Rather than one heat source, a coke oven—or specifically, Alan Wood's coke ovens—has a row of 26 verticle flues between each oven (as well as on each end of each battery).

This volatile material will be almost entirely driven off if the coal has been completely coked. If the coke is underdone or green then there will be "significant" emissions when that green coke is pushed. With 26 flues, of course, it may well be that only one part of the coke mass[12] is green, and that only slightly green.

Since (1) there is no heat being applied directly to the ends of the oven, and since (2) the brickwork on the flues at the ends of the oven is subject to a large thermal shock every time the doors are removed and then replaced, resulting in greater damage to those "end flues" than to the other flues, "green ends" are probably the most common pushing emission problem. Green ends can be recognized by a dark puff of particulate matter coming off at the beginning and/or end of the pushing process—when

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12. Referred to sometimes as the "coke cake".

the coke cake first starts out of the oven, and/or when the last bit is coming out.

If it can be assured that the coke mass will be heated evenly all the way through, all the time, then there will be no emissions due to green coke, and the only pushing emissions will be due to particles of the coke itself abrading from the coke cake as it is pushed. Those emissions are clearly not zero, though there was considerable dispute (but very little evidence) as to just how great they were. James K. Hambright, the representative of the department who signed the letter from which this appeal is taken, and who is extremely knowledgable on a variety of air pollution problems including coke ovens, testified that at one plant, the Interlake Steel Company plant at Erie, Pennsylvania (now operated by Koppers Company), such abrasion emissions were substantial. That is a foundry coke plant; the coking cycle is much longer (resulting in almost no green coke); but the coal mix is also different, which may have some effect in increasing abrasion emissions. Whether it does or not is, at least on this record, speculative. What is not speculative is that while the abrasion emissions were substantial with just about every push at that plant (this observation is based both on Mr. Hambright's testimony and on the fact that the hearing examiner here was at the Interlake-Erie plant at the same time as Mr. Hambright) the emissions from pushing at the Alan Wood plant are in most cases relatively insubstantial, and what emissions there are show indicia of being due to greenness rather than abrasion. (Such indicia are, e.g., green ends that smoke while in the hot car, and an occasional puff from the middle of a coke cake where one or two of the middle flues did not heat well enough.)

Based on this record, we feel justified in concluding that abrasion emissions will not cause a failure to meet the order standard. If greenness can be controlled, it would appear at this point that pushing emissions will indeed be negligible.

Greenness is controlled by making sure that the coking is accomplished at the right temperatures for the right amount of time. (Again like a cake in an ordinary oven, there may be problems from overdoing as well as underdoing it.) With 26 flues on each oven wall to keep track of, the job of determining that all parts of the coke mass have been coked at the right temperature for the right amount of time is monumental. Actually, it is easy enough to tell by watching the push—heavy smoke emissions would indicate greenness. But that only tells whether the job *has been* done. The public interest—and the reason for requiring prior approval of a program for controlling emissions—lies in the prevention of emissions,not in observing them and perhaps imposing fines or civil penalties afterwards. If the only time one could tell that adjustment, maintenance, or repair were needed was when a push took the battery over

the standard, then it would be fairly clear that Alan Wood's program would not work.

The really hard task is determining that the job *is being* done, during the coking cycle. Fortunately for Alan Wood's idea, there are a lot of determinants of that ideal "right temperature for the right time" that can be kept track of without having to wait and see if the pushes violate the standard.

Heating becomes inadequate because something goes wrong with the heating mechanism, or because the heat escapes somewhere. If heat escapes it will lead to someplace with a lower temperature. Ordinarily this will be through the doors to the outside air, not into a flue.[13] If something goes wrong with the heating system it will ordinarily be (1) because the gas or air flow to the bottom of one or more of the flues becomes clogged—either from dirt in the gas or debris falling from above—or (2) because something has gone wrong with the pumps delivering gas and air to the bottoms of the flues, or (3) because gas from inside the coke ovens is leaking into one or more of the flues, making the mixture too rich and preventing efficient combustion.

The main things to keep track of, then, are defects in the brickwork on and around the doors, flue temperatures, gas and air pressures, cracks in the oven walls, and the amount of time each oven is in its coking cycle at the appropriate temperatures. This, in fact, is what Alan Wood's plan calls for. See Exhibit A-W J-2 quoted in Finding of Fact Number 32.

The principal bone of contention is whether Alan Wood can in fact monitor flue temperatures and oven heating controls sufficiently closely to insure—in advance of a push—that the opacity of emissions will be below 20% almost all the time.[14] If it were possible to continuously monitor all flue temperatures during the entire coking cycle on all ovens, then it ought to be possible to rather consistently insure complete coking. In fact, of 2,912 flues on the coke oven plant, both batteries, two types of monitoring is done on each shift: (1) Two complete lines of flues (112 on the pusher side and 112 on the coke side, inspecting one flue in each crosswall, the entire length of both batteries) are checked by removing the flue cap and taking the

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13. Unless something as drastic as a total blockage goes wrong with the heating system, the flues should be the source of heat—i.e. heat should be radiating from the flue to the oven, not vice versa.

14. If emissions over 20% from pushing are to be kept below about one minute, then emissions from each push will have to be kept below 15-20 seconds, based on 3-4 pushes per battery per hour.

temperature with an optical pyrometer.[15] (2) Two complete crosswalls (26 flues in each crosswall are checked, again by removing flue caps, this time visually inspecting the flue to see whether it appears to be functioning properly, whether the gas nozzle at the bottom needs to be cleaned or repaired, whether the brickwork needs to be repaired, and so on.

As the temperatures are taken and crosswalls inspected anything that is amiss is corrected.

But at the rate of one crosswall inspection per shift, done on three shifts per day[16], that means each crosswall will be looked at approximately once every 15-20 days. The line checks—one flue in each oven—could result in checking every flue approximately once every 6 1/2 days, if done on two shifts as it is now. A lot can go wrong in 15 days, however—or even in 6 1/2 days. Reasonable assurance of complete coking requires a better information system than that.

Alan Wood seems to have realized this, because midway through the hearings an additional information source and operating procedure was added. Prior to each push Alan Wood proposed to have the push "pre-rated" by plant personnel as to whether that push is likely to produce emissions over 20%. The pre-rating is based on (1) observations of emissions from the gooseneck lid when it is opened and the oven dampered off from the collector main (if there are emissions fron the gooseneck lid, that indicates volatile matter is still being driven off and the coke has therefore not been baked through); (2) observations of the coke through the charging holes (if it is dark, or if there is appreciable smoke in the tunnel head—the air space between the top of the coal and the top of the oven—that indicates the coke is not completely baked through); and (3) observations of the ends of the coke cake when the doors are taken off (if the ends are hard, that indicates incomplete coking, possibly "green ends"). The push is rated A (okay), B (possibly had), or C (probably quite bad). If the rating

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15. An optical pyrometer provides a color scale that is compared with the color of the inside of the flue. It is based on the principal that as temperature changes, the color with which the brickwork glows will also change.

16. There was some vagueness in the testimony as to whether this was done on 2 or 3 shifts—we will for the moment assume 3. Green pushes can occur on the night shift as well as during the daytime, even if opacity cannot be read then.

is C then the oven is taken out of its normal sequence, a check of the crosswalls made and any problems corrected, if possible, and that oven is coked (recoked) for an additional time.

There are three major problems with this program. The first major problem is the ability and/or willingness of Alan Wood to take more than a certain number of ovens out of their regular sequence if very much goes wrong. This is not merely a problem of ease of operations. Ordinarily the ovens are pushed in a sequence whereby every 9th oven will be pushed. The ovens, in fact, are numbered with the 10's left out (1-9, 11-19, 21-29, etc., with numbers 10, 20, 30, etc., missing) so that the workers can more easily keep track of the normal sequence. (Thus every 9th oven will be, e.g., numbered 2, 12, 22, etc., or 3, 13, 23, etc.) If ovens are taken out of the normal sequence, their coking times are adjusted so that after several cycles they will be back in sequence again. (Alan Wood committed itself to making this adjustment a lengthening of the normal coking time, rather that a shortening—that will potentially cut down on production, but will also cut down on emissions since, *certeris paribus*, longer coking times are associated with more completely coked coal.) The problem is that if very many ovens start being taken out of sequence, then the problem of the workers' keeping track of what ovens are to be pushed at what time may become severe, and the probability of an oven being pushed at entirely the wrong time (e.g., in the middle of its 16 1/2 hour coking cycle) may go up alarmingly.

Given the pre-push rating system, that difficulty should not be a serious one, however. Any oven that was seriously green when about to be pushed should be detected and not pushed—at which point someone ought to find out that it is incompletely coked not because something is wrong with the heating system but because it wasn't scheduled to be completely coked.

The second problem is that Alan Wood will need time to develop in its personnel a very high degree of sensitivity to the various possibilities for green pushes. To date the only tests of this sensitivity that have been introduced on the record have been under circumstances where the people making the rating would have had other clues to what the ratings ought to be—in terms of the tests being given, they already knew the right answers. There is no *a priori* basis for doubting that it is possible to develop such sensitivity, however.

The real question is, are the indicia of greenness sufficiently strong so that any reasonable degree of sensitivity will allow the pre-push rating to be meaningful. Alan Wood says yes, and points to the series of pushes on December 11, 1975, four of which were predicted as poor (a "B" rating) and were certainly poor enough that

frequent pushes of that quality would prevent attaining compliance with the order standard. Alan Wood also pointed with some pride to its record on that day of (taking the observations of Robert J. Clark, the principal coke oven investigator and observer for the Commonwealth) an average of less than 15 seconds per push of emissions over 20% opacity).

The department makes two replies to that. First, the "test" of the pre-push rating system was defective in that the raters knew in advance which pushes were coming out of schedule and therefore "ought" to look bad. Unconscious bias can creep into any judgment made under those circumstances—that is the reason psychological testing is made not only "single blind" (where the subject does not know whether he is part of the experimental group or the control group) but "double blind" (where the person administering the test does not know either). Given that this test of the pre-push rating system was not even single blind, however, we still think the test was sufficient to suggest that the pre-push rating system may work, and that—absent other reasons—there ought to be a further opportunity to see whether it can work prior to requiring the expenditure of a large amount of money and energy to install an alternate sytem.

The other argument of the department related to the rather clean pushes from all of the "A" pre-push rated pushes. The coking cycle on December 11, 1975, when these pushes were observed, was approximately 36 hours. William F. Kemner, an environmental engineer for Alan Wood, testified that it was his understanding that coking for a longer time at a lower temperature, and that, given the lower temperature, variations in coking time should have the same effect as variations in coking times at higher temperatures and shorter times. As a general proposition that seems plausible, and the same conclusion is supported generally by earlier testimony. Given the analogy with ordinary cake baking, even recognizing the somewhat different character of what is occurring in the oven, one wonders whether that inverse time-temperature relation holds over the entire time range from 16 1/2 hours to 36 hours. The record permits no more than wondering, however.

Bernard Bloom, a technical advisor on coke ovens on the staff of the Environmental Protection Agency, testified based on observations at the Burns Harbor Coke Oven Plant of Bethlehem Steel Corporation and at the Great Lakes Carbon Coke Oven Plant at St. Louis, that there appeared to be a far stronger correlation between coking temperature and emissions. Objection was made to receipt of this testimony on the ground that the raw data was not supplied—citing *Peters v. Mutual Life Insurance*

Company of New York, 107 F.2d (1932). The department cited *Commonwealth v. Thomas*, 444 Pa. 436, 282 A.2d 293 (1971), in rebuttal, arguing that an expert may rely on outside tests if the data is of the sort customarily relied upon by that sort of expert. At the hearing the examiner admitted Mr. Bloom's testimony, based in part on the *Thomas* rationale and in part in the proposition that Alan Wood had had ample opportunity to seek from Mr. Bloom and/or the department the backup data in question. Nevertheless there are problems with the weight to be accorded the testimony. We do not, for example, know exactly what variables may be regarded as held constant for purposes of either the temperature or time data. For example, Great Lakes Carbon is a foundary coke oven plant: what difference does the different coal mix, generally longer coking times, and the like have on the nature of the variability of pushing emissions as a function of either time or temperature.

Again as with the first argument, an element of doubt has been introduced. But there seems to be a likelihood that Alan Wood may well be able to succeed. We think the public interest is served by giving them a full opportunity to try.

We are mindful of the fact, as noted by Mr. Hambright, that the very purpose of the permitting and pre-approval process contemplated respectively in the regulations and in the order is prevention. One should try to do what is necessary to prevent pollution before it occurs, rather than bring legal action after it occurs. We do not think our action here destroys the integrity of that purpose.

Furthermore, we are also mindful of the strictures of *Bortz Coal Co. v. Commonwealth*, 2 Pa. Commonwealth Ct. 441, 279 A.2d 388, (1971) that we balance economic factors into our decisions. The installation of positive control equipment is expensive, requires energy, and the production of energy entails some substitute pollution. Hopefully there is a net gain.

There was a good deal of argument about just what the net gain might be—what the appropriate emission factor for pushing is, what pollution might be produced in the course of energy production to operate a control device, etc. A perusal of the literature on emission factors from coking, including those sources admitted over objection from the department, convinces us that Bernard Bloom is right when he said (March 3, 1976, Tr. p. 185) that there are various emission factors for pushing, depending on the degree of greenness. To come up with one figure, from any study, even if one knows the parameters of that study (testing procedure, type of coal, length of coking cycles etc.) is going to be misleading.

What we do know about Alan Wood is that giving the Company some additional time to prove out (or disprove out) its proposed operating procedure is not likely to

cost a great deal in terms of air pollution, compared with the benefits (economic and other) if Alan Wood's technique can be shown to work. That additional time should be limited, and some definite criteria set for deciding whether the procedure does or does not work. We will attempt to set such a time and such criteria. But put in terms of the initial statement of the question, the probablity of success of Alan Wood's plan seems high enough, taking into account the environmental costs both of continuing that program and of installing positive control equipment, and the economic costs of installing control equipment, that it would be unreasonable *at this time* to require the immediate installation of control equipment. However, some effort should be made by Alan Wood to explore types of positive control devices for installation at its batteries here—preliminary engineering is not so heavy a burden that it is unreasonable to require the company to go forward with this immediately. The probability of success of Alan Wood's plan is not so high as to preclude that.

It should be noted that one factor that influences us to allow more time is the factor emphasized by Lewis K. Felleison in his testimony on October 24, 1974, Tr. 6. That is that it is our judgment that the management of Alan Wood is committed to pollution control, and has a good enough relationship with its operating personnel—union workers—to be able to motivate them to participate fully in the pollution control efforts at the coke oven plant as a spirit of cooperation. If the management-union relationship were worse, then an operational-maintenance control program requiring as high a degree of fine tuning as this one would probably not work. As put by Mr. Felleison: (October 24, 1974, Tr. p. 6)

> "There is one other thing that is not touched upon too much in here that I would like to add. That is, my opinion was based upon observations; however, in addition, I considered other factors. One of them is the continuance of Alan Wood's management to motivate its operating personnel. That is [for] both supervision and the bargaining people to minimize emissions. This, of course, would mean that Alan Wood management's philosophy towards pollution control would have to continue as it is. If there is [are] changes in these, in my opinion, very probably there would be changes in the amount of emissions."

Whether the techniques that we think may work at Alan Wood will work at other plants is therefore highly doubtful. Management philosophy, employee relationships, present condition of the battery[17], size of the battery[18], all will have an impact. We emphasize, therefore, that we are deciding only this case.

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17. As noted, Alan Wood is in the position of seeking to improve an already good maintenance program on batteries that are presently in good shape. An ill maintained battery might well be in such poor shape that it would be almost impossible to bring it up to compliance, short of rebuilding from scratch.

18. It should be noted that Alan Wood's batteries are not so large as many of the batteries in the Commonwealth—it should therefore be easier to comply as there are fewer pushes per hour.

That leaves two open questions that must be dealt with, one of which could modify our above conclusions considerably: (1) The question of techniques for measuring compliance with the order standard. (2) The question of the applicability of 25 Pa. Code §123.41, or alternatively §123.1, in addition to or instead of the order standard.

Techniques for measuring compliance with the order standard have already been mentioned as a problem. Alan Wood contended, through the offering of Alan Wood Exhibit J-3, that the agreement was entered into with reference to certain techniques for measuring emissions, and hence for measuring compliance with the order standard. Exhibit J-3 consists of two letters from Kenneth R. Myers, counsel for Alan Wood to Hershel J. Richman, then counsel for the department. One of these is dated March 20, 1972, and contains the following paragraph:

> "It is our understanding that compliance of emissions from coke oven doors will be determined by inspection, viewing across the roof of the coke oven battery. Similarly, emissions in the charging process are to be viewed across the top of the larry cars. We agree that it is not necessary to include these details in the Order itself."

The second is a cover letter along with which the agreement that sets forth order no. 72-548 was returned, signed by Alan Wood. That letter reads in full:

> "Under separate cover, Mr. Burgoyne of Alan Wood Steel Company is transmitting to you Order No. 72-548, dealing with abatement of air emissions at the Company's coke ovens. The Order has been executed on behalf of the Company.
>
> "May I take this opportunity to confirm our understanding of the methods that will be used to determine compliance with paragraph 5, which provides a limit of three minutes in any hour for certain emissions from charging, coking and pushing operations. Based on our discussions with Mr. Hambright, we understand that if a luted door is found to be leaking, the Company's luterman must take prompt action to relute the door. However, if he does so the unavoidable emissions during the period from detection until the door is effectively sealed will not be considered in determining whether total emissions from the battery comply with the three minute standard."

There was considerable resistance to the admissions of these letters as having probative value to prove that the department committed itself to particular testing methods. We are inclined to agree. The Commonwealth, the board has held, is subject to estoppel.[19]

In this case, the testimony was that Alan Wood sought to have a testing method specified in the written agreement and the department resisted. There is no custom, certainly, of including such a specification in written agreements like this one. (There are so few of them that a custom would be hard to find one way or the other.) On the other hand, as noted above, just what the order standard means could vary considerably with the measuring technique. It is for this reason that testing methods are specified for certain emissions in the regulations. See 25 Pa.

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19. *Commonwealth of Pennsylvania, Department of Environmental Resources v. Bednar and Wolford*, EHB Docket No. 73-351-W, issued January 25, 1974; *Commonwealth of Pennsylvania, Department of Environmental Resources v. Flynn*, EHB Docket No. 74-138-W, issued October 31, 1974, affirmed, 21 Pa. Commonwealth Ct. 264 (1975); *Commonwealth of Pennsylvania, Department of Environmental Resources v. Conley*, EHB Docket No. 72-440-W, issued May 3, 1973.

Code §§139.4, 139.11-139.14. The methods for viewing fugitive-type emissions from coke ovens was not settled in 1972 when this order was agreed to. See e.g. the testimony of Mr. Hambright, December 23, 1974, Tr. 202-203. The only possible reason the department would have for resisting the inclusion of viewing techniques in the order was that it did not want to get tied down. Its oral specification of observation methods—as referred to in Alan Wood, Exhibit J-3—accompanied by an unwillingness to be bound in writing can therefore not be taken as a binding agreement, but rather as an indication of their then current thinking.

It does not follow, however, that the matter should be left unresolved by us at this time. Techniques of reading emissions should be such that Alan Wood's obligations under Order No. 72-548 do not shift randomly, and should be such that the purposes of the Air Pollution Control Act are promoted. The purposes of the Air Pollution Control Act are specified in §2 of the Act[20], 35 P. S. §4002, as follows:

> "It is hereby declared to be the policy of the Commonwealth of Pennsylvania to protect the air resources of the Commonwealth to the degree necessary for the (i) protection of public health, safety and well-being of its citizens; (ii) prevention of injury to plant and animal life and to property; (iii) protection of the comfort and convenience of the public and the protection of the recreational resources of the Commonwealth; and (iv) development, attraction and expansion of industry, commerce and agriculture."

Primarily what we are concerned with, from the standpoint of the effect of emissions on the first three, of these is not merely the opacity, but the total amount of particulate matter being emitted. Whether, for present purposes, we take the proper measure of that amount to be weight, volume, or number of particles, it seems clear that that amount is indicated to some extent by opacity. But it also seems clear that two equally opaque emissions may be emitting a different amount of particulate matter. Around a doorframe, for example, a very opaque stream may be coming from a pinhole, or the entire doorframe may be leaking. Similarly, during charging (as indicated by Robert T. Clark, principal coke oven observer for the department) there may be small leaks that are more than 20% opaque only under the larry car at the point of emission, and there may also be larger leaks that are more than 20% opaque over the top of the larry car.

For door emissions, the pinhole leak will probably not count towards a possible violation of the three minute standard, at least not if it is near the bottom of the door, because readings are taken between the top of the door and the top of the oven. The distance may well be enough for sufficient dilution to have taken place to reduce opacity below 20%. Where the entire door is leaking, this

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20. As amended by the Act of June 12, 1968, P. L. 163.

probably will count—the volume is large enough so that, even diluted somewhat, it will be over 20% opacity. The 20% opacity standard thus is an indicator not merely of the density of emissions at the point where there is a leak, but also of the amount of particulate matter being emitted. For doors, we are satisfied that that is as it should be. Mr. Clark testified that he did not think that reading just over the roof the battery would make much difference—it would be a foot or so higher, only. Further, on the pusher side, where the collector main is located, reading above the roof at the oven would be very difficult.

For charging, both the large and the small leaks are counted equally. This, it seems to us, is not as it should be. Nevertheless, the emissions coming from charging are (judging in part from the testimony and in part from the visits) often substantial, and they are not emitted into any kind of conduit.[21] Dispersing in the open air, subject to scattering by the wind, it is possible for even somewhat voluminous emissions[22] from the charging lids to be diluted to the point above where they appear less than 20% when viewed across the top of the larry car. Nor does there appear to be some other intermediate point where such emissions might be viewed for standardization. We are inclined to think that the current method of making observations is legally plausible, provided that the observations of charging are accompanied by some sort of verbal (written in words) description of the quality of the emissions observed. Given that the opacity of leaks during a charge were to be viewed as, say 60% for 40 seconds, one would like to know whether that was a series of pinhole-type puffs (charging emissions can be very discontinuous—"puffy") or was the kind of emission that produces a large black cloud above the horizon. This Board in a civil penalty case, or Commonwealth Court in a suit to enforce the Order, ought to know where along the continuum between these extremes the company is performing. Whether or not the information can be meaningfully used in deciding whether there has been a violation, it would be vitally necessary to deciding what penalties to impose.

Before dealing with the measurement of pushing emissions we should deal with the two other issues: (1) Visual opacity measurement technique, and (2) the question of counting door emissions when reluting is performed promptly. First,

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21. Door emissions tend to be channeled upward between the adjacent buckstays—large I-seams used to hold the oven together. There is one buckstay between every two doors plus one on each end.

22. Emissions that would seem large if they were from a door, for example.

the method of making opacity readings is by using a terminal and a certified visual opacity reader, not by a Ringlemann Chart or a smokescope as suggested in *Bortz Coal Co. v. Commonwealth*, 2 Pa. Commonwealth Ct. 441, 279 A.2d 388 (1972). As has been made clear in subsequent decisions, see e.g. *United States Steel Co. v. Department of Environmental Resources*, 7 Pa. Commonwealth Ct. 429, 300 A.2d 508 (1973), visual tests of compliance may be made where other methods are essentially unavailable . . . (necessary) and where the visual test can be shown to be accurate with respect to indicating whether or not there is a violation. The question of necessity was not litigated here, and the record is largely devoid of evidence relative to this question.[23] Since it was not viewed we will not deal with it.

The question of accuracy is another matter. That was dealt with extensively. The department started by submitting evidence based on "EPA Method 9". This is a technique, developed for stack emissions, of judging how long smoke of a particular density is emitted from a given source. The certified opacity reader makes a reading of the opacity of the plume at a point in time—that is, the opacity at a particular instant—every 15 seconds. For emissions from a boiler stack, say, it is reasonable to add up the numbered readings and assume that each one represents continuous emissions at a particular level for 15 seconds. Finding the number of minutes of emissions over 20% opacity, therefore, becomes simply a matter of counting the number of readings greater than 20% and dividing by 4.

Boiler emissions have a continuity that makes this procedure meaningful. Coke oven emissions do not. Emissions from charging, for example, depend on whether, at a particular moment, the pressure inside the oven is positive or negative relative to atmospheric pressure. The examiner has seen it change several times during a 15 second period at Alan Wood. Each time pressure becomes greater than atmospheric pressure for a few seconds, there is a puff of emissions from one or more of the charging lids, or around the jumper pipe. Pushing emissions and door emissions are not quite as "puffy" as charging, but they are enough so that the classic EPA Method 9 does not seem to the board to be a reasonable way of assessing compliance with the standard, at least at a plant such as Alan Wood where the approach to compliance is (or can be) close. See also the testimony of Bernard Bloom, December 23, 1974, Tr. 169-171.

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23. See December 23, 1974, Tr. 258-260, for a little. It does seem clear that a Ringlemann Chart could not be used, given the shifting locations of emissions points. It would also seem difficult, if not impossible to use either a Ringlemann Chart or a smokescope on door emissions and many charging emissions, which are usually not black, but vary in color from dark brown to yellow.

The department apparently agreed, for at the December 11, 1975, observations the department used a method that had been developed by Bernard Bloom when he was with the Allegheny County Bureau of Air Pollution Control. This was to have the observer use a stopwatch, look continuously at the emissions, and punch the stopwatch on for those periods when emissions were of an opacity greater than 20%. For coke oven emissions, we are satisfied this gives far better accuracy than the classic EPA Method 9.

The other issue connected with accuracy is the possibility of human error. The certification testing by EPA involves viewing 25 black plumes and 25 white plumes, each at a different opacity—that opacity being measured by a transmissometer. Opacities are read in increments of 5%. For certification the average error[24] must be no more than 7 1/2%, and no single error may be more than 15%. Essentially what is done is that the human eye, regarded as a measuring instrument, is calibrated to a transmissometer with the certification standard being defined as the calibration accuracy. Since, over a period of time of looking at potential or active emissions from a charge or push, one is dealing with a large number of readings, it seems reasonable to treat the average error as the relevant statistic for applying corrections. During the December 11, 1975, visit to the plant, all department observers recorded an emission as a violation (i.e. they punched the stopwatch on) only when their reading of that emission was 30% or more. We think that reasonably accounts for the calibration error of the human observer.

With regard to the question raised by the June 7, 1972, letter from Kenneth R. Myers to Hershel J. Richman, whether door emissions should be counted at all if Alan Wood promptly relutes the door, we are convinced that would create more litigation problems than it would solve. Emissions during the period between a leak and tamping or reluting should count. Alan Wood can reduce that period to just about as short a time as it cares to and it should be Alan Wood's responsibility to do so. That will take more people than it had on hand on December 11, 1975, and may take more than it was indicated at the March 3, 1976, hearing (Tr. 214-217) would be on hand at full production load. Here as with charging, a verbal notation should be made on inspection reports by the department stating whether leaks are sealed promptly by tamping or reluting. Here such a notation would be helpful, without, we think, being necessary.

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24. The sum of the absolute value of each error divided by the number of readings.

The reading of pushing emissions by the revised method (with a stopwatch) seems reasonable to us, with one charge. The greater the contrast between the color of the emissions and the color of the background, the higher the reading is likely to be, and conversely the lower is that contrast, the lower are the readings likely to be. The certification test procedure calls the black emissions to be read against the sky, and for the white emissions to be read against a dark background. Greater contrast thus tends to produce accuracy, in the sense that greater contrast will be more like the calibration conditions. Errors because of the background tend to be in favor of the emittor. (For an extreme example, black smoke against a black background might not be seen at all.)

Where, however, the background is a light source, such as the sun, or such as a glowing mass of coke, then we think readings may turn out to be too high—the contrast may be too great, relative to the calibration conditions. We are especially concerned where the light background is something like the glowing mass of coke, either coming out of the oven or lying in the hot car, which glows unevenly, thus introducing the possibility of readings that are really a function of differential temperatures of the background. This is exacerbated when the parts of the coke mass that are emitting will be exactly those parts that are underdone—green—and hence at a lower temperature and darker. Add to that the fact that if one views the push from the bridge[25] at Alan Wood the background is "busy"—literally everything seems to be moving—and it would seem a large improvement in accuracy to require that viewing be done from the coke side bench. We so require.

The remaining question involves the applicability of the emission standards contained in §123.1, §123.41, or any other standard in the regulations.

Section 123.1 provides in relevant part as follows:

"§123.1. Prohibition of certain fugitive emissions.

"(a) No person shall cause, suffer, or permit the emission into the outdoor atmosphere of any fugitive air contaminant from any source except from:

. . .

"(9) Other sources and classes of sources determined by the Department to be of minor significance with respect to the achievement and maintenance of ambient air quality standards or with respect to causing air pollution."

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25. There is a bridge over the hot car tracks between the two batteries from which one can see any push, at varying angles of view below the horizontal depending on distance.

Section 123.41 provides as follows:

"§123.41. Limitations.

"No person shall cause, suffer, or permit the emission into the outdoor atmosphere of visible air contaminants in such a manner that the opacity of the emission is:

"(1) equal to or greater than 20% for a period or periods aggregating more than 3 minutes in any one hour; or

"(2) equal to or greater than 60% at any time."

Alan Wood argued that the only standard that applied to it was the order standard (quoted in full above, and the only standard discussed so far in this adjudication). The department argued that §§123.1 and 123.41 were both applicable. Alan Wood then replied that the only way of reading those two sections together in such a way as to be consistent (since one imposes a zero emission standard and the other a non-zero emission standard) is to view coke ovens as a source included under §123.1 (a) (9), at least after it is largely controlled, in which case §123.2[26] would apply to it and, under §123.42[27], §123.41 would not apply.

That argument seems to us to carry the desire for consistency farther than it is warranted. Whether §123.41 or §123.1 or §123.2 is/are applicable, the department has entered into an argreement with Alan Wood that is binding and enforceable, to

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26. Which provides as follows:

"§123.2. Fugitive particulate matter.

"No person shall cause, suffer, or permit fugitive particulate matter to be emitted into the outdoor atmosphere from any source or sources specified in items (1) through (9) of §123.1 (a) of this Title (relating to prohibition of certain emissions) if such emissions are:

"1) either visible, at any time, at the point such emissions pass outside the person's property, irrespective of the concentration of particulate matter in such emissions; or

"2) not visible at the point such emissions pass outside the person's property and the average concentration, above background, or three samples, of such emissions at any point outside the person's property, exceeds 150 particles per cubic centimenter."

27. Which provides in relevant part as follows:

"§123.42. Exceptions.

"The limitations of §123.41 of this Title (relating to limitations on visible emissions) shall not apply to any visible emission:

. . .

"(3) from sources specified in items (1) through (9) of §123.1 (a) of this Title (relating to permitted fugitive emissions)."

the extent that the Air Pollution Control Act, *supra*, allows the department to compromise the literal requirements of the Regulations in an enforcement context. We think the Air Pollution Control Act does allow this, with some limitations, provided the public interest—and the public trust[28]—in clean air—is not harmed thereby. The point was not litigated, but we see no indication that the public interest was harmed by this agreement. If at some future time it should appear that the public interest has been harmed or is then being harmed, then it will be time to deal with possible limitations on the validity of the agreement.

The limitations can be important in another possible future case. Section 6.1 of the Air Pollution Control Act[29] requires that the department, before granting a permit, must be satisfied that the permitted operation will comply with all applicable regulations of the Environmental Quality Board. When and if a permit is required for some aspect of Alan Wood's operation, that problem will come to fruition. At that point, §123.1, which does set a zero emissions standard, may well produce some serious problems. It was obviously not designed for coke ovens, although even more obviously all emissions from coke ovens other than stack emissions are fugitive emissions. And one wonders whether even a coke oven battery in compliance with the Order standard in this case could be brought under the exception in §123.1(a)(9).

Fortunately, we can leave that for another case—the applicability of §123.1 was argued, but need not be resolved in the context of this case. The Order standard tracks §123.41 with some modifications, and we think those modifications are reasonable at least as far as the validity of the Order standard is concerned.

Framing an order of our own presents a problem. One of the difficulties with this case was that the letter disapproving Alan Wood's pushing program approved Alan Wood's door and charging programs. Yet the crucial issue is the interrelationship between the three, both operationally and in terms of there being, a single 3 minute standard to apply to all operations on the whole battery. In order to determine whether installation of positive control equipment must be installed to control pushing emissions on the other hand, we must to some extent judge door emissions, charging emissions, and pushing emissions separately, even though we could in the end come around to agreeing with the department that pushing emissions must be

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28. As specified in Article I, §27 of the Constitution of Pennsylvania.

29. 35 P. S. §4006.1

collected because the sum of charging and door emissions over 20% opacity can be brought only barely within the three minute standard by themselves.

We are convinced, on the state of this record, that it is more probable than not that Alan Wood can meet the Order standard, with its proposed program. While the evidence does not permit us to attach a numerical value to our level of confidence, we are sufficiently confident that we think Alan Wood should be given a chance to prove its success. The reasons why we think it will probably be successful are set forth above, and include (1) the relative newness and good condition of Alan Wood's coke oven batteries, (2) the maintenance program already in existence and the apparent thoroughness of Alan Wood's inspection program to provide for the preventive maintenance necessary to insure complete coking, (3) the commitment of management to a working program, the willingness of the company to allow flexibility in devising techniques to do so, and the cooperative attitude of both union employees and management relative to doing what needs to be done to achieve compliance. This last factor is especially important, as already noted. If the workers—the people actually responsible for putting a complex program such as this into operations—were not also committed to make it work, no amount of commitment on the part of management, probably, would be enough.

We do think Alan Wood's program should be given some additional time to be proven. An infinite amount of time would not be appropriate, however—there is, after all, a greater than zero probability that it will not work, and clearly compliance with the Order standard should be achieved within some reasonably short time. We think all testing and inspection should be completed within 120 days of the date of this adjudication.

We are also convinced, however, that the probability is not so high that it is unreasonable to require Alan Wood to follow through with an investigation of pushing emission collection devices—which are in a state of development, with new improvements being made constantly—and make a decision on the best system for its batteries, and do some preliminary engineering, both within the same period of time we are allowing for further testing of the Clean Push Program. If Alan Wood's batteries are not in compliance by that time, and that non-compliance can be reasonably attributed to failure of the Clean Push Program (as amended) then positive control equipment will have to be installed, on a schedule to be worked out between Alan Wood and the department, but completed no later than July 1, 1978. (If such

equipment must be installed, Alan Wood will be expected to operate the Clean Push Program as well as possible in the interim. If in the interim Alan Wood is able to improve its operation and meet the order standard, then the equipment installation process may be abandoned. The possibility that improvement may be forthcoming shall not, however, be a reason, or an excuse, for failing to move forward expeditiously with the equipment installation process during that interim.

How shall a failure to meet the order standard be attributed to a failure of the Clean Push Program? Alan Wood's estimate for charging was 1.7 minutes (or about 100 seconds); for doors it seems to have been zero; for pushing Alan Wood estimated about 60 seconds to start with, and 30 seconds after the program was well under way. Part of the basis for the zero door emissions estimate was Exhibit J-3, which said that door leaks would not be counted if they were promptly reluted or tamped. See November 19, 1974 Tr. 114-121. Assuming Alan Wood is willing to really put forth its best efforts on doors, it can probably reduce emissions to 15 or 20 seconds. That would leave approximately 60 seconds for pushing emissions.

If the order standard is violated, but if pushing emissions have been brought within 60 seconds, and if charging and door emissions are not terribly far above 100 seconds and 20 seconds respectively, and if it appears that charging and/or door emissions can be reduced sufficiently to bring the total within the 180 second order standard, then we would say that violation of the standard cannot be attributed to pushing emissions. Such might be the case, for example, where charging emissions over 20% totalled 120 seconds, door emissions, 60 seconds, and pushing emissions 60 seconds—a total of 4 minutes. If there is some reasonable probability that charging and/or door emissions can be reduced to a combined total of 2 minutes, then that should be done. If there is no reasonable probability of reducing charging and door emissions to less than 2 minutes, then installation of control equipment will be required in order to achieve compliance with the order standard.

The same principles should apply if the numbers are different—work on the areas that look most promising of the most economical and environmentally least damaging solution. But Alan Wood does have an obligation to meet the order standard. If charging and door emissions total four minutes and pushing emissions 30 seconds, and it is not feasible to reduce combined charging and door emissions below 3 minutes, then it will be necessary to install equipment. Our present thinking is that equipment should be installed also if the "feasible" total for charging and doors is 3 1/2 minutes, but that is the sort of question that prompts us to retain jurisdiction over the case and wait and see just what the numbers are. One difficulty—

and a reasonably probable one—will arise if Alan Wood gets substantially below 60 seconds for pushing (say 40 or 45 seconds), well under 100 seconds for charging (say 75 or even 60 seconds), but door emissions total several minutes (enough to take the total over 3 minutes). That would suggest that the thing to attack ought to be doors. It might also suggest a shed approach instead of a hood or enclosed quench car approach. Or it might be that the outcome ought to depend more on total volume of emissions than solely on minutes. This again is the sort of question that prompts us to retain jurisdiction over this case and wait and see what the numbers are.

In connection with making the tests for compliance with the order standard, it should be noted that we are not dealing with a characteristic of coke oven operations that is invariable. Taking a number of samples of 3 pushes and grouping them convinces us that (as one would expect from the central limit theorum)[30] the amount of emissions over 20% opacity is approximately normally distributed, with a longer tail on the high end. The order standard obviously contemplates that the mean shall be less than 3 minutes—for a normal distribution if the mean were 3 minutes, then for half the time (or half the number of hours when opacities were observed) emissions would be more than 20% for more than 3 minutes.[31] But since the variation at the upper end goes potentially up to 60 minutes (with a probability that decreases as the duration increases but is never zero) Alan Wood cannot be taken to have necessarily failed to meet the standard just because, in *one* 60 minute period, emissions were over 3 minutes[32] (or pushing emissions were over 1 minute, or charging emissions plus door emissions were over 2 minutes). In such a case they could be taken to have failed only if that one failure represented some statistically significant—and air-pollution-impact-significant-portion of the time. The most commonly used measure of statistical significance is the "95% confidence level," which would suggest in the present context that during 95% of the hours tested the 3 minute (or 1 minute or 2 minute) standard was not exceeded. At this point there is little evidence upon which to base a judgment about the air pollution impact—other than that even the 19 "good" pushes on December 11, 1975 show a tendency for poorer pushes to come in clumps. That would suggest that the relevant standard should not be lower than 95%, unless and until further evidence is submitted showing that the hours of failure

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30. See Yamane, T., Statistics, An Introductory Analysis (1967); and Mood, A. M. and Graybill, F. A., Introduction to the Theory of Statistics, especially Chapters 2 and 7 (2d. Ed. 1963).

31. For a normal distribution the mean and the median are equal.

32. This does not necessarily mean the violation should be totally forgiven—it might well be that it should result in some civil penalties, hopefully leading to an effort to try even harder.

tend to be surrounded by hours of better then 3 minute performance, so that the air pollution impact averages out somewhat.

For the moment, subject to modification upward or downward on the submission of additional evidence on that question, we think that the testing of Alan Wood's program should be over a sufficient number of hours to provide some indication of the statistical distribution of the measured time of emissions over 20%, and if a failure is indicated, to show whether that failure is greater than 5% of the time. We will not specify the design of such an inspection study, noting that both the department and Alan Wood have access to statistically competent air pollution engineers who can do that better than we can. We do note, however, that for decisions such as this one, the parties seem inclined to go on less evidence, usually, than we would like to see. Perhaps this is a matter of costs and tight budgets. Although to simply prove a violation for (say) civil penalties, a few hours—or even one—might be sufficient, we think that for our purposes here at least eight full days of readings, covering portions of at least two shifts per day, should be required. In addition, one day per month for the preceding three months should assist in determining whether there has been any trend. We are, therefore, in our order, going to require a minimum of eleven full days of readings.

All testing done for purposes of a submission to this board on this question and in this case only should be done with inspectors and/or observers present representing both parties, or at least with enough advance notice so that an opportunity is reasonably provided for them to be present.

CONCLUSIONS OF LAW

1. The board has jurisdiction over this case and over the parties before it.

2. The applicable standard of performance governing this case is the standard contained in Air Pollution Abatement Order No. 72-548, which standard is quoted in full at the beginning of this adjudication.

3. The emissions standards contained in §§123.1, 123.2, 123.41, or any other section of the regulations of the department are not relevant to the issues being decided in this adjudication.

4. The board has the authority and responsibility to modify and clarify Order No. 72-548 in the manner being done by this adjudication.

ORDER

AND NOW, this 26th day of May , 1977, it is ordered that Alan Wood Steel Company shall have 120 days from the date of issuance of this opinion in which to operate, perfect, and thoroughly test, and have tested by the Department of Environmental Resources, its entire coke oven emissions control program, in accordance with procedures outlined in the foregoing adjudication. Testing shall be performed by smokereaders for the department and Alan Wood for an entire day *at least* one each month in the first three months of this 120 day period and for an entire day (covering portions of at least two shifts) *at least* twice each week in the fourth and final month. Days shall be ramdonized to some extent—that is, different days of the week should be sampled. Readings shall be taken of charging, doors, and pushing emissions. Alan Wood shall be responsible for all costs incidental to the performance of these tests. A report of all such testing shall be submitted to this board within 2 weeks following the end of said 120 day period.

If the entire program results in compliance with the standard set forth in paragraph 5 of Air Pollution Abatement Order No. 72-548, or if the plant is close to compliance as defined by the criteria set forth in this adjudication, then Alan Wood's compliance program shall be approved, subject to whatever modifications are required to bring total charging plus door emissions over 20% opacity to less than 2 minutes. If there is not compliance, or near compliance within the criteria set forth in this adjudication, then Alan Wood shall promptly install some form of positive controls to collect pushing emissions (or take other action satisfactory to the department and the board), on a schedule to be arranged to the mutual satisfaction of the department and Alan Wood, but such controls shall result in compliance with Order No. 72-548 no later than July 1, 1978. In any event, the board's approval shall be required if Alan Wood's coke oven emissions control program is to stand without modification.

During the same 120 day period Alan Wood shall do an investigation of controls now available or about to become available sufficient to select a positive control technology so that it will be in a position to submit a plan for installing such technology to the department immediately if the board finds that necessary.

The board will retain jurisdiction over the case for purposes of making a ruling as to whether the criteria for success or failure have been met, whether to allow Alan Wood to continue its program without modification, and if not, what modifications and/or additional technology should be added.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: May 26, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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Harrisburg, Pennsylvania 17101
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ALAN WOOD STEEL COMPANY

Docket No. 73-368-B

AIR POLLUTION ABATEMENT PLAN

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

A D J U D I C A T I O N
ON EXCEPTIONS TO EXAMINER'S PROPOSED ADJUDICATION

By the Board, May 26, 1977

In this appeal, which has received a great deal of time and consideration from the parties, the hearing examiner and the board, the board has followed an unusual procedure. The hearing examiner in this matter, Robert Broughton, was formerly chairman of the board and began hearings in this matter during his tenure. As more fully explained in his proposed adjudication that accompanies this adjudication, the record was reopened at the instigation of the hearing examiner after the original briefs had been filed in order to determine whether the Clean Push Program in operation was likely to enable Alan Wood to meet the three minute standard of the 1972 consent order. A view was held in December of 1975 and further hearings were held before Examiner Broughton in January and March of 1976, and further briefs filed after those hearings. Citing 1 Pa. Code §35.211 *et seq.*, Alan Wood's counsel requested that the board make available the hearing examiner's proposed adjudication in this matter before the board considered the adjudication. This procedure has not been followed in other cases because the board's own rules, Rule 21.32 (e), provide "hearings held by hearing examiners not members of the board will be decided by the board based on its review of the record and the examiner's proposed adjudication". Although the board was not convinced that it was required to make the proposed adjudication of the hearing examiner available to the parties,[1] a majority of the board felt that in this case it was

1. Rule 21.1 (c) provides: Except where inconsistent herewith the general rules of Administrative Practice and Procedure shall be applicable.

appropriate to make the examiner's report available and follow an exception procedure because the parties had so requested, and because of the complexity of the case and the expertise of the hearing examiner, who has handled this as well as other coke oven cases for the board. The exception procedure has helped the board to focus its review of the examiner's adjudication and to conclude that it should be adopted only with modification of the order.

The modifications in the order are necessitated by our agreement with the Commonwealth that the board should not extend the compliance date under the consent order in the context of this proceeding, and by our considerable reservation about the probability subscribed to by the examiner that Alan Wood can meet the three minute standard without positive pushing controls. Furthermore, the exception procedure has made clear that the testing schedule proposed by examiner (the testing to be completed within four months of a final adjudication issued by the board) cannot be accomplished as contemplated since, because of Alan Wood's current financial difficulty, the company has not yet installed its new staged charging larry car and will continue to operate its coke ovens on a very slow (36 hour) coking cycle. Also, the company has proposed a program for the installation of door plugs on the coke side doors that will not be installed until September of 1977. The new larry car is expected to be installed by November 1, 1977. Consequently, it is unknown at what point a testing program at normal operations, such as that envisioned by the examiner, could be carried out. We simply do not think that the evidence warrants postponing *any* planning for positive pushing controls until sometime, probably in 1978, when the testing program designed by the examiner could be completed.

Although we are dubious about the likelihood of Alan Wood's achieving the overall three minute standard without pushing controls, we are reluctant to substitute our judgment for that of the examiner, who had thorough familiarity with the record and the witnesses and considerable expertise in coke oven observation and evaluation. Initially, we were disposed to agree with the examiner's adjudication in its entirety primarily on the ground that the record does indicate that pushing is not the primary problem at Alan Wood, that pushing alone would probably be controlled to around one minute of the total three minutes, and that it did not make sense to require an enormous expenditure for pushing controls when the real problems are charging and doors. However, we also agree with the examiner that the department could require pushing controls to reduce those emissions close to zero if that were the only way of meeting the three minute standard with other emissions. The real problem in this case is that the three minute standard embodied in the 1972 consent order is an overall standard that cannot really be evaluated without knowing what

the contribution of all the components will be. The department has approved Alan Wood's programs for charging and doors, but these have yet to be implemented. We firmly subscribe to the examiner's view that where compliance seems possible without the expenditure of a large amount of capital on an energy-intensive solution, some experimentation and testing to attempt a simple solution is appropriate. However, as the examiner correctly notes, it is a question of weighing the probabilities and in this case we do not think the probabilities are sufficiently in Alan Wood's favor to allow them to take no action toward positive pushing controls for the next year. Consequently, we will require Alan Wood to do the basic planning that is required to select a positive pushing control plan and submit such a proposal to the department by November 1, 1977. If, when it becomes possible to carry out the testing program envisioned by the examiner, it is established within the parameters discussed by him that Alan Wood can meet the three minute standard, Alan Wood will not be required to install the contemplated pushing control technology. Basically, there are three reasons for our conclusion that the success of the Clean Push Program in meeting the order standard is sufficiently doubtful at least to require planning for a positive control technology.

1. Under Alan Wood's own theory, in order for Alan Wood to achieve the three minute standard, pushing emissions must amount to no more than one minute of opacity over 20% per hour per battery. In none of the tests that are a part of this record, all of which were conducted at slower than "normal" coking time, did Alan Wood achieve that standard except in the readings of Robert Clark, the Commonwealth's smoke observer, on December 11, 1975, who testified that he was reading over 30% opacity rather than 20% opacity. Alan Wood's own smoke readers read an average of 21.2 seconds per push and 32 seconds per push at battery 3 and 23.5 seconds per push and 32 seconds per push at battery 4. Assuming three pushes an hour, the first smoke reader's opacity readings would be just over the one minute allotted to pushing emissions and the second smoke reader's would be considerably over the one minute time allotted to pushing emissions (viz. 96 seconds). Assuming four pushes per hour, which would be a frequent occurrence at the proposed fully operational sixteen and a half coking cycle, both Mr. Morris' and Mr. Bowinski's averages would result in opacities considerably over the one minute time allotted to pushing emissions (Mr. Morris' averages would result in 84 seconds over 30% opacity at battery 3 and 92 seconds over 20% opacity at battery 4; Mr. Bowinski's readings would result in 128 seconds over 20% opacity at both batteries). Even Mr. Clark's readings over 30% opacity would result in

pushing emissions slightly over one minute on battery 4 with four pushes per hour. Although we would agree with the examiner that Alan Wood is very close to achieving its goal with regard to pushing emissions and that Mr. Clark's reading may be closest to the mark because of the necessity to allow for a seven and one half percent error in smoke reading, the fact is that taking the readings and conditions most favorable to Alan Wood, the pushing component has barely been achieved. Furthermore, pushing emissions are at least close at Alan Wood, but door and charging emissions are far in excess of what is needed to achieve Alan Wood's goal with regard to the breakdown of the three minute standard (charging emissions 1.7 minutes and .3 minutes for doors).

2. In reviewing the evidence we tend to agree with the department that a decrease in the coking cycle to 16 and a half hours, as proposed by Alan Wood at normal operations, is likely to result in increased problems with green pushes and consequently that opacity from pushing emissions may be increased. The testimony of Bernard Bloom, a technical advisor on coke ovens on the staff of the Environmental Protection Agency, was to the effect that time is more significant than temperature in determining whether or not coal is fully coked. While the Burns Harbor study and the Great Lakes carbon studies relied upon by Mr. Bloom were not entirely conclusive on this point, they do tend to show that there is an increase in opacity readings that is correlated to coking times from sixteen to eighteen hours and that after twenty-two hours the coking time makes less difference to opacity readings.

3. Our third reservation about Alan Wood's plan is that it is dependent upon a maintenance approach that must be exquisitely finely tuned—so exquisitely in fact that we wonder if it can successfully be carried out by a human agency. As the examiner notes in his opinion, the approach to doors at Alan Wood is a maintenance approach in that they must be luted each time they are sealed and reluted when any leaks occur. By any standard, the door emissions at Alan Wood were completely excessive at all times they were read. Alan Wood considered it unfair to have door emissions observed at the December 1975 view on the theory that this case involved pushing emissions. However, as we are dealing with an overall standard, we conclude that door emissions and the probability of containing them must be considered. While we are not sufficiently confident of our own judgment in the matter to overrule the examiner's finding on this point, we are dubious about his Finding of Fact Number 41 to the effect that door emissions can probably be reduced to 15-20 seconds in any one hour per battery. Certainly the door emissions in the record were nowhere close to this figure, and the maintenance pro-

cedures to attempt to reduce them were desultory at best. It would seem a probability that the best solution at Alan Wood may be a shed that would contain both the pushing emissions as well as the coke side door emissions, which present the most persistent problem to Alan Wood (see Alan Wood's petition for a variance extension, the denial of which has been appealed in docket number 76-095-D).[2]

In sum, we think that the possibility of Alan Wood's attaining the order standard without positive pushing controls is sufficiently problematic that it does not make sense to let another year go by without Alan Wood's having any obligation to plan for positive pushing controls. (We note that the new-proposed coke oven regulations which are before the Environmental Quality Board and may be adopted within the next several months, would require the installation of pushing controls, but would allow a deferral of compliance upon a proper showing until December 31, 1979, the new date for attainment of ambient air quality standards under the proposed Clean Air Act amendments). We do not think it unreasonable to require that Alan Wood investigate and select a type of positive pushing control device and submit its plan and schedule for installation to the department. Although the expenditure of funds for this purpose may turn out to be unnecessary if the testing program to be completed after the installation of charging and door controls demonstrates that the standard is being attained, we believe the expenditure of these funds (which we doubt could exceed $100,000) for planning is warranted when balanced against the delay and possibility of noncompliance.

The other major modification we make in the order is to make clear that the expanded time given by the examiner and the board for the installation of pushing controls is not an extension of the order deadline for compliance, but simply an extension of time in which to install pushing control technology. We should stress that we do not disagree with the hearing examiner as to the power of the Environmental Hearing Board to establish testing criteria and to interpret the 1972 consent order and the regulations and to alter the deadline date for the installation of pushing controls—all of which the department vigorously objected to in its exceptions filed to the examiner's proposed adjudication. In fact, we think the hearing examiner did an admirable job of attempting

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2. Alan Wood's exception to the Examiner's adjudication focused on his failure to find that the Commonwealth was bound by 1972 letters from Alan Wood's counsel stating an "understanding" as to methods for reading charging and door emissions. Clearly, as the Examiner recognized, the method of reading emissions is critical to the application of any standard and should not shift at the whim of the department and thereby alter the company's obligation. We see some equity in Alan Wood's position that the order standard should not be applied differently from Alan Wood's understanding when it signed the order. However, after reviewing the evidence, we are satisfied with the Examiner's conclusion that there was no meeting of the minds on this issue in 1972, and that his opinion sufficiently fixes the methods of reading doors and charging for the future so as to prevent the search for ever smaller pinhole leaks that Alan Wood foresees.

to translate the summary terms of the 1972 order's final standard into some practical meaning; and that the power to do so must be a concomitant of the board's power to review departmental action where the questions for administrative review turn on the resolution of factual issues that are not settled by any regulation. See *Warren Sand and Gravel, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 20 Pa. Commonwealth 186, 341 A.2d 556 (1975). However, we do agree with the department that the board should not in the context of an appeal from the department's refusal to approve Alan Wood's pushing control program alter the compliance date of a consent agreement entered into between the department and Alan Wood. See, *Commonwealth v. New Enterprise Stone & Lime Co.*, _____ Pa. Commonwealth _____, 359 A.2d 845 (1976). The examiner's extension of the compliance date is unwarranted as it gives Alan Wood a carte blanche to operate its coke oven batteries out of compliance without any consequences from now until the new date, when Alan Wood had previously agreed to comply by an earlier date. Whether or not the Commonwealth would choose to take enforcement action against Alan Wood for its failure to meet that date, we do not believe the board should excuse Alan Wood for any and all noncompliance by altering the compliance date. To do so is to remove any incentive Alan Wood may have to operate its maintenance program on doors and its Clean Push Program as efficiently as possible to meet the compliance standard. Obviously, in any enforcement action the fact that the board has given Alan Wood more time to test its pushing control plan would affect the amount of liability for civil penalties that might be imposed on Alan Wood. Also, we agree with Alan Wood that so far as its pushing control plan is concerned, Alan Wood should not have to incurr liability as a consequence of the length of administrative proceedings. However, consistent with our reasoning in *Pennsylvania Power Company v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket Number 72-428-CP-C issued April 16, 1976 and, we think with the Supreme Court's recent opinion in *Commonwealth of Pennsylvania, Department of Environmental Resources v. Bethlwhem Steel Corporation*, _____ Pa. _____, A.2d _____ No. 5 May term, 1977 (November 24, 1976), one who is polluting is not removed from responsibility for the consequences of pollution by litigation and must litigate on his own time. Our concern with a maintenance approach is that it requires consistent effort on the part of management and employees. An important incentive to such efforts is potential liability for penalties for failure to contain emissions to the extent required.

Consistent with the foregoing considerations, the hearing examiner's proposed adjudication is adopted with the following modified:

ORDER

AND NOW, this 26th day of May, 1977, it is ordered that Alan Wood Steel Company shall do the investigation and planning necessary to select a positive pushing control technology for its coke oven batteries, and shall submit to the department by November 1, 1977, a plan for such a system as well as a schedule for the installation of pushing controls to be completed by June 31, 1979.

As soon as Alan Wood's new larry car and coke side door plugs are installed and operating, Alan Wood Steel Company shall notify the department and shall agree with the department to a testing period consisting of 120 days in which to operate, perfect, and thoroughly test and have tested by the Department of Environmental Resources, its entire coke oven emission control program in accordance with the procedures outlined in the hearing examiner's proposed adjudication. Testing shall be performed by smoke readers for the department and Alan Wood for an entire day *at least* once each month in the first three months of this 120 day period and for an entire day (covering portions of at least two shifts) *at least* twice each week in the fourth and final month. Days shall be randomized to some extent--that is, different days of the week should be sampled. Readings shall be taken of charging, doors, and pushing emissions. Alan Wood shall be responsible for all costs incidental to the performance of these tests. A report of all such testing shall be submitted to this board within 2 weeks following the end of said 120 day period.

If the entire program results in compliance with the standard set forth in paragraph 5 of Air Pollution Abatement Order No. 72-548, or if the plant is close to compliance as defined by the criteria set forth in the examiner's proposed adjudication, then Alan Wood's Clean Push Program shall be approved. If there is not compliance, or near compliance within the criteria set forth in the examiner's adjudication, then Alan Wood shall promptly install positive controls called for in its plan submitted to the department, if that plan has been approved by the department. If the parties do not agree as to whether the test results show that pushing controls are or are not necessary, the board will promptly resolve that question upon receipt of the test results.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

BY: JOANNE R. DENWORTH
Member

DATED: May 26, 1977

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
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DR. PATRICIA SLOANE CAMPBELL AND
KENNETH CAMPBELL

Docket No. 75-276-C

Grant of Mine Drainage Permit

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and SWISTOCK, INC., Intervenor

ADJUDICATION

By Joseph L. Cohen, Member, June 1, 1977

This matter is before the board on the appeal of Dr. Patricia Sloane Campbell and Kenneth Campbell, her husband, from the action of the Department of Environmental Resources (DER) in granting Swistock and George, a partnership, a permit to operate a strip mine in Broadtop Township, Bedford County, Pennsylvania, in the vicinity of appellants' property. Swistock, Inc., the successor to Swistock and George is the present permit holder. Appellants claim that the proposed mining operation authorized by the permit will have an adverse effect upon the quality and quantity of appellants' domestic water supply. Appellants also claim that the permit should not have been granted for the reason that the requirements of law and departmental regulations were not followed in the issuance of the permit in question.

Hearings in this matter were held on July 8 and 9 and August 24 and 25, 1976. The appellants and Swistock, Inc. have filed proposed findings of fact and conclusions of law and briefs in support thereof. The DER filed proposed conclusions of law and a brief on the question of whether in acting upon a mining application it must consider whether the proposed mining activity will divert groundwater from existing springs supplying domestic water supplies. On the basis of the foregoing we enter the following:

FINDINGS OF FACT

1. Appellants, Patricia Sloane Campbell and Kenneth Campbell, own a tract of land situate partly in Broadtop Township, Bedford County, and partly in Carbon Township, Huntingdon County, Pennsylvania.

2. Appellants also maintain a residence in New York City where Dr. Campbell, a member of the faculty of New York University, teaches art history. Her husband is

a sculptor and is on the faculty of the University of Maryland at College Park, where he teaches sculpting.

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

4. Intervenor is Swistock, Inc., successor to the Swistock and George partnership.

5. Appellants' property is approximately 37.7 acres in area. Legislative Route 05070 runs through appellants' property in a north-south direction. The property has a residence and other improvements thereon, including a man-made pond. Appellants maintain livestock on their property.

6. Several springs and areas of water seeping to the surface are located on appellants' property. One spring is encased in masonry and fitted with a pump intake to provide water for the appellants' domestic uses. This spring is approximately 60 feet southeast of the house.

7. To the southeast of the drinking water spring is a man-made pond constructed by Kenneth Campbell. This pond was fed initially by the overflow from the drinking water spring alone. The overflow from the drinking water spring was insufficient to fill the pond at a reasonable rate. For this reason, Mr. Campbell placed trenches in a marshy area south of the pond in order to fill the pond more quickly from other springs on the property. Without such additional sources of water to fill the pond, the overflow from the water supply spring alone would fill the pond only after several months.

8. Ordinarily, drainage from the township road culvert would reach the man-made pond. In order to prevent salt water from the road from entering the pond, Mr. Campbell diverted the water from the township road culvert by artificial barriers so it would not reach the pond in question.

9. To the south and west of the man-made pond is a marshy area from the eastern side of which a small stream travels in a northeasterly direction to a small pond located on the eastern boundary line of appellants' property. The little stream continues to travel in a northeasterly direction after it leaves this small pond.

10. In May of 1975, Swistock & George submitted application no. 4275SM12 to the DER to strip mine the Kelly and Dudley seams of coal on a 662 acre tract of land situate in Broadtop Township, Bedford County, Pennsylvania. The application stated that the total surface area to be affected by the mining operation was to be 195 acres. It proposed that 173 acres of the Kelly Seam of coal and 136 acres of the Dudley Seam would be mined. The daily yield of coal from the mine was estimated to be 1,700 tons. The application proposed drainage to Coal Bank Run, a tributary of the Juniata River.

11. The location of the proposed mining is on the western slope of Dudley Hill. Appellants' property is located at the bottom of the eastern slope of Dudley Hill.

12. On or about October 20, 1975, the DER granted intervenor's predecessor, Swistock and George, a mine drainage permit containing several standard and special conditions. Of special interest to this proceeding are additional special conditions No. 2, 3, 8 and 9. These conditions provide as follows:

> "2. There shall be no mine drainage amendments granted to the mine drainage permit issued under No. 4275SM12.
>
> "3. Permittee shall notify Dr. Patricia Sloane Campbell, R. D. #1, Six Mile Run, PA. when future mine drainage applications are being submitted to the Department for evaluation and approval in the vicinity of the present mine drainage permit.
>
> "8. The Campbell's water supply (spring) will be monitored monthly by Gwin, Dobson and Foreman for both quantity and quality. Water samples to be collected and sent to Gwin, Dobson & Foreman, Inc., 8th Ave. & 12th Street, P. O. Box 1589, Altoona, PA 16603.
>
> "9. Strip mining shall start at existing old stripping and advance up to the limits at the hill top on the southeast side. No mining to be performed over the crest of the hill adjacent to Campbell property."

13. Kelly and Dudley are other names for the Upper and Lower Freeport seams of coal. The paleoenvironment of the Upper and Lower Freeport seams is termed "continental", one associated with fresh water sedimentation.

14. The overburden from coal that is associated with the Lower and Upper Freeport seams is generally not productive of acid mine drainage.

15. In the general area of Broadtop, which is the area of the proposed strip mining operation of intervenor, there has been old deep mining along the Barnett Seam of coal. Barnett is another name for the Lower Kittaning Seam, which is one of the lower portions of the Allegheny Coal series. The lower portions of the Allegheny series are normally more acid producing than the upper portions.

16. Given the fact that deep mining in the Broadtop area has been of the Barnett Seam of coal, which is a known acid producing seam, and that the proposed strip mining of intervenor involves the Kelly and Dudley seams, low in acid-producing potential, the likelihood that the acid mine drainage in the streams of the Broadtop area are the result of stripping of the Kelly and Dudley seams of coal is extremely small. The much more likely source of the acid mine drainage in the area is the deep mining of the Barnett Seam of coal.

17. In its review of the Swistock and George permit application, the DER did not make any determination regarding the location of the groundwater divide on Dudley Hill.

18. The DER, in its review of the permit application, did not ascertain whether the proposed mining by intervenor would adversely affect the quantity of groundwater available to appellants for domestic and other uses with regard to their property.

19. The proposed mining of the Kelly and Dudley seams of coal will not intercept the water table near the crest of Dudley Hill.

20. The groundwater recharge area for the springs and marsh areas on appellants' property is approximately between 16 to 25 acres and lies on the eastern slope of Dudley Hill.

21. The eastern side of Dudley Hill has a slope of approximately 15 per cent; the western side has a slope of less than 15 per cent.

22. The water table supplying appellants' water supply spring is a shallow, not a deep, water table. This fact is indicated by the reduction in flow from two gallons per minute in July to .3 gallons per minute in August as measured by intervenor's experts.

23. While the effect of intervenor's mining activity may have the effect of diverting some groundwater from the east to west, the amount of loss in the eastern groundwater recharge area is not likely to be substantial.

24. Application 4275SM12 was advertised in the Pennsylvania Bulletin, but was not advertised in a newspaper of general circulation in the county in which the mining was to occur.

25. No public water supply that was upstream of the proposed mining activity was notified of the filing of application no. 4275SM12, even though such water supply may have been within a radius of ten miles from the proposed mining site.

26. The proposed mining activity of intervenor will not adversely affect either the quality or the quantity of the groundwater supplying the springs and marsh areas on appellants' property. Neither is such proposed mining activity likely to cause siltation or erosion damage to appellants' property.

DISCUSSION

Appellants contend that the issuance of mine drainange permit 4275SM12, which permits intervenor to strip mine on the west slope of Dudley Hill in Broadtop Township, Bedford County, Pennsylvania, was improper for the following reasons:

(1) The application for the permit was incomplete;

(2) The review of the application conducted by the DER was inadequate, perfunctory and unprofessional in character;

(3) Public notice of the pendancy of the application did not conform to the requirements of §307 of The Clean Streams Law, Act of June 22, 1937, P. L. 1987,

as amended, 35 P. S. §691.1, *et seq.*;

(4) The proposed mining activity under mine drainage permit 4275SM12 poses a serious risk of interruption of the groundwater supplying the springs and marsh area on appellants' property.

With regard to the completeness of the permit application and the review performed by the department, the DER had sufficient information before it to ascertain whether the proposed mining activity would generate significant acid mine drainage. Both the Kelly and Dudley Seams of coal are part of the Allegheny group. In fact, they seem to be other names for the Upper Freeport and Lower Freeport seams respectively. These coals developed in a continental paleoenvironment. Continental coals are low in acid production. Although some of the streams in the Broadtop area show signs of acid mine drainage, this drainage most likely originates from the deep mining that had occurred in the area. The deep mined coals were Lower Kittanning, which is a well-known acid producing seam. With this information available to DER, very little reason, if any, existed for the DER to conduct extensive chemical analyses of the overburden in regard to application no. 4275SM12.

Appellants claim that the DER did not properly waive the requirement of §4 of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P. L. 1198, *as amended*, 52 P. S. §1396.1 *et seq.*, requiring a surface mining applicant to include in its application a map or plan showing, *inter alia*, the nature and depth of the various strata, the thickness of any coal or mineral seam, a complete analysis of any coal, the mineral streams and an analysis of the overburden. Appellants claim that rather than waiving this requirement for cause, it has relieved applicants generally of such reporting requirement unless the application states otherwise. Regardless, however, of the wording of the application form itself, the facts of this case would have justified a waiver of the requirements of the analysis of the overburden.

The DER has accumulated over the years knowledge of the various seams of coal in Pennsylvania and the overburden associated therewith and whether the same produce significant quantities of acid. Furthermore, the department has no confidence in the testing procedures that it has in the past used for analyzing the acid producing potential of overburden. We are of the opinion that the experience of the DER with past overburden analyses in conjunction with its knowledge of the seams of coal to be mined under the application and the nature of the overburden associated with such seams of coal constitutes sufficient cause for it to have waived the aforementioned requirement of §4 of the Surface Mining Conservation and Reclamation Act, *supra*, in this case. The fact that the language in the application form does not imply a waiver on a case by case basis is no reason to deny a waiver where the facts of the case would otherwise justify its grant.

We are not required to remand the matter to the DER for that reason. *Warren Sand & Gravel v. DER*, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975), empowers us to exercise discretion conferred upon the DER to the extent that the evidence supports our action. We are convinced that the DER properly waived the statutory requirement in the case before us.

The record is clear that the proposed mining will not create significant amounts of acid drainage, either during mining or thereafter, or will subject appellant to siltation and erosion damage. The procedures that the DER requires to be employed during the strip mining process will preclude siltation or erosion damage to appellants' property from the intervenor's proposed mining activity.

We agree with appellants that the public notice requirements of §307 of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1 *et seq.*, applies to applications for mine drainage permits. Inasmuch as The Clean Streams Law, *supra*, includes mine drainage within the definition of "industrial waste" the application for a mine drainage permit is, of necessity, also an application for the discharge of industrial wastes. Thus, we are of the opinion that the public notice provisions of §307 of the act apply to applications for mine drainage permits.

However, the failure of the DER to comply with the public notice provisions of §307 of The Clean Streams Law, *supra*, in this case, did not, in our opinion, adversely affect appellants. Particularly is this so when appellants had actual knowledge of the pendency of the application in this matter prior to its issuance and had meetings with representatives of the department and those of intervenor's predecessor while the DER had this application under review. Under such circumstances, the failure on the part of the DER to comply with the public notice requirements of §307 of The Clean Streams Law, *supra*, did not affect appellants' rights.

Much of the record in this matter is concerned with whether the extent of the mining permissible under intervenor's permit is likely to so divert the groundwaters nourishing the springs and the marsh area on appellants' property as to substantially diminish or completely dry up these springs and hence deprive appellants of their existing water supply for domestic and other uses. Whether, if proved, it is appropriate for the DER in its review of mining permits to consider the impact that such mining will have on groundwater flow is directly raised by appellants. On the answer to this question, the relevancy of major portions of the expert testimony in this matter depends. We are of the opinion that Article I, Section 27 of the Pennsylvania Constitution places upon the DER an affirmative duty to assess the direct environmental consequences likely to flow from activities authorized by permits it issued under appropriate

provisions of law. As we have said in *Bader Brothers Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-019-W (issued April 7, 1976), ". . . Any direct and inevitable effects of the permit grant are certainly not outside of the scope of DER's proper interest. . . ." Thus, the expert testimony regarding the evidence relative to the degree to which a probability exists that intervenor's proposed mining activity will adversely affect the flow of the springs on appellants' property is relevant to DER's duty under the environmental amendment of the Pennsylvania Constitution.

The fact that it is appropriate for the DER to consider problems related to groundwater flow in reviewing permits to mine does not mean that it is required to deny a mining permit where the mining activity will affect the groundwater flow system. First, there is no statute that imposes such a mandate upon the DER. Second, if the proposed mining activity otherwise met the requirements of law, it is extremely doubtful whether a permit could be denied unless the activity would likely result in the creation of a possible nuisance. Cf. *DER v. Glasgow Quarry*, 23 Pa. Commonwealth Court 270, 351 A.2d 689 (1976). Lastly, if the diversion of groundwater did not constitute a public nuisance, but adversely affected the interests of a private landowner, we question whether the department or this board is authorized to decide a question of private nuisance in order to determine whether a permit should rightfully issue.

Although it is unclear under Pennsylvania law whether the disturbance of the water table by mining may constitute a public nuisance, we are inclined to think that under certain circumstances the disturbance of the water table could amount to a public nuisance. However, we are not faced with determining that issue in this case for the reason that appellants' evidence merely suggests a possibility that intervenor's mining activity will interfere with the springs on their property. We have concluded that this is not a substantial possibility.

Mining to the crest of Dudley Hill is, in our opinion, not likely to affect appellants' water supply. While we agree with Dr. Parazak, appellants' expert hydraulogist, that it may take 16 to 25 acres of groundwater recharge area to supply appellants' springs and marsh areas, it is not likely that intervenor's mining activity will be such as to significantly change the position of the groundwater divide or, in any other manner, result in substantial groundwater diversion away from appellants' property.

Appellants' property is part of a groundwater discharge area. This is evidenced by the marshy area and the springs on the appellants' land. By definition, a groundwater discharge area exists where the water table is at or near the surface of the ground. If appellants' springs were fed substantially by a groundwater system much below the

surface of the land, it is highly unlikely that the flows from appellants' domestic water supply spring would vary from two gallons per hour in July to .3 of a gallon per hour in August.

Moreover, because Dudley Hill does not have steep slopes to the east or the west, surface water run-off is not a great problem. Thus, more rainwater enters the groundwater system than would be the case if the slopes were steeper. Finally, inasmuch as the mining is not likely to intercept the water table near the crest of Dudley Hill, there is little likelihood that there will be a shift to the east of the groundwater divide. Given all these factors, it is our opinion that appellants have not shown a likelihood that intervenor's mining activity will substantially interfere with their water supply.

CONCLUSIONS OF LAW

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

2. The mine drainage applications reviewed by the DER are subject to the public notice provisions of §307 of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1 *et seq.* However, appellants were not harmed by the failure of the DER to publish notice of application no. 4275SM12 in the manner required by §307 of the act.

3. Where the DER has accumulated knowledge and experience over the years with regard to seams of coal and their acid producing potential, it is not necessary for it to conduct specific analyses of the overburden material of those seams of coal that it has found through experience not to produce substantial amounts of acid mine drainage.

4. The DER properly waived the requirements of §4 of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P. L. 1198, *as amended*, 52 P. S. §1396.1 *et seq.*, in regard to the facts of this case.

5. As opposed to conjecture and speculation, there is no substantial evidence to support any finding that intervenor's mining activity would result in any substantially diminished flow in the springs on appellants' property.

6. While the DER may refuse to grant the permit where the activity is highly likely to cause a public nuisance, there is no substantial evidence in this case that intervenor's mining activity will create a public nuisance.

7. Article I, Section 27 of the Pennsylvania Constitution requires the DER to take into account direct adverse environmental impacts that may result from activity authorized by a permit it is requested to grant.

8. The DER validly issued mine drainage permit no. 4275SM12 under the facts of this case.

O R D E R

AND NOW, this 1st day of June , 1977, the appeal of Kenneth and Patricia Sloane Campbell from the grant of mine drainage permit 4275SM12 authorizing Swistock, Inc., to operate a strip mine in Broadtop Township, Bedford County, Pennsylvania, is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: June 1, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
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In the Matter of:

ADAM DOMINE

Docket No. 76-122-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Paul E. Waters, Chairman, July 11, 1977.

This matter comes before the board on stipulated facts and concerns a provision of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P. L. 1198, *as amended*, 52 P. S. §1396.4b(c), which limits the opening of a pit for mining purposes within 300 feet of a dwelling, under certain circumstances. Appellant, the owner of land on which mining is conducted has been ordered to cease mining within a 300 foot distance of a dwelling house, and although the operation has been conducted since 1926, DER has refused to issue a permit to continue the operation within the limit indicated.

STIPULATED FACTS

1. Adam Domine is the owner of property situated in the Village of Martins Creek, Lower Mount Bethel Township, Northampton County, Pennsylvania.

By deed dated October 20, 1926, Emidio Diomedo and Adam Gasparetti became the owners of the property in question, consisting of approximately 103.9 acres situate in Lower Mount Bethel Township, Pennsylvania. The said Emidio Diomedo died on June 30, 1942 and by his will devised his one-half interest in the aforesaid premises to the appellant, Adam Domine. The aforesaid Adam Gasparetti died a resident of the State of New Jersey in the year 1960 and by his will devised his one-half interest to his wife, Emma Gasparetti. The appellant and the said Emma Gasparetti are the present owners of the property in question and the said Emma Gasparetti joins with the said appellant in this appeal. The appellant has resided on the aforesaid

premises since its purchase on October 20, 1926, and the aforesaid shale removal has been conducted continuously on the aforesaid premises by appellant since the aforesaid date of October 20, 1926.

2. The property has been operated in the past as a non-coal mining site. The operation conducted on the aforesaid premises on a continuous basis since the date of October 20, 1926, has been the removal of shale. The operation has been conducted on a continuous basis every year for approximately four (4) to five (5) months each year in the late spring, summer and early fall by independent contractors, namely James Palmeri and the Lower Mount Bethel Township who performed all the necessary removal operations on the appellant's land. A total of approximately two hundred fifty (250) dump truck loads of shale of approximately six (6) tons each have been removed yearly. No excavation or removal has been performed below the surface of the earth. The aforesaid operation has been conducted on the same basis continuously for the past fifty-one (51) years.

3. Operations at the Domine site were halted on June 10, 1975, pursuant to a Stop Order issued through Tom Cerucella, the Martins Creek zoning officer, and by the Board of Supervisors of Lower Mount Bethel Township. The Department of Environmental Resources was not involved in this action. George Sterling of the department first visited the Domine site on June 26, 1975, at which time operations had already ceased in compliance with the local order. At this point, Sterling issued a verbal stop order preventing further operations until Domine received a license.

4. On June 27, 1975, Adam Domine was issued a written stop order by George R. Sterling, Chief of Anthracite Surface Mining Section, regarding his mine for conducting a surface mining operation without a license.

5. On or about April 8, 1976, the appellant submitted to the Department of Environmental Resources, Bureau of Surface Mine Reclamation, an application dated September 17, 1975, for a license, and an application dated April 7, 1976, for a mining permit for his property in the Village of Martins Creek, Lower Mount Bethel Township, Northampton County, Pennsylvania. On April 9, 1976, the appellant was issued a surface mining operator's license by the Department of Environmental Resources, for which he paid $50.00.

6. There are two occupied dwelling houses located less than three hundred (300') feet of the mine. The occupied dwelling of Armando Bavaria within the three hundred (300') foot proximity of the appellant's shale removal operation was constructed in 1959 and, prior to that time, the site was a vacant lot. The dwelling of John and Gloria DiFilippantonia, being within the proximity of the three hundred (300') foot distance from the appellant's shale removal operation was constructed in

1963 and, prior to that time, the site was a vacant lot. The aforesaid two occupied dwellings are the only ones in the proximity of the three hundred (300') foot distance of the appellant's shale removal operation.

7. The owners of these dwellings have not executed releases consenting to the operation of the mine located on Domine's property.

8. No variance revising the statutory release requirement has been granted to Adam Domine by the Department of Environmental Resources. The appellant has not applied for a variance revising the statutory release requirement but, instead, is electing to proceed hereunder.

9. On September 24, 1976, Donald J. Zutlas, Chief of the Licensing and Bonding Division of the Bureau of Surface Mine Reclamation, informed Adam Domine by letter that the "cease and desist order of June 27, 1975, was still in full force and effect" since Domine had not received written permission from the owner or owners of occupied dwelling or dwellings within 300 feet of the operation.

10. Prior to the denial of the permit in 1976, the appellant, at the direction of the aforesaid George R. Sterling, erected a fence and gate and restored and leveled a land bank between his shale removal operation and the occupied dwelling homes within the proximity of the three hundred (300') foot distance. However, even after following such instructions, the appellant was denied his permit for the year of 1976.

DISCUSSION

Although appellant on April 8, 1976, filed an application with the DER to operate a small shale mine in Lower Mount Bethel Township, Northampton County, appellant claims, among other things, that he is not an operator of a mine within the meaning of the Surface Mining Conservation and Reclamation Act, Act of November 20, 1971, P. L. 554 No. 147, *as amended*, 52 P. S. §1931.1 *et seq.* (1977-1978 Supp.). The DER claims that appellant does fall within the definition of "operator" as defined in the act. Section 3 [52 P. S. §1396.3 (1977-1978 Supp.)] of the act defines operator as follows:

> "'Operator' shall mean a person, firm, corporation or partnership engaged in surface mining, as a principal as distinguished from an agent or independent contractor, and, who is or becomes the owner of the minerals as a result of such mining. Where more than one person, firm, corporation or partnership is engaged in surface mining activities in a single operation, they shall be deemed jointly and severally responsible for compliance with the provisions of this act."

The DER erroneously assumes that because Palmeri and the township are "independent contractors" as to appellant, they cannot be "operators" within the definition of the act. This assumes that appellant is engaged in surface mining as a principal. This assumption, however, is contrary to the facts of this case. It is the township and Palmeri who are engaged in surface mining as principal, not appellant. It is Palmeri and the township that become the owners of the minerals as a result of the mining activity, not appellant. The fact that Palmeri and the township pay appellant for the privilege of removing the shale is but another indication thatthey,not appellant, are engaged in surface mining. Finally, it is clear that appellant does not intend to engage in surface mining on his property in the future.

Regardless of whether the stated reason for the denial of appellant's permit application was proper, he is not entitled to a permit under the facts of this case. In a permit denial proceeding, an applicant has the affirmative burden of showing its entitlement to the thing claimed. See 2 AM JUR 2d, ADMINISTRATIVE LAW, §391; accord: *Jones et al v. Zoning Hearing Board, et al*, 7 Pa. Commonwealth Ct. 284, 298 A.2d 664 (1972); *F & T. Construction Company v. Department of Environmental Resources*, 6 Pa. Commonwealth Ct. 59, 293 A.2d 138 (1972). Appellant, neither being an operator nor intending to become one, may not require the DER to issue him a surface mining permit. Thus, we uphold the refusal of the DER to grant appellant a permit for the reason that he has not sustained his burden.

If appellant fell within the definition of "operator" under the act, we would be constrained to set aside the DER "permit denial" for lack of conformity with the provisions of the act. In his letter of September 24, 1976, denying appellant's permit, Donald J. Zutlas, Chief of the Licensing and Bonding Division, Bureau of Surface Mine Reclamation of the DER, stated:

> "Occupied dwelling or dwellings are within 300 feet of the operation and you have not received written permission from the owner or owners as required under the provisions of Section 4.2(c) of the Surface Mining Conservation and Reclamation Act. A permit is denied until you receive notarized releases from the owners of these dwellings to operate within the 300 feet area."

Nothing in the act absolutely conditions the grant of a permit upon obtaining releases from the owners of dwellings within 300 feet of the mining operation. Section 4.2(c)[52 P. S. 1396.4b(c)] provides:

> "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 cemetary, 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."

The denial of a mining permit solely based upon a limitation set forth in §4.2(c) of the act was inappropriate in this case because it failed to state, in the alternative, that the applicant could seek a variance from the secretary. However, inasmuch as appellant is not a proper applicant for a permit under the circumstances of this case, the error on the part of the DER in failing to set forth that alternative in its letter of denial does not adversely affect appellant.

Appellant contends that the use of the word "open" in §4.2(c) of the act in lieu of the word "operate" manifests a legislative intent to apply that provision prospectively instead of retroactively. He contends , further, that the word "open" was chosen to prevent that provision from being in violation of the due process clause of the 14th Amendment of the United States Constititution. While we agree with appellant that §4.2(c) of the act is prospective in operation, we do so for reasons other than those advanced by appellant.

It takes no resort to statutory construction principals to ascertain that §4.2(c) of the act only operates in a prospective manner. The opening words of that provision—"from the effective date of this act, as amended hereby,"— are the operative words that make that subsection prospective in operation. There is no need, therefore, to look beyond these words to ascertain whether the provision is prospective in operation.

The significance of the choice of the word "open" as opposed to "operate" in §4.2(c) of the act relates to an entirely different matter. To place the word "open" in its proper context, it is necessary to note the words "any pit for surface mining operations" immediately following "open". Anyone at all familiar with the surface mining of coal, for example, realizes that a strip mining operation may consist of the opening of more than one pit, depending upon the size of the operation. It is clearly possible, therefore, in the mining of coal to have some pits which are not within the 300 foot limitation while others in the same operation may be within that limitation. Thus, at least in the strip mining of coal, it is clear that §4.2(c) of the act would only apply to the opening of those pits in the operation

that would fall within its provisions. It would not apply to those pits in a strip mining operation that were not within the limits of that subsection.

The meaning of the term "open any pit" may or may not apply to the operation on appellant's property, depending upon whether in the shale mining industry the practice of shale mining only during part of the year for a number of years constitutes the "opening of any pit" at the beginning of each year's operation. If so, the next relevant line of inquiry would be whether the activity on appellant's property that fell within the 300 foot limit took place prior to or subsequent to the affective date of §4.2(c) of the act. However, if the mining for shale only results in the opening of one pit which is subsequently enlarged, it is difficult to construe §4.2(c) of the act to include an operation which began much prior—approximately 50 some years prior—to the effective date of that provision.

We are of the opinion that the variance provisions of §4.2(c) of the act were designed to avoid possible substantive due process problems. This is the clear implication of *Harger, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 9 Pa. Commonwealth Ct. 482, 308 A.2d 171 (1973). In *Harger*, the court said:

> "The Legislature has declared, however, that the Surface Mining Conservation and Reclamation Act 'shall be deemed to be an exercise of the police powers of the Commonwealth.' Section 1, 52 P. S. §1396.1. Where the Commonwealth, through exercise of the police power, restricts the use of property, no compensation for diminution of use is payable. *See McCrady Case*, 399 Pa. 586, 160 A.2d 715 (1960). It is clear, therefore, that the 300-foot restriction cannot be considered an acquisition of property by the Commonwealth, so as to require assessment of damages by the Mining Commission. If appellants had a remedy, it was to contest the validity of the restriction imposed under the police power through proper administrative procedures."

The procedure intended was not followed in this case. The act clearly provides for variances regarding the distance requirements. Apppellant has elected to by-pass this procedure, presumably on the assumption that a variance would be denied on the same grounds that the permit was denied.[1] However, while the question of the retroactive application of §4.2(c) of the act to the facts of this case is an appropriate question to raise on the denial of a permit on grounds similar to those in this matter, it is our opinion that the challenge should initially be made in a variance proceeding as outlined in the act.

---

1. In a variance proceeding, applicant would have the burden to show what measures have been taken to protect the property owners and the economic benefit, as opposed to the health and safety detriment, could be explored.

CONCLUSIONS OF LAW

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

2. Appellant, although the owner of land on which the surface mining of shale is taking place, is not an "operator" within the definition thereof in §3 of the Surface Mining Reclamation and Conservation Act, Act of May 31, 1945, P. L. 1198, *as amended*, 52 P. S. §1396.1 *et seq*.

3. The Surface Mining Reclamation and Conservation Act governs the mining of shale on land of a permit applicant, and prohibits such mining operation within 300 feet of any dwelling, regardless of when the dwelling was constructed, unless a variance is granted or the provision is waived by the dwelling owner.

4. Section 4.2(c) of the act is not retroactive in operation.

5. A person who is neither an operator nor intends to become one is not entitled to an operator's permit under the provisions of the Surface Mining Reclamation and Conservation Act, *supra*.

O R D E R

AND NOW, this 11th day of July, 1977, the appeal of Adam Domine is hereby dismissed and the order of the department is hereby sustained.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: July 11, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CHARLES J. FLECK AND GENEVIEVE M. FLECK and
PETER J. CARUSO AND SONS, INC.

Docket No. 75-029-C

MINE FIRE ABATEMENT ORDERS

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joseph L. Cohen, Member, July 20, 1977

This matter is before the board on the separate appeals of Charles J. Fleck and Genevieve M. Fleck, his wife (Fleck), EHB Docket No. 75-029-C, and Peter J. Caruso and Sons, Inc. (Caruso), EHB Docket No. 75-035-C, from two separate orders issued by the Pennsylvania Department of Environmental Resources (DER) issued January 20, 1975. These orders sought the abatement of an underground mine fire beneath a tract of land situated between Malor Drive and Streets Run Road in the Borough of Baldwin, Allegheny County, Pennsylvania. On May 12, 1975, the board ordered the two appeals consolidated under EHB Docket No. 75-029-C.

Prior to the hearings in the matter, appellants raised the question of the board's jurisdiction to hear the appeals. On July 25, 1975, the board entered an opinion and order overruling appellants' jurisdictional objections. Thereafter, Fleck filed a motion for summary judgment, challenging the statutory authority of the DER for issuing the orders that are the subject matter of these proceedings. Caruso joined in this motion. By opinion and order dated October 30, 1975, this board denied the motion. The DER sought and obtained discovery from appellant. The board held 11 days of hearings in this matter and thereafter received from the parties their proposed findings of facts and conclusions of law, and briefs in support thereof.

On the basis of the foregoing, we enter the following:

FINDINGS OF FACT

1. Appellants Charles J. Fleck and Genevieve M. Fleck, his wife, reside at 108 Charles Drive, Carnegie, Pennsylvania 15106.

2. Appellant Peter J. Caruso & Sons, Inc. is a corporation duly organized under the laws of the Commonwealth of Pennsylvania with offices at 352 Baldwin Road, Pittsburgh, Pennsylvania 15207.

3. Appellee is the DER, the agency of the Commonwealth authorized to administer and enforce §§1915-A and 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51, *et seq*., the Act of January 19, 1968, P. L. 996, *as amended*, 32 P. S. §5101 *et seq*., and the Act of April 3, 1968, P. L. 92, *as amended*, 52 P. S. §30.201 *et seq*.

4. On October 29, 1973, a subsurface fire existed beneath a tract of land situated between Malor Drive and Streets Run Road in Baldwin Borough, Allegheny County, Pennsylvania. Two mine openings exist on this property.

5. The property under which the mine fire existed is the second parcel of land that Beatrice M. McBride conveyed to appellants Fleck by deed dated May 28, 1948, and recorded in Deed Book Volume 3010 at page 93 in the Office of the Recorder of Deeds of Allegheny County. This parcel of land was thereafter conveyed by appellants Fleck to Caruso by deed dated July 31, 1974. This deed was recorded on August 1, 1974, in Deed Book Volume 5371 on page 481 in the Office of the Recorder of Deeds of Allegheny County. There is no evidence that there exists any recorded instrument effecting a severance of the coal estate with regard to this tract of land.

6. The two mine openings were situated to the south of the residences on Malor Drive. These residences were between 200 and 300 feet from the mine openings. These mine openings are the only such openings in the immediate area.

7. The mine openings penetrated a seam of coal that extended beneath residences on adjoining properties and were part of an abandoned coal mine. These abandoned workings extended beneath the residences on Malor Drive.

8. On October 29, 1973, the fire existed within one of the mine openings. The fire originated in that mine opening.

9. By November 20, 1973, this subsurface fire had propagated to a sink hold located 150 feet away from the two mine openings and toward the residences on Malor Drive.

10. In November of 1973, the DER undertook a "holding action" for the purpose of containing the subsurface fire. The holding action consisted of filling the two mine openings with clay and dirt and filling the crevices at the sink hole with dirt.

11. Between November of 1973 and August of 1974, the "holding action" was repeated 14 times. This action did not prevent the spread of the subsurface mine fire.

12. By March of 1974, the mine fire had propagated to the second of the two mine openings on the fire site and by December 16, 1974, it had propagated 300 feet along the hillside below Malor Drive.

13. This subsurface fire was propagating within the abandoned mine workings connected to the mine openings.

14. This mine fire threatened to propagate beneath the residences on Malor Drive and threatened them with subsidence damage. The fire also threatened the occupants of these residences with exposure to harmful concentrations of carbon monoxide.

15. By December 16, 1974, the threat to the Malor Drive residences required immediate action.

16. The fire generated noxious and annoying smoke and odors that interfered with the comfortable use and enjoyment of the Malor Drive properties by residents thereof.

17. The fire caused heating of the ground surface, including the surface in a wooded and vegetated area, and threatened to ignite the surface vegetation and the wooded area.

18. As a result of the mine fire, a sink hole, existing on the site prior to the mine fire, subsided.

19. The fire existed in an area frequented by children and threatened their safety. Because of this threat, their parents became apprehensive.

20. Despite the holding action of the DER, the fire continued to exist between October of 1973 and March of 1975 and required immediate abatement action.

21. The two mine openings were used by Fleck to haul coal, which Fleck leased from Consolidation Coal Company, the owner of the coal rights.

22. Alexander E. Molinski, the District Engineer for the Bituminous Region of the Office of Resources Management of the DER, in a letter dated February 19, 1974, to Dennis Keenan, Director of the Bituminous Mine Safety area of the DER, made a determination that the "holding action" was no longer the correct procedure to

follow regarding the underground mine fire. Mr. Molinski sent a copy of this letter to Clifford H. McConnell, Deputy Secretary of Resources Management of the DER.

23. From February 1974 until August 27, 1974, Mr. Molinski received no direction from his superiors to take further action regarding the abatement of the mine fire. On August 27, 1974, Mr. Molinski received instructions to prepare bidding documents for the control and abatement of the mine fire.

24. On or about September 10, 1974, John Caruso had contacted Dennis W. Strain, Esquire, from the Der and informed him of the smoke and vapor seen by Mr. Caruso. Mr. Strain indicated to Mr. Caruso that action was being taken by the Commonwealth. Mr. Strain also told Mr. Caruso that the department was about to issue an order to Carl T. Schwenke, purported to be the owner of the coal. Mr. Strain indicated to Mr. Caruso that the department was about to issue an order to Mr. Schwenke as owner of the mineral rights. Mr. Strain indicated to Mr. Caruso that the Commonwealth was going to take action to abate the mine fire. At no time did Mr. Strain indicate to Mr. Caruso that he or Peter J. Caruso and Sons, Inc. should take steps to abate the alleged fire.

25. On September 13, 1974, the DER issued an order to Carl T. Schwenke, requiring him to submit within 15 days of the receipt of the order a plan for the abatement of the mine fire at issue in the instant proceedings. Said order provides:

> "The Commonwealth of Pennsylvania, Department of Environmental Resources, has found and determined as follows:
>
> "A. That Carl T. Schwenke, who resides at 2-A Fleck Court, Carnegie, Pennsylvania 15106, owns in fee simple the coal now remaining unmined and in place in or underlying all that certain tract of land situate in Baldwin Borough, Allegheny County, more particularly described in D.B.V. 4087, P740 in the record of the Recorder's Office of Allegheny County, Pennsylvania, as the same tract which Charles J. Fleck and Genevieve M. Fleck by deed dated August 30, 1963, conveyed to Carl T. Schwenke.
>
> "B. That at the present time a subsurface mine fire exists beneath and within said tract of land, in the area at the rear of 1788 Malor Drive, Baldwin Borough.
>
> "C. That said subsurface mine fire is continuing to propogate and spread in that area.
>
> "D. That the subsurface mine fire is situate in an area proximate to residential housing.
>
> "E. That the subsurface mine fire, through its continuing to propogate, and Carl T. Schwenke's failure to undertake the necessary means to extinguish it, constitutes a hazard to the health, safety and welfare and, therefore, a nuisance to the community, including but not limited to adjacent property owners.
>
> "F. That the subsurface mine fire constitutes a hazard to the health, safety and welfare of the community because of, *inter alia*, the threat of ground subsidence, carbon monoxide emissions and fire itself.
>
> "G. That Carl T. Schwenke is the party responsible for controlling and abating the aforementioned nuisance.
>
> "NOW, THEREFORE, based upon the aforesaid findings of fact, the Commonwealth of Pennsylvania, Department of Environmental Resources, this day of , 1974, issues the following Order pursuant to Section 1917-A of the Administrative Code, the Act of April 9, 1929, P. L. 177, as amended by the Act of December 3, 1970, P. L. _____, No. 275, 71 P. S. 510.17:

"1. Carl T. Schwenke shall within fifteen (15) days of receipt of this Order submit a plan to abate the subsurface fire and a schedule of when said plan shall be implemented.

"2. Said plan and schedule shall be submitted to Mr. Walter N. Heine, Associate Deputy Secretary for Mines and Land Protection, Department of Environmental Resources, Commonwealth of Pennsylvania, 9th Floor Fulton Building, P. O. Box 2063, Harrisburg, Pennsylvania 17105.

"In accordance with the provisions of 1917-A, supra, failure of Carl T. Schwenke to abide by this Order, will, because of the immediacy of the problem, force the Department of Environmental Resources to:

"1. Enter upon the premises to which this Order relates; and

"2. Control and abate the subsurface fire; and

"3. Maintain the appropriate action, as required by law, against Carl T. Schwenke to recover the expense of abatement.

"You are hereby notified any person aggrieved by this Order has a right to appeal to the Environmental Hearing Board. Appeals shall be filed in the manner provided in Chapter 21 of the Rules and Regulations of the Department, a copy of which is attached hereto. The original shall be mailed to the Environmental Hearing Board, First Floor Annex, Blackstone Building, 112 Market Street, Harrisburg, Pennsylvania 17101. A copy shall be mailed to this office and a copy shall be mailed to the Bureau of Administrative Enforcement, Room 709, Health and Welfare Building, P. O. Box 2351, Harrisburg, Pennsylvania 17105."

26. Mr. Schwenke received the order on September 18, 1974, and filed an appeal therefrom to this board on September 30, 1974. Said appeal is captioned "Carl T. Schwenke v. Commonwealth of Pennsylvania, Department of Environmental Resources" EHB Docket No. 74-229-C.

27. On January 20, 1975, the DER issued the following order to Mr. Schwenke:

"The Commonwealth of Pennsylvania, Department of Environmental Resources, has found and determined as follows:

"A. That Carl T. Schwenke, who resides at 2-A Fleck Court, Carnegie, Pennsylvania 15106, owns in fee simple the coal now remaining unmined and in place in or underlying all that certain tract of land situated in Baldwin Borough, Allegheny County, more particularly described in D.B.V. 4087, P740 in the record of the Recorder's Office of Allegheny County, Pennsylvania, as the same tract which Charles J. Fleck and Genevieve M. Fleck by deed dated August 30, 1963, conveyed to Carl T. Schwenke.

"B. That by Order issued September 13, 1974 and received on September 18, 1974, Carl T. Schwenke was ordered to submit plans for the abatement of a subsurface mine fire situated between Malor Drive and Streets Run Road in Baldwin Borough, County of Allegheny.

"C. That information recently received indicates that the subsurface mine fire may neither have started within nor spread to the above-mentioned coal tract as of the date the aforementioned Order was issued.

"NOW, THEREFORE, the Order issued to Carl T. Schwenke on September 13, 1974 and received by him on September 18, 1974 is this 20th day of January, 1975, hereby rescinded."

28. On February 3, 1975, the DER filed a motion to dismiss the Schwenke appeal, alleging:

"The Commonwealth of Pennsylvania, Department of Environmental Resources, by its attorney, Dennis W. Strain, Assistant Attorney General, hereby moves the Board to dismiss the above captioned appeal, and sets forth the following:

"1. The Appellant, Carl T. Schwenke, was ordered by the Department of Environmental Resources to submit plans for the abatement of a subsurface mine fire situated between Malor Drive and Streets Run Road in Baldwin Borough, County of Allegheny; he was so ordered by an Order issued on September 13, 1974, and received by Carl T. Schwenke on September 18, 1974. A copy of this Order has been attached hereto as Exhibit A.

"2. Carl T. Schwenke appealed the above mentioned Order by a Notice of Appeal dated September 26, 1974, thus initiating the above captioned proceedings.

"3. By Order dated January 20, 1975, the Department of Environmental Resources rescinded the Order issued to Carl T. Schwenke on September 13, 1974 and received by him on September 18, 1974. A copy of the rescinding Order has been attached hereto as Exhibit B.

"4. Since the Order, from which the above captioned appeal was taken, has been rescinded, the appeal is moot. Epstein v. Pincus, 449 Pa. 191, 296 A.2d 763 (1972).

"WHEREFORE, The Commonwealth of Pennsylvania, Department of Environmental Resources, moves the Board to dismiss the above captioned appeal."

29. Mr. Schwenke, on February 3, 1975, requested the board to take action on the DER order of January 20, 1975.

30. On February 7, 1975, the board entered the following order:

"AND NOW, this 7th day of February, 1975, upon Motion of the Commonwealth to which Appellant offers no objection, the appeal in the above captioned matter is hereby dismissed."

31. On October 28, 1974, Dennis W. Strain, Esquire, Assistant Attorney General in the Bureau of Legal Services of the DER, sent a memorandum to Clifford H. McConnell, Deputy Secretary for Resources Management of the DER, which memorandum reads:

"This is to inform you of the present status of legal action being taken to abate the above mine fire.

"This case was initially referred to Attorney Thomas M. Burke, who ascertained that the burning coal seam was owned by Mr. Carl T. Schwenke, whose address is 2-A Fleck Court, Carnegie, Pennsylvania 15106. On September 13, 1974, Mr. Burke sent to Mr. Schwenke an Order which required him to submit, within fifteen (15) days of the receipt of the Order, a plan for the abatement of the mine fire. The Order also advised him that a failure to comply would result in measures by the Commonwealth to control the fire, the cost of which measures would be charged to Mr. Schwenke. [A copy of this Order is attached.]

"By our records, Mr. Schwenke received this Order on September 18, 1974. Three (3) days later, this case was transferred from Mr. Burke to myself. On September 26, 1974, Mr. Schwenke sent to the Environmental Hearing Board a Notice of Appeal from the Order of September 13; he argued principally that he owns neither the surface nor subsurface rights of the property on which the fire is burning. [A copy of this Notice of Appeal is also attached.]

"By Order of the Hearing Board, the Appellant's Pre-Hearing Memorandum is due on November 7, 1974; the Commonwealth's reply is due fifteen (15) days after that date. Judging from the Hearing Board's current case load, it is unlikely that a hearing will be scheduled until late January, 1975.

"Accordingly, there will be no resolution of ownership for several months. Once ownership is ascertained, moreover, there will be an inevitable delay before the owner can formulate appropriate plans, have them approved by the Department, and ultimately carry them into effect.

"Because immediate action through an enforcement order is no longer available, I think it advisable that the mine fire be inspected in order to determine whether emergency action under Act 42 (Act of April 3, 1968, P. L. 92, 52 P. S. §§30.201-30.206) is needed to prevent the fire from endangering lives or property or from spreading to a point at which its abatement becomes prohibitively expensive. It is my understanding that these determinations are made by your office.

"I will keep you informed of any developments in the dispute as to ownership. In turn, I would appreciate from your office information on any expansion of the fire, since this information may effect the appeal before the Environmental Hearing Board.

"If you have any questions or instructions on this matter, please advise. "

32. On August 27, 1974, Alexander E. Molinski instructed Frank Skupien to prepare the necessary plans and specifications for an abatement project to extinguish the fire. Mr. Skupien commenced work on the plans on August 28, 1974, and completed them on September 12, 1974. The technical specifications for the project were completed within the same time.

33. On December 13, 1974, Mr. Skupien was directed to reinvestigate the area of the mine fire. He had to revise the plans he completed on September 12, 1974, for the reason that his site visit indicated that the area of the fire had been extended.

34. The final bidding package was forwarded to the Harrisburg offices of the DER on September 19, 1974, approximately three weeks after Mr. Molinski was instructed to prepare the documents.

35. On January 20, 1975, appellants Fleck and appellant Caruso were issued orders by the DER to extinguish the mine fire. This was the same day on which the DER rescinded its order against Mr. Schwenke.

36. In both the Fleck and Caruso orders appellants were given five days after its receipt within which to submit a plan to control the spread of the mine fire and for its abatement together with an implementation schedule.

37. At the time of the issuance of the orders to Fleck and Caruso, the DER had a plan of its own for the control and abatement of the mine fire.

38. Work commenced on the abatement project March 13, 1975, and was completed on or about July 21, 1975, a period of approximately 137 calendar days.

39. The cost of abating the fire as of October 13, 1973, would have been $58,000. The final cost of the abatement process was $168,000. This sum includes the cost of drilling holes that were beyond the Caruso property.

40. Five days is insufficient time within which to prepare plans and specifications for the abatement of a fire of the magnitude of the one that is the subject matter of these proceedings.

41. The DER knew or should have known that neither Fleck nor Caruso could have submitted an abatement plan within five days of the receipt of the January 20, 1975, order.

42. The funds available for the abatement project were the so-called "bond issue" funds alloted to the DER pursuant to the provisions of the Land and Water Conservation and Reclamation Act, Act of January 19, 1968, P. L. 996, no. 443, *as amended*, 32 P. S. §5101 *et seq* (1977-1978 Supp.).

43. The DER did not order the abatement project to commence until after the issuance of orders to Fleck and Caruso.

44. If the DER had given the mine fire abatement project sufficient priority, the determination of the proper party against whom an order should issue could have been made prior to the middle of 1974.

45. The DER appeared to have been unwilling to commence the abatement project without first issuing an abatement order to the owner of the site of the mine fire.

46. During the entire period commencing with the discovery of the underground mine fire in September of 1973 and its ultimate abatement in July 1975, the DER could have made application to the Federal government for an Appalachia Project for the extinguishment of the mine fire. Such application takes approximately six months to process and if made in February or March of 1974, and approved, could have commenced in July or August of that year.

47. Although the Federal government requires that property releases be obtained from property owners upon which entry is to be made to abate a mine fire, the Federal government will accept rights of entry obtained by the state in lieu of property releases. Although the DER on November 19, 1974, made a determination to make an application for an Appalachia Project, it subsequently decided not to do so because the length of time necessary to process such an application would have resulted in further propagation of the mine fire and further delayed its extinguishment.

48. The length and nature of the bureaucratic processes adopted by the DER in connection with the abatement of the mine fire are an example of administrative procedures that are not conducive to expeditious actions relating to public health and safety entrusted to the DER.

49. The prime cause for the propagation of the mine fire to the point where the fire became an imminent hazard to residents in the area was the inordinate delay on the part of the DER in its decision-making processes to determine who owned the land and coal on the site on which the fire existed.

50. The DER did not offer any testimony that would shed any light on why it took so long to ascertain title to the property in question.

51. If the DER had operated with the required dispatch, given the nature of the hazard to the residents in the area, the order issued to Caruso would never have been issued.

DISCUSSION

This matter presents many complex issues of law and of fact. The DER claims:

(1) The board has jurisdiction over this matter;

(2) The mine fire is a public nuisance;

(3) The DER has the authority to abate and to order the abatement of such nuisances;

(4) Appellants are subject to the orders of the department from which these appeals are taken.

Appellants Fleck contend:

(1) The DER has failed to dispatch its statutory duties;

(2) The DER abused its administrative discretion;

(3) The DER violated the 14th Amendment of the Federal Constitution;

(4) The DER is guilty of laxness and therefore estopped to issue an abatement order to appellant;

(5) The DER failed to prove that a valid abatement order was issued to appellants Fleck;

(6) The DER chose the wrong remedy in this matter.

Appellant Caruso argues:

(1) It is only the surface owner of the parcel of land under which the fire was located;

(2) The ownership of the coal beneath the surface of the site of the mine fire was never properly established prior to the conveyance of Fleck to Caruso;

(3) The DER failed to establish ownership of the coal remaining beneath the hillside wherein the mine fire allegedly existed;

(4) Compliance with the DER order of abatement was impossible;

(5) Caruso's ownership of the land is unrelated to the forces or conditions that resulted in the public nuisance which was occurring at the time of the conveyance of the surface property to Caruso from Fleck;

(6) Commonwealth Exhibits 12, 13, 14 and 15 are inadmissable evidence;

(7) Under §1917-A of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq.*, the maximum amount recoverable for the expense of abatement is the market value of the property computed immediately after the DER has completed its abatement project;

(8) Section 1917-A of the Administrative Code of 1929, *supra*, does not apply to mine fires and, therefore, the order of the DER issued under that section is invalid.

The DER argues that this board has jurisdiction to entertain these appeals. Its reason for doing so is that appellants had previously argued before the board that it lacked jurisdiction to hear the appeal for the reason that the DER lacked authority to issue the orders and that they were void on their face. In an interlocutory ruling on this matter, we rejected appellant's argument. Subsequently, appellants have not revived this contention. Had the board quashed these appeals for lack of jurisdiction at the behest of appellants, appellants could not have attacked the validity of the orders which are the subject matter of these appeals. However, saving appellants from the folly of their jurisdictional arguments, we reiterate that we have jurisdiction to entertain and determine these appeals.

Section 1921-A(a) of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq.*, clearly confers upon this board the power and duty to hold hearings and issue adjudications under the provisions of the Administrative Agency Law, Act of June 4, 1945, P. L. 1388, *as amended*, 71 P. S. §1710.1 *et seq.*, on, *inter alia*, any order of the DER. Clearly, the DER orders in this matter fall within the definition of actions, as that term is defined in 25 Pa. Code §21.2. Had appellants not appealed the orders to this board, they would have precluded from attacking their validity in any other proceeding. *DER v. Wheeling-Pittsburgh Steel*, 22 Pa. Commonwealth Ct. 280, 348 A.2d 765 (1975). Thus, if we had acquiesced in appellants' contentions that we lacked jurisdiction, the orders in question would be immune from collateral attack.

We agree with the DER that the mine fire in question constituted a public nuisance. It has long been the law of this Commonwealth that a condition which threatened adjoining property owners with the perils of a fire constitutes a public nuisance. *Fields v. Stokley*, 99 Pa. 306 (1882). More generally, conditions which tend to prejudice public health or safety constitute public nuisances. *Philadelphia v. Witt*, 162 Pa. Super. 433, 57 A.2d 591 (1948).

Section 1917-A [71 P. S. §510-17] of the Administrative Code of 1929, *supra*, provides in relevant part:

> "The Department of Environmental Resources shall have the power and its duty shall be:
> "(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;
> "(2) To cause examination to be made of nuisances, or questions affecting the security of life and health, in any locality, and, for that purpose, without fee or hinderance, to enter, examine and survey all grounds, vehicles, apartments, buildings, and places, shall have the powers and authority conferred by law upon constables;
> "(3) To order such nuisances including those detrimental to the public health to be abated and removed;"
> (Footnote omitted)

Regardless of whether an underground mine fire is a nuisance declared by statute, as the DER contends, it is a condition which is abatable under the provisions of §1917-A of the Administrative Code of 1929, *supra*. In our opinion, any condition that arguably falls within the provisions of clauses (1), (2) and (3) of this section of the code is subject to the provisions of that section regarding abatement orders.

While we agree with the DER that this section of the Administrative Code of 1929 authorizes the issuance of abatement orders against persons who neither own nor occupy the premises in question [see: *Ryan v. Commonwealth of Pennsylvania, Department of Environmental Resources*, ___ Pa. Commonwealth Ct. ___, 373 A.2d 475 (1977)], once the DER took abatement action on its own, the validity of the abatement order issued to the Flecks became moot. In *Ryan* , the court noted at footnote 5 thereof (373 A.2d at 477):

> "We note with considerable interest that, while the circumstances under which DER may itself abate a nuisance and recover the costs thereof are expressly limited to situations where the owner or occupier of land fails to comply with abatement orders, DER's power and duty to order others to abate a nuisance is not so limited."

Thus, the DER could not proceed against Fleck under the reimbursement provisions of §1917-A of the Administrative Code of 1929, *supra*.

As to Caruso, we are unable to agree with appellant that the conveyance from Fleck to Caruso only conveys the surface to Caruso. The deed from Fleck to Caruso, which conveyed to Caruso, *inter alia*, the McBride property, contain no reservation or exception regarding coal rights. While there was testimony by both appellants as to what was intended to be conveyed by the Fleck-Caruso conveyance, parol evidence is not admissable, in the absence of fraud, accident or mistake, to ascertain

what the parties may have intended by the language used in the deed. In *Yuscavage v. Hamlin*, 391 Pa. 13, 137 A.2d 242 (1958), the court said:

> "As we recently pointed out in *Brookbank v. Benedum-Trees Oil Co.*, 389 Pa. 151, 157, 131 A.2d 103, certain rules are applicable in the construction of deeds. Among such rules are those providing: (1) that the nature and quantity of the interest conveyed must be ascertained from the instrument itself and cannot be orally shown in the absence of fraud, accident or mistake and we seek to ascertain not what the parties may have intended by the language but what is the meaning of the words; (2) effect must be given to *all* the language of the instrument and no part shall be rejected if it can be given a meaning; (3) the language of the deed shall be interpreted in the light of the subject matter, the apparent object or purpose of the parties and the conditions existing when it was executed."
> 137 A.2d at 244

Appellant Caruso cites *Brookbank v. Benedum-Trees Oil Co.*, 389 Pa. 151, 131 A.2d 103 (1957) in support of its contention that the Fleck-Caruso deed only conveyed to Caruso an interest in the surface of the property. Caruso's reliance on *Brookbank* is totally misplaced. In the first place, the reason that the act of April 1, 1909, P. L. 91, *as amended*, 21 P. S. §2 *et seq.*, did not apply to the conveyance involving the strip of land from Ingrahams to the Susquehanna and Southern Railroad Company is that the conveyance took place on January 7, 1903. Section 1 of the 1909 act could not have applied to the 1903 conveyance for the reason that the act by its very word was not retroactive. Section 1 of that act provides, in pertinent part:

> "From and after the approval of this act, . . . "

Secondly, the Act of May 28, 1715, 1 Sm. L. 94, 21 P. S. §8 was expressly applicable to the 1903 conveyance in the *Brookbank* case. The court in *Brookbank* said:

> "The instrument recites that the Ingrahams 'have granted, bargained, sold, released and conveyed' a strip of land 'unto the Susquehanna and Southern Railroad * * * its successors and assigns'. Appellants urge that by the use of this language the parties clearly intended to convey a fee, the words granted, bargained, etc., being in the 'classic form of a Pennsylvania conveyance of a title in fee', as approved by the testwriters of that day as well as by statute. The statute however does not provide that these words shall have the effect of conveying a fee but rather that if a grantor employs such words he covenants that he is seized of an indefeasible estate in fee simple and that he has done no act nor created any incumbrance whereby the estate granted may be defeated. *Dorsey v. Jackman, 1 Serg.& R.* 42, 50; *Knepper v. Kurtz*, 58 Pa. 480; *Little v. Thropp*, 245 Pa. 539, 91 A. 924; *Grange Trust Co. v. Shade*, 102 Pa. Super. 122, 156 A. 620; it is a certification of the quantum and quality of the grantors' estate, not that which is being conveyed. . . ."
> 131 A.2d at 108-109.

The only case cited by appellant Caruso that in any manner aides its contention that it does not own anything but the surface of the ground is *Brennan v. Pine Hill Collieries, Co., et al*, 312 Pa. 52, 167 A. 776 (1933). In that case there was evidence that prior to the acquisition of title by adverse possession by appellee's predecessor there was a severance of the coal estate. Nothing appearing thereafter to suggest that the severance did not continue, the court held that appellees did not have title to the mineral estate involved in the case.

There is nothing in the record that shows a severance of the coal estate on that portion of the McBride property that Flick conveyed to Caruso. In our opinion, the absence of such evidence distinguishes the present factual situation from that obtaining in *Brennan*. Thus, *Brennan* does not govern the facts of this case.

We are of the opinion that the burden of showing a severance, under the circumstances of this case, was upon appellant Caruso. It has not met its burden in this regard.

However, the order issued to Caruso is invalid for two reasons:

(1) It is arbitrary, capricious and unreasonable;

(2) Under the circumstances of this case, the DER was relegated to the remedies available to it under §16(a) of the Land and Water Conservation and Reclamation Act, Act of January 19, 1968, P. L. 966, no. 443, *as amended*, 32 P. S. §5101 *et seq*.

On October 29, 1973, a subsurface mine fire existed at a site between Malor Drive and Streets Run Road in Baldwin Borough, Allegheny County, Pennsylvania. As of that date, the fire existed within one of two mine openings at the site. These openings were situated between 200 and 300 feet from residences on Malor Drive. The mine openings penetrated a seam of coal that extended beneath the houses on adjoining properties and were part of an abandoned coal mine. The abandoned workings extended beneath the Malor Drive residences.

By November 20, 1973, this fire had propagated to a sinkhole located approximately 150 feet away from the two mine openings and toward the houses located on Malor Drive. Beginning in November of 1973, the DER undertook a "holding action" for the purpose of containing the subsurface fire. This action consisted of filling the two mine openings with clay and dirt and filling the crevices at the sinkhole with dirt. Between November of 1973 and August of 1974, this "holding action" was repeated 14 times, but failed to prevent the spread of the mine fire. By March of 1974, the mine fire had propagated to the second of the two mine openings and by December 16, 1974, it had propagated 300 feet along the hillside below Malor Drive.

The manner in which the mine fire propagated constituted a substantial threat to the health and safety of the residents living on Malor Drive. It threatened their homes with subsidence and them with exposure to harmful concentrations of carbon monoxide.

The mine fire caused heating of the surface in a wooded and vegetated area, thereby threatening to ignite surface vegetation and the surrounding wooded area. It also endangered children in the area who frequented the site. By December 16, 1974, the threat to the residences on Malor Drive required immediate action.

In a letter dated February 19, 1974, Alexander E. Molinski, the District Engineer for the Bituminous Region of the Office of Resources Management of the DER, advised Dennis Keenan, Director of the Bituminous Mine Safety area of that department, that the "holding action" was no longer the correct procedure to follow regarding the underground mine fire. In fact, Mr. Molinski, had he the power to do so, would have instituted permanent abatement action in February of 1974. From February 1974 until August of that year, Mr. Molinski received no directions from his superiors to take further action regarding the abatement of the expanding mine fire. On August 27, he received instructions to prepare bidding documents for the control and abatement of the fire.

On September 13, 1974, the DER issued an order to one Carl T. Schwenke, requiring him to submit within 15 days of the receipt of the order a plan for the abatement of the mine fire. Three days prior thereto John Caruso had contacted Dennis W. Strain, Esquire, an Assistant Attorney General in the DER Office of Enforcement and Litigation, and informed him of the smoke and vapor seen by Mr. Caruso. Mr. Strain indicated to Mr. Caruso that action was being taken by the Commonwealth and that the DER was about to issue an order to abate the fire to Mr Schwenke, the presumed owner of the mineral rights. He also indicated to Mr. Caruso that the Commonwealth was going to take action to abate the mine fire, but at no time did Mr. Strain indicate to Mr. Caruso that he or appellant Caruso should take steps to abate the mine fire.

Mr. Schwenke received the order on September 18, 1974, and filed an appeal therefrom to this board on September 30, 1974. As a result of the appeal by Schwenke, it was determined by the DER that the mine fire may neither have started within nor spread to the coal tract owned by Mr. Schwenke. It therefore rescinded the order issued to him and the appeal was subsequently dismissed, having become moot.

On the same day that the order to Schwenke was rescinded, January 20, 1975, new abatement orders were issued to appellants in this matter. Comparing the order against Schwenke with those against appellants, it is to be observed that while Schwenke was given 15 days within which to prepare a plan for the abatement of the fire, appellants were given but five days.

The record is bereft of any evidence tending to show why it took the DER from February 1974 to January of 1975 to ascertain who owned the property under which the fire burned. If the mine fire was beginning to become a hazard in February of 1974, surely, if the DER had placed a high priority on the extinguishment of the fire, it could have engaged the services of a competent surveyor and title searcher sometime in the middle of February or the beginning of March to determine in a relatively short period of time who owned the property under which the fire was located. It could have then in a fairly expeditious manner entered an order against the property owner.

The failure of the DER to act in a timely and prompt manner was responsible for the mine fire to propagate in the manner in which it did. Furthermore, if it had thus acted, appellant Caruso, which had nothing to do with the starting or maintaining of the fire, would never have had an order issued against it. Abatement orders would have issued prior to July 1974, when Caruso acquired the property in question. To sustain an order against Caruso would be to encourage administrative and bureaucratic ineptitude at the expense of both public and private interests. Regardless of whether Caruso may have a cause of action over against the Flecks, we are of the opinion that as of January 1975, the issuance of an order to Caruso was unwarranted.

Moreover, the order on its face was unreasonable. The expectation that appellant Caruso could have come up with a plan of abatement within five days of the receipt of the order was unreasonable. It took the DER approximately two weeks to complete abatement plans. To expect a private party with no experience either in mining or in the extinguishment of mine fires to come up with an abatement plan

within a five day period, is patently unreasonable, arbitrary and capricious.

The record discloses that the DER was unwilling to take any abatement action until an order could properly issue against the owner of the land on which the fire was burning. However, its unwillingness to do so in this case resulted in the propagation of the mine fire to an unreasonable extent. A combination of administrative policies and actions that have such an effect cannot justify imposition of personal liability upon a landowner that in no manner was responsible for either the creation or maintenance of the fire.

Finally, we are persuaded that the only remedy available to the DER under the circumstances of this case was that provided by the former provisions of §16 of the Land and Water Conservation and Reclamation Act, *supra*, which in pertinent part provided:

> "The moneys expended for such work and the benefits accruing to any such premises so entered upon shall immediately become a charge against such land and shall mitigate or offset any claim in or any action brought by any owner of any interest in such premises for any alleged damages by virtue of such entry. Within six months after the completion of any of the work herein contemplated on any property, the Secretary of Environmental Resources shall itemize the moneys so expended and shall file a statement thereof in the office of the prothonotary of the county in which the land lies. Such statement shall constitute a lien upon the said land as of the date of the expenditure of the moneys and shall have priority as a lien second only to the lien of real estate taxes imposed upon said land. The lien shall not exceed an amount determined by a board of viewers, appointed as provied in the 'Eminent Domain Code,' to be the market value of the land immediately after the Department of Environmental Resources has completed its work, and the lien shall extend only to that portion of the premises directly involved in the work of the Department of Environmental Resources under this act."

We think the DER was relegated to this remedy for the reason that it was committed to the use of the bond issue funds prior to the orders against Fleck and Caruso and, also, because it had taken an unjustifiably long time to ascertain the ownership of the land in question. Section 16 of the Land and Water Conservation and Reclamation Act, *supra*, has subsequently been amended regarding its lien provisions. However, at the time that orders were issued to appellants, the act contained the above quoted provision.

While we are reluctant to say that, under any circumstances, once bond issue money was used in the abatement of the mine fire, recovery of the expenditures therefor could not be had under the provisions of §1915-A of the Administrative Code of 1929, *supra*, we are of the opinion that the facts of this case were such as to preclude recovery under that provision of the Administrative Code of 1929.

During the hearings in this case, the DER offered into evidence two maps (Commonwealth Exhibits 1 and 2), prepared by Gateway Engineers, purporting to show

the boundaries of the property under which the mine fire existed. The author of this adjudication, before whom the hearings were held, refused to admit the maps into evidence for the reason that they were hearsay and not the subject of any exception to the hearsay rule. The person who testified as to the accuracy of the maps was the president of the engineering firm, who was neither present when the property was being surveyed nor when the drafting was being done. He merely testified as to the usual manner in which such maps are prepared. Appellants raised strenuous objection to the admissability of these maps on grounds of hearsay, and were upheld in their objections. The rationale of the DER for seeking the admission of these documents was that they were "business records" under the Uniform Business Records of Evidence Act, Act of May 4, 1939, P.L.42, No. 35, 28 P.S. §91(a) *et seq.* However, inasmuch as these documents were prepared for the express purpose of their use in this litigation, they are not business records covered by the act. *Pompa v. Hojanoki and Olszewski*, 445 Pa. 42, 281 A.2d 886 (1971). In *Pompa* the court said:

> "Appellee practically concedes that the report is inadmissible hearsay. The report cannot qualify as an exception to the hearsay rule under the Business Records Act. Business records must be made 'in the regular course of business.' This expert's report was specifically prepared for the purposes of the pending litigation which can never be 'in the regular course of business.' *Palmer v. Hoffman*, 318 U. S. 109, 113, 63 S.Ct. 477, 480, 87 L.Ed. 645 (1943); accord *Neuman v. Pittsburgh Railways Co.*, 392 Pa. 640, 642, 141 A.2d 581, 582 (1958); c.f. *Githens, Rexsamer & Co., Inc. v. Wildstein*, 428 Pa. 201, 204-205, 236 A.2d 792, 794-795 (1968); McCORMICK, EVIDENCE §287 at 604 (1954)."

CONCLUSIONS OF LAW

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

2. Under the provisions of §1917-A of the Administrative Code of 1929, *supra*, the DER is authorized to issue abatement orders to persons other than the owner or occupier of land on which a public nuisance exists.

3. An underground mine fire that threatens homes with subsidence and exposes the residents thereof to hazardous levels of carbon monoxide constitute a public nuisance abateable under the provisions of §1917-A of the Administrative Code of 1929.

4. Inasmuch as the DER proceeded to abate the mine fire subsequent to the issuance of the abatement order to appellants Fleck, the validity of that abatement order is moot insofar as appellant Flecks are concerned.

5. Appellant Caruso, from the period commencing July 31, 1974, and uninterruptedly to the present, is the owner of the real estate that was the site of the underground mine fire. Appellant Caruso not only owns the surface thereof but the entire estate in fee, subject to certain easements and rights of way specifically set forth in the deed from appellants Fleck.

6. The issuance by the DER to appellant Caruso of an order to abate a mine fire on its property that the DER had found to exist in October 1973, and found to require abatement in February of 1974, was an abuse of the discretion of the DER for the following reasons:

(1) The said order issued 11 months after it was found to be a serious hazard requiring timely abatement;

(2) The order issued more than six months after Caruso acquired ownership of the property;

(3) Caruso was not responsible for the starting of the fire and was told by a DER representative in the Fall of 1974, that someone other than Caruso was being ordered to abate the fire;

(4) The requirement of the order issued to Caruso that it submit a plan of abatement to the DER within five days of the receipt of the order is patently arbitrary, capricious and unreasonable.

7. The DER was relegated to its remedies under §16 of the Land and Water Reclamation and Conservation Act, *supra*, to recover expenses of abating the mine fire on the Fleck-Caruso property.

8. Documents prepared for the purpose of use in pending litigation are not records kept in "the usual course of business" and, hence, do not fall within the provisions of the Business Records as Evidence Act, *supra*. Such documents are inadmissable hearsay if the persons creating the documents are not available for examination and cross-examination as to the information contained therein and the manner in which it was collected.

9. Maps purporting to show the correct boundaries of the property under which the mine fire was burning are inadmissable hearsay where such maps were prepared for the purpose of the pending litigation and the persons who performed the surveying and the drafting were not available for examination or cross-examination regarding the maps.

O R D E R

AND NOW, this 20th day of July, 1977, the appeals of Charles J. Fleck and Genevieve M. Fleck, his wife, are hereby dismissed as being moot. The appeal of Peter J. Caruso and Sons, Inc. is hereby sustained and the order issued it by the DER to abate an underground mine fire in the Borough of Baldwin, Allegheny County, Pennsylvania, is hereby set aside.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

JOANNE R. DENWORTH
Member

DATED: July 20, 1977
vf

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

MR. & MRS. T. BROOKS, *et al*

Docket No. 75-072-C

v.

PERMIT FOR CULVERT

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and WEST GOSHEN TOWNSHIP and RVDM CORPORATION,
Intervenors

ADJUDICATION

By Joseph L. Cohen, Member, July 22, 1977

Appellants in the above captioned matter, on September 22, 1975, filed a petition for supersedeas alleging that RVDM Corporation, an intervenor in this proceeding, was proceeding to construct a culvert over the east branch of Chester Creek, connecting South and Wayne to Westtown Road in West Goshen Township, Chester County, Pennsylvania, pursuant to provisions of permit no. 157-4723, issued to the corporation by the DER. Appellants filed their appeal in this matter on March 26, 1975, alleging that the said permit was improperly issued. The board held a hearing in this matter on October 8, 1975, to determine whether a supersedeas should issue as requested in appellants' petition. On the basis of the evidence adduced at the hearing, the board, on October 21, 1975, issued an order granting a supersedeas until November 10, 1975, under certain specified conditions. The order, in relevant part, provides:

> "(1) Effective as of October 14, 1975, the petition of appellants for a supersedeas in the above captioned matter is hereby granted upon the following conditions:
>
> (a) The supersedeas shall expire no later than November 10, 1975, but may expire before such time as is hereinafter provided.
>
> (b) Counsel for all parties to this proceeding and such engineering or experts they desire to bring with them shall meet as soon as possible at a mutually convenient place and time to review the application of R.V.D.M. Corporation for a permit to construct a culvert in Westtown Knoll, a real estate subdivision in West Goshen Township, Chester County, Pennsylvania, and cause a review thereof to take place to ascertain whether Permit No. 1574723 should have been issued to R.V.D.M. Corporation.
>
> (c) After the parties have held the conference set forth in paragraph (1)(b) hereof, counsel for each party shall submit to the Board on or before November 10, 1975, but in no case later than ten days after said conference shall have taken place, a statement as to their legal positions *vis a vis* the issuance of the permit

explaining the nature of their position in light of the information ascertained at the aforesaid conference.

(d) The Board shall review the statements of counsel as aforesaid and shall issue an appropriate order on or before November 10, 1975, setting forth the nature and scope of further proceedings in this matter, if any.

"(2) If on the basis of reports submitted to the Board as aforesaid, the Board shall determine that it is unlikely that appellant will prevail on the merits of the matter, appellants shall indemnify R.V.D.M. Corporation in an amount not to exceed $1,000.00 for such economic loss suffered by said corporation as a result of the issuance of this supersedeas. Such amount to be determined either by agreement between the parties or, in the absence thereof, the matter shall be referred to the Board for its determination.

"(3) R.V.D.M. Corporation shall undertake no activity authorized by Permit No. 157-4723 during the period within which the supersedeas is in effect."

The supersedeas expired by its own terms on November 10, 1975, without the parties having complied with paragraph (1) thereof in any respect. Neither did any party to the proceeding request at any time prior to the expiration of the supersedeas that it be extended. In response to the parties' request, the board issued an opinion and order, the order of which provides:

"AND NOW, this 13th day of December, 1976, it is hereby ordered as follows:

(1) Appellant shall on or before December 28, 1976, show cause why the appeal in the above captioned matter shall not be dismissed as being moot, and

(2) The DER and intervenors or any of them are hereby granted leave to show cause why the $1,000.00 held in escrow by Ronald C. Nagle, Esquire, solicitor for West Goshen Township, shall not be returned together with any and all interest that may have accrued by virtue of the deposit of said sum, to appellants in the above captioned matter. Such shall be filed on or before December 28, 1976.

(3) All replies intended to be filed by any party to the filings authorized by paragraphs 1 and 2 of this order shall be filed within 15 days thereof but no later than January 12, 1977."

Counsel for RVDM Corporation requested an extension of the time for filing its legal memoranda to January 3, 1977. This request was granted. The RVDM Corporation filed its memorandum on January 6, 1977. Appellants did not reply to intervenor's memorandum of law. In response to that memorandum, the DER, through its counsel, Thomas J. Cravetz, Esquire, Deputy Attorney General, wrote the board on January 11, 1977, as follows:

"In response to the Memorandum filed on January 4, 1977 by counsel for R.V.D.M. Corporation, the Department of Environmental Resources wishes to advise the Board of the following: The Department takes no position and is neutral with respect to the ultimate question of who should receive the $1,000 being held in escrow. However, with respect to the permit to R.V.D.M. the Board should be aware that at the November 12, 1975 meeting between the parties the Department stated the position that it had determined after review of existing data that there was a flooding potential from the proposed culvert. The Department at that meeting therefore stated that R.V.D.M. must therefore either submit specific data showing there is no flooding hazard or submit a redesign of the bridge which will allow a greater flow of water without any backwater effects. This statement was reiterated in the Department's letter of February 9, 1976 to R.V.D.M. Corporation, a copy of which is attached.

"R.V.D.M. Corporation submitted additional data regarding the first bridge design, but the Department found the data inadequate to show the lack of the existence of a flooding hazard, as the February 9, 1976 letter states. R.V.D.M. Corporation thereupon submitted a new design for a bridge which eliminated the flooding hazard and which the Department found to be acceptable. The Department thereupon approved the new bridge design and issued the permit."

As a result of an apparent disparity between the facts as set forth in intervenor's memorandum of law and the subsequent DER letter to the board, the undersigned, on February 14, 1977, wrote counsel of the parties as follows:

"The board is in receipt of the parties' responses to its opinion and order of December 13, 1976, and Mr. Oravetz's letter of January 11, 1977.

"Inasmuch as there appears to be some difference of opinion with regard to the facts of the matter, the board is willing to schedule a hearing to ascertain what actually transpires with regard to the permit issued to R.V.D.M. However, if the parties are willing to sipulate to the material facts regarding the reissuance of the permit, the board will enter an order with regard to the escrow account on receipt of that stipulation. If no stipulation is possible, the board will schedule a hearing.

"Please advise the board at your earliest convenience whether the parties desire a hearing on this matter or will stipulate to the facts and permit the board to enter an order based on such stipulation."

On February 22, 1977, Ronald C. Nagle, Esquire, solicitor for intervenor West Goshen Township, advised the board in writing that there was some doubt as to whether the parties could stipulate to material facts in this case. The board then scheduled a hearing. The hearing was cancelled at the request of the parties.

On April 25, 1977, the undersigned had a conference call with counsel for all parties in this matter to determine why the parties did not wish a further hearing. The parties indicated that the facts set forth in Mr. Oravetz's letter of January 11, 1977, were essentially correct and that the board, on the basis of the filings to date and the record, should make a determination regarding the escrow funds. In this regard, although appellants did not file any response to RVDM Corporation's memorandum of law, appellants nevertheless claimed that they were entitled to the return of the escrow funds for the reason that an amended permit was issued to the corporation as indicated in the DER letter of January 11, 1977.

In view of the foregoing, we enter the following:

FINDINGS OF FACT

1. Appellants are:

Mr. and Mrs. T. Brooks, 826 Falcon Lane, West Chester, Chester County, Pennsylvania

Mr. and Mrs. A. Andrews, 830 Falcon Lane, West Chester, Chester County, Pennsylvania;

Mr. & Mrs. C. Liverton, 811 Falcon Lane, West Chester, Chester County, Pennsylvania;

Mr. & Mrs. P. Snyder, 832 Falcon Lane, West Chester, Chester County, Pennsylvania;

Mr. & Mrs. G. Spencer, address not given;

Mrs. K. Foley, address not given.

2. Appellee is the Pennsylvania Department of Environmental Resources (DER), the agency of the Commonwealth that administers the act of June 25, 1913, P. L. 555, *as amended*, 32 P. S. §681 *et seq.*

3. Intervenors are the RVDM Corporation (RVDM), 327 West Front Street, Media, Pennsylvania, permittee under permit number 157-4723, and West Goshen Township, a township of the second class with its principal address being 1025 Paoli Pike, West Chester, Chester County, Pennsylvania.

4. On or about February 25, 1975, the DER, in response to an application from RVDM, issued that corporation bridge permit no. 157-4723, authorizing RVDM to construct and maintain a 12 foot by 7.05 foot R.C. Box Culvert in a tributary to the east branch of Chester Creek at a point approximately 800 feet upstream from its mouth in West Goshen Township, Chester County, Pennsylvania. The permit was issued in response to an application filed with the DER on October 7, 1974. The permit notes that revised plans were filed on November 5, 1974.

5. On March 26, 1975, appellants filed this appeal from the grant of the bridge permit to RVDM. On or about May 16, 1975, the DER suspended for a period of 90 days bridge permit no. 157-4723 for the purpose of requiring RVDM to supply the DER certain information relating to hydrology, hydraulics and properties in the general area of the culvert.

6. On June 16, 1975, RVDM appealed the suspension. This appeal was docketed at EHB Docket No. 75-152-C.

7. The appeal of RVDM was withdrawn on September 16, 1975, apparently because the suspension period had expired on August 14, 1975.

8. On September 22, 1975, appellant filed a petition for supersedeas, alleging, *inter alia*, construction of the culvert was imminent and that the construction of the culvert would present a clear and present danger to the residents of the last two houses located on Falcon Lane near the proposed bridge and that irreparable damage would result from the start of construction.

9. The reason for the suspension of the permit as stated by the DER, was that its issuance had been appealed by appellants and that in its review of the permit application, the DER found the data it submitted in support thereof to be insufficient to evaluate some points raised in the appeal.

10. The sole reason for suspending the RVDM permit was the appeal filed by the appellants in this present matter. But for the present appeal, the original permit issued to RVDM on February 25, 1975, would never have been modified.

11. Prior to the present appeal, RVDM was never notified that its application or plans submitted therewith were insufficient in any manner. In fact, the procedure followed by the DER in evaluating the sufficiency of the RVDM permit application is the general procedure followed by the DER in applications for culverts of this size.

12. There was no evidence that RVDM did not comply with the requirements of the 1913 "Water Obstructions Act" nor the provisions of 25 Pa. Code §105.91 *et seq.*

13. RVDM sustained monetary losses in excess of $1,000 as a result of the supersedeas proceeding.

DISCUSSION

Near the conclusion of the supersedeas hearing, the undersigned made the following remark (R. 205-206):

> "Let me preface my remarks by saying that on the basis of appellant's expert testimony alone, I would be unwilling to grant the supersedeas in this case for the reason that appellant has not shown that there is a likelihood for appellant to prevail on the basis of its expert testimony.
>
> "The burden of that expert testimony was that there should have been data which he did not know about. That is not sufficient in and of itself to predicate a supersedeas upon. It seems to me if persons are going to come before the Board asking for a supersedeas, they ought to be prepared to show that the issuance of the permit was wrong, and they should show the basis of the opinion, and if that is based on scientific opinion it should be documented more fully than was documented in this case.
>
> "However, as I explained before, I am concerned about the procedures that have been followed in this case and the inability of the Department, apparently, to come to a conclusion about the permit.
>
> "For that reason, and for that reason alone, I am granting a supersedeas to commence from the end of the hearing today until 30 days thereafter, conditioned upon the appellant's filing with the Board a bond in the amount of $1,000 to cover any loss that may be sustained by the company, in this case R.V.D.M. Corporation, one of the intervenors."

Nothing that has happened since the supersedeas hearing convinces us that appellants were likely to prevail on the merits. The original permit was granted in accordance with all applicable standards in effect at the time of its issuance. The fact that during the process of the present appeal, RVDM acquiesced in the demands of the DER is insufficient by itself to indicate that the original permit was wrongfully issued. In the absence of such evidence, it is difficult to understand how appellants could have prevailed in this case. The fact that, under the pressure of litigation, RVDM acceded to the demands of the DER and was issued an amended permit does not

constitute sufficient evidence that appellants would have prevailed on the merits. In view of the foregoing, we are of the opinion that appellants have not met their burden. See 25 Pa. Code §21.42.

CONCLUSIONS OF LAW

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

2. Appellants have not shown that the original bridge permit no. 157-4723 issued to RVDM on February 25, 1975, was improper.

3. Inasmuch as appellants have not shown that they would have prevailed on the merits, the escrow fund held by Ronald Nagle, Esquire, solicitor for West Goshen Township, should be awarded to RVDM.

4. The fact that RVDM acceded to the demands of the DER and was issued an amended permit is insufficient to prove that the initial permit issued to it was improper.

O R D E R

AND NOW, this 22nd day of July, 1977, Ronald C. Nagle, Esquire, is hereby ordered and directed to pay RVDM Corporation all the monies that he has held pursuant to the provisions of the supersedeas order of October 21, 1975. The payment of such funds to RVDM Corporation shall relieve Ronald C. Nagle, Esquire, of any liability based on any claim or demand that appellant may assert against him, now or in the future, on account of such payment.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

Member Joanne R. Denworth did not participate in this adjudication.

DATED: July 22, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

PENNSBURY VILLAGE CONDOMINIUM :

Docket No. 76-057-C

SEWERAGE PERMIT

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
& THE MUNICIPAL AUTHORITY OF THE TOWNSHIP OF ROBINSON
& THE ROBINSON TOWNSHIP AUTHORITY, INTERVENORS

ADJUDICATION

By: Joseph L. Cohen, Member, July 22, 1977

This matter is before the board on the appeal of Pennsbury Village Condominium (Pennsbury) from the action of the Department of Environmental Resources (DER) on or about April 14, 1976, in approving an application filed by the Municipal Authority of the Township of Robinson and the Robinson Township Authority (collectively Authority) to substitute an inverted siphon for the then approved pump station. Pennsbury also filed a petition for supersedeas, which, after hearing, was denied. On October 11, 1976, the DER and the Authority entered into a consent order that set forth several maintenance procedures that the Authority is to follow in an attempt to make the inverted siphon function properly, should it malfunction. Pennsbury filed a timely appeal from the consent order at EHB Docket No. 76-155-C. These appeals where consolidated by order of the board dated November 23, 1976.

Six days of hearings were held in this matter, including the supersedeas hearing of May 17, 1976. At the conclusion of the hearings, Pennsbury and the DER filed their proposed findings of fact and conclusions of law and briefs in support hereof. The Authority although intervening in this matter, has not filed any post-hearing document. On the basis of the hearings and the filings of the parties we enter the following:

FINDINGS OF FACT

1. Appellant is Pennsbury, a condominium, which at the time of the filing of this appeal was located within the Township of Baldwin, Allegheny County, Pennsylvania, but is now located in the Borough of Pennsbury Village as a result of proceedings filed on January 19, 1976, in the Court of Common Pleas in Allegheny County. On May 3, 1976, that court entered a decree incorporating the Borough of Pennsbury Village. The decree of the Court of Common Pleas of Allegheny County was affirmed on appeal on May 12, 1977, by a *Per Curiam* order of the Commonwealth Court.

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

3. Intervenors are the Municipal Authority of the Township of Robinson and the Robinson Township Authority, collectively known as the Authority , having their place of business in Robinson Township.

4. On or about August 28, 1973, the Authority made application to the department to construct a sewer extension along Baldwin Road to its Campbell's Run Sewage Treatment Plant. This permit application was numbered 0273493.

5. The project proposed by sewerage permit application no. 0273493 would consist of constructing additional sanitary sewers to service houses and Pennsbury along Baldwin Road in Robinson Township.

6. This project called for, *inter alia*, the construction of a sewage pumping station along Baldwin Road.

7. The permit to construct the Baldwin Road extension was issued in 1973 as sewerage permit no. 0273493.

8. On or about February 2, 1976, the DER received a proposal from Bankson Engineers, the consulting engineers for the Authority, to modify permit no. 0273493 to substitute a double barrel inverted siphon for the heretofore permitted pump station.

9. At the time the Authority submitted its application to the department, the pump station had not yet been constructed.

10. The area proposed to be served by the inverted siphon included Carlynton High School, an institution of approximately 1,100 students, a group of approximately 25 single-family dwellings and Pennsbury composed of approximately 500 units.

11. An inverted siphon is nothing more than a depressed sewer. The sewage flows by gravity, entering into a siphon pit; it then travels down to the

low point in the line and, as sewage continues to flow into the line, the sewage behind it starts to push the sewage to a point where it can ultimately flow by gravity to the treatment plant.

12. On or about April 14, 1976, the DER approved the Authority's request to substitute the then-approved pump station for an inverted siphon.

13. Inasmuch as the sewage would flow from a higher elevation to a lower one, it is possible to convey sewage to the Campbell's Run Road Sewage Treatment Plant by gravity.

14. The pump station authorized by sewage permit no. 0273493, would require two pumping units, two sources of energy and a need for employees to check the pump station on a daily basis. The pump station would also require replacement maintenance for moving parts as well as a stand-by generator.

15. The inverted siphon does not require a source of power inasmuch as gravity causes the sewage to flow to the Baldwin Road inteceptor and the Campbell's Run Road Sewage Treatment Plant.

16. In view of the flushing and cleaning requirements of the Baldwin Road inverted siphon, there is no meaningful saving of operating costs between the inverted siphon and the pump station originally authorized in sewage permit no. 0273493.

17. Even if both barrels of the siphon were to clog, the sewage would not back up onto Pennsbury property for the reason that the ground elevation of the siphon pit is thirty feet less than the ground elevation at the Pennsbury property line.

18. The inverted siphon has a maximum design flow of 600,000 gallons per day. If such a flow were reached, a velocity of 4.7 feet per second would be achieved.

19. In determining the expected flows for the Baldwin Road inverted siphon, the application of the Authority also included flows from Carlynton High School and approximately 25 single-family residences at the top of Baldwin Road. However, Carlynton High School is apart of the ALCOSAN sewage treatment system, and the Baldwin Road sewer line does not extend as far as the 25 single residential homes. Furthermore, there are no plans to bring either Carlynton High School or the 25 single-family residences into the unicipal uthority's sewage system in the foreseeable future.

20. Unless Carlynton High School and the 25 single-family residences become part of the Baldwin Road inverted siphon, the velocity of the sewage during average flows would be 1.66 feet per second.

21. Section 27.6 of DER's *Sewerage Manual* contains the following provision with respect to inverted siphons:

> "Inverted Siphons: Inverted siphons should have not less than two barrels, with a minimum pipe size of 6 inches and shall be provided with necessary appurtenances for convenient flushing maintenance; the manholes shall have adequate clearance for rodding; and, in general, sufficient head shall be provided and pipe sizes selected to secure velocities of at least 3.0 feet per second for average flows. The inlet and outlet details shall be arranged so that the normal flow is diverted to one barrel, and so that either barrel may be cut out of service for cleaning."

22. The preface to DER's *Sewerage Manual* provides as follows:

> "Part III [which includes Section 27.6] is a detailed technical guide for sanitary engineers, containing minimum requirements and limiting factors used by the Bureau of Water Quality Management in the review of applications for sewage works permits. It has been based in large part on the 'Standards for Sewage Works' of the Great Lakes & Upper Mississippi River Board of State Sanitary Engineers, but differs in many details.
>
> "The design of sewage works should not be limited by minimum requirements, but must meet the needs of the particular situation. It is not the purpose to set forth data which can be used without due regard for the requirements of the particular project under design. The judgment of the skilled professional engineer is still required to apply these data. The Department will apply more stringent criteria when, in its judgment, their use is justified. With the foregoing qualifications definitely understood, the Department considers the items set forth in Part III of this manual as generally representative of good practice."

23. The requirements for inverted siphons set forth in the DER's *Sewerage Manual* while not having the status of regulations, are representative of good engineering practice.

24. While grit and heavy solids settle out of sewage flows at velocities between 2.0 and 2.5 feet per second, very little grit is anticipated in Pennsbury's sewage inasmuch as its collection system is not combined with a storm sewer system.

25. Prior to its approval of the inverted siphon in question in this proceeding, the DER presented no evidence that it had previously granted a permit for an inverted siphon that didn't meet the requirements set forth in the *Sewerage Manual*.

26. During June 1976, after the denial of Pennsbury's petition for a supersedeas, the Authority completed the construction of the siphon.

27. The ground elevation of the sewer at the property line of Pennsbury is more than 1,014 feet. The ground elevation of the siphon pit into which the sewer drains is 943.3 feet. Thus, the siphon pit is more than 30 feet

below the sewer at the Pennsbury property line.

28. Between the sewer at the Pennsbury property line and the siphon pit there are three additional manholes at elevations lower than the sewer. Thus, if the siphon were to clog completely, any discharge from the sewer would exit from these manholes and never back up to Pennsbury.

29. Module 6-3 of the Baldwin Road inverted siphon designer's report indicate that the inverted siphon would produce a velocity of only 1.8 feet per second at average flows.

30. Appellant's exhibit 26 represents the calculation of velocity that the DER performed in its review of the inverted siphon application. Said formula is not a valid and proper one for determining velocity in an inverted siphon. The formula used by the DER in calculating the velocity in the siphon overstates said velocity, inasmuch as the formula is one for velocity in a partly filled sewer pipe. An inverted siphon, by definition, is a filled sewer pipe.

31. Although the consent order entered into by the DER and the Authority is designed to assure that the inverted siphon will not malfunction at velocity of less then 3 feet per second at average flows, there is a likelihood that compliance with the consent order will prevent the inverted siphon from serious malfunction.

32. If the remedial measures set forth in the consent order are not sufficient to prevent serious malfunction of the inverted siphon, the Authority, then, under the terms of the consent order must install the requisite pump station authorized by sewage permit no. 0273493.

DISCUSSION

Despite the fact that Pennsbury is under orders by the DER to discontinue using its present sewage treatment facilities and to connect to those of the Authority (see EHB Docket No. 76-028-C), the DER steadfastly maintains that Pennsbury lacks the standing to prosecute the current appeal. As a potential customer of the Authority, we are of the opinion that Pennsbury has the requisite standing to maintain these appeals. The cases cited by the DER in support of its claim that Pennsbury lacks standing to prosecute these appeals do not support its contention. In *Committee to Preserve Mill Creek v. Secretary of Health*, 3 Pa. Commonwealth Ct. 200, 281 A.2d 468 (1971), the individual landowners who owned

property adjacent to a swim club were held to have standing to appeal the grant of a permit to the club to locate and construct an individual sewage disposal system. On the other hand, the court denied standing to Committee to Preserve Mill Creek for the reason that it neither owned land near the site of the sewage facility nor was it an authorized agent of any such owner. In *Committee to Preserve Mill Creek*, the landowners were held to have had a direct interest in the subject matter of the permit and were, therefore, persons aggrieved. Likewise, in *Community College of Delaware County v. Fox*, 20 Pa. Commonwealth Court 35, 342 A.2d 468 (1975), the Foxes were held to have standing while the trust in that case was denied standing. *Fox* relied, insofar as the standing issue was concerned, on the *Committee to Preserve Mill Creek v. Secretary of Health, supra.*

Appellant does have a direct interest in the action appealed from, within the meaning of *Loudon Hill Farm, Inc. v. Milk Control Commission*, 420 Pa. 548, 217 A.2d 735 (1966). Pennsbury is under orders from the DER to connect to the Borough of Baldwin sewerage system. It is not a matter of idle curiosity to Pennsbury whether it is connected to a sewerage system that does not meet the professional standards of competent sanitary engineers. Furthermore, if Pennsbury did not appeal from the grant of the permit authorizing the inverted siphon, we have no doubt that the DER in the appeal at EHB Docket No. 76-028-C would have argued that Pennsbury could not collaterally attack the grant of the inverted siphon permit if it had not appealed that grant. The board does not propose to allow either the DER or any other party before it to so compartmentalize actions as to create a "Catch 22" situation. We, therefore, again reject the DER contention that Pennsbury lacks standing, either with regard to the inverted siphon appeal or the appeal from the consent order.

Pennsbury's standing in these appeals confers upon it the right to insist that the DER act in conformity with The Clean Streams Law, *supra*, and the rules and regulations of the Environmental Quality Board adopted pursuant thereto. *Committee to Preserve Mill Creek v. Secretary of Health, supra.*

We agree with the DER that Pennsbury has the burden of showing that the DER acted improperly both with regard to the grant of the permit for the inverted siphon and with regard to the consent order with the Authority. Section 21.42 of the board's rules provides that the party protesting the issuance of a permit from the DER has the burden of proof and the burden of proceeding. Except in *Samuel Perksy, et al v. Department of Environmental Resources and*

Abington Township, Intevenor, EHB Docket No. 76-038-D (March 7, 1977), we have uniformly upheld that provision of our rules. *Township of Penn v. Department of Environmental Resources and E & J Contracting Company*, EHB Docket No. 75-317-C (May 28, 1976); *Summit Township Taxpayers Association v. Department of Environmental Resources*, EHB Docket No. 74-176-C (April 11, 1975); *Penn's Woods West Chapter of Trout Unlimited v. Department of Environmental Resources and West Penn Coal and Construction Company*, EHB Docket No. 76-037-C (March 2, 1977); *Anthony J. Agosta v. Department of Environmental Resources and City of Easton*, EHB Docket No. 76-026-W (March 25, 1977).

While we agree that *Persky* assigned the burden of proof differently from the above cited adjudications, we have no hesitancy in reiterating the validity of *Persky*, in light of the fact that the board under §21.42 of its rules may order the burden of proof to be assigned otherwise. We emphatically reject the suggestion of the DER that *Persky* may be invalid. We consider the suggestion of the DER that the *Persky* adjudication may not be valid to be an unwarranted assumption, given the clear authority to the board to alter the burden in any given case. Nevertheless, Pennsbury has not persuaded us that the initial burden should be borne by the DER.

While we agree with the department that in order to overturn an action taken by it, the board is to decide whether the DER committed a manifest abuse of discretion or a purely arbitrary exercise of its duties and functions, we are of the opinion that with regard to the inverted siphon permit Pennsbury met its burden and showed indisputedly that the action of the DER was a manifest abuse of its discretion. We are unimpressed by the argument that the *Sewerage Manual* contains mere guidelines, not rules and regulations of the DER. While the statement is true, it does not follow that the DER can abandon good engineering practices at will. Although it is not necessary for the DER to follow the guidelines set out in its *Sewerage Manual*, it is incumbent on that agency not to depart from good sanitary engineering practice without some valid reason.

When the department reviews an application for sewerage permit, it has a duty beyond looking to see whether an application bears the stamp of a registered professional engineer. It must review the application and evaluate it in terms of good engineering practice. The consenus of good engineering practice is that inverted siphons should be so designed that at average flows the velocity should be at least three feet per second. The *Sewerage Manual* so states. *Metcalf & Eddy, Wastewater Engineering: Collection, Treatment, Disposal*

(1972), a source book utilized by the DER in reviewing the inverted siphon proposal, states that a minimum velocity of three feet per second or more should be obtained in inverted siphons.

Emil R. Rometo, Director of Sanitary Engineering for Michael Baker, Jr., Inc., was an extremely impressive expert witness in this matter. He had previously designed inverted siphons and explained in great detail and with great clarity why the manual figure of three feet per second is the accepted norm in the field of sanitary engineering in regard to inverted siphons.

It is conceded that without the connection of the Carlynton High School and the residences along Baldwin Road, the required velocity would not be met in the inverted siphon. Moreover, whether the high school will tie in to the system is highly speculative. For all intents and purposes, Pennsbury would be the only connection to the siphon for the foreseeable future.

It is only by assuming that the flow into the inverted siphon will reach the flow for its maximum design capacity that the velocity will exceed three feet per second. The best that can be said of the inverted siphon proposal is that the manner of its functioning will test the validity of the prevailing engineering opinion on the subject. It is, in fact, highly experimental in nature.

If there were a realistic expectation that the Carlynton High School would connect to the Baldwin Road sewer line in the near future we would have no hesitancy in upholding the grant of the inverted siphon permit. However, the likelihood of such a connection is highly speculative in view of the fact that sewage from the high school is now being conveyed to the sewage treatment plant of the Allegheny County Sanitary Authority (ALCOSAN). This is being accomplished at the present time by a pumping station that may in the future need repair. No evidence was produced by either the DER or the Authority to indicate when and if the pumping station transporting the sewage from the high school to the ALCOSAN treatment facility would become necessary. Nor was there any evidence presented that if such a contingency should occur, the school district would choose to hook up to the Campbell's Run Treatment Facility. Thus, the only users of the inverted siphon facilities for a substantial period of time will be the residents of Pennsbury. Under such circumstances, the inverted siphon is unlikely in the near future to conform to the requirements set forth in the *Sewerage Manual*.

The *Sewerage Manual* certainly does not have the status of a DER rule or regulation. It, therefore, cannot be considered binding upon the department.

Nevertheless, if the manual is representative of good sanitary engineering practice, the DER is obliged to offer a rational justification for departing from such a standard. Otherwise, the public cannot be assured that in the vital public health field of sewage treatment the DER will observe those sanitary engineering standards that are a prerequisite to the design of adequate sewage treatment and conveyance facilities.

Had the DER approved the inverted siphon in this matter only on an experimental basis and set forth a time period within which to test the proposal (given the realistic assumption that the high school may not tie into the treatment facilities of the Authority), then we might have been predisposed to uphold the inverted siphon permit. However, inasmuch as that was not done in this case, we cannot not uphold the grant of the permit.

Inasmuch as we are setting aside the inverted siphon permit granted the Authority, we dismiss the appeal from the consent order as being moot.

CONCLUSIONS OF LAW

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

2. Pennsbury has standing to appeal the grant of an inverted siphon permit granted the Authority, where it appears that the DER in a separate proceeding has ordered Pennsbury to connect to the inverted siphon for the purpose of conveying sewage from Pennsbury to the Campbell's Run Sewage Treatment Facility of the Authority.

3. In administering the sewerage facilities provisions of The Clean Streams Law, *supra*, the DER is not free to disregard arbitrarily such sanitary engineering standards as are representative of good engineering practice among competent members of the sanitary engineering profession.

4. Pennsbury sustained its burden of showing that the grant to the Authority by DER of a permit for an inverted siphon was improper for the reason that during average sewage flows the velocity of the sewage traveling through this siphon would be less than three feet per second, the minimum velocity during average flows for inverted siphons considered by the sanitary engineering profession as good engineering practice.

5. The presumption of administrative regularity is rebuted with regard to DER action that does not conform to good sanitary engineering practice.

6. Inasmuch as the DER granted the Authority a permit for an inverted siphon that did not meet the standards of good practice in the sanitary engineering profession, this action of DER must be set aside.

7. The appeal by Pennsbury from the action of the DER in entering into a consent order with the Authority must be dismissed as moot for the reason that the permit for the inverted siphon is set aside and the consent order is predicated upon the validity of that permit.

ORDER

AND NOW, this 22nd day of July, 1977, the action of the Pennsylvania Department of Environmental Resources in approving the request of the Municipal Authority of the Township of Robinson and the Robinson Township Authority to modify sewage permit no. 0273493 in such a manner as to permit the substitution of an inverted siphon for a hitherto permitted pump station is hereby set aside and the appeal of Pennsbury Village Condominium regarding that action is hereby sustained. The appeal of Pennsbury Village Condominium from the action of the Pennsylvania Department of Environmental Resources in entering into a consent order with intervenors is hereby dismissed as being moot.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOSEPH L. COHEN
Member

Member Joanne R. Denworth did not participate in this adjudication.

DATED: July 22, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

BUCKINGHAM TOWNSHIP CIVIC ASSOCIATION : Docket No. 76-093-D

: Sewer Connection Order

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and THE ESTATE OF MARY T. YOUNG, Intervenor

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

By Joanne R. Denworth, Member, September 8, 1977

Appellant has appealed from the Department of Environmental Resources' (department's) order to the Buckingham Township Supervisors directing them to supplement the township's official sewage facilities plan to provide for the extension of a sewer line to service intervenor's property and to allocate two EDU's out of the 32 EDU's available to the township at the Chalfont-New Britain treatment plant to intervenor's property. Intervenor, the estate of Mary T. Young, had requested such an order from the department pursuant to §5(b) of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.5(b) *et seq.*, and §71.17 of the regulations adopted under that act, 25 Pa. Code §71.17, which provide that a person may seek an order from the department where the existing sewage facilities plan is not adequate to meet its needs, and where the local municipality has refused the landowner's request to revise its plan. The estate seeks a sewer connection for a subdivided 5 acre portion of its property pursuant to an agreement for the sale of that portion. The prospective buyer intends to use the property for light manufacturing. The department, after reviewing the estate's request, ordered the township to supplement its plan to provide for public sewerage for the estate's property by extending an existing sewer line in Landisville Road approximately 112 feet to intervenor's property. The department concluded that the order to sewer this property was appropriate because it is consistent with both the comprehensive zoning plan, under which intervenor's land is zoned as light industrial, and with the township's official

sewage facilities plan, which shows this area as one to be sewered within ten years.

The township supervisors did not appeal from the order. However, appellant, Buckingham Township Civic Association, filed a timely appeal. The civic association's objections to the department's order are primarily the following:

1. The association is concerned that "proper procedures" were not followed in the adoption of the official sewer facilities plan, which designates the area in question as a light industrial area to be sewered within 10 years (from 1969, the date of adoption of the plan), or in the approval by the township supervisors of the prior extension of the sewer along Landisville Road. The association claims that the township supervisors did not follow the alleged requirements of public notice and a public hearing prior to adopting the official sewerage facilities plan upon which the department in part relied in issuing its order.

2. The association is interested in maintaining the integrity of the township's comprehensive zoning plan adopted in 1974, and preventing the development of a large tract of land adjacent to intervenor's property, which has been designated as agricultural in the zoning plan. The association is afraid that the extension of this sewer line close to the boundary of the industrial area will make it difficult to prevent development of the agricultural lands. (There is currently a suit by developers to make those agricultural lands available for development by curative amendments to the comprehensive zoning ordinance.)

A hearing in this matter was held October 22, 1976. After the hearing, appellant filed a post-hearing brief. Since that time, the matter has been delayed for consideration of several issues raised after the hearing.

On January 5, 1977, the department filed a motion to reopen the record to introduce further evidence as to the unsuitability of the intervenor's property for an on-lot sewage system. After a conference, action in this appeal was stayed by order dated February 9, 1977, while the intervenor applied to the Bucks County Health Department for a permit for an on-lot sewerage system. The intervenor does not want an on-lot system on this portion of its property, but maintained at the hearing that it could not get a permit for such a system since the soil on intervenor's property is unsuitable. Intervenor sought a ruling on an on-lot sewerage application because appellant complained at the hearing that no investigation of an on-lot system had been made, and appellant's attorney represented that if in fact the property was unsuitable for an on-lot system, appellant would have no objection to an extension of the sewer line to intervenor's property. On June 3, 1977, the sewage enforcement

officer for the County of Bucks, Department of Health, notified intervenor that its permit application was denied on the grounds that the soils were unsuitable. Through correspondence, it is apparent that appellant does not accept this determination and wishes to have its own experts determine whether or not there might be some place on intervenor's property for an alternate sand mound system. However, such systems are apparently prohibited by ordinance of Buckingham Township.

Also on January 5, 1977, the department filed a motion to dismiss the appeal for lack of standing. The department's motion was supported by the intervenor. Neither the department nor the intervenor raised the issue of standing at the hearing in this matter. The department explained its failure to raise the issue earlier on the ground that it received the board's opinion in *Robert L. Anthony v. Department of Environmental Resources*, EHB Docket No. 76-112-D, (issued December 10, 1976), after the hearing in this appeal . In the *Anthony* case the board dismissed several appeals brought by Mr. Anthony on the ground that he lacked standing to complain of the action of the department from which the appeals were taken.

After the department raised the issue of standing, the board requested, in lieu of hearing on the standing question, that appellant submit an affidavit in support of its standing to appeal. An affadavit was submitted by a member of the Buckingham Civic Association, George Hagen. The affidavit has attachments including a membership list of the civic association, a publication of the association called the "Civic Post", a publication describing the association's activities, and a map showing the distribution of members over the township area. Some asterisks on that map corresponding with names on the membership list show that some members live around, however, not adjacent to the property on Landisville Road. Those persons have not specifically complained of any adverse affect on them or their property that would result from the extension of the sewer line to intervenor's property. After the board received the affidavit, the parties filed briefs on the issue of standing. Subsequent to that, on June 23, 1977, two members of appellant's organization filed a petition to join as parties appellant in this matter. The Commonwealth and intervenor opposed this motion on the ground that to allow them to join as appellants would permit the taking of an appeal outside the 30 day period specified in the board's rules and recognized by the board to be jurisdictional. *Rostosky v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976).

Standing

1. Although the board would prefer a broad interpretation of 71 P. S. §510-21(c)[1] for purposes of determining who may appeal an administrative action of the department, it is clear that the Pennsylvania courts, which we are bound to follow, do not share the board's view of this matter. The Pennsylvania courts have limited the class of persons aggrieved and therefore entitled to appeal from an administrative action to persons who are "directly" and "immediately" and "substantially" affected by the action taken. *Man O' War Racing Association, Inc. v. State Horse Racing Commission,* 433 Pa. 432, 250 A.2d 172 (1969); *Lansdowne Board of Adjustments Appeal,* 313 Pa. 523, 525, 170 A.2d 867, 868 (1934); *Louden Hill Farm v. Milk Control Commission,* 420 Pa. 548, 217 A.2d 735 (1966). The Commonwealth Court has stated that such an interest must be a direct pecuniary interest, and has seemed to confine such interests to adjacent landowners where the administrative action relates to a specific property. *Committee to Preserve Mill Creek et al v. Secretary of Health et al,* 3 Pa. Commonwealth Ct. 200, 281 A.2d 468 (1971); *Community College of Delaware County v. Fox,* 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975). That court has specifically ruled that a civic association does not have standing to appeal as one adversely affected by enactment of a zoning ordinance under 53 Pa. §65741, even though some of its members might be entitled to appeal. *Northampton Residents Association v. Northampton Township,* 14 Pa. Commonwealth Ct. 515, 322 A.2d 787 (1974). Furthermore, the Commonwealth Court has several times expressed its disapproval of the board's view of the concept of persons adversely affected. In *Commonwealth of Pennsylvania v. Fox, supra,* the Commonwealth Court disagreed with the board's view that the Natural Lands Trust had standing to appeal as a beneficiary of the public trust created by Article I, §27 of the Pennsylvania Constitution, but concluded that it qualified as a person aggrieved because it owned land that would be crossed by, and therefore affected by, the proposed interceptor. In *Western Pennsylvania Conservancy v. DER,* No. 974 C. D. 1976 (slip opinion October 27, 1976), the court, while dismissing that appeal on another ground, noted that it did not agree with the board's conclusion that an organization has standing to appeal where it is complaining of possible harm to public land that its members use and enjoy.

We believe that the law on standing has been broadened somewhat by the Supreme Court's decision in *William Penn Parking Garage v. City of Pittsburgh,* 11 Pa. Commonwealth Ct. 507, 346 A.2d 269 (1975). However, it does not appear that the law

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1. 71 P. S. §510-21(c) provides:
"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."

has been broadened sufficiently to include the type of interests that appellant here is asserting. In the parking garage case, Justice Roberts made a thorough survey of the law of standing. His opinion rejects the old notion that a person has standing only if a "legal right" has been invaded in such a way as to give him a cause of action, and also states that "some interests will suffice to confer standing even though they are neither pecuniary nor readily translatable into pecuniary terms". However, in setting forth what sort of an interest may be "direct" and "immediate" and "substantial", the opinion sets forth criteria that appellant here does not satisfy.

> "Thus, the requirement of a 'substantial' interest simply means that the individual's interest must have substance--there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law."
> 346 A.2d 280 at 282.
>
> . . .
>
> "The requirement that an interest be 'direct' simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains."
> 346 A.2d at 282.
>
> . . .
>
> "The remaining requirements of the traditional formulation of the standing tests are that the interests be 'immediate' and 'not a remote consequence of the judgment'. As in the case of 'substantial' and 'pecuniary' these two requirements reflect a single concern. Here that concern is with the nature of the causal connection between the action complained of and the injury to the person challenging it."
> 346 A.2d at 283.
>
> . . .
>
> "In summary, then, one who seeks to challenge governmental action must show a direct and substantial interest, in the sense discussed above. In addition, he must show a sufficiently close causal connection between the challenged action and the asserted injury to qualify the interest as 'immediate' rather than 'remote'."
> 346 A.2d at 286.

In *William Penn Parking Garage* the court found that individual plaintiffs who would be subject to the tax imposed had standing to appeal from the enactment of the taxing ordinance, and that the parking garage operators had standing to appeal from the imposition of the tax, even though they would not pay it, because there was a sufficiently close causal connection between the imposition of the tax and the pecuniary effect on their businesses.

Appellant has not demonstrated any interest that is harmed within the meaning of the tests set forth in *William Penn Parking Garage, Inc. v. City of Pittsburgh, supra*. Certainly, there was no showing of any direct effect upon the association or, for that matter, upon any member. None of the members are adjacent landowners, though some apparently live in the "vicinity" of Landisville Road. However, as to these, it was not shown how they would be harmed or affected in any way by the department's order to the township to provide a sewer connection to intervenor's property. The type

of interests that the association is purporting to protect in this appeal are precisely the type of interests that have been rejected by the courts as insufficient for purposes of standing to appeal. In *William Penn Parking Garage, Inc., supra*, the court said:

> "In particular, it is not sufficient for the person claiming to be 'aggrieved' to assert the common interest of all citizens in securing obedience to the law."

The federal courts, which have gradually broadened their view of who is a "person aggrieved" under the Administrative Procedure Act to include persons who have suffered an "injury in fact" that is not necessarily economic, require that any person or organization appealing must show a specific injury to himself, or in the case of an organization to some of its members. *Sierra Club v. Morton*, 405 U. S. 727, 92 S. Ct. 1361, 31 L.Ed.2d 636 (1972). Here appellant's witness, Paul Silver, who is a member of the association as well as a township supervisor, essentially acknowledged that there would be no actual injury to himself or to the association from the sewer extension to the Young property. At one point he said:

> "I'm not particularly opposed at all to Mr. Young's property here being sewered."

What Mr. Silver was interested in was that "proper procedures" should have been followed by the township supervisors in approving the official sewage facilities plan and in approving the prior extension of the sewer line along Landisville Road. This would appear to be what Justice Roberts referred to as "the common interest of all citizens in procurring obedience to the law", which is not a sufficiently specific injury to confer a right of appeal from an action by which one is otherwise unaffected. The association's other primary interest as articulated by Mr. Silver is in preventing the development of the agricultural lands adjacent to intervenor's property. While this may be a laudable object, the development of those lands certainly cannot be said to be a direct or immediate or substantial effect of the department's order. In fact, one would have to assume that the township's zoning ordinance and official sewage facilitiy plan will not be enforced or complied with in order to believe that this possible injury might actually occur.[2]

Appellant argues that the recent case of *Raum v. Tredyffrin Township Board of Supervisors*, 28 Pa. Commonwealth Ct. 426, 342 A.2d 450 (1975), is applicable here and supports the right of the association to this appeal. In *Raum* residents in sub-standard housing, some of whom were members of an appellant association, were allowed to

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2. We are aware of the development threat presented by creeping sewers, but it does not enable us to disregard all applicable criteria of remoteness in evaluating whether this group is actually affected by this proposed installation.

challenge the constitutionality of a major zoning ordinance amendment on the ground that it excluded low income residents. The court recognized the interest of residents in preserving the integrity of their zoning ordinance, and that an association may have derivative standing to raise issues that affect the residents. The difference between that case and this is that in *Raum* there was a foreseeable effect on an injury to some residents from the enactment of the ordinance, which was applicable to a very large development tract in the township. Where the issue is one of overall planning that will affect some, if not all, members of an association, it appears that the Commonwealth Court is prepared to recognize that an association has standing to assert its members' interest. Thus, we believe that an association would have standing to appeal from the adoption or approval of an official sewage facilities plan, which would inevitably affect the residents' persons and property by determining who would have sewers and who would not. Here, however, we have an administrative action relating to one specific piece of property with no demonstrable effect on the association or any of its members. We conclude that the injuries that appellant is asserting are insufficient to sustain its appeal.

"Proper Procedures"

2. Reluctant as we would be to dismiss the appeal purely on the ground of lack of standing, we have less reluctance in this case where, after a full hearing on the merits, it is clear that appellant cannot prevail on the substance of its contentions. The essence of appellant's complaint relates to the alleged illegality of actions taken by the township supervisors. Beyond doubt, this board has no jurisdiction to review and determine the propriety of actions of the township supervisors. Administrative Code §1921A, 71 P. S. §510-21(a). As a matter of law, any challenge to the procedural regularity of ordinances and resolutions adopted by second class townships must be made within 30 days in the court of common pleas. 53 P. S. §65741. From our cursory examination of the applicable law, it appears that that is the exclusive procedure for making procedural challenges to ordinances or resolutions. *Hodge v. Zoning Hearing Board*, 11 Pa. Commonwealth Ct. 311, 312 A.2d 813 (1973); *Griffith v. McCandless Township*, 366 Pa. 309, 77 A.2d 420 (1951). Certainly, this board could not invalidate any action taken by the township supervisors. The thrust of appellant's position has to be that the board should declare the department's order arbitrary, capricious and unreasonable because the township supervisors acted improperly, even though there has been no official determination that they did so act, and neither the department nor this board would be qualified to determine that they did act improperly. It does

not appear to us unreasonable for the department in reviewing a private request to assume that the official sewerage facilities plan adopted by the township was properly adopted. In fact, they could not assume otherwise. If the supervisors were to revoke their prior action or if it were revoked by action of a court of competent jurisdiction, of course the department could no longer conclude that a sewer extension to intervenor's property was consistent with the official sewage facilities plan.

The appellant presented elaborate and somewhat confusing evidence to show that sewers in the Landisville Road area were previously deleted in 1967 from sewer plans developed for the township and adopted by Ordinance 38 in 1967. The innuendo was that this sewerage area mysteriously reappeared when the official sewage facilities plan was adopted in 1969. Whatever merit there may be to appellant's contention, it is clear that appellant's allegations cannot be countenanced by this board and must be dealt with in some other judicial or political arena. In fact, the section of the second class township code upon which appellant relies to suggest that the action of the township supervisors was illegal, 53 P. S. §66502, does not appear to apply to the adoption of a plan but only to the construction of sewers. This section provides the avenue for challenging the construction of a sewer where it is opposed by sixty percent of the total property owners of the township or the affected sewer district. This section might, therefore, have been applicable to the prior construction of sewers in Landisville Road. Apparently, the prior installation of the sewer line in Landisville Road was permitted by the Bucks County Water and Sewer Authority and authorized by agreement between the developers who were to pay the cost of the sewers and the township supervisors, but was never authorized by ordinance or resolution as required in 53 P. S. §66502. Again, if there is a remedy for this failure, it does not lie here; nor could that failure affect the department's consideration of whether to order the township to allow intervenor's property to be connected to a sewer line that is consistent with the official sewage facilities plan and with the township's comprehensive zoning ordinance.

Propriety of Department's Order

3. We are, in fact, satisfied that the department's action in this matter was not arbitrary, capricious or unreasonable. We might have some question as to whether the department can, in the context of a request for a private revision under §71.17, which contemplates an order to the township to "revise" its plan to accomodate a private property owner, order the township to "supplement" or implement its official plan. However, on the principle that the greater power usually encompasses the lesser power, we would suppose that the department does have this power, particularly as §10 of the Pennsylvania Sewage Facilities Act, 35 P. S. §750.10, authorizes the department to

order the implementation of official plans and revisions thereto. The testimony of the department's witness indicated that the department did carefully evaluate the intervenor's request in light of the criteria set forth in §71.17(c).[3] At the hearing, department's witness testified that he concluded that the site was unsuitable for an on-lot sewage disposal system by consulting the soil maps, which show these soils to be unsuitable except for alternate systems. Edward Prout, the department's witness, stated that these soil maps were 85 percent reliable in his experience. He also noted that Buckingham Township has an ordinance prohibiting alternate systems. At that point, no tests had been performed on the intervenor's property to determine whether or not there might be some place suitable for an on-lot system. Since the hearing, tests have been performed by the Bucks County Department of Health, which is the agency authorized to administer the Sewage Facilities Act for purposes of the granting and denying of permits for on-lot systems. Because of appellant's indication that it would not oppose the sewer extension to intervenor's property if in fact the lot was unsuitable for sewage, and because intervenor had applied for an on-lot sewage system, the board deferred resolution of this matter in hope that the appeal might be resolved in this manner. (It was also thought that a deferral would give the township supervisors time to act if indeed they wished to authorize an alternate system on intervenor's property.) Despite appellant's counsel's representation that appellant would not oppose a sewer connection if the site is unsuitable for an on-lot system, appellant now rejects the Bucks County Health Department's conclusion that the lot is so unsuitable and asks to make its own determination as to the suitability of the lot. Clearly, appellant is not given responsibility under the law for determining whether a lot is suitable for an on-lot system.

Joinder of Parties

4. We must deny the petition of Mrs. Michael Manoff and Mr. Robert W. Pearson to join as parties appellant. First, the board has no procedure for the joinder of parties appellant. Rather, the board's rules provide for intervention where that is appropriate. Secondly, the petition on its face does not demonstrate that these petitioners have any more interest than the association itself, though they live closer to Landisville

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3. 25 Pa. Code §71.17(c) provides:
"(c) In arriving at its decision as whether to order a revision or supplement, the Department shall consider at least the following:
(1) The reasons advanced by the requesting individual in comparison with reasons advanced by the municipality, if submitted; and
(2) Past actions by the municipality in approving the plans for the lot or lots in question; and
(3) Any applicable zoning; subdivision regulations; local, county, or regional comprehensive plans; or any existing Commonwealth plan; and
(4) The existing plan developed under the provisions of this Chapter."

Road than other members. The only possible allegation of injury is paragraph 5 in which it is asserted that petitioners might "if sewer lines are extended throughout the immediate sector, be required at very substantial expense to tie into such sewer lines". Since this case does not involve any such proposed sewer lines, the board could hardly recognize this interest as one that would confer standing to appeal the department's order. Third, as the department contends, the board's jurisdiction to hear appeals is limited to appeals that are timely filed within 30 days from the receipt of notice of the action taken by the department. Even if petitioners had alleged a sufficient interest to allow them to appeal the department's action, we could not allow an appeal to be taken one year after the department's order.

For all the foregoing reasons, the appeal must be dismissed.

ORDER

AND NOW, this 8th day of September, 1977, the petitions of Mrs. Michael Manoff and Mr. Robert W. Pearson to join as parties appellants is denied. The appeal of Buckingham Township Civic Association is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

DATED: September 8, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

DANIEL K. and DORIS G. JAHNKE
d/b/a TRI-COUNTY DISPOSAL

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 77-035-W

Pennsylvania Solid Waste Management Act

ADJUDICATION

BY PAUL E. WATERS, Chairman, Issued September 16, 1977

This matter comes before the board as an appeal from an order to close a landfill which is operating in Wyoming County, Pennsylvania, without a permit. Appellants contend that the landfill is now almost filled and inasmuch as no action has been taken against some other operators they should be allowed to complete their operation before closing down.

FINDINGS OF FACT

1. The appellants are Daniel K. Jahnke and Doris G. Jahnke, trading and doing busisness as Tri-County Disposal in Tunkhannock Borough, Wyoming County.

2. On January 20, 1970, one Ben Pherrigo applied for a permit for the operation of the landfill which is subject of this proceeding. The application was incomplete and another was submitted on December 12, 1971.

3. No permit has been issued for the site.

4. The refuse is placed in lifts and some are below ground level 15-20 feet, while the groundwater table is 10-21 feet below ground level in some places.

5. The site experienced flooding during hurricane Agnes and some of it was washed away while portions of it were underwater as indicated by high water marks. The site has flooded on at least one other occassion.

6. The site is located between 100-200 feet from the Susquehanna River.

7. Appellants collect solid waste from Lackawanna County, Susquehanna County and Wyoming County. The largest amount comes from Wyoming County.

8. There are a number of permitted landfills in the counties in which appellants collect solid waste. Their operation is contrary to the official solid waste plan of Wyoming County which has no permitted landfill.

9. A number of other landfills in the area operating without permits are under orders from the DER to close.

10. On April 3, 1975, the former landfill owner, a Mr. Pherrigo, came to an administrative hearing with the DER regarding the future of the landfill. Action was delayed because he suffered a heart attack. Sometime thereafter, appellants purchased the site with knowledge that the site was not permitted.

11. The DER is presently taking administrative steps to close all landfills, both private and municipal, which are presently operating without permits in the region around Wyoming County.

12. Some of the landfills that are now operating without permits are operated with more violations of the DER regulations than occur at appellants' landfill.

13. The DER issued an order to appellants on December 3, 1976, ordering them to cease operations and take certain final steps to close the landfill by March 15, 1977.

14. The DER has inspected the site on numerous occassions and recognizes that some of the responsibility regarding a final closing remains with the former owner, Pherrigo, as to previously filled portions of the landfill.

15. The present operation is in violation of a number of the DER regulations, relating to daily cover, and keeping the refuse a safe distance from groundwater.

16. Appellants are making preparations to close the landfill and cease operations when all of the useable space is filled. At the present time, about 97% of the land has been used.

17. Appellants presently intend to complete operations within the next six months.

CONCLUSIONS OF LAW

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

2. The Pennsylvania Solid Waste Management Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001, *et seq.*, requires that appellant have a permit issued by the DER in order to carry on their disposal operation in Wyoming County.

3. Appellants have failed to obtain a permit and under the facts of this case would not be entitled to the issuance of a permit because of site location and condition.

4. The order of the DER requiring appellants to cease operation was proper even though there are still other illegal operators in the region and appellants would conclude their landfilling operation by necessity in less than one year.

DISCUSSION

The real issue here does not seem to be the one which appeared when this appeal was first instituted. It is now clear that the issue is not whether appellants have properly been ordered to cease operations without a permit, but when this should take place. Reduced to its simplest terms, appellants would have this board change the order issued by the DER to allow them to cease operations after all available land is filled at their landfill.

The Pennsylvania Solid Waste Management Act of July 31, 1968, P. L. 788 No. 241, *as amended*, 35 P. S. §6001, *et seq.*, and the rules and regulations of the DER promulgated pursuant thereto clearly require that operators such as appellants must have a properly issued permit to carry on a solid waste disposal operation. Appellants do not dispute the fact that they have none and are not planning to seek one. Indeed, it is clear that any such request would be denied by the DER because of the location of the landfill and the soil and groundwater configuration. Thus, there is no doubt that the DER acted properly in ordering the landfill to be closed. Appellants would have us grant a delay so that they may continue their law violations until they no longer can benefit therefrom—and then they agree to comply. This is seen by appellants as a fair and reasonable offer because of the fact that it will only take another one-half year of indulgence by the DER before that remaining land is

filled. The DER has declined the offer and we do likewise. At the very least, we must conclude, this was not an abuse of discretion on the part of the DER. We are not impressed with appellants' argument that their unpermitted site is only one of many and that they should, therefore, be allowed to continue operation. In effect, this is an argument that appellants should be among the last to be closed. We find no discrimination in the order in which the DER has elected to proceed against various violators. Appellants have no legal right to a particular chronological position in the DER enforcement plan for this region. We therefore enter the following:

ORDER

AND NOW, this 16th day of September, 1977, the appeal of Daniel K. Jahnke and Doris G. Jahnke, d/b/a Tri-County Disposal Landfill is hereby dismissed and the order of the DER is sustained.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

DATED: September 16, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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BELLEFONTE BOROUGH

Docket No. 74-010-D

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joanne R. Denworth, Member, September 21, 1977

The Department of Environmental Resources has moved to quash this appeal on the ground it was untimely filed. After review of the pleadings and affidavits filed by the parties, we agree with the Commonwealth that the appeal must be dismissed under *Joseph Rostosky v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976).

FINDINGS OF FACT

1. On October 12, 1973, the Department of Environmental Resources, appellee, issued an order to a number of municipalities, including the Borough of Bellefonte, directing those municipalities to take certain steps to plan for and construct a regional sewage treatment facility.

2. The department's order was received by Bellefonte Borough by October 23, 1973.

3. The department's order contained a notice of right to appeal which advised appellant:

> ". . . Appeals shall be filed in the manner provided in Chapter 21 of the Department's Rules and Regulations, a copy of which is attached hereto. The original shall be mailed to Environmental Hearing Board, First Floor, Blackstone Building, Harrisburg, Pennsylvania, 17101. . . ."

4. A copy of the notice of appeal directed to the Environmental Hearing Board from the Borough of Bellefonte was received by the Department of Environmental Resources on October 29, 1973.

5. No copy of the appeal was received by the Environmental Hearing Board before January 8, 1974, when a copy of the appeal was forwarded to the board from the department.

6. This matter was consolidated with other appeals by order of the board dated March 26, 1974, but was later severed from the other appeals by order dated June 26, 1974. The other appeals have been closed and discontinued.

7. Although appellant claims to have filed this appeal with the board along with an appeal from the Township of Boggs, another municipality subject to the October 12 order, no appeal from the Township of Boggs was ever received by the board.

8. Appellant has produced return receipts for copies of the notice of appeal mailed to several people in the department as well as the attorney general's office, but has been unable to produce any return receipt for the notice of appeal allegedly filed with the board.

CONCLUSION OF LAW

1. Under *Rostosky v. Commonwealth of Pennsylvania, Department of Environmental Resources, supra,* which held that the board had no jurisdiction to review an appeal that was filed with the department within 30 days of the department's order but not with the board, the appeal of the Borough of Bellefonte must be quashed as untimely filed.

O R D E R

AND NOW, this 21st day of September, 1977, the appeal of the Borough of Bellefonte is hereby quashed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

DATED: September 21, 1977

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
Blackstone Building
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CLAUDE P. REICK, JR.

Docket No. 77-013-W

Pennsylvania Sewage Facilities Act

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Paul E. Waters, Chairman, October 12, 1977

This matter comes before the board as an appeal from a refusal by the DER to order a revision of the Act 537[1] plans for two municipalities in which a large resort housing development is in early stages of growth. The Lake Wynonah development does not permit alternate sewage disposal systems and appellant, who is presently using a holding tank and cannot qualify for a standard septic system, desires to install such a system but has been refused by the townships and now seeks to have the DER order the allowance of an alternate system as now authorized by the regulations, by a plan revision pursuant to §17.17 of the DER regulations.

FINDINGS OF FACT

1. Appellant is Claude P. Reick, Jr. who resides permanently at 596 Wynonah Drive in the Lake Wynonah development in Schuylkill County.

2. The Lake Wynonah development is located in both Wayne and South Manheim Townships of Schuylkill County.

3. The sewage facilities plans of both said townships with regard to the Lake Wynonah development provide for interim sewerage service supplied by standard subsurface disposal systems where permitted by soil conditions and holding tanks in other areas.

4. It was contemplated by the sewage facilities plans of the townships that ultimately some 1,300 lots would be serviced by holding tanks and 1,300 lots would be serviced by standard subsurface systems.

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1. Pennsylvania Sewage Facilities Act, Act of 1966, January 24, P. L. (1965) No. 537, 35 P. S. §750.5.

5. At present, some 93 residents of Lake Wynonah are serviced by holding tanks and the remainder of the 242 presently existing homes are serviced by standard on-lot systems. The holding tank owners use Lake Wynonah's Municipal Authority plant.

6. The Lake Wynonah country club has a sewage treatment plant which is designed to handle up to 5,000 gallons per day, however, said plant is permitted by the DER at only 1,300 gallons a day because it discharges into the lake.

7. If alternate systems are allowed in Lake Wynonah, appellant would qualify for one although the total number of home owners that would qualify for such is unknown. Appellant presently uses a holding tank.

8. The municipal authority sewage treatment plant presently has 90-plus holding tank owners to utilize its facility and needs about this number in order to meet its present operational costs.

9. An alternate system is considered generally equivalent to a standard on-lot sewage disposal system from an environmental standpoint although the requirements differ.

10. On or about May 18, 1976, appellant filed with the DER a private request for a revision to the official sewage facility plan of Wayne Township, Schuylkill County.

11. The essence of the private request was to allow an alternate on-lot system to be utilized on Mr. Reick's lot, lot no. 596 located in the Lake Wynonah development in Wayne Township.

12. On June 4, 1976, Wayne Township notified the DER that it opposed appellant's private request on the basis that it was inconsistent with the sewage facilities plan of the authority and would endanger the financial condition of the municipality authority sewage treatment plant and could expose Lake Wynonah to substantial pollution.

13. On July 5, 1976, South Manheim Township wrote to the DER and also opposed appellant's private request on the same basis generally as did Wayne Township.

14. The municipal authority for Lake Wynonah also objected to the appellant's private request for a revision on June 21, 1976, and on November 1, 1976, by a letter to the DER.

15. On January 4, 1977, the DER denied appellant's request.

16. The townships have failed to answer the questions in the DER's letter of October 20, 1975, which requested information on soils, geology, topography, etc., as related to installation of alternate systems, the types and numbers of alternate systems that can be utilized, the influence of nutrients

resulting from expanded use of on-lot sewage disposal systems, maximum densities for on-lot systems and a schedule for phased installation of public sewerage.

17. All nutrients may not be renovated by on-lot systems of either the standard or alternate type and could pollute Lake Wynonah if the development becomes densely populated. The plans, however, call for providing public sewerage before this occurs.

CONCLUSIONS OF LAW

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

2. Where the economic hardship, it is alleged will be suffered, is by another, not a party to the proceedings, the board will require clear proof of same and not merely speculation or conjecture as to its nature and scope.

3. It is unreasonable for the DER to refuse a private request to have municipalities revise their plans to allow the installation of an alternate disposal system where it can properly operate and thereby make a more expensive holding tank unnecessary, especially since the holding tank itself creates some risks to the environment and is generally considered the least desirable sewage disposal system.

DISCUSSION

Appellant was lured to Lake Wynonah, a magnificently beautiful location for a homesite in Schuylkill County, by a dream which has become somewhat of an expensive nightmare. Although appellant presently lives year-round[2] in the resort area at the lake, a sewage disposal problem has created unexpected inconvenience and expense. The original plan for the development in question called for 1,300 homes to use septic tanks and 1,300 homes to use holding tanks for sewage disposal until a public sewer system could be justified by expansion in the future. There are presently two sewage treatments plants on the premises. One is used exclusively for a club house and discharges to the lake and another was constructed especially to treat the sewage from the holding tanks in the development, of which there are now about 90, and discharges downstream from the lake and developed areas.

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2. Only 22 home owners are presently year-round residents.

There is no provision made for the use of alternate systems in the development although the regulations of the department provide for such systems where there are certain limiting soil conditions.[3]

Appellant has conducted the necessary tests and has determined that his home would qualify for an alternate system if they were allowed. No doubt some other lots which do not qualify for a standard system would likewise qualify for an alternate one, but this has not been determined and no figures or reliable information are available in this regard.

Both Wayne and South Manheim Townships, in which the development is located, have opposed an amendment to their Act 537 sewage plans which would allow the use of alternate systems in the development. Appellant believes that the initial cost of such a system would be more than offset by the high cost of maintaining his present holding tank. In any event, he made a private request asking the DER to require the townships to amend their plans to allow alternate systems where the conditions are satisfactory. Although not a party, the Lake Wynonah Municipal Authority did not favor this change because it depends on the holding tank users for the necessary funds to operate and pay for its treatment plant, and it fears losing some customers, like appellant in this matter. The DER has refused to order the revision and appellant would have this board reverse that decision.

At the outset, we must affirm the general principal that an owner of real estate has the right to use his land as he sees fit. *Commonwealth by Shapp v. National Gettysburg Battlefield Tower Inc.* (1973) 311 A.2d 588; *Glen Alden Coal Co. v. Schuylkill Co. Com'rs.*, 27 A.2d 79; *Appeal of Lieb* (1955) 116 A.2d 860; *Philadelphia School of Beauty Culture v. State Board of Cosmetology* (1951) 78 D & C 111. This natural right is, of course, not without limitation. We believe, however, that the need for restrictions

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3. Section 73.1(3) provides:

. . .

"(3) *Alternate subsurface absorption area* - The area of an alternate system in which the liquid from a treatment tank seeps into the soil. It includes the following:

(i) *elevated sand mound* - an area mounded above the surface using a sandy fill material under the gravel bed and open-jointed or perforated piping.

(ii) *over-size area* - a larger absorption area than provided for in §73.63 and §73.64 for use on slowly permeable soil.

(iii) *sand lined system* - an area in which open-jointed or perforated piping is laid over a sandy fill material in covered trenches or excavations.

(iv) *shallow placement* - an area in which open-jointed or perforated piping is laid near the ground surface requiring the addition of soil fill to provide a covering over the system." . . .

and limitations on the use of ones' property should be clearly indicated and not merely conjectural and speculative. Here, the appellant has simply asked to be allowed to do that which would be legal in other areas of the state. We assume that the DER would not have authorized the use of alternate systems or any on-lot sewage disposal system unless satisfied with their safety and efficacy. Indeed it is conceded that a properly functioning alternate system is every bit as good as a standard subsurface system in protecting proper areas of the DER's interest.

The DER has raised the failure of the municipal authority to provide certain information[4] regarding geology, soils, topography, etc. which it requested as a justification for denying the appellant's present revision request. In *Commonwealth v. Trautner*, 19 Pa. Commonwealth Ct. 116, 338 A.2d 718 (1975), which dealt with a related problem, the court said:

> ". . . The burden is placed upon the property owner to motivate his municipality to (1) comply with the regulations relevant to amending municipal plans; and (2) satisfy DER that the property owner's plan for sewage disposal is otherwise acceptable. If the municipality fails to act to amend its plan, or cannot or will not fully satisfy DER, for whatever reasons, the property owner is left with no sewage permit and no opportunity to use his land in what is otherwise a completely lawful manner. This situation is confiscatory and tantamount to a . . taking without due process of law. Robin Corporation v. Board of Supervisors of Lower Paxton Township, ___ Pa. Commonwealth Ct. ___, 332 A. 2d 841 (1975); Township of Nevill v. Exxon Corporation, 14 Pa. Commonwealth Ct. 225, 332 A.2d 144 (1974)."

We are, then, left with only economic arguments for preventing appellant from using an alternate system on his land. The difficulty with the economic justification for the DER's denial is that it requires the DER and this board to move away from environmental health and safety considerations and into questions about the amortization of plant and equipment costs and future development probabilities and possibilities. Even this might not

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4. Appellant initially alleged that he was entitled to an answer to his private revision request under Regulation §17.17, within 60 days of May 18, 1976. Inasmuch as the 60-day period is supposed to run from the date of receipt by the DER of requested data, and appellant has not addressed this argument in his brief, we will not pursue it further.

be a totally inappropriate inquiry except for the fact that the municipal authority, which has the necessary information and presumably the primary interest in these questions, has elected not to become a party to this proceeding.[5] We, therefore, believe the refusal by the DER to order a revision to the plans in question was unreasonable.

Appellant has also argued that the refusal of the townships to revise their plans is improper inasmuch as this is inconsistent with regulations of the DER, and is therefore, unenforceable as to alternate systems. He offers as support the recent case of *Ryan Builders Inc. v. Buckingham Township, et al.*,[6] No. 77-5308-08-2, decided by the Bucks County Common Pleas Court on July 11, 1977. Although that was an action in *mandamus*, we believe it does lend support to appellant's position. We therefore enter the following:

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5. The DER filed a petition to force the Lake Wynonah Municipal Authority to join this proceeding but the board, having no authority to require this, denied the petition, but advised that the authority could intervene if it so desired. It did not. An employee of the authority was, however, subpoenaed to the hearing.

6. Although no full opinion was written, the order of the court is as follows:

ORDER

"AND NOW, this 11th day of July, 1977, upon consideration of the pleadings and following a full hearing, a preemptory mandamus judgment is hereby entered in favor of Plaintiff; Buckingham Township Ordinance No. 6-76, to the extent that it prohibits or restricts on-site alternate sewage disposal systems of the sand mound variety on any lots on which they are authorized by state law, is declared invalid and unenforceable, being superseded and preempted by state statutes and regulations, including the Pennsylvania Sewage Facilities Act, 35 P.S. Section 750.1 et seq., and the regulations of the Pennsylvania Department of Environmental Resources, 25 Pa. Code Section 71.1 et seq.; and Defendants are directed to order the issuance of, and to issue, a building permit for the subject lot No. 2 of the Leisure Acres subdivision in Buckingham Township, recorded in Subdivision Plan Book No. 134, Page 6, subject to all other applicable township rules, regulations and ordinances."

O R D E R

AND NOW, this 12th day of October, 1977, the department is hereby ordered to direct Wayne and South Manheim Townships to revise their plans to permit an alternate on-lot sewage disposal system on Claude Reick's property in the Lake Wynonah development if his property is clearly qualified for such a system. However, such alternate system shall be counted as one of the 1,300 subsurface disposal systems presently permitted by the townships' official sewage facilities plans unless the plans are revised in a general way to provide for alternate systems in the Lake Wynonah development according to an overall plan that would include an equitable distribution of the burden of supporting the treatment facility that is necessary for property owners with holding tanks.

ENVIRONMENTAL HEARING BOARD

P e Waters

BY: PAUL E. WATERS
Chairman

I concur in the order only. Joanne R Denworth
JOANNE R. DENWORTH
Member

DATED: October 12, 1977
11j

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
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Harrisburg, Pennsylvania 17101
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CURRYVILLE WATER AUTHORITY :

Docket No. 77-079-W

Public Water Supply Law

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Paul E. Waters, Chairman, October 20, 1977

This matter comes before the board as an appeal from the denial by the DER of a permit requested by the Curryville Water Authority, hereinafter appellant, to utilize an existing private well owned by one Kegarise, as a source for an alternate public water supply for the village. The DER refused the permit because of the level of nitrates in the well, among other things.

FINDINGS OF FACT

1. Appellant, Curryville Water Authority, is the applicant for a public water source permit, for the Village of Curryville, North Woodbury Township, Blair County.

2. Appellant presently has a permit for Well No. 1 which was issued in July 1975 for the primary water source for the village.

3. Although appellant's application for the No. 1 well permit indicated a level of nitrate above the public drinking water standards (10 mg/l) the DER's test showed a high level but less than the indicated maximum, and special precautions were required as a condition for issuance of the permit.

4. The special condition concerned notice to users of the well and to all doctors in the area that the nitrate level could cause in infants the malady known as methemoglobinema.

5. There is reason to believe that all of the water in the vicinity contains a high nitrate level, and appellant has very limited resources for further drilling, although federal funding has been approved for a distribution system for the new well project and $45,000 has so far been expended.

6. The public water supply will serve 45 families some of whom presently have no water supply and consequently must carry water from nearby wells,use rain water or do without. These families presently use unchlorinated water.

7. The DER was unable to check the physical construction of the Kegarise well intended for a new water supply, and the appellant's application was incomplete on this point.

8. The Kegarise well is located approximately 15 feet from Legislative Route 366 and the DER is concerned that an accident could cause damage to and interrupt service from the well.

9. The well has been used by the Kegarise family as a private source of water for more than 9 years and the water has been satisfactory in quality and produces approximately 90 gallons per minute, which is considered a very high production.

10. The nearest septic system to the Kegarise well is between 150-200 feet, and although this is adequate for a private well, it is less than ideal for a public supply but violates no regulation.

DISCUSSION

Appellant, in this case,has obtained approval of a federal grant which requires an alternate or secondary source of public water for a small number of homes in Curryville, Pennsylvania. The area has a well which presently produces just about enough water for the needs of the area in question, but a distribution system is needed. It was deemed advisable to secure a secondary source of supply to augment Well No. 1 which was previously permitted by the DER and is presently the only public supply. The federal funds will be used for a connecting distribution system for No. 1 well and the Kegarise well to which the present application relates.

The DER has refused a public water supply permit sought pursuant to the Public Water Supply Law, Act of April 22, 1905, P. L. 260, *as amended*, 35 P. S. §713 and the regulations based on the fact that a water quality test made by the DER indicated a level of nitrate in the well in excess of public drinking water standards. Appellant has made a similar test from a water sample and although a witness from the Blair Chemical Laboratories of Altoona, Pennsylvania[1] did not testify, their results indicate a nitrate level of only 5.6 mg/l which is only one-half of the maximum permitted for

1. The chemist who made the test according to Exhibit A-2 was David J. Menza who was unavailable on the date of the hearing. Although appellant reserved the right to call him at a later date, apparently the press of time and the desire for an early resolution because of federal funding and bidding requirements prevented this.

a public water supply. We could, of course, accept the conclusions of the DER test as to nitrates and end the matter there, but there are circumstances in this case which demand more than that, before we will concur that this appellant should lose its federal funding[2], and the 40 families in question should be made to continue carrying unchlorinated water for their household purposes. The chemist who tested the nitrate level for the DER was less than positive about the accuracy of the test results. He was asked on direct examination:

> "Q What is the potential for human measuring error in the analyzing procedure the Department employs for nitrates?
>
> "A At this level—and there are several different ways you could look at that question and give several different answers. I am trying to—the precision we run on the samples runs about plus or minus one percent. On this, using this particular method, this cadmium reduction method, I have seen results that various laboratories that have done the same sample that have a standard deviation of plus or minus six percent. Statistics is not one of my strong points, but it is a very accurate and precise measurement using this particular methodology."

We believe there is too much difference in the testing results for the board to accept the one figure with the equivocal statement of the DER chemist over a report of another chemist who found only half that amount of nitrate, without at least requiring further samples be taken to clarify the mystery of the nitrate level.

The DER has given two other reasons for its denial of the requested public water supply permit. The well is deemed to be too close to a public road for safety. Appellant has indicated a willingness to provide added protection for the well to guard against some unforeseen mishap on the nearby highway which could affect the well. We believe this is a feasible and logical solution to the problem and no doubt this protection can be spelled out in a condition appended to any permit that would be issued.

Finally, the DER believes it properly declined the requested permit because appellant's application did not contain complete information regarding the Kegarise well's physical construction. When the DER investigated the site, the well driller was unavailable and the DER has been unable to confirm certain dimensions and materials used in the well.[3] Inasmuch as the DER does not contest the fact that the well was properly

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2. Apparently, the federal government is satisfied with the water quality of the Kegarise well as a secondary source.

3. A letter received by the board from an engineering firm concerned with the well could not properly be admitted into the proceedings but stated in part:

> "1. The actual outside diameter of the hole for the well was nine (9) inches. The well pipe outside diameter was 6.25 inches, indicating a minimum wall thickness of 1.325 inches.
>
> "2. The grouting was accomplished with grout pumps and was constructed from the bottom upward using a mixture of 5 to 6 gallon of water per bag of cement.
>
> "3. The steel pipe casing for the well weighed 13.5 pounds per lineal foot and was constructed with threaded joints using couplings."

constructed, but simply contends that it does not have adequate information to confirm the fact, we are satisfied that this matter can also properly be resolved if we remand this matter to the DER. We, therefore, enter the following:

CONCLUSIONS OF LAW

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

2. Under the Public Water Supply Law, Act of April 22, 1905, P. L. 260, *as amended*, 35 P. S. §713, the DER may properly deny a permit where the water does not meet the drinking water standards published by the United States Public Health Service. The present limit for nitrate is 10.0 mg/l.

3. Where there is some doubt as to the accuracy of one test for the level of nitrates and there is an irreconcilable difference due to other chemical test results, the board may properly order the DER to again conduct a test before denying a permit for

O R D E R

AND NOW, this 20th day of October, 1977, the matter of Curryville Water Authority v. DER is hereby remanded to the DER with instructions to again test the level of nitrates in the well proposed as an alternate source of water and to review the application of the Curryville Water Authority in accordance with this adjudication.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

BY: PAUL E. WATERS
Chairman

Joanne R. Denworth

JOANNE R. DENWORTH
Member

DATED: October 20, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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VINCENT P. AND JUDITH C. BELMONT : Docket No. 77-056-W

Clean Streams Law
Sewer Ban

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

BY: PAUL E. WATERS, Chairman, October 20, 1977

STIPULATION OF FACTS

1. By Order dated February 22, 1972, the Department of Environmental Resources (Department) imposed a ban on further connections to the Penndel Borough Authority sewage treatment plant.

2. On January 28, 1977, appellants Vincent P. Belmont and Judith C. Belmont made settlement on a parcel of vacant real estate situate on Centre Street, Penndel Borough, Bucks County Tax Parcel 32-003-399.

3. On or about February 25, 1977, appellants made application to the Penndel Sewer Authority for a sanitary sewer connection for the home which they intended to construct on the above referenced property. By letter dated March 1, 1977, the authority denied the application.

4. By letter dated April 6, 1977, Judith C. Belmont requested the department to grant an exception to the sewer connection ban on the basis that she had purchased a lot in Penndel Borough without knowledge of the existing sewer ban; she had obtained a loan for the construction of a new home, and that she was suffering a financial hardship.

5. By letter dated April 20, 1977, the department denied Mrs. Belmont's request for an exception to the sewer connection ban. Said letter was received by Mrs. Belmont on April 21, 1977. The within appeal was dispatched on May 20, 1977, and was received by the Environmental Hearing Board on May 23, 1977.

6. By letter dated May 11, 1977, the Bucks County Health Department advised that a permit for on-lot sewage disposal could not be issued due to unsuitable soils.

DISCUSSION

The facts have been stipulated, and the law should by now be so clear that extended discussion is unnecessary.

Appellants find themselves in a regrettable situation from which this board is unable to extract them. We have traditionally recognized four circumstances in which a sewer ban exception may properly be recognized. They are:

1. Where the connection is for a previ sly existing building,
2. Where a building is razed which was connected, and a new one is built,
3. Where a highway condemnation causes relocation,
4. Where there is a previously issued building permit.

See *Alan Mitchell Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 71-108, issued June 7, 1972; and *David C. Starr v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 72-266, issued November 16, 1972.

Appellants do not fit into any of the indicated exceptions to a sewer ban order and it is clear that the DER is in no way responsible for the problem which appellants face and which they were in the best position to protect themselves against.

CONCLUSIONS OF LAW

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

2. Where the DER has properly issued a sewer ban prohibiting additional municipal sewer connections pursuant to The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P. S. §691.1 *et seq.*, an exception thereto may not be granted more than five (5) years later on the basis that a prospective home builder did not have knowledge of the ban and has suffered financial hardship.

3. The fact that a building lot is unsuitable for an on-lot sewage disposal system does not provide the basis for an exception to a proper sewer ban order issued by the DER.

We must enter the following:

ORDER

AND NOW, this 20thday of October, 1977, the order of the DER in refusing an exception to its sewer ban order is sustained and the appeal of Vincent P. and Judith C. Belmont is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

DATED: October 20, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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TOWNSHIP OF HEIDELBERG et al : Docket No. 76-150-D

v. : Official Sewage Facilities Plan Revision

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and C & H DEVELOPMENT COMPANY AND
WASHINGTON TOWNSHIP, Intervenors

ADJUDICATION

By Joanne R. Denworth, Member, October 21, 1977

Heidelberg Township has appealed from the Department of Environmental Resources' (DER's) approval of a plan revision to Washington Township's official sewage facilities plan to allow for a package treatment sewage plant to serve the proposed development of C & H Development Company. In an earlier related appeal the board sustained the department's refusal to grant a permit for the package treatment plant because it was not included in Washington Township's official sewage facilities plan. *C & H Development Company v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 73-299-W (issued March 8, 1974). That decision is on appeal to the Commonwealth Court, which is awaiting the outcome of this action to have Washington Township's plan revised to provide for C & H's treatment plant. In the earlier proceeding, Washington Township had approved C & H's subdivision plan for Section 1, but had not formally approved of the package treatment plant or sought to have it included in its official sewage facilities plans. Neighboring Heidelberg Township, in which a small portion of the C & H Development lies, was opposed and remains opposed to a package treatment plant discharging into Mill Creek, which flows through Heidelberg Township.

FINDINGS OF FACT

1. Appellant is Heidelberg Township, a second-class township, located in Lehigh County, Pennsylvania.

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

3. Washington Township, intervenor, is a second-class township located in Lehigh County, Pennsylvania.

4. C & H Development Company (C & H), intervenor, is a Pennsylvania corporation with offices at 943 North Seventh Street, Allentown, Pennsylvania. Charles A. Costello and Harold William Campbell are the principal shareholders of C & H.

5. C & H is in the process of developing a 114 acre tract of land in a rural section of Lehigh County. The development is known as Mill Creek Acres. The first section, consisting of 37.492 acres with 81 building lots, was given subdivision approval by the Washington Township Planning Commission on May 24, 1971, and by the Washington Township Board of Supervisors on July 13, 1971. The site data legend on the approved subdivision plan calls for "a central water system" and "sanitary sewage system".

6. The approved subdivision plan shows 51 lots in Washington Township (a portion of one of the lots may be in Heidelberg Township) and 30 lots in Heidelberg Township (portions of 7 of these lots are in Washington Township).

7. Section 2 of Mill Creek Acres contains 76.35 acres. The proposed subdivision plan provides for 192 lots, all located in Washington Township.

8. The area surrounding the proposed development is farmland.

9. C & H previously applied to DER in 1973 for a permit for its proposed package treatment plant. The application was denied on the grounds that there was no provision for such a plant in the official sewage facilities plan of Washington Township and further that the development was inconsistent with planning concepts set forth in the Regional Comprehensive Plan of the Joint Planning Commission of Lehigh-Northampton Counties (JPC). The denial was upheld by this board.

10. By resolution adopted November 12, 1974, the supervisors of Washington Township approved an amendment to the Township's official sewage facilities plan so as to include the sewage treatment plant proposed by C & H to serve Mill Creek Acres.

11. On March 5, 1976, a plan revision module was submitted to the Department of Environmental Resources by Washington Township asking that the department approve the plan revision.

12. On October 6, 1976, DER approved the Washington Township amendment to its official plan. Heidelberg Township filed a timely appeal from that approval.

13. Approximately 27 single family detached homes have been constructed in the Mill Creek subdivision Section 1. These homes are served by the central water system, which has been constructed, and have on-site sewage disposal facilities that the developer views as "interim" systems until the "sanitary sewage system" is in operation.

14. According to the planning module, the proposed sewage treatment plant will have a 105,000 gallons per day capacity, and will discharge into the main tributary that forms Mill Creek. The system would be able to serve 350 homes. C & H contemplates using the excess capacity to serve neighboring residents who desire service.

15. The JPC, which was required to comment on the requested plan revision in accordance with regulation 71.16(b)(2), opposed the construction of the package treatment plant. In a review letter of March 31, 1976, JPC chief planner, Allen O'Dell, gave the following reasons, among others, for the JPC's opposition to the Mill Creek Acres development and treatment plant:

> "(a) . . . it is clear that Mill Creek Acres will contribute nothing toward meeting the fair share housing allocation of Washington Township. It should also be noted that Washington Township has already met its fair share allocation through about 1978 and only needs about 80 more low and moderate income units to meet its allocation for 1983.
>
> "(b) The JPC Regional Comprehensive Plan recommends that most development take place adjacent to existing urbanized areas. It is in these areas where existing capacities in community facilities, utilities, transportation and mass transit facilities can be utilized and where needed expansion of such facilities can be most economically provided.
>
> "(c) The Mill Creek Acres Development is located in an area away from existing urban areas and in an area designated as conservation and rural in the JPC comprehensive plan.
>
> "(d) Another reason that the commission has consistently opposed the treatment plant is that the discharge is located upstream of proposed Trexler Dam.
>
> "(e) The commission concluded that there is no social justification for the treatment plant and the proposed development at the project site."

16. Since 1971 the JPC has consistently recommended against the Mill Creek Acres development and the package treatment plant that the developer proposes. The review letters over the years have reiterated the following objections:

> a. The proposed treatment facility is not in accord with JPC Water Supply and Sewage Facilities Plan. The regional plan does not provide for a treatment facility at this location or for sanitary sewer service in this area.
>
> b. The density of development planned in this subdivision is counter to the regional land use concept of concentrating higher densities adjacent to the existing metropolitan urban area.
>
> There is a large amount of land potentially developable for residential uses in other areas of the region nearer the metropolitan area.
>
> c. A significant portion of this site does not appear to be suitable for high density development due to slope and flood plain limitation.
>
> d. The proposed package treatment plant is located upstream of the proposed Trexler Reservoir site.

e. The state stream quality classification resulted in the denial of a treatment plant expansion on the same stream.

f. The plant cannot be considered "interim" as there is no prospect for it to be replaced by a public system in the foreseeable future.

g. The development will not contribute to Washington Township's share of Lehigh County's low and moderate income housing allocation. The homes which have already been built are in the $30,000—$40,000 price range.

17. The Washington Township Planning Commission disapproved Section 2 of Mill Creek Acres development on September 27, 1972, as exceeding the township's density limitation and as "not in keeping with the township comprehensive plan of actual land use". However, Washington Township now permits the density (3 lots per acre) proposed by C & H.

18. The Washington Township Planning Commission apparently was not asked to review and did not review the proposed sewerage facilities plan revision.

19. Mill Creek, as part of the Little Lehigh Drainage Basin, has been designated a conservation area under regulation 93.6 of the department's rules and regulations.

20. By letter of July 1, 1976, the department requested Washington Township to provide the department with additional information in support of the plan revision, including social and economic justification for the proposed discharge to Mill Creek pursuant to regulation 95.1(b) which provides:

> "Waters having a better quality than the applicable water quality criteria as of the effective date of the establishment of such criteria shall be maintained at such high quality unless it is affirmatively demonstrated that a change is justified as a result of necessary economic or social development and will not preclude uses presently possible in such waters."

21. The department's letter stated, *inter alia:*

> "Therefore, prior to completing our review of the Mill Creek Acres proposal, we are bringing the issue of social and economic justification to your attention and are hereby requesting your comments. You should consider the comments of the Joint Planning Commission Lehigh-Northampton Counties as well as the comments of the developer relative to this matter.
>
> "In preparing an assessment of the social and economic impacts and/or benefits of the proposed development, we suggest that you address the points listed below. The responses which you prepare should be based on a careful analysis of available data and should be well documented.
>
> "1. Evaluate the adequacy of existing community services and facilities to accommodate the proposed development, including schools, roads, utilities, fire and police protection. If additional services and facilities will be needed, evaluate the impact of the proposed development on community taxes. Will the property taxes generated by the development be adequate to offset the cost of any additional services and facilities?
>
> "2. Will the proposed development fill a housing need in the township or in the region?

"3. Evaluate the expected impact of the development on adjacent property owners in terms of future increases in property taxes, conflicts between the new development and existing land uses, and increased pressure for development of adjacent properties.

"4. Evaluate the potential impact of the development on natural, scenic, historic, and aesthetic resources important to present residents of the township. Will the proposed development eliminate or interfere with historic sites, scenic areas, open space resources, or other sites of outstanding natural value? Will the development produce or aggravate stormwater runoff or flooding problems or cause other environmental problems which would affect present township residents?"

22. By letters dated July 13, 1976, and August 12, 1976, from Walter Krum, Chairman of the Washington Township Board of Supervisors, the township responded to DER's questions and stated essentially that the development was socially and economically justified because people would want to live in these houses. The letters further represented that the development would be serviced by township roads, fire and police protection and that future taxes from the proposed development would pay for any needed municipal services.

23. The testimony of Albert Semmel, a Washington Township Supervisor, indicated that there are now no macadam roads in the area of Mill Creek Acres and that the township has no police protection at the present time.

24. The JPC prepared a regional sewer and water plan that was adopted by Washington Township by resolution dated February 13, 1973, and by Heidelberg Township by resolution dated July 11, 1972. The plan recommends that development take place in the areas where public sewer facilities are available. According to the testimony of the chief planner for JPC, one purpose of encouraging development in areas where public sewers are available is to reduce the need for package treatment plants in outlying areas.

25. The proposed package plant selected by C & H is one that DER includes on an approved list of such facilities. If operated continually with maximum care and at maximum performance, the proposed plant could meet DER stream quality standards for a conservation stream.

26. Package treatment plants at optimum performance are able to achieve 95% removal of solids and organic load, but they frequently do not function at optimum efficiency. According to appellant's expert witness, Frederick White, it is reasonable to expect "85% removals on a regular basis".

27. Although the plan revision modules submitted by Washington Township anticipate an eventual municipal plant to serve Mill Creek Acres and states that the proposed package plant would be only an emergency facility, there are no proposed municipal interceptors to serve the Mill Creek Acres area, and the JPC sewage facilities plan does not indicate any future municipal sewage facilities to serve Mill Creek Acres.

28. Washington Township has taken steps to provide interceptor sewerage facilities for portions of its township, but has made no plans to extend any inter-

ceptor lines closer to Mill Creek Acres than the village of Slatedale. The village of Slatedale is 2.75 miles from the proposed Mill Creek plant. It would not be possible to install a gravity interceptor from Mill Creek to carry sewerage to the Slatedale interceptor.

29. There have been no malfunctions of the on-lot systems presently operating at Mill Creek Acres.

30. The discharge point of the proposed plant would be located close to Heidelberg Township. Beyond the discharge point, Mill Creek then flows into and through Heidelberg Township.

31. An existing package treatment plant, the Heidelberg Heights Treatment Plant, is located downstream from the proposed Mill Creek Acres plant in Heidelberg Township. That plant has had frequent malfunctions. The department has been aware of the malfunctions and has sent notices of violation to the permittee of the plant over a period of years, but the malfunctions were continuing up to the time of the hearing.

32. On November 17, 1976, at the point marked by an "X" and "MX" on Heidelberg Exhibit H, the creek was flowing black and had an odor of sewage. The sewage was running out of the door of the Heidelberg Heights plant. The same situation was observed on November 20, 1976.

33. The portion of the Mill Creek watershed which is located upstream from the Heidelberg Heights plant has good quality water. There are minnows and trout in the stream. The stream has no odor at that location.

34. The quality of the water in Mill Creek at the Martin Swank residence, which is located downstream from the Heidelberg Heights plant, has deteriorated over the last several years in that it has been filling up with algae, the stream has an odor, and there are no longer fish and eels in the stream. The stream used to be used for swimming and bathing but residents along the stream no longer use it for that because of its polluted condition.

35. Up until 1970, the portion of Mill Creek flowing by Herman Sander's property (as indicated on Heidelberg Exhibit H) was clear even though there were dairy farms upstream. At that time the creek had no objectionable odors, however, over the past several years, the creek began to develop an odor and turbidity. At that point of Mill Creek marked by an "X" and the initials "A.H.", until 1970 the water was pure and almost clear and the creek was used for swimming. Prior to 1970, there were no weeds growing in the creek bed, but the quality of the water began to change in the early 1970's and the creek began to develop an odor. On July 28, 1976, at the Hower residence, the creek became so thick it clogged a water pump Mr. Hower had been using to irrigate his garden and the creek was grey and blackish and just barely moved upstream towards the Heidelberg Heights Sewage Plant.

36. Because one package treatment plant malfunctions does not necessarily mean that another will also malfunction. However, even if the Mill Creek Acres plant were to be operated at peak efficiency and with maximum care there would be a degree of degradation to Mill Creek from the plant's effluent.

37. The tributary of Mill Creek to which the treatment plant would discharge is designated an intermittent stream on the U.S. geodetic map.

38. At Mr. Harold Rumble's premises, located downstream on the tributary on which the plant would be built (at the point marked "H.R." on Heidelberg Exhibit H), the creek normally is only about a foot to a foot and a half wide and perhaps six inches deep. Over the last twelve-year period during three summers, 1966, 1967 and 1968, the creek bed was completely dry.

39. The portion of Mill Creek indicated on Heidelberg Exhibit H by a rectangle with the initials "M.S." inside shows that over the past twelve years the flow of the creek decreases substantially in the summer months from a normal width of ten to twelve feet, to a width of approximately three feet.

40. Over a six month period in the fall and winter of 1971-72, the developer took flow measurements of Mill Creek near the point of discharge and found the minimum flow at that time to be approximately 300 gallons per minute or 1,800 gallons per hour. The developer is also prepared to augment the flow from the plant with well water if necessary.

41. There would be dilution of plant effluent from the stream in non-dry months and possibly dilution of pollution now in the stream by virtue of the increased flow from the plant. However, no discharge is preferable to dilution as a means of preventing pollution.

42. On two occasions C & H asked the Heidelberg Township Supervisors to revise their official sewage facilities plan to accommodate the Mill Creek Acres plant. The Heidelberg Supervisors refused for the following reasons:

> "A. The plant was represented as being an interim facility, however the Heidelberg Township Supervisors 'did not see the possibility of sewage coming into that area for. . . the foreseeable future . . .'
>
> "B. The Heidelberg Supervisors did not feel the small tributary to Mill Creek was adequate to handle a sewage treatment plant.
>
> "C. The malfunctions of the Heidelberg Sewage Plant made the Heidelberg Supervisors aware of the problems that could develop with other treatment plants on the same stream.
>
> "D. Even though Heidelberg Township notified the Department of the Heidelberg Heights Plan malfunctions, the department did essentially nothing to remedy the difficulties at the plant."

43. DER was aware of Heidelberg Township's objections to the treatment plant prior to the time it approved Washington Township's plan revision.

DISCUSSION

This case presents a critical question of whether and to what extent the department must exercise discretion in reviewing decisions made by municipalities when the department is called upon to review a plan revision to an official sewerage facilities plan submitted by a municipality. The evidence in this case suggests that the department did not exercise any independent judgment on the question of whether C & H Development Company should be allowed to locate a package treatment plant on Mill Creek, but simply approved Washington Township's decision that the plant should be allowed. The department perhaps felt compelled to take this position because of the Commonwealth Court's decision in *Community College of Delaware County v. Fox*, 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975), and several decisions by this board, recognizing that under *Fox* basic planning decisions are to be made by local municipal bodies. We believe, however, that the *Fox* decision is distinguished from this case by the significant fact that it involved a permit application under The Clean Streams Law as opposed to a plan revision under the Pennsylvania Sewage Facilities Act.[1] Though it may be that a departmental decision on whether or not to grant a permit for an interceptor should not involve the department in planning decisions, we believe the law clearly requires that the department address such considerations when it is called upon to review an official plan submission or a revision thereto. Here we find the department failed to exercise any discretion in reviewing Washington Township's requested plan revision. That in itself is an abuse of discretion. Further, however, considering the evidence presented by appellant, it is difficult to see how DER could, in the proper exercise of its discretion, approve this plan revision.

The department's responsibility with regard to official sewage facilities plans derives from the Pennsylvania Sewage Facilities Act, Act of January 24, 1966,

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1. Judge Blatt's opinion in the *Fox* case stated:
"We need not, however, be further concerned with the construction of the Sewage Facilities Act, for we observe that the appeal which was filed by Mrs. Fox and Natural Lands with the EHB from the DER issuance of the sewer permit falls, as a matter of law, only within the provisions of The Clean Streams Law, and we note that Section 207 of The Clean Streams Law, 35 P. S. §691.207 requires merely that a permit be issued by the DER before a municipality shall be permitted to extend its sewer lines. The issuance of such a permit, of course, was the subject of the DER action here. The Sewage Facilities Act, on the other hand, requires permits where an individual or community sewage disposal system is to be installed or where any building is to be erected for which such a system is to be installed. Not only is this not the situation here, but the DER issued no such permit. This is obviously not an appeal from DER approval of the official sewerage facilities plan of Delaware County and, therefore, the Sewage Facilities Act was not involved here. The EHB, however, seems none the less to have been following the language of the Sewage Facilities Act, and while it may be true that, based upon a well framed complaint in an original action alleging a breach by the DER of its fiduciary duties under Section 27, such language might offer persuasive evidence of the DER's fiduciary responsibilities, this is an *appeal* from action under another statute, and such considerations are not appropriate here."
20 Pa. Commonwealth Ct. at 352.

P.L. 1535, *as amended*, 35 P.S. §750.1 *et seq.* Section 5 of that act provides, *inter alia:*

> "Official Plans.—(a) Each municipality shall submit to the department an officially adopted plan for sewage services for areas within its jurisdiction within such reasonable period as the department may prescribe, and shall from time to time submit revisions of such plan as may be required by rules and regulations adopted hereunder or by order of the department: Provided, however, that a municipality may at any time initiate and submit to the department revisions of the said plan. Revisions shall conform to the requirements of subsection (d) of this section and the rules and regulations of the department.
>
> * * *
>
> "(d) Every official plan shall:
> (1) Delineate areas in which community sewage systems are now in existence, areas experiencing problems with sewage disposal including a description of said problems, areas where community sewage systems are planned to be available within a ten year period, areas where community sewage systems are not planned to be available within a ten year period and all subdivisions existing or approved.
>
> * * *
>
> "(3) Provide for adequate sewage treatment facilities which will prevent the discharge of untreated or inadequately treated sewage or other waste into any waters or otherwise provide for the safe and sanitary treatment of sewage or other waste;
> "(4) Take into consideration all aspects of planning, zoning, population estimates, engineering and economics so as to delineate with all practicable precision those portions of the area which community systems may reasonably be expected to serve within ten years, after ten years, and any areas in which the provision of such services is not reasonably foreseeable;
> "(5) Take into consideration any existing State plan affecting the development, use and protection of water and other natural resources;
>
> * * *
>
> "(8) Be reviewed by appropriate official planning agencies within a municipality, including a planning agency with areawide jurisdiction if one exists, in accordance with the act of July 31, 1968 (P.L. 805, No. 247), known as the 'Pennsylvania Municipalities Planning Code,' as amended, for consistency with programs of planning for the area, and all such reviews shall be transmitted to the department with the proposed plans; and" (Emphasis supplied).

Section 10 of the act provides, *inter alia:*

> "Section 10. Powers and Duties of the Department of Environmental Resources.—The department shall have the power and its duty shall be:
> (1) To order municipalities to submit official plans and revisions thereto within such time and under such conditions as the rules and regulations promulgated under this act may provide.
> (2) To approve or disapprove official plans and revisions thereto."

Chapter 71 of the rules and regulations of the Department of Environmental Resources, 25 Pa. Code §71.1 *et seq.*, as adopted and amended by the Environmental Quality Board, contain the following provisions pertinent to the department's obligations with regard to the review of a plan revision that is requested by a municipality:

§71.16. "Approval of plans and revisions.

"(a) No plan or revision shall be approved by the Department unless it contains the information and supporting documentation required by the act and the provisions of this Chapter.

"(b) No official plan or revision shall be considered for approval unless accompanied by:

(1) Evidence that establishes municipal adoption; and

(2) A statement by the appropriate planning agency with areawide jurisdiction if one exists, and the appropriate existing county or joint county Department of Health commenting on the official plan, or revision thereto, whenever such agency shall have reviewed the plan or revision pursuant to the requirements of the Municipalities Planning Code (The Act of July 31, 1968, P. L. 805, No. 247, 53 P.S. §10101 *et seq.*); . . .

* * *

"(e) In approving or disapproving an official plan or revision submitted to it, the Department shall consider:

(1) whether the plan or revision meets the requirements of this section and of §71.14 of this Chapter,

(2) the comments, if any, of the appropriate area wide planning agency and the county or joint county Department of Health,

(3) whether the plan or revision is consistent with a comprehensive program of water quality management in the watershed as a whole, as set forth in §91.31 of Chapter 91 of this Title, and

(4) whether the plan or revision furthers the policies established pursuant to §3 of the Act and §§4 and 5 of the Clean Streams Law.

"(f) In the event the official plan or revision is disapproved by the Department, written notice shall be given to each municipality included in the plan, together with a statement of reasons for such disapproval. Any municipality aggrieved by the action of the Department may appeal to the Environmental Hearing Board pursuant to Chapter 21 of this Title (relating to rules of practice and procedure)."

Section 71.16(e) requires that the department exercise its discretion in accordance with the criteria set forth, which means that it may not approve a revision simply because it has been adopted by a municipality. In the earlier appeal in this matter the department denied C & H's application for a permit because Washington Township's sewage facilities plan did not provide for a package plant at this location and also indicated in its denial letter and at the hearing that a private revision would not be approved because the treatment plant was inconsistent with planning concepts as set forth in the comprehensive plan for Lehigh County as well as in the official sewage facilities plans adopted by both Washington and Heidelberg Townships. Although no further justification for this plant from a planning point of view has been presented to the department, and the plant is opposed by the JPC and Heidelberg Township, the department approved the plan revision because Washington Township had approved it and the request was made by the township rather than the

individual.[2] While we agree with the department that it should give significant weight to the view of a municipality so far as a plan revision is concerned, that should not be the only factor to be taken account of by the department.

The statute and regulations call upon the department to "approve or disapprove" a plan revision. Those words call for the exercise of "sound judgment and discretion". Cf. §5 of The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.5. The question is then what should the department have considered in the proper exercise of its discretion in this case.

First, since a plan revision is required to be accompanied by a statement from the regional planning agency, we must presume that this provision is not useless and that the department is obliged to consider carefully under §71.16(e)(2) the comments submitted by that agency. In addition, as appellant points out, the act itself requires that an official plan "be reviewed by appropriate planning agencies within a municipality", 35 P. S. §750.5(d)(8), *supra*. This suggests that the plan should have been reviewed by the Washington Township Planning Commission and then approved or disapproved in relation to some overall township plan of development. It was not so reviewed or considered.[3] By unfortunate coincidence, both people who seem to have

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2. At the hearing the department was not prepared to offer any evidence, leaving it to the intervenors, C & H and Washington Township, to support the plan revision approval. At the examiner's request, Joe R. Hayes testified as to the department's action in this matter. (Donald R. Becker who had handled the matter for the department was unavailable due to illness.) Among the questions asked by the examiner was the following:

> ". . . Now, I understand that in the prior case the developer was asking for a private provision and I have to admit I am not aware and maybe you aren't either of what information in terms of social and economic justification was before the department at that time.
>
> "It doesn't appear to me that there has been a great deal of additional information. I mean, the situation seems to be the same. However, the department has arrived at a different result.
>
> "I wonder what your explanation for that is?
>
> THE WITNESS: "Well, I think generally we'd be more inclined to grant a revision to the plan when it has the backing and approval of the townhip.
>
> "If it comes in as a private request, we take a much more stringent look at it. We'd be much less inclined to grant that revision to the plan.
>
> "Our position on the social and economic justification probably didn't alter too much during that period of time.
>
> THE EXAMINER:"So the significant difference is the township approval.
>
> THE WITNESS: "Yes."
>
> (N.T: 399-400)

3. The developer contends that the Washington Township Comprehensive Plan, which was prepared by the JPC and adopted by Washington Township, recognizes Mill Creek Acres as an accomplished fact. It does so; however, not in terms that suggest the development should be expanded:

> "The projected pattern for the immediate future shows a continuing growth in residential land use demands. One difference is that rather than isolated scatteration of single units, a pattern of rural subdivisions such as Mill Creek and the Mobilehome Park adjacent to the Turnpike has developed. Unfortunately, these scattered subdivisions along which continuing scatteration of individual units will just proliferate the problems associated with such a residential pattern."

Later, the plan does mistakenly refer to the proposed treatment plant as if it were an accomplished fact:

> "Two community sewage systems have recently been installed in Washington Township. The Mill Creek subdivision has its own sewage collection and treatment system. The waste treatment facility discharges to a stream in Heidelberg Township."

most to do with approval of this plan revision, the Chairman of Washington Township's Board of Supervisors and DER's regional sanitarian, were stricken with heart attacks shortly before the hearing in this matter and were unavailable to offer any further explanation or justification for the plan revision or its approval. The township supervisor who did testify at the hearing was not aware of any planning review of this project by the township, though he said that the supervisors had taken account of "all the angles".

From a planning point of view, it is difficult to see how the department could approve of this plant. All of the planning agencies that have commented on this treatment plant have been opposed to it. We are aware that under the *Fox* decision DER is not to "second guess the propriety of decisions properly made by individual local agencies in the areas of planning, zoning and such other concerns of local agencies, even though they obviously may be related to the plans approved". 20 Pa. Cmwlth. Ct. at 351. However, where as here the department's function is to consider a "plan" revision, the department must make some independent judgment as to whether the proposed sewage facility has been considered by all the appropriate local agencies and agrees with general planning for the area. While DER might be justified in rejecting a regional agency's planning comments where they conflict with local decisions, DER should then be able to give some justification in planning terms related to the municipality's overall scheme of development. In the event the department had disapproved the package plant, it would have been required to give reasons for its disapproval under regulation 71.16(f). We think the department should also be able to give reasons for its approval when called upon to do so in a hearing by an appeal from an affected party that is opposed to the plan revision. In this case the department did not appear to consider, or at least gave no reasons for rejecting, the comments of the area-wide planning commission.

Second, under §71.16(e)(3) the department is required to consider whether a plan revision is consistent with the comprehensive program of water quality management in the watershed as a whole, as set forth in §91.31. Section 91.31 reads in relevant part:

> "(a) The Department shall not approve a project requiring . . . approval under the act or the provisions of this Article unless the project . . . conforms with a comprehensive program of water quality management and pollution control, . . .
>
> (b) The basis for determining whether a project . . . conforms to a comprehensive program of water quality management and pollution control shall be:
>
> * * *
>
> "(2) Official Plans for Sewage Systems which are required by Chapter 71 of this Title."

The sewage facilities plans as promulgated by the JPC and adopted by Washington and Heidelberg Townships does not call for any public sewerage facilities to serve the area of Mill Creek Acres and recommends as a general policy against small treatment plants in outlying areas. Hence, this treatment plant is inconsistent with the sewage facilities planning that has been done. It is true that the statute and regulations provide for plan revisions. However, the law seems to us to require that there be some justification for a plan revision from the point of view of comprehensive planning other than the developer's desire to build in a particular place.

We also think that the department in considering whether a plan or revision is "consistent with a comprehensive program of water quality management in the watershed as a whole" must take a more serious account of the views of a township such as Heidelberg Township that will be affected by the placement of a treatment plant on this stream that runs almost entirely through Heidelberg Township. In fact, since the effect of any malfunction or degradation of the stream will be borne almost entirely by residents of Heidelberg Township, we would view the comments of that township as important as those of Washington Township.

Third, in exercising its discretion to approve or disapprove plan revisions, the department must be guided by the policies of the Pennsylvania Sewage Facilities Act and The Clean Streams Law,since any sewage facility necessarily involves an affect on the waters of the Commonwealth. §71.17(e)(4), *supra*. Section 3 of the Sewage Facilities Act provides in relevant part:

> "It is hereby declared to be the policy of the Commonwealth of Pennsylvania through this act:
> (1) To protect the public health, safety and welfare of its citizens through the development and implementation of plans for the sanitary disposal of sewage waste.
> (2) To promote intermunicipal cooperation in the implementation and administration of such plans by local government.
> (3) To prevent and eliminate pollution of waters of the Commonwealth by coordinating planning for the sanitary disposal of sewage wastes with a comprehensive program of water quality management.
>
> * * *
>
> "(7) To insure the rights of citizens on matters of sewage disposal as they may relate to this act and the Constitution of this Commonwealth."

Section 4 of The Clean Streams Law sets forth the following declaration of policy:

> "(1) Clean, unpolluted streams are absolutely essential if Pennsylvania is to attract new manufacturing industries and to develop Pennsylvania's full share of the tourist industry;
> (2) Clean, unpolluted water is absolutely essential if Pennsylvanians are to have adequate out of door recreational facilities in the decades ahead;
> (3) It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted;

(4) The prevention and elimination of water pollution is recognized as being directly related to the economic future of the Commonwealth; and

(5) The achievement of the objective herein set forth requires a comprehensive program of watershed management and control."

Section 5 of The Clean Streams Law, which is referred to under regulation 71.16(e) requires as follows:

"(a) The board and the department, in adopting rules and regulations, in establishing policy and priorities, in issuing orders or permits, and in taking any other action pursuant to this act, shall, in the exercise of sound judgment and discretion, and for the purpose of implementing the declaration of policy set forth in section 4 of this act, consider, where applicable, the following:

(1) Water quality management and pollution control in the watershed as a whole;

(2) The present and possible future uses of particular waters;

(3) The feasibility of combined or joint treatment facilities;

(4) The state of scientific and technological knowledge;

(5) The immediate and long-range economic impact upon the Commonwealth and its citizens."

35 P. S. §691.5

In approving a plan revision, the department is required under §71.16(e)(4) to consider whether the revision will be consistent with these policies. In this case Mill Creek is part of a watershed basin that has been designated a conservation area.[4] Under Chapter 95 of the regulations, which deals with wastewater treatment requirements, waters having a better quality than the applicable water quality criteria

"shall be maintained at such high quality unless it is affirmatively demonstrated that a change is justified as a result of necessary economic or social development and will not preclude uses presently possible in such waters." 25 Pa. Code §95.1

Above the confluence of the tributary on which the Heidelberg Plant is located, Mill Creek is a stream of better quality than the applicable water quality criteria. In fact, in an aquatic biology investigation made by DER on May 5, 1976, samples taken from Mill Creek below the Heidelberg treatment plant discharge met Chapter 93 stream quality criteria, although there was some evidence of degradation that indicated the discharge may at times be very detrimental to aquatic life.

Section 95.6 at the least places a burden on Washington Township and C & H to demonstrate affirmatively that this treatment plant ". . . is justified as a result of necessary economic and social development and will not preclude uses presently possible in such waters". See *Concerned Citizens of Orderly Progress v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-161-W, issued February 11, 1976. In our view they did not so demonstrate; nor did the department give any explanation in terms of necessary economic or social development as a reason for approving this plan revision. The letter of the Township

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4. Mill Creek is part of the Little Lehigh Creek Basin, which is designated a "conservation area" under 25 Pa. Code §93.6 No. 01.130.15. A conservation area is defined in §93.2 (3.5) as follows:

"Waters used within and suitable for the maintenance of an area now or in the future to be kept in a relatively primitive condition."

The waters of this basin are also given a "protected use" designation for cold water fishes. §§93.6, No. 01.130.15 and 93.2(1.1).

Supervisor, Walter Krum, setting forth social and economic justification dwells upon the notion that people will like living in this development and that they can commute to Allentown and Bethlehem where schools, jobs and shopping are available. We believe, however, that social and economic justification must be related to a more coherent scheme of township development, as discussed above, and further that some necessity for the plant must be shown under §95.1. It was clear from the testimony that the sewage treatment plant is not necessary to alleviate any malfunctioning problems; nor did it appear to be necessary to the social and economic development of the township. It was apparent that Washington Township had few of the public services that would be required for a development the size of Mill Creek Acres (e.g. roads, schools, police and fire protection) and was counting upon future taxes from the residents of the development to provide the services that might be needed. The *Fox* decision requires that DER give deference to a municipality's development choices; however, that does not mean that DER must refrain from any evaluation of social and economic necessity when it is called upon to approve a deviation from comprehensive planning in a conservation area.

In addition, we believe that the department must consider the condition of Mill Creek caused by the malfunction of another package treatment plant. C & H argued that the malfunctioning of the Heidelberg Heights Treatment Plant was irrelevant to this case. We do not agree. If the department is to act to further the policies set forth in §4 of The Clean Streams Law, it must be aware of the overall condition of a stream and the goal "to prevent further pollution of the waters to the Commonwealth". The developer would have us assume that its proposed plan would operate at peak efficiency, which even at 95% would cause some degradation to the stream but which would be adequate to meet the department's performance standards for package treatment to the plants (even if the plan were required to meet higher water quality criteria in the event the proposed Trexler Dam is built). However, the department, while recognizing that package treatment plants do function and may be appropriate in certain circumstances must take account of "the state of scientific and technological knowledge", *supra*, and cannot ignore the fact that package plants frequently do not perform at optimum efficiency and, in fact, commonly perform below optimum efficiency. Thus, the department must certainly consider the possibility that a small stream, particularly a conservation area stream, that has already been degraded by a malfunctioning package treatment plant will be further degraded by the placement of another plant on the stream. The previous uses of the stream for fishing and bathing are presently precluded below the Heidelberg plant discharge and could be precluded above with the addition of another plant. While these consequences might be tolerable if the plant was necessary to relieve the consequences of malfunctioning on-lot sewage systems, it is

unnecessary where no such problems exist and the plant is in fact contrary to the general planning concepts for the area as set forth in the regional comprehensive plan and the official sewage facility plans adopted by the townships.

Under §5 of The Clean Streams Law, the department is to consider "the present and possible future uses of particular waters" in making any decision in the implementation of that act. Here there is a possibility that the proposed Trexler Dam will be built as a recreation area. The treatment plant would be located approximately two miles from the proposed dam site. Testimony indicated that the dam has been discussed for many years but its construction depends upon whether or not the project receives federal appropriations. According to the chief planner for the JPC, it is on the list of approved federal projects this year. Certainly it is a "possible" use that the department should bear in mind in deciding whether it is appropriate to allow a second treatment plant on Mill Creek.

The developers take the position that these plans, since their inception, have called for a sewage treatment plant. They point out that all of the plans that have been reviewed by the various planning commissions and the township board have borne a site legend calling for a sewage treatment plant and that Section 1 of that plan has received subdivision approval.[5] The developer's position appears to be, if we say it is so long enough, it will be so. The fact that C & H's plans as proposed and reviewed for different purposes by various bodies showed a sewage treatment plant, cannot prevent independent consideration of whether or not such a plant should be allowed. Whenever that question has been considered by the JPC or by Heidelberg Township and originally by Washington Township, the plant has been disapproved. In fact, only Section 1 of the proposed development has received subdivision approval. Presumably, it would be necessary for the treatment plant to be approved before subdivision approval could be given for Section 2. It appears that the developers could develop their property at a lesser density with on-lot sewage treatment (on-lot systems are limited to one-acre lots by ordinance of Washington Township). However, they do not wish to do this and say that they cannot because they have already put in water and electric lines for a greater density. In our view they have done so at their own risk since there was no reason that we can see to assume that a package treatment plant would be approved at this location. The developers, who are personable and well-intentioned and persistent, have a dream that a development should take place on property they have purchased for that purpose. However, their dream is not enough to justify a plan revision to accommodate a package treatment plant where the department is called upon to be sure that the criteria of 71.16(e) have been met.

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5. Heidelberg Township points out that although they gave subdivision approval three days after their subdivision ordinance was adopted, the plan was never reviewed by a planning agency and was not recorded within the proper time, so they believe that the approval was invalid.

Appellant Heidelberg Township has also raised the question of whether the department's action was a violation of its duty as trustee of the natural resources of the Commonwealth under Article I, Section 27 of the Pennsylvania Constitution.[6] In our view the department's action did not meet all of the tests for compliance with Article I, Section 7 set forth in *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 29-30, 312 A.2d 86, 94 (1973). However, we deem it unnecessary to consider the constitutional question in depth since appellant has demonstrated that the department did not act in accordance with the criteria of the applicable statutes and regulations.

CONCLUSIONS OF LAW

1. The board has jurisdiction in this matter.

2. In approving or disapproving a municipality's plan revision under §71.16 of the regulations, the department is required to exercise its discretion and to justify its action affirmatively within the criteria set forth in §71.16(e) when an appeal is taken by an affected party.

3. Although the department should give great weight to the fact that the plan revision is requested by a municipality, that fact alone cannot support a plan revision where the other criteria set forth in §71.16(e) are not satisfied.

4. The department's approval of Washington Township's plan revision was an abuse of discretion in that the department did not adequately consider the objections of Heidelberg Township or justify its action in terms of the criteria set forth in §71.16(e) of the regulations.

5. Where the stream into which a package treatment plant would discharge is located in a conservation area under 25 Pa. Code §93.6, the proponents of the plant have the burden of demonstrating that the possible degradation that might result from the plant is "a change justified as a result and necessary economic or social development and will not preclude uses presently possible in such waters".

6. Intervenors did not satisfy the burden of demonstrating the social and economic necessity of this package treatment plant.

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6. "Natural resources and the public estate
Section 27. The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

I would reverse the department's action approving Washington Township's plan revision.

BY: JOANNE R. DENWORTH

OPINION AND ORDER

By the Honorable Paul E. Waters, Chairman

While agreeing almost toally with the well written adjudication of my colleague, I am unable to conclude that a reversal alone of the decision of DER is the appropriate remedy. I would also remand.

It is clear to me that it was the failure of DER to properly exercise its rightful review role in this matter which has led to the order proposed by the Honorable Joanne R. Denworth. Indeed that role is spelled out with specificity in the adjudication as were the shortcomings of DER. I would only add that information on the alternatives available to the developer would be helpful in giving the board a complete picture regarding the need for the requested Act 537 plan revision.

The following order is therefore joined by the Honorable Joanne R. Denworth only because of the necessity to have a majority decision of the board.

O R D E R

AND NOW, this 21st day of October, 1977, the matter of the Township of Heidelberg v. Commonwealth of Pennsylvania, Department of Environmental Resources is hereby reversed and remanded to DER for further action consistent with this adjudication.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

DATED: October 21, 1977

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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BEDFORD SPRINGS HOTEL

Docket No. 76-055-W

Pennsylvania Sewage Facilities Act

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and BOROUGH OF BEDFORD, et al, Intervenor

ADJUDICATION

By Paul E. Waters, Chairman, October 28, 1977

This matter comes before the board as an appeal from the refusal of a plan revision requested by Bedford Township pursuant to the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.1, *et seq.* and the regulation of the DER, for a private treatment plant to be utilized by the Bedford Springs Hotel. The hotel, one of the major users of the sewage services, now that a new borough treatment plant is going into operation, believes that it can treat its own sewage at a much lower cost than will be charged for use of municipal services and has, therefore, appealed the denial.

FINDINGS OF FACT

1. The appellant, Bedford Springs Hotel, is located on 2,900 acres of land and has operated as a resort since 1806 in Bedford Township, Bedford County, Pennsylvania.

2. The luxury hotel operates from May to October and accommodates about 440 guests.

3. In 1975 the appellant submitted certain information to the Supervisors of Bedford Township and requested that they revise their Act 537 Sewage Facilities Plan to allow the hotel, which was and is on the municipal system, to disconnect, construct and operate a private treatment system.

4. The township approved the request by resolution on September 2, 1975, and requested the DER to approve a revision of the Bedford County official plan which it had adopted.

5. The DER denied the revision request on March 22, 1976, because the appellant was a major user of the sewer system and a new borough plant with capacity based in part upon appellant's needs, was under construction.

6. The private plant which appellant proposes would cost less than $100,000.00 and could be operated for about $7,000.00 per year.

7. Appellant presently pays more than $20,000.00 per year for sewage disposal and this will be likely to increase.

8. The appellant presently has its sewage treated by the Bedford Borough Plant (owned by the Bedford Municipal Authority) in accordance with a contractual arrangement entered into in 1958. Because appellant owns the connecting sewer line, it was not required by law to have municipal service at the time the contract was made.

9. A 1975 feasibility study (Facciani) for the proposed private plant was not detailed enough, did not consider the option of reducing the excessive sewage flows, and was found unacceptable by the Bedford County Planning Commission. The Bedford County Planning Commission, relying upon the recommendation of its consulting engineer, in January 1976, refused to approve the appellant's proposed plan amendment.

10. The proposed plant is to be designed for 70,000 gallons per day, but the flow is expected to be 54,000 and this is lower than originally indicated in the Facciani study which was submitted to the DER.

11. Although prior information indicated appellant intended to install what is commonly known as a package treatment plant, it developed at the hearing that the proposal is now for an aeration and ejection type plant with poured concrete and with 90 percent of the plumbing cut out.

12. The proposed plant would be located on Shobers Run, which is presently used for fishing and recreation. Whether there would be a land dispersion or discharge of effluent to the stream is not clear.

13. The sewage treatment costs for appellant have gone from about $6,000.00 in 1972 to over $20,000.00 at the present time, and appellant can reasonably expect to construct and operate a private plant at a lower cost.

14. Although the [illegible] Corporation,

which owns the hotel, is about 1-1/2 million dollars per year, the hotel is having financial difficulty because of general inflation and rising sewage disposal costs.

15. The appellant presently employs about 300 people on a seasonal basis and the township approved the plan revision because it did not want to have the hotel close, due to financial reasons related in any way to sewage costs.

DISCUSSION

The Township of Bedford, seeking to comply with the wishes of one of its major hotel resort owners, requested the DER to allow an amendment to its sewage facilities plan[1] adopted pursuant to the Pennsylvania Sewage Facilities Act, *supra*. Although the hotel is located in the township, its sewage treatment services are provided by Bedford Borough[2] which has just completed a new secondary treatment facility.

It is really unfortunate history of this case that presents the difficult practical problem for which a legal solution is sought. The Bedford Hotel entered a contract with the borough in 1958 agreeing that the borough would treat sewage of the hotel conveyed to the borough through a sewer line actually owned and maintained by the hotel.[3] Rates were to be "at regular rates as established by the borough". All went well for many years. In the late 1960's, however, the rates began to climb slowly but steadily until about 1973 when the increases were almost in a vertical line. Appellant became concerned and by 1974 was making efforts to resolve the problem which was finally to be dealt with by which a proposal, presently before us, for the construction and operation of a private treatment facility. The county planning commission and, of course, the appellant are wholeheartedly in favor of the money saving idea put forward as a means to stave off mounting financial problems for the hotel, caused in part by the inflationary spiral of which this board has no reluctance to take judicial notice.

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1. The County of Bedford actually devised the plan and on June 4, 1974, as provided by statute, the township adopted the relevant portion as its plan required under Act 537, reserving the right to "revise or change this plan at any time as they deem necessary".

2. The Bedford Municipal Authority is the actual owner.

3. The hotel had to obtain an [illegible] right to cross certain land owned by the Elks Lodge to reach the borough [illegible].

Although some questions are raised about the fact that the proposed plant will presumably discharge at or near Shobers Run,[4] which apparently is a good quality stream, the nub of the matter is economic and not environmental.

Because the Borough of Bedford, an intervenor in the case, has an obvious and direct financial interest, we must balance this against the interest of the township which also appears to be founded on a pocketbook issue. As a matter of policy, all things being equal, the DER and this board would prefer to have sewage given secondary treatment at a newly constructed municipal plant, which is possible in this case. Should the admittedly substantial additional cost for such treatment be outweighed simply by the dollar savings which appellant can realize?

Appellant[5] argues that it could not be compelled to connect and convey sewage to the borough treatment plant because, under the Second Class Township Code,[6] unless a municipality passes an ordinance requiring all residents to hook up to the system, there is no compulsion to do so. Inasmuch as there is no such law or ordinance applicable here and the connection was actually effected by a contract which is terminable, it is reasoned that the DER action dissapproving a plan revision cannot be sustained. This is a very technical legal question and we, therefore, do not hesitate to answer it on a similar basis. The fact is, that the DER has not technically said appellant may not disconnect from the municipal system or withdraw from the contract which it entered with the borough some years ago. All that the DER was asked to do and all that it had done is to determine whether appellant could construct and operate a private sewage treatment facility. It has said "no" and we can find no abuse of discretion in that. To say that this leaves appellant without options is not only beside the point, but untrue. We believe, however, an extended discussion along this avenue is not here appropriate.[7] It must

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4. We are satisfied that the DER is not here contesting appellant's ability to meet departmental standards by a private plant, as a technical matter, at this location.

5. The Township of Bedford made the same argument, but was unable to intervene because of a minor procedural problem.

6. Section 66501.1 provides:

> "Whenever a sewer system is or shall have been established or constructed by a municipality authority within a township of the second class, the township supervisors shall be empowered, by ordinance, to compel all owners of property accessible to and whose principal building is within one hundred fifty feet from such sewer system to make connection therewith and use such
> (Continued to next page)

also be remembered that nothing we say here prevents appellant from again seeking a plan revision should events indicate it is able to make a stronger case.

The only other issue which we believe requires discussion, concerns the way the entire matter was handled on both sides over the years. We believe the borough knew that the appellant was unhappy with the rate structure and inasmuch as the hotel was one of the largest, if not the largest single user, effort should have been made to determine whether adjustments were called for before the plans for a new secondary treatment plant went ahead. Since the borough[8] made no effort to resolve the matter at this early stage, it then became incumbent upon appellant to act before it was too late. Certainly appellant knew that a new plant was in the wind and it should have known that unless it indicated otherwise, it would be expected to remain a customer. (Imagine the case we would have before us if the new plant had been completed without sufficient capacity for appellant and it wanted to continue to have municipal treatment.) Thus, we conclude that the parties themselves are equally responsible for the unhappy dependence which they now have upon each other. We cannot say the DER acted unreasonably or beyond the scope of its authority in refusing to let appellant turn and run.[9]

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6. Continued from preceeding page

> sewer system in such manner as they may order. The township supervisors may, by ordinance, impose penalties to enforce any regulation or order they may ordain with reference to any sewer connections. In case any owner of property acessible to and whose principal building is within one hundred fifty feet from a sewer system established or constructed by a municipality authority shall neglect or refuse to connect with said sewer system for a period of sixty days after notice to do so has been served upon him by the township supervisors, either by personal service or by registered mail, the township supervisors or their agents may enter upon such property and construct such connection. In such case, the township supervisors shall forthwith, upon completion of the work, send an itemized bill of the cost of the construction of such connection to the owner of the property to which connection has been so made, which bill shall be payable forthwith. In case of neglect or refusal by the owner of such property to pay said bill, it shall be the duty of the township supervisors to file municipal liens for said construction within six months of the date of the completion of the construction of said connection, the same to be subject in all respects to the general law provided for the filing and recovery of municipal liens."

7. Appellant always has the option to close an economically marginal operation, or it could again raise its rates to reflect actual costs for what it characterizes itself as—a luxury hotel. Perhaps as suggested by the county planning commission, there is an infiltration problem which has caused such a high volume flow. This could be corrected. Finally, if all else fails, appellant would appear to be in a good bargaining position to obtain lower treatment rates.

8. We refer to the borough only because it was represented at the hearing and appeared to act for the borough authority as well.

9. The board has, in some cases, had a different view when a private treatment plant is needed in order to develop an area where public facilities are unavailable. See *Commonwealth v. Trautner*, 19 Commonwealth Ct. 116, 338 A.2d 718 (1975) and *Pocono Haven Truck Plaza*, EHB Volume I, Page 139.

CONCLUSIONS OF LAW

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

2. The Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. 750.1, *et seq.* requires the DER approval before a municipality may properly revise its official sewage facilities plan to permit the construction and operation of a private treatment plant not provided for in the approved plan.

3. Where newly constructed secondary treatment public sewage facilities are presently available and a private owner who has been using the municipal service for many years desires to disconnect and operate its own private treatment plant for purely economic reasons, it is not an abuse of discretion for the DER to refuse to allow a revision of an Act 537 Official Sewage Facilities Plan for that purpose.

O R D E R

AND NOW, this 28th day of October, 1977, the order of the Department of Environmental Resources denying a revision of the Bedford Township Official Sewage Facilities Plan is hereby sustained and the appeal of Bedford Springs Hotel and Township of Beford, Intervenor, is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

DATED: October 28, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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(717) 787-3483

WILLARD W. IRION, SR.

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 75-187-W

Water Obstructions Act

ADJUDICATION

By Paul E. Waters Chairman, November 14, 1977

This matter comes to us as an appeal from an order issued by the DER under the Water Obstructions Act, Act of June 25, 1913, P. L. 555, *as amended*, 32 P. S. §381, *et seq.*, which requires appellant, Willard W. Irion, to remove a dam which has formed a lake partially flooding an adjoining property and which was, in 1954, erected without a permit.

FINDINGS OF FACT

1. Willard W. Irion, Sr. owns land situated in Lennox Township, Susquehanna County. He acquired this land in 1952.

2. The Irion property is located adjacent to property owned by Floyd C. Smith, Jr. and Reva Smith, his wife.

3. There is a concrete overflow dam on the Irion property, which extends across Millard Creek and is approximately six feet in height.

4. The dam has created a lake which is approximately 25 to 30 acres in size.

5. Approximately 12 acres of the said lake covers land owned by the adjacent property owners, Mr. and Mrs. Smith.

6. The dam was originally a beaver dam which existed prior to 1954. In 1954, appellant, after unsuccessful attempts to destroy the beaver dam, poured concrete and made a permanent structure in order to extend the lake caused by the dam.

7. Although the dam at this site was originally created in 1953 by beavers, in 1954, Mr. Irion and workmen paid by him, bulldozed earth on top of the beaver dam and placed concrete on it. Additional concrete work on the dam was done by Mr. Irion in 1966.

8. Mr. and Mrs. Smith have never given any permission or consent to Mr. Irion to back water up onto the property by constructing a dam.

9. Before the dam was created, there was no flooding of Mr. Smith's property, although there is testimony that it was somewhat swampy.

10. Mr. Irion's construction work raised the level of the dam. The precise amount by which the dam was raised is a matter of dispute, but the dam is now about six feet high.

11. In 1966, the addition of wing walls was made and the dam was again heightened to some extent, creating a larger lake area and further extending the lake onto the adjoining Smith property.

12. Although the Smith's were not pleased about the lake and never consented to it's being on their property, a major complaint was not made until the 1966 work was started, and this complaint went unheeded.

13. Appellant has never applied for nor received a permit for the water obstruction erected on his property in 1954 and 1966.

DISCUSSION

Although appellant, at the outset, seemed to indicate that if anyone was at fault in this case, it was the beavers, the evidence is clear that the dam in question actually was made permanent by the actions of appellant in 1954 and 1966.[1]

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1. Appellant said in this regard: (Notes of Testimony, page 35, lines 21 to 25 and page 36, lines 1 to 25)

"Q. Would you describe what work was done then?
"A. I poured some concrete in there, on both sides. I put a wall up here, and a wall there. This was the original, right in here.
"Q. We are looking at Exhibit A-5. There are several concrete abutments, which are sticking up; is that correct?
"A. Right.
"Q. And the one that is in the background is the one that you put in in 1966?
"A. Right.
"Q. The one in the foregound was built in 1954?
"A. Yes.
"Q. Is the one in 1966 higher?
"A. I don't know.
"Q. Looking at this picture?
"A. This is higher -- this is lower?
"Q. The one in 1954 is lower?

(Continued to next page)

The Water Obstructions Act, *supra*, provides:

> "...it shall be unlawful for any person or persons, partnership, association, corporation, county, city, borough, town, or township to construct any dam or other water obstruction; or to make or construct, or permit to be made or constructed, any change therein[1] or addition thereto; or to make, or permit to be made, any change in or addition to any existing water obstruction; or in any manner to change or diminish the course, current, or cross section of any stream or body of water, wholly or partly within, or forming a part of the boundary of, this Commonwealth," without the permit (Footnote omitted)
> Water Obstructions Act, Act of June 25, 1913, P. L. 555, *as amended*, 32 P. S. §381, *et seq.*

No matter how we construe the facts which were disputed by the parties as to when the beavers came, how high the dam was[2] and what portion of the property of the adjoining landowners is flooded, we still must conclude that appellant did, at least, make an addition to a water obstruction without first obtaining a permit from the DER.

Appellant would have us excuse his oversight on the grounds that he now has acquired, by adverse possession, rights on 12 acres of the adjoining property over which his lake now extends and, therefore, because more than 21 years have passed, the Smith's have no legal basis to complain. There are at least three reasons why this is no answer to the order before us requiring removal of the dam. First, the order issued pursuant to Section 1917A of the Act of April 19, 1929, P. L. 177, *as amended*, 71 P. S. §510-17,[3] was issued

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1. Continued:

> "A. Yes.
> "Q. In 1966, you raised the level of the dam?
> "A. I didn't raise the level of the dam. It is the same dam, the same flow; but I raised the walls up here.
> "Q. What do those walls do?
> "A. They protect the water from expelling all over the dam.
> MR DEAN: "What exhibit was that?
> MR. ORAVETZ: "A-5, showing the work that was done in 1966.
> BY MR. ORAVETZ:
> "Q. Did you speak to the Smiths at the time that this work was being done in 1966?
> "A. No."

2. The evidence indicates that beaver dam was about 2-1/2 feet while the present structure is about 6 feet.

3. The Act provides:

> "The Department of Environmental Resources shall have the power and its duty shall be:
> "(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;
> "(2) To cause examination to be made of nuisances, or questions affecting the security of life and health, in any locality, and, for that purpose, without fee or hinderance, to enter, examine and survey all grounds, vehicles, apartments, buildings, and places, within the Commonwealth, and all persons, authorized by the department to enter, examine and survey such grounds, vehicles, apartments, buildings and places, shall have the powers and authority conferred by law upon constables;
> "(3) To order such nuisances including those detrimental to the public health to be abated and removed;..."
> (Footnote Omitted)

on July 23, 1975. Appellant has shown that the first man-made dam was built by him in 1954, but he has failed to prove that this was done prior to July and, therefore, even under his theory, he has not established the necessary 21-year period. In fact, more work was done on the dam in 1966 and this would refute the claim as to the additional land over which the lake was then extended in any event. Thirdly, we are not here concerned with property rights.[4] Whether Mr. Smith consented to the dam or whether it was done openly and adversely to his interest is irrelevant to the issue before us. The DER has issued the order to remove the dam because it was constructed without a permit in violation of the Water Obstructions Act, *supra*, and it was declared to be a nuisance, which appellant does not contest. As a legal matter, the DER order can stand alone, seperated from the questions of title to the land or consent of the owner, upon which appellant would now rely.[5]

We conclude that the DER order requiring removal of a dam which has caused flooding on an adjoining property[6] was properly issued.

CONCLUSIONS OF LAW

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

2. Section 2 of the Water Obstructions Act, 32 P. S. §682, makes it unlawful for any person "to make or construct any dam or other water obstruction", or "to make, or permit to be made, any change in or addition to any existing water obstruction," without a permit.

3. Appellant Irion's raising of the level of the beaver dam and making it a permanent structure constitutes a change in or an addition to an existing water obstruction within the meaning of section 2 of the act.

4. The back water permanently placed on the adjoining land by the

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4. Mr. & Mrs. Smith, the adjoining property owners, agreed that this work caused added flooding of their property but the exact amount is unclear.

5. Even if these issues were controlling, we would have to decide them against appellant on this record. We might add, however, that there is nothing to prevent the DER from issuing a permit after the fact, and in this case, that would not seem to be inappropriate if agreeable arrangements were made with adjoining property owners affected by the water.

6. The lake is now used for fishing and boating for which a charge is made to users by appellant.

unpermitted dam, without the consent of the adjoining landowners, constitutes a nuisance within the meaning of Section 1917-A of the Administrative Code. (71 P. S. §510-17)

5. The issuance by the Department of Environmental Resources of the order to Willard W. Irion, Sr. was authorized by statute and is not an abuse of the department's discretion.

O R D E R

AND NOW, this 14th day of November, 1977, the order of the DER is hereby sustained and the appeal of Willard W. Irion, Sr. is dismissed.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

DATED: November 14, 1977
llj

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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(717) 787-3483

WESTERN POCONO MUNICIPAL AUTHORITY : Docket No. 77-007-D

v. : Clean Streams Law—Construction of Sewage Treatment Facilities

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Joanne R. Denworth, Member, November 16, 1977

This appeal and the related appeal in Kidder Township v. Commonwealth of Pennsylvania, Department of Environmental Resources, EHB Docket No. 77-009-D, raise the question of what may be considered by this board on appeal from an "enforcement" order of the department. The department has moved to dismiss both appeals: the Kidder Township appeal on the ground that it is precluded by Kidder Township's failure to appeal prior orders of the department directing it to plan, construct and operate a regional sewage facility; and Western Pocono Municipal Authority's appeal on the ground that the only issue raised by the Authority cannot be considered except in any enforcement action that might be brought by the department. *Ramey Borough v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 466 Pa. 45 , 351 A.2d 613 (1976). The issues raised by the department have been briefed; oral argument was held before the board *en banc* on August 16, 1977. After careful consideration, we agree with the department that the appeals may be dismissed by the board as a matter of law without further hearing. The uncontroverted facts as determined from the pre-hearing memoranda and oral argument are as follows:

FINDINGS OF FACT

1. Appellant, Western Pocono Municipal Authority, is a duly authorized incorporated municipal authority under the provisions of the Municipal Authority Act of May 2, 1945, P. L. 382, 53 P. S. §301 *et seq.*

2. Kidder Township, Carbon County, Pennsylvania, a second-class township, received two orders from the Department of Environmental Resources on March 21, 1972. One of the orders required Kidder Township to plan, construct, finance and operate sewage facilities in the drainage basin of Lake Harmony and to negotiate and enter into an agreement with East Side Borough. The second order required Kidder Township to plan, construct and operate sewage facilities in the drainage basins of Black Creek and Mifflin Creek.

3. Both the 1972 orders were premised on the conclusion that "pollution and public health nuisances exist by reason of untreated and partially treated sewage discharges from Kidder Township into the waters of the Commonwealth . . ."

4. Kidder Township never appealed the 1972 orders.

5. The Western Pocono Municipal Authority (Authority) was formed by Kidder Township on October 7, 1974, in order to permit Kidder Township to incur debts in excess of its statutory borrowing limit. The only municipality represented on the Authority is Kidder Township.

6. The Authority applied to DER and received Water Quality Management Permit no. 1373401 on May 19, 1975. This permit authorized the construction of a sewage treatment system within the borders of Kidder Township.

7. Kidder Township did not appeal from the grant of that permit.

8. Subsequently, Western Pocono Municipal Authority applied to the federal government for and received grant offers totaling almost 10 million dollars for the design and construction of the facilities permitted under the DER permit.

9. The project for which the federal government monies have been offered and $300,000 so far advanced is a 15 million dollar project. The difference between the federal grant and the total cost must be made up by the local municipality.

10. DER issued the order appealed from here on December 21, 1976, in order to get the Authority to proceed with construction of the permitted sewage facility so that federal funds for the project would not be forfeited.

11. The DER order, after recitation of the history of the sewage facility and the pollution condition existing in the Lake Harmony and the Black Creek and Bisseling Creek Drainage Basins, ordered the Authority to take the following action:

> "A. Immediately proceed to take steps to construct and operate the sewage facilities covered by Water Quality Management Permit No. 1373401.
>
> "B. Cause said sewerage facilities to be constructed in a manner consistent with procedures outlined in the application for Permit No. 1373401.
>
> "C. Within ninety (90) days of receipt of this order, submit a schedule for 'department' approval, outlining the dates for the initiation and completion of said sewerage facilities and comply with each step of the schedule as approved by the 'department'.

"D. Concurrent with the requirement of Paragraph C, within ninety (90) days of receipt of this order, enter into agreements with East Side Borough for the financing, construction and operation of the permitted sewerage facilities in compliance with §4, 5, 201, 202, 203 and 402 of the Clean Streams Law and §91.31 of the Department's Rules and Regulations promulgated thereunder. Copies of said agreement shall be submitted to the Department's Regional Water Quality Manager within seven (7) days of execution."

12. The Authority filed a timely appeal from the department's order. Kidder Township also filed a timely appeal and a petition to intervene in the appeal of the Authority.

DISCUSSION

In the appeal filed by the Western Pocono Municipal Authority, the Authority initially raised a number of issues, including its financial inability to proceed with construction of the permitted facility. However, at the oral argument in this matter, the Authority's counsel stated that the Authority was prepared to waive all of the arguments raised in its appeal except its objection to the department's order "to enter into an agreement with East Side Borough". Counsel represented that the Authority is unable to comply with paragraph D of the order unless East Side Borough is willing to enter into an agreement, which the Borough has shown no inclination to do. Counsel agreed that the question of the validity of paragraph D of the order is a question of law—*viz.* whether the department can order the Authority to take some action that is impossible for it to accomplish alone.

The Authority acknowledges that their argument runs counter to decisions of the Commonwealth Court and the Supreme Court in *Commonwealth v. Derry Township*, 466 Pa. Commonwealth Ct. 31 , 351 A.2d 606 (1976) and *Ramey Borough v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 466 Pa. 45 , 351 A.2d 613 (1976): The Authority argues that it should not have to be cited for contempt (under §210 of The Clean Streams Law, 35 P. S. §691.210) for failure to comply with the order to agree. For its part, the Commonwealth argues that the board is bound by the precedents of *Derry Township* and *Ramey Borough*. It points out that there is an order outstanding against East Side Borough issued at the same time as the order to Kidder Township and that that order is now final since East Side Borough's appeal to the board was dismissed in 1974 for failure to prosecute the appeal. Hence, the Commonwealth could bring the parties together in Commonwealth Court under §210 of The Clean Streams Law[1] in a contempt proceeding if the parties fail to enter an agreement for support of

1. "It shall be the duty of the corporate authorities of a municipality upon whom an order is issued pursuant to section 203 of this act to proceed diligently in compliance with such order. If the corporate authorities fail to proceed diligently, or if the municipality fails to comply with the order within the specified time, the corporate authorities shall be guilty of contempt and shall be punished by the court in an appropriate manner and, for this purpose, application may be made by the Attorney General to the Court of Common Pleas of Dauphin County, until such time as the Commonwealth Court comes into existence and thereafter the Commonwealth Court instead of said Court of Common Pleas of Dauphin County, or to the court of common pleas of the county wherein the municipality is situated, which courts are hereby given jurisdiction." 35 P. S. at 691.210

the sewage facilities. The Commonwealth points out that prior to the December 1976 order, there was no order to the Authority since it was not in existence at the time of the 1972 orders and has since been formed to carry out those orders. Consequently, the Commonwealth views the 1976 order as a necessary prelude to any action under §210 of The Clean Streams Law.

Although we appreciate the point of view expressed in the dissent by Justice Pomeroy from the opinion in *Derry Township* and relied on by appellants, the majority opinion in that case clearly rules that the department is authorized to order a municipality or municipal authority to enter an agreement.[2] 351 A.2d at 609. We would perhaps prefer that the department's order take more account of reality and order the Authority to "negotiate and enter an agreement". However, it does appear that the Commonwealth may order municipalities to enter agreements for regional sewage facilities, and that the defense of impossibility of performance must be raised in an enforcement proceeding against all parties such as is authorized under §210 of The Clean Streams Law. We do believe, however, that the department may not enter one party to negotiate without similar orders to the other parties who would be necessary to the negotiations. Here, however, that condition is satisfied by the prior final order to East Side Borough.

CONCLUSIONS OF LAW

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

2. As a matter of law, the Department of Environmental Resources' order to a municipal authority is not invalid on the grounds that it requires the authority to enter into an agreement with a municipality for the financing and constructing of sewage facilities where that municipality is subject to a prior order of the department to negotiate and enter into such an agreement.

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2. The court relied on the underlined portions of this sentence in Section 203:

> ". . . Such orders may include, but shall not be limited to, orders requiring municipalities to undertake studies, to prepare and submit plans, to acquire, construct, repair, alter, complete, extend, or operate a sewer system or treatment facility, or to negotiate with other municipalities for combined or joint sewer systems or treatment facilities. . . ." 35 P. S. §691.203 (b).

ORDER

AND NOW, this 16th day of November, 1977, the appeal of Western Pocono Municipal Authority is dismissed and the department's order of December 21, 1976, is hereby sustained.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

DATED: November 16, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

KIDDER TOWNSHIP

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 77-009-D

Clean Streams Law—
Construction of Sewage Treatment Facilities

ADJUDICATION

By Joanne R. Denworth, Member, November 16, 1977

Kidder Township has appealed from the same order that was issued to Western Pocono Municipal Authority. The Authority's appeal is disposed of by the board's adjudication in docket no. 77-007-D. The findings of fact in that adjudication, issued this same day, are identical in this appeal and are hereby incorporated by reference. The issues raised by Kidder Township, however, as well as the department's response to those contentions, differ from the issue in the authority's appeal and are consequently dealt with in a separate adjudication. Kidder Township also filed a petition to intervene in the Authority's appeal. Normally, the board would grant a petition to intervene filed by a municipality that will clearly be affected by the sewerage facility that an authority is ordered to construct. In this case, however, the township did not appeal two prior orders directing it to plan, finance, construct and operate the sewage facility now being constructed by the Authority; nor did it appeal from the grant of a permit for the facility to the authority.

The question here is whether Kidder Township is precluded from raising the question it wishes to raise because of its failure to appeal the prior actions of the department. Since that question is the same whether we are considering Kidder Township's right to appeal or its right to intervene, and since the Authority's appeal was disposed of on other grounds, we deal with Kidder Township's contention in this separate adjudication.

The grounds for appeal set forth in the Township's appeal are summarized as follows:

A. The Authority and the affected municipality do not have sufficient funds to construct the planned sewage facility;

B. The scope of the project as mandated by the department is overly broad and has no "reasonable relationship to the magnitude of the sewage disposal problem that exists or may exist within the affected township";

C. East Side Borough has repeatedly indicated that it has no desire to enter into an agreement with the Township or the Authority; consequently, the authority cannot be forced to "enter into agreements with East Side Borough for the financing, construction and operation of the permitted sewage facility".

Kidder Township has argued that the sewage facility that has been planned for and authorized by Water Quality Management Permit no. 1373401 is larger than necessary to alleviate the sewage problem of the township and beyond the financial ability of the municipality's residents to bear. The Township wishes to have an opportunity to present facts establishing that excess capacity and financial impossibility. It argues that it should be allowed to do so in spite of the earlier orders and permit because conditions have changed and because of the Township's realization that its sewage problems can be handled by a system of more "modest proportions". Among the facts alleged by Kidder Township are:

> "...The township is rural in character. Its land area is comprised of approximately 50% state game lands and state parks, and has a permanent population of under 700 persons with a seasonal influx of persons using recreational facilities and second homesites."

The Commonwealth argues that the issues raised by Kidder Township are clearly precluded by *res judicata* and the doctrine of failure to exhaust administrative remedies.

While we are not certain that this appeal would be precluded under the doctrine of *res judicata* because of the absence of certain identities required for the application of that doctrine, see *Stevenson v. Silverman*, 417 Pa. 187, 208 A.2d 556 (1965); *Thompson v. Karastan Rug Mills*, 228 Pa. Super. 260, 323 A.2d 341 (1974), we are convinced that the department is correct that the doctrine of failure to exhaust administrative remedies is applicable here. That principal has been firmly established by a number of cases. *Commonwealth v. Lentz*, 353 Pa. 98 (1945), where the court stated:

> "... one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy."
> 353 Pa. at 104.

See also, *Standard Lime & Refractories Company v. Department of Environmental Resources*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971); *Commonwealth of Pennsylvania, Department*

of Environmental Resources v. Wheeling-Pittsburgh Steel Corp., 22 Pa. Commonwealth Ct. 280, 348 A.2d 765 (1975). It is clear that an unappealed order of the department becomes a final adjudication after the appeal period has run. Section 1921-A of the Administrative Code, Act of April 9, 1929, P. L. 1777, *as amended*, 71 P. S. §510-21; *Commonwealth of Pennsylvania v. Derry Township*, 466 Pa. 31 , 351 A.2d 606 (1976).

In this case, Kidder Township did not appeal the 1972 orders. Hence, it is bound by the conclusions in those orders that there was pollution occurring in the relevant drainage basins and that the department's order to plan, construct and operate sewerage facilities to abate the pollution is valid. Those orders did not cover the scope of any project to be built; consequently, an appeal questioning the extent of a project developed in response to the department's order might be proper when the department approves and authorizes a particular sewerage treatment facility. In this case, Kidder Township had the opportunity to question the scope of the project when a permit to build a particular facility was granted to the authority. While it may be true that Kidder Township could not anticipate "that the consulting engineer would attempt to sewer the entire township" in 1972, it certainly must have been aware of that fact in 1974 and could have raised its objections to the issuance of the permit for the system it believed to be too extensive. At some point the department must be able to proceed to enforce plans for construction of municipal treatment facilities that have been developed to the point of receiving funding from EPA. The order to the Authority in this case is a necessary prelude to an action under §210 of The Clean Streams Law to require the construction of the facilities. If financial impossibility is truly a defense to the constuction of these facilities, the authority and/or Kidder Township may raise that issue in any such enforcement proceeding. *Ramey Borough v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 466 Pa. 45 , 351 A.2d 613 (1976).

We are concerned that the department's orders may sometimes result in the overbuilding of sewage treatment facilities. We do not wish to see the plans that may be developed in response to a departmental order set in concrete by virtue of prior unappealed orders. Obviously, there are times when conditions change (such as a decrease in population where an increase was projected) or the discovery that pollution may be remedied by the installation of advances on on-lot systems. We are satisfied, however, that there is a route for a municipality to follow if it is dissatisfied with the sewage plans that have been developed. A municipality may submit a plan revision to its official sewage facilities plan under the Pennsylvania Sewage Facilities Act and the regulations thereunder, 25 Pa. Code Chapter 71. (Although the regulations do not seem to provide specifically for voluntary revisions of plans by municipalities, the act clearly authorizes such submissions.) Thus Kidder Township could adopt a

revision limiting the scope of the present facilities, which revision the department would either approve or disapprove. The department's decision would, of course, be appealable to this board. It is clear that the revision process could go on simultaneously with any enforcement proceeding to enforce the orders and permit that have already become final. See *Bethlehem Steel Corp. v. Commonwealth of Pennsylvania, Department of Environmental Resources,* 23 Pa. Commonwealth Ct. 387, 367 A.2d 222 (1976).

CONCLUSIONS OF LAW

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

2. Under the doctrine of failure to exhaust administrative remedies, Kidder Township is precluded from taking this appeal because of its failure to appeal the 1972 orders of the department directing it to plan, operate and construct a sewage treatment facility and its later failure to appeal the permit in 1974 authorizing the construction of particular treatment facilities.

O R D E R

AND NOW, this 16th day of November, 1977, the appeal of Kidder Township is hereby dismissed and the department's order of December 31, 1976, is sustained.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

DATED: November 16, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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TOWNSHIP OF MONROE : Docket No. 75-095-W

: The Clean Streams Law

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Paul E. Waters, Chairman, November 23, 1977

This matter comes before the board as an appeal from an order issued by the DER on March 2, 1975, to appellant, Monroe Township, requiring it to enter an agreement with the Borough of Mechanicsburg and to provide public sewage treatment facilities for a portion of the township. Appellant contends that Sewer District No. 1, the area in question, is generally suitable for on-lot sewage treatment systems, and therefore, a public sewer system is unnecessary and the order of the DER is improper.

FINDINGS OF FACT

1. Appellant, Township of Monroe, is a sparsely populated municipality in Cumberland County, Pennsylvania.

2. On March 2, 1975, the DER ordered the appellant to prepare and submit a new implementation schedule for a sewage collection system which will utilize available capacity in the Mechanicsburg Municipal Authority Treatment plant.

3. The DER had issued a prior order in 1973 similar to the one here in question; an appeal was taken therefrom, and this board upheld the order. On appeal to the Commonwealth Court, the board was reversed in part, for the reason that there was insufficient evidence to support our factual finding as to the future need for public sewage facilities in the appellant township.

4. A second order was issued by the DER as above indicated, and this order again raises the question of future public sewage disposal

needs in a particular portion of the township, known as Sewer District No. 1.

5. This sewer district is an area located on both sides of the Pennsylvania Turnpike as it runs through the township and to the south of Pennsylvania Route 641. It lies immediately west of and adjoins Mechanicsburg Borough.

6. The area in question as indicated on a map from the Tri-County Sewerage Facility Plan of 1969 has large amounts of soil which is considered hazardous for the purpose of on-lot sewage disposal.

7. The soil in this area is shallow with numerous bedrock outcrops and it is subject to sinkholes in an area near Trindle Road (Route 641).

8. The area is geologically described as stratographically and structurally complex carbonate (limestone--dolomite) underlain by four formations of bedrock.

9. The groundwater table is generally from 10 to 50 feet below ground and must be considered a limiting factor at least along Trindle Road and its tributaries in the sewer district.

10. The lowland area has high permeability soil and there is the evidence that this may be a valuable groundwater reservoir which may be needed for future public water supply purposes.

11. The soil, as indicated on a Cumberland County soil survey and confirmed by an expert DER soil scientist, is primarily in the Hagerstown Series. Mapping units are gently to moderately sloping phases of Hagerstown silt loam, silty clay loam, rocky silty clay loam and the Hagerstown-Rock outcrop complex.

12. The soils have varying depths to the limestone which underlays it, and the site also includes Penlaw silt loam, lindside silt loam and poorly drained melvin silt loam on the flood plain along Trindle Spring Run.

13. It is not disputed, by any of the experts, that at least 25 percent of the soils in Sewer District No. 1 are generally unsuitable for on-lot sewage disposal systems, as much as 75 percent may be suitable.

DISCUSSION

This matter has been previously before the board and our findings and conclusions in *Township of Monroe v. Department of Environmental Resources*, 16 Pa. Commonwealth Ct. 579, 328 A.2d 209 (1974), while not repeated herein, are re-affirmed based on the testimony in that case which was offered by stipulation in this proceeding. The Commonwealth Court would appear to have removed any lingering doubt about the authority of the DER to issue orders such as the one now before us by its decision in *Commonwealth v. Westmoreland-Fayette Mun. Sewage Auth.*, 18 Pa. Commonwealth Ct. 555, 336 A.2d 704 (1975).[1]

As its starting point, the Commonwealth Court noted the following provision of The Clean Streams Law, §5, 35 P.S. §691.203(b):

> "(b) ...the department may issue appropriate orders to municipalities where such orders are found to be necessary to assure that there will be adequate sewer systems and treatment facilities to meet present and future needs ..." (Emphasis Supplied)

The court construed this as appropriate authority for the DER to employ "preventive medicine", and outlined the proper test to be whether the municipality—"will at some ascertainable time in the future need a sewerage treatment facility or access to a facility in a neighboring municipality". The projected growth of the township population over a given number of years was not deemed adequate in the absence of evidence regarding the soils or other factors limiting the continued use of on-lot sewage disposal (septic) systems.

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1. The court there said in response to the argument that the DER lacked such authority.

> ..."Although appellants' due process attack is, of necessity, framed in the context of a taking of their property without just compensation, we must initially determine whether appellants may even mount such an attack. The U. S. Supreme Court has traditionally denied to municipalities the right to assert their due process protections against actions taken by their sovereign.[3] While recognizing the validity of this concept, appellants would nonetheless have this Court distinguish between its applicability where the municipal property rights "appropriated" by the state were rights in property used for proprietary, not governmental purposes. However, the Supreme Court has not been so discriminating. In Trenton v. New Jersey, 262 U.S. 182 (1923), the Court found the governmental/proprietary dichotomy to be relevant in certain areas of the law (e.g., the law of torts), but not in the context of pure state/municipality interactions, such as the case now before us." (Footnote omitted)
>
> In that case, the pollution which caused the DER to issue its joint sewer order, originated in East Huntingdon Township, and predictably, the two other municipalities argued that the DER had no authority to issue the order to them under The Clean Streams Law, Act of June 22, 1937, *as amended*, 35 P. S. §691.203. The Court affirmed the action of this board which dismissed the appeal. A previous adjudication of the board, *City of Uniontown v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 72-203-B, issued June 18, 1973, is in accord with that decision.

In an effort to pass the test, which at first blush seems easy enough to apply, the DER has now presented an exhibit indicating soil suitability or lack thereof in the sewer district, and two expert witnesses[2] with reports on the hydrology and geology of the area.[3] Keeping in mind that it is the DER that carries the burden of proof, let us apply the facts to the law.

It is immediately apparent that when an effort is made to determine whether a particular municipality will have sewage treatment needs in the future, this by necessity requires some speculation.[4] We are now, if only by semantics, firmly planted on the horns of a dilemma. We cannot know—for certain—the future needs of Sewer District No. 1 in Monroe Township.[5] Knowing that the court did not intend to fashion for us, an impossible task, we conclude that it is really the likelihood of future need that we must pursue.[6]

We are satisfied that the extensive investigation carried out by both parties in this case has uncovered the physical facts which must be at the base of our decision. It is clear to us that there is a bedrock formation of limestone beneath substantial portions of the site and because of this and the level of the groundwater table in other parts of the sewer district, at least 25 percent of the lots are unsuitable to accommodate any

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2. One witness, Dr. Glade Laughry, is recognized as an outstanding expert in the field of soil science.

3. Appellant's experts conducted a field exploration program with auger borings at 52 scattered points over the sewer district. The excavated seven test pits or deep probes, reviewed the DER reports of geology and hydrology as well as aerial photographs of the area.

4. Commonwealth Court, speaking through the Honorable James S. Bowman said in *Township of Monroe, supra*:

> "...In the absence of additional evidence of a non-speculative nature, the finding by EHB of a future need existing in appellant is not supported by substantial evidence."

5. Indeed, it is virtually impossible to discern the sewage disposal needs of an unassembled population at some future date when frequently this is unknown for one person here and now.

6. It is not a certainty or a possibility, but a probability, with which we believe the court and the legislature would have us concern ourselves. To carry the matter one step further, we could have substantial non-speculative evidence indicating that there will, likely or probably, be a future need—or we could have substantial evidence, necessarily of a speculative nature, that there definitely will be a future need for public sewage disposal in Sewer District No. 1. We cannot have substantial nonspeculative evidence that there will be such a future need. The question of whether the need will arise depends in part upon uncontrollable variables, some of which we are not even aware.

growth in the township unless a public sewer system is installed.[7] The necessary municipal action to accomplish this would, not coincidentally, be of tremendous benefit to the Borough of Mechanicsburg, a neighboring municipality whose need is more immediate. If there are no errors made in the issuance of future sewage permits, and if all the presently installed systems continue to operate without problems for the next 25 or so years, and if there are no unforeseen occurrences due to sinkhole developments in the area, then chances are excellent that Monroe Township will not have need of a public sewer system. The converse, of course, is also true. It is this that causes my concern.[8] It must be kept in mind that the DER has not dictated exactly when the appellant must provide public facilities. It has simply indicated that the time is ripe to make planning commitments. We are satisfied under the facts as developed that this is a proper order.[9]

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7. On cross examination an expert witness, relied upon heavily by appellant, was questioned as follows: (N.T. Page 112, Lines 6-25, Page 113, Lines 1-25 and Page 114, Lines 1-13)

> "Q. So, basically, with regard to the entire series, it either says "severe" or it says "moderate," and it emphasizes groundwater contamination?
> "A. With respect to the series that we missed, it said "moderate," with "...depth to bedrock and hazard to groundwater contamination."
> "Q. So, your definition on page 11 is not quite complete, is it, on page 11 of your report?
> "A. Well, the hazard of groundwater pollution would be because of sinkhole probabilities, not so much because of the soil characteristics.
> "Q. Well, whatever the reason is, there is a hazard of groundwater contamination listed against all of the Hagerstown series by the Soil Conservation Service; is that not correct?
> "A. That is the way it reads.
> "Q. And the Soil Conservation Service was the service that you relied on for the soil map as set forth in the Table of your report; is that not correct?
> "A. That is correct.
> "Q. Now, you just changed the definition.
> "A. No, because I found minimal problems with sinkholes, which would eliminate that concern.
> "Q. Where does it say in there that sinkholes is the reason that there is hazard of groundwater contamination?
> "A. It doesn't say specifically; but it would be my judgment, in the limestone area, that if a statement appears like that, it would be related to a sinkhole.
> "Q. Why does it say, "Moderate", "Depth to bedrock," "Hazard to groundwater contamination"?
> "A. It says, "Moderate," rather than the slight category, because you do run high bedrock occasionally.
> "Q. So, it is the high bedrock that is the problem, not just the sinkhole development?
> "A. That is a problem, correct.
> "Q. And you find high bedrock in your own tests, at least on all four corners of Sewer District Number 1, according your map; is that basically correct? You found high bedrock in the southwest and the southeast, in the northeast and the northwest?
> "A. I found it along the two rock ridges that ran east to west.

(Continued to next page)

The order has simply required that a revision of the sewer implementation schedule for Sewer District No. 1 be undertaken by appellant. Although, clearly the DER believes that it is time for appellant to begin steps toward an eventual joint sewer arrangement with treatment at a new Mechanicsburg treatment facility, the final decision as to when the public sewers are to be put in use is left to the township. In short, the DER has recognized that the time to plan for a future need is now, and we agree. Appellant would have us conclude that inasmuch as 75 percent of the district may be suitable for on-lot systems, it is inappropriate for the DER to order it to take immediate steps to plan for the eventual development of the 25 percent that is unsuitable and for the likelihood that within the coming years some marginal area will begin to create pollution problems. The Clean Streams Law, *supra*, we believe, anticipated this reluctance now displayed by appellant and authorized the DER to issue orders that assure that municipalities will have adequate sewer systems and treatment facilities to meet present and future needs.

CONCLUSIONS OF LAW

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

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7. (Continued)

"Q. Which, again, is where the roads are?
"A. Yes, sir.
"Q. In the first paragraph of your conclusion, you say that the Hagerstown series, which comprised 76.5 percent, are generally suitable for the absorption of septic tank effluent.
That is not based on the definition as set forth by the Soil Conservation Service, is it?
"A. At that point, "generally suitable" is my definition.
"Q. Okay; but let me just ask you this: if you used the definition that the Soil Conservation Service used, then you could not reach this conclusion, could you?
"A. I didn't use it entirely.

"THE EXAMINER: That was not his question.
"He asked, if you did use it, could you reach that conclusion.
"THE WITNESS: No, I could not."

8. A public sewer system falls into the category of those things which it is better to have and not need—than the other way around.

9. The order requires that appellant:

"...1. Within thirty (30) days from the date of this Order, negotiate and enter into an agreement with the Authority as Paragraph 4 above.

"...2. Within one hundred twenty (120) days from the date of this Order revise the implementation schedule for sewer district No. 1."

of this appeal.

2. Under The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1, *et seq.*, the DER has the authority and indeed a responsibility to issue necessary orders to municipalities to assure that they will have adequate sewer systems and treatment facilities to meet both present and future municipal needs.

3. Inasmuch as future sewage needs cannot be precisely determined, the DER and this board may properly consider the likelihood of such need arising due to pollution by on-lot sewage disposal systems.

4. Under the facts of this case, where 25 percent of the soil is unsuitable for on-lot sewage disposal systems, the DER is authorized under The Clean Streams Law, *supra*, to require municipal planning for public sewers.

5. The DER has properly required that appellant, Monroe Township, begin planning for future sewage disposal needs by revising its sewer implementation schedule for Sewer District No. 1, which presently utilizes only on-lot sewer disposal systems.

O R D E R

AND NOW, this 23rd day of November, 1977, the order of the DER is hereby upheld but the time periods are amended to begin from the date hereof. The appeal of Monroe Township is dismissed.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

THOMAS M. BURKE
Member

DATED: November 23, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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TOWNSHIP OF MONROE : Docket No. 75-095-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

DISSENTING OPINION

I dissent. I do not understand the Commonwealth Court opinion in *Township of Monroe v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 16 Pa. Commonwealth Ct. 579, 328 A.2d 209 (1974), to mean that if DER shows that some portion of Sewer District No. 1 is unsuitable for on-lot systems, it will have established a "future need" for sewers. It does not matter whether the soils of an area are unsuitable if the area is not going to be developed much beyond its present level. While I accept the board's conclusion that portions of Sewer District No.1 are unsuitable for on-lot systems, I believe there should be more concrete evidence of projected patterns of growth in Sewer District No. 1 as related to soil areas. Population projections for the township are as referred to in the Tri-County Plan, are one indicia of future need. I would also like to know whether the township has a comprehensive plan or zoning plan that calls for development in this area and/or whether there is development occurring in fact, that is either planned or unplanned. It is clear that the purpose of DER's order to the Township of Monroe is to get EPA funding for the Mechanicsburg plant. This is an understandable, practical objective; however, it does not justify sewering a rural area unless it is known that there will be growth there.

ENVIRONMENTAL HEARING BOARD

Joanne R. Denworth

JOANNE R. DENWORTH
Member

DATED: November 23, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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WRIGHTSTOWN TOWNSHIP
WRIGHTSTOWN TOWNSHIP CIVIC ASSOCIATION,
et al, Intervenor

Docket No. 75-307-W

Surface Mining Conservation and Reclamation Act

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and MILLER & SON PAVING, INC., Permittee

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

By Paul E. Waters, Chairman, December 1, 1977

This matter comes before the board as an appeal from the issuance by the DER, of a surface mining permit pursuant to the Act of May 31, 1945, P. L. 1198, 52 P. S. §1396.1, to Miller & Son Paving, Inc. for the mining of agrilite from its quarry in Wrightstown Township, Bucks County, Pennsylvania.

Appellants, Wrightstown Township and a civic association, oppose the permit on the grounds that the DER did not follow the act in requiring the permittee to comply with zoning requirements, proper contouring of the area and the handling of runoff, among other things. The permittee, Miller & Son Paving, Inc., sought unsuccessfully, to have the appeal dismissed for late filing and that effort has been renewed at this stage of the proceedings.

FINDINGS OF FACT

1. Wrightstown Township is a township of the second class located in Bucks County with offices located in the Wrightstown Township Municipal Building, Penns Park Road, Rushland, Pennsylvania.

2. Wrightstown Township Civic Association and one Margaret Perry were permitted to intervene on the side of the township. Perry is an adjoining property owner to the existing Miller quarry.

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

4. Intervenor, Miller, is the successor by merger; to Miller Quarries, Inc., the applicant for the permit in question.

5. The property of Miller consists of two parcels of land in Wrightstown Township. The first is an approximate forty-seven acre tract of ground on which Miller has been operating a quarry since 1959. The second is approximately twelve acres, and this parcel adjoins the aforementioned forty-seven acre tract.

6. On October 17, 1973, Miller submitted to the DER an application for surface mining and mine drainage permits to operate a quarry on the aforementioned tracts of ground.

7. Upon receipt of Miller's application, the DER made an initial technical review based upon their standards for mining, mine drainage, erosion control and reclamation. Then a public fact-finding hearing was held at the Bucks County Community College before Walter Heine, Associate Deputy Secretary for Mines and Land Protection of the DER, Jack Scheffler, Hearing Examiner for the DER and Robert Biggi, Chief of the Pits and Quarry Section, Bureau of Surface Mine Reclamation for the DER. Finally, a personal inspection of the site was made by Mr. Biggi.

8. Thereafter, on December 24, 1974, the DER approved and issued to Miller, Mine Drainage Permit No. 7973SM3. Also, on December 24, 1974, the DER approved Surface Mining Permit No. 799-75 for issuance to Miller. However, due to an administrative oversight, this permit was not mailed by the DER until October of 1975, backdated to December 24, 1974.

9. Issuance of the aforementioned permits was not published in the Pennsylvania Bulletin.

10. Issuance of said permits was not published in any newspaper in circulation in Bucks County, Pennsylvania where Miller operates the quarry for which the permits were sought.

11. The DER never notified Wrightstown Township of the issuance of aforesaid permits.

12. Wrightstown Township made repeated inquiries of Miller to determine whether permits had been issued but never received official documentation of their issuance until November 20, 1975.

13. Wrightstown Township filed the instant appeal with the Environmental Hearing Board on December 9, 1975, and at the same time served notice of the appeal on the DER.

14. Appellant did not serve Miller with a copy of the appeal until December 19, 1975, ten days after the filing of the appeal with the Environmental Hearing Board.

15. Water, which runs off of an overburden pile which is adjacent to Perry's property line and has been there since 1972, is drained by a wet weather ditch. The sides and bottom of the overburden pile and the wet weather ditch are vegetated to some extent.

16. Water draining from lands east of the quarry is permitted to enter the quarry by falling into a catch basin from which it is piped through and under the quarry floor to a ditch which runs to Mill Creek. The DER permits catch basins in non-coal surface mines where the minerals involved do not generate acid.

17. The mineral mined in this quarry, argilite, does not dissolve in water and does not cause acid. It is found in thick deposits.

18. The quarry floor is sloped from the catch basin into the quarry so that water does not run out of the quarry. The area in front of the catch basin is completely paved and is swept periodically.

19. The catch basin and pipe have been in place since the quarry began operation in 1959, and during that eighteen-year period, it only overflowed on one occasion. That occasion was during hurricane Agnes when a stump washed into the culvert entrance.

20. The DER approved terracing as a reclamation procedure. Contouring was not required for the Miller quarry as it had been waived for all existing quarries in the Commonwealth. Contouring in an existing quarry is impractical and the DER does not require a quarry to reclaim the walls which are in place prior to the Surface Mining Conservation and Reclamation Act, *supra*. In such cases, terracing provides the best alternative to contouring.

21. The DER did not require test borings for the Miller quarry as they have been waived for existing quarries and the material being quarried is argilite, which is a very thick deposit.

DISCUSSION

The appeal in this case is alleged to be untimely filed because it was filed more than thirty days after the surface mining permit in question was issued. On October 13, 1973, Miller Quarries, Inc. applied for a permit under the Surface Mining Conservation and Reclamation Act, *supra*.[1] For reasons which are not clear on this record, the permit was approved on December 24, 1974,[2] but was not sent to permittee until October 1975. It is at this point that the path, giving rise to the argument about jurisdiction over this appeal, becomes more tortuous. The appellant was not notified of the permit nor was notice published in the Pennsylvania Bulletin. Through continuous efforts, the township was able to get complete copies of the permits on November 20, 1975, and filed its appeal on December 9, 1975, within the thirty-day period provided by our rules.[3] Although we have held this filing requirement to be jurisdictional,[4] the provision requiring that notice be given to the permittee has been the subject of a more extended controversy. The rules originally required

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1. Permittee also applied for a drainage permit under The Clean Streams Law, Act of June 22, 1937, P. L. 1987, *as amended*, 35 P. S. §691.1, *et seq.*, and this was approved and sent on in December of 1974 by the DER.

2. Perhaps the fact that it was Christmas Eve caused some lapse in the expected efficiency of the DER.

3. Rule 21.21(a) of the Rules of Practice and Procedure before the board provided:

> "(a) In cases where Appeals are authorized by statute or regulation of the Department, such Appeal shall be in writing and shall be filed with the board thirty (30) days from the date of receipt of written notice of an action of the Department or local agency, unless a different time is provided by statute. ..."

4. See *United States Steel Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-167-W, issued September 5, 1975.

that notice to be given to the permittee within 48 hours of the filing of the appeal.[5] This was later deemed to be an insufficient amount of time and the notice period was extended to 10 days by an amendment to the rules.[6] At the same time, the rules were changed to provide that a permittee would automatically become a party to the proceedings without the necessity of intervention. Here, appellant gave notice to the permittee within 10 days of the date the appeal was filed. It would now seem unjust to dismiss this appeal based on a prior limitation, in effect, when this appeal was filed, inasmuch as the board itself was then divided on the consequences of giving late notice, especially when the rule has now been changed expressly because of the unduly short notice period

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5. Rule 21.21(b) provided:

> "(b) . . .The Appellant shall, within 48 hours after filing an Appeal, serve a copy of the appeal on the officer of the Department or the local agency issuing the Order and on the Bureau of Administrative Enforcement, P. O. Box 2351, Harrisburg, PA 17120. Where the Appeal is from the granting of a permit, an additional copy shall be served upon the recepient of the permit. . ."

6. Rule 21.21 of the board's current Rules of Practice and Procedure provide:

> "(a) An appeal to the board from an action of the department shall be commenced by the filing of a written notice of appeal with the board within 30 days from the date of the receipt of written notice of an action of the department, unless a different time is provided by statute.
>
> "(b) The notice of appeal shall be filed with the Environmental Hearing Board, Blackstone Building Annex, 112 Market Street, Harrisburg, PA 17101.
>
> "Within ten days after the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:
>
> "(1) The officer of the department issuing the notice of departmental action.
>
> "(2) The Bureau of Administrative Enforcement, P. O. Box 2357, 505 Executive House, 101 South Second Street, Harrisburg, PA 17120. *
>
> "(3) Where the appeal is from the granting of a permit, license, approval or certification, the recipient thereof. Service upon the recipient of a permit, license, approval or certification, at the address set forth in the document evidencing such action by the department, or at the place of business or registered office of the recipient in this Commonwealth, shall be deemed sufficient service in compliance with this section.
>
> "No appeal from the granting of a permit, license, approval or certification shall be deemed to be perfected unless and until the recipient thereof is served with a notice of appeal in accordance with this section. The service upon the recipient of such permit, license, approval or certification as required by this section, shall subject such recipient to the jurisdiction of the Board as a party appellee.
>
> "Upon order of the board, appellant shall provide satisfactory proof that service has been made as required by this section. . ."
>
> *Currently, Bureau of Litigation Enforcement, P. O. Box 2357, 512 Executive House, 101 South Second Street, Harrisburg, PA 17120.

allowed. We, therefore, reaffirm our earlier decision and conclude that the appeal and the notice to the permittee were timely.[7]

We now move to the second question which was discussed throughout the proceedings although it was the subject of a ruling by the examiner which clearly presaged the decision we now reach. Permittee, Miller & Son, owns two tracts of land to which the permit relates. The smaller, 12-acre tract, is presently zoned for agriculture purposes by the township. Efforts to have this zoning description changed have led some of the same parties now before us, into Common Pleas Court in Bucks County on the question of a zoning change. As of the date of hearing in this proceeding, that issue was unresolved.

Under the Surface Mining Conservation and Reclamation Act and the permit conditions, it is clear that a prospective permittee must comply not only with the state law, but in addition, must meet all local zoning requirements before it can properly engage in a mining operation such as here under consideration. The question, then, is not whether Miller & Son Paving, Inc. must comply with the local zoning laws in Wrightstown Township, but rather—must the DER withhold a permit until such time as compliance has occurred?[8] The board has had the occasion to deal with this question in a related setting. In *Anthony J. Agosta, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources and City of Easton, Intervenor*, EHB Docket No. 75-208-W, issued March 25, 1977, an appellant under the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001, *et seq.*, argued that a permit was improperly granted for a landfill to be located in an area for which zoning litigation was then underway in common pleas court. It was appellant's position that the board should delay any decision until after the court resolved the zoning dispute. We there said: "... Unless the respective forums

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7. We also note that the permittee raised the question of jurisdiction for the first time at the hearing, having made no preliminary issue of it. Recognizing that jurisdiction cannot be waived, we simply note the added burden placed on the parties by a delay in complaining about the delay of another.

8. We need not decide whether the DER could properly withhold a state permit until an applicant has received local zoning approval.

were to hand down decisions on the exact same day, obviously one issue must be resolved last, and either adverse decision possibily could prevent the landfill from ever coming into existence. Obviously we could reach a circular delay if the court believes administrative remedies must first be exhausted. It may well be that the court will conclude that the Pennsylvania Solid Waste Management Act, *supra*, takes precedence over local zoning ordinances, but be that as it may, it is our view that the zoning question must be resolved by the Common Pleas Court and not the Environmental Hearing Board. All we are deciding on this question, as we have in prior ruling in this case, is that we have no jurisdiction to decide the merits of that zoning issue, and we should do what we can to resolve the issues now properly before us. . ." There is some question whether the statute now before us goes further than the Solid Waste Management Act by expressly preserving zoning regulations. This, however, does not change our opinion. Since we have already concluded that it is the common pleas court which must decide whether local zoning requirements are being complied with. We are here again content to defer to the Bucks County Court on the zoning issue raised by appellant.[9]

Moving now to the substantive issues which separate the parties, we are asked to consider whether the DER and the permittee have complied with Article I, Section 27 of the Pennsylvania Constitution[10] as interpreted by our courts in *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973). Basically, we have to inquire whether the three considerations which have come to be known as the *Payne* test, are in evidence whether through compliance with the surface mining act or otherwise.[11] Appellant and intervenors[12] have raised questions about the zoning law to which we have previously alluded. It is also

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9. The standard permit condition requiring compliance with any local zoning ordinance would seem to be appropriate.

10. Article I, Section 27 provides:

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

11. Our Supreme Court, on appeal from the indicated decision of Commonwealth Court, has said that compliance with the statute is sufficient to meet the Constitutional Trustee duties. *Payne v. Kassab, et al*, 361 A.2d 263.

12. Hereafter, we will mention only the former, but this is intended to include the latter where applicable.

alleged that permittee is operating in volation of the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, *as amended*, 35 P. S. §4001 *et seq.* This issue was not properly raised by the pre-hearing memorandum and, at the hearing there was serious objection to allowing testimony on this issue for which no preparation had been made by permittee. The hearing examiner sustained the objection based on the board rule 21.21(c) (3) which clearly provides: . . ."Any objections not raised by the appeal shall be deemed waived."[13] We now reaffirm that ruling.

The major thrust of appellant's arguments concern the disposal of water that comes on the site and the waiver by the DER of certain requirements for data in the surface mining application itself. With regard to the handling of runoff from the site, the permittee has relied chiefly upon a 42" pipe[14] which has an inlet at a catch basin, and runs under the quarry to an outlet at Mill Creek not far below the site. The basin is approximately 12 feet deep and 35 feet in diameter. There is extensive testimony regarding the drainage area which governs the amount of runoff that ultimately must be handled by the basin and pipe. The dispute in this matter centered to an unreasonable extent upon the rainfall that had occurred in the past and that could be expected in the future. The issue of duration and frequency of storms in the Wrightstown area, fueled by weather experts and others, threatened to become a case with a life of its own.[15] The bottom line fact is that the pipe and basin have been in use since 1960 and only on one occasion, during hurricane Agnes when a tree stump blocked the flow, have they been inadequate to handle the runoff in that 17-year period.[16] Thus, regardless of how many storms occurred and what their duration, there is no evidence to refute the unequivocal testimony which we accept as to the past adequacy of the pipe and basin.[17]

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13. The board has not construed this as mandatory, but very strong directory language. Where unfairness or surprise seem evident, the evidence is properly foreclosed.

14. The pipe is made of concrete at one end and is a galvanized squash pipe (flat on top and bottom) at the inlet end.

15. The examiner was tempted to cut short this extremely protracted discussion, but deferred to the insistence of all parties that important data would otherwise be missed. We can now say with some confidence that we should have succumbed to the temptation.

16. The water which runs toward the quarry drops over a fall of about 40 feet into a large odd-shaped catch basin. The 42" pipe at the lower end of the basin conducts the water under the quarry to a natural drainage channel leading under Mill Creek Road to Mill Creek which runs parallel to the road in front of the quarry.

17. Notes of Testimony, Page 426, Lines 6 through 22:
(Continued to next page)

Although there is a large overburden pile which has been on permittee's property at its boundary with intervenor Perry, since about 1969, we can find no basis to overturn the action of the DER simply because it is unsightly and very annoying to a quarry neighbor.[18]

There was extended discussion on the question of whether water would get into the quarry itself. The Surface Mining Conservation and Reclamation Act, *supra*,[19] provides: "K. The application shall also set forth the manner in which the operator plans to divert surface water from draining into the pit and the manner in which he plans to prevent water from accumulating in the pit. No approval shall be granted unless the plan provides for a practicable method of avoiding acid mine drainage and preventing avoidable siltation or other stream pollution. Failure to prevent water from draining into or accumulating in the pit, or to prevent stream pollution, during surface mining or thereafter, shall render the operator liable to the sanctions and penalties provided in this act and in "The Clean Streams Law,"[1] and shall be cause for revocation of any approval, license or permit issued by the department to the operator. . ." (Footnote omitted)

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17. Continued:

> "Q. Does the Department have a standard as to what size of conveyance must be provided in relationship to the year of storm or the frequency of occurence of flows?
> "A. I don't know of any; I didn't use one in determining whether we would accept that method or not.
> "Q. Do you have a rule of thumb that you use?
> "A. In this case, in an existing quarry, where this wasn't a proposed facility, it was one that was there, we went based upon the history of it that it worked, that there hadn't been any problems with that culvert or that method of handling the water. So, we continued; we allowed it to continue.
> "The further operation of this quarry would not affect that water handling system, because, in the first place, the area was paved or improved upon.
> "The watershed area wouldn't change based on the quarry; if anything, it might decrease." . . .

18. The pyramid-shaped pile is no longer being added to and although there is a wet weather course and undergrowth in the area of the pile, it is not clear that any damage, for which the board has a remedy, is taking place.

19. Section 1396.4(a) (2) (k)

It is clear from a reading of the above section, that acid mine drainage was the chief evil to be prevented thereby. Although we have no doubt that some water does drain into the pit from time to time, we cannot ignore the fact that the mineral here being mined is agrilite which does not produce acid. The slope, away from the pit and the other precautions taken by the permittee, convinces us that there has been compliance with the intent of statute in this regard.

The Surface Mining Act requires in Section 1396.4(a) (2) (g) that the reclamation plan provide for contouring or indicate the conditions which do not permit it, and outline an alternative. Appellants contend first that there was no reclamation plan submitted and secondly, even if there was one, it did not provide for contouring and is, therefore, inadequate. In fact the permittee did submit supplemental information to its application which indicated its reclamation plan would use terracing. This was because the walls were in existence prior to the passage of the act, thereby making contouring impractical. The DER approved this plan and thereby waived any requirement for contouring. In like manner, the DER waived any requirements for test boring as it has in all existing quarries. We need not decide whether the DER may properly waive such a statutory requirement across the board rather than on a case-by-case basis.[20] Inasmuch as argilite in very thick deposits, is the material with which we are here concerned, the acid mine drainage problem is, therefore, not in issue. We are satisfied that the request was properly waived as to this particular permittee. Finally, appellant challenges the planting and vegetation portion of the reclamation plans. Initially, permittee admits that it does not know precisely what the full life of the quarry will be. It asserts that the quarrying duration[21] depends, in part, upon unknown factors such as future demand for the product. The plans for final terracing contemplate grass and woodlands and the present overburden piles on the property are to be used for topsoil and subsoil purposes. We believe the application substantially meets the statute and regulations of the DER in this regard.

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20. We do have some reservations regarding both the legal and practical implications of this procedure. Section 1396.4(a) provides:

> ". . .As a part of each application for a permit, the operator shall, unless modified or waived by the department for cause, furnish the following: . . ."

21. This has been suggested to be as long as 50 years, but we deem that to be nothing better than a guess and disregard it.

CONCLUSIONS OF LAW

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

2. Under the unique facts of this case, the appeal was timely filed and perfected in accordance with Rule 21.21 of the Rules of Practice and Procedure before the board.

3. Neither the DER nor the Environmental Hearing Board has jurisdiction to resolve zoning questions which are being litigated in another forum, although this board will take judicial notice of any final court decision on such matters.

4. The DER may properly waive certain requirements of the Surface Mining Conservation and Reclamation Act as so authorized in the Act of May 31, 1945, P. L. 1158, *as amended*, 52 P. S. §1396.4(a).

5. The DER has properly reviewed and verified the application of permittee in this matter and the permits in question were issued in compliance with the Surface Mining Conservation and Reclamation Act.

O R D E R

AND NOW, this 1st day of December, 1977, the appeal of Wrightstown Township, *et al*, is hereby dismissed and the surface mining and mine drainage permit grant actions by the DER to Miller & Son Paving, Inc. are hereby sustained.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

JOANNE R. DENWORTH
Member

THOMAS M. BURKE
Member

DATED: December 1, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES : Docket No. 75-205-CP-D

v. :

UNITED STATES STEEL CORPORATION

OPINION AND ORDER

The Department of Environmental Resources (department) has filed a motion for sanctions against United States Steel (USS) for failure to fully answer interrogatories and to produce documents as required by an order of the board dated August 13, 1976. In response, USS has moved for a protective order based on its assertion that it cannot be required to produce certain documents until there is a guarantee by the department that it will keep these documents confidential and follow certain procedures for protecting the confidentiality of the documents.

The department points out as grounds for rejection of USS' motion for protective order, that USS did not raise the issue of confidentiality in the objections to discovery filed last April, and extensively briefed prior the board's decision on August 13, 1976. We are disturbed by this failure and by the delay caused by waiting until the date for delivery of documents to raise the issue of confidentiality. However, the double opportunity to object is a consequence of the board's discovery procedures and cannot be totally ascribed to USS. It is the intent of the present board members to attempt to have the rules revised so that a formal petition for discovery is unnecessary and discovery may be conducted by the parties with objections being raised at a point in the answering process where specific objections may be dealt with. In the meantime, the board has ruled, however, in accordance with the rule in Common Pleas Court that objections to discovery may be raised at any time in the discovery process, and are not precluded by the failure to raise them in response to

the initial petition for discovery filed with the board. See Opinion and Order in *Commonwealth of Pennsylvania, Department of Environmental Resources v. Jones & Laughlin Steel Company*, EHB Docket No. 74-272-C; issued September 10, 1976; Goodrich Anram §4005 (b)-2; 5A Anderson Pa. Practice, §4005.49 and §4012.12.

On the issue of confidentiality, we cannot agree with the Commonwealth that §13.2 of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001 *et seq.*, is the outer limit of protection that the department may afford to USS.[1] Section 13.2 describes the confidential treatment that is to be afforded records, reports and information that are obtained by the department in the exercise of its functions under the Air Pollution Control Act. Although the powers and duties of the department under that act include the power to institute proceedings to enforce the act, 35 P.S. §4004 (5) and (7), the authority to compel the production of documents and answers to interrogatories through discovery does not come from the Air Pollution Control Act but from the Pennsylvania Rules of Civil Procedure, which have been incorporated into proceedings before the board by Rule 21.15 (d) of the Rules and Regulations of the Environmental Hearing Board. Obviously, the broad powers of investigation given the department under §4 of the Air Pollution Control Act, see e.g. 35 P.S. §4004 (1) (2) (2.1) (2.2) and (2.3), could not authorize the department to require a company to produce information concerning operations in other jurisdictions, as the department seeks to do here through discovery. Information obtained through discovery for the specific purpose of particular litigation is only discoverable for that litigation because of the Rules of Civil Procedure; consequently, those rules are determinative of what may or may not be discovered, and rule 4012 authorizes a court, or this board, in cases before the board, to fashion protective orders to limit the scope of discovery where appropriate. Goodrich-Anram §4005 (c)-4.

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1. That section provides:

> "All records, reports or information obtained by the department *or* referred to at public hearings under the provisions of this act shall be available to the public, except that upon cause shown by any person that the records, reports or information, or a particular portion thereof, but not emission data, to which the department has access under the provisions of this act, if made public, would divulge production or sales figures or methods, processes or production unique to such person or would otherwise tend to affect adversely the competitive position of such person by revealing trad secrets, the department shall consider such record, report or information, or particular portion thereof confidential in the administration of this act. Nothing herein shall be construed to prevent disclosure of such report, record or information to Federal, State or local representatives as necessary for purposes of administration of any Federal, State or local air pollution control laws, or when relevant in any proceeding under this act." emphasis supplied; 35 P.S. §4013.2

It must be noted, however, as articulated in our earlier opinion on discovery in this matter, that information that a source is required to collect and retain as a consequence of the Air Pollution Control Act, independent of any particular litigation, is discoverable. Such information (which would include test data, records and reports pertaining to the Fairless Sinter plant) even though obtained through this specific litigation, is obtainable under the provisions of the Air Pollution Control Act, and should therefore be treated in accordance with the confidentiality provisions of §13.2. Apparently, USS is claiming that many of the documents identified in response to interrogatories, which would be available to the state under the provisions of 35 P.S. §4004, should be subject to the extensive protective order it seeks.[2] We do not agree.

Recognizing that it is the rules of discovery that govern the issue here, we can find no authority under them for the broad protection for "confidentiality" that USS seeks in its proposed stipulation. Section 401 of the Rules of Civil Procedure provides in part:

> "no discovery or inspection shall be permitted which
>
> ...
>
> "(c) relates to matter which is privileged or would require the disclosure of any secret process, development or research

This provision simply prohibits discovery of a limited category of information. See *Prinscott v. Henry T. Campbill Sons' Corporation*, 16 D & C 2d 650 (C. P. Phila. 1958). USS is not claiming the absolute protection that this section affords for any secret process, development or research. On the other hand Section 4012, which by its terms is applicable protective orders for deposition, but has been extended to apply to objections to interrogatories, see Goodrich-Anram §§4005 (c); 4012-1, enables a court to allow discovery to proceed subject to appropriate restrictions in a given case. See, e.g. *Philco Corporation v. Sunstein*, 30 D & C 2d (C.P. Montg. 1963). No case suggests that a court should afford elaborate protection to whatever documents a party wishes to label "confidential", particularly where those documents are necessary to its own case. See *Yoffee v. Golin*, 45 D & C 2d 318, 323, (Daugh 1968) where the court held that a plainfiff could not object to discovery by defendant on the ground that it would elicit confidential information where such information would be required to be produced at trial in order to prove plainfiff's case. Much of the disputed

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2. From an exhibit attached to the pleadings on these motions, it appears that USS may be willing to turn over 17 of 28 documents identified subject to the confidentiality provisions of 13.2, but I am unable to tell which documents those are.

information that the department seeks from USS is desired because of the claims that USS has raised in these consolidated actions that the standards applicable to its Fairless sintering plant operation are technologically and economically infeasible. When asked what basis it has for these assertions, USS claims the information related to these assertions is confidential. So far as we can see it make no distinction between general technical information, emission data from particular sources, documents upon which expert information is based and the like. Furthermore USS simply makes a general allegation, without any specific showing, that the disclosure of these documents may be used by competitors or other enforcement agencies or litigants to harm USS.

Certainly general technical information is not entitled to "confidential" treatment under any case law we have discovered. See *Papers Manufacturers Company v. Weiss*, 57 C & D 2d 573 (C.P. Bucks 1972). Moreover, the federal courts in affording protection for "confidential" information make a determination as to whether there is good cause for such protection, which includes an assessment of the likely harm of publicity to the parties seeking protection. See, e.g., *Essex Wire Corp. v. Eastern Electric Sales Co.*, 48 S.R.D. 308 (E.D. PA 1969). In view of the generality of the allegations it is difficult to assess the actual risk of harm here. However, we can see some basis for USS' claims as to emission data from other jurisdictions as well as production and cost data and any experimental test data generally, if such information is only available to the department because of this litigation and would not otherwise be available to the department under the provisions of the Air Pollution Control Act. As stated above, we believe that the confidential treatment of information that would normally be available to the department under the provisions of the act is governed by Section 13.2.

From the briefs and letters that have been filed with the board since the department filed its motion for sanctions, it appears that with one exception the issues other than confidentiality have been resolved by the parties. In accordance with the protective order entered with this opinion, we will give USS three weeks to produce the information requested by the department and ordered to be produced by the board's order of August 13, 1976. If USS does not choose produce responsive information by the date set, the board will not entertain USS' claims of technological and economical infeasibility, since we do not believe that USS should be allowed to make these arguments in litigation if it is unwilling to produce information relevant to it assertions in discovery. Furthermore, any responsive information that is available to USS but is not identified and produced will not be acceptable by the board if it is later thought to be introduced into evidence by USS in support of its assertions. In truth, the absence

of these feasibility arguments would make this case a great deal easier since the board could than deal simply with the question of whether or not USS is violating Pennsylvania's air pollution standards at its Fairless sintering operations and whether or not it was entitled to a variance for this operation without the delay inevitably caused by voluminous discovery and hearings devoted to the issue of feasibility.

O R D E R

AND NOW, this 4th day of February, 1977, it is hereby ordered that on or before February 25, 1977, United State Steel Corporation shall produce all information requested by the department in its interrogatories and motion for production of documents and ordered to be identified and produced by the board's order of August 13, 1976.

With the exception of general technical information and records, reports and information concerning its Pennsylvania operations that are kept by USS in accordance with the provision of the Air Pollution Control Act and are hence governed by §13.2, information provided by USS to the department shall be designated and held by the department as confidential, shall be used for no purpose other than the preparation and trial of this case, shall not be duplicated copied or summarized for purposes other than the preparation and trial of this case, and shall not be made public or communicated to other governmental agencies without leave of this board or a court of competent common jurisdiction. Prior to February 25, 1977, either party may request an immediate ruling from the board as to whether or not any particular document is to be held as confidential within the meaning of this order.

USS shall identify and produce all copies of any documents identified that differ other than technically from the original, such as by presence of notes or other memoranda from different USS personnel.

USS shall identify any expert witnesses that it intends to use for the trial of this matter as soon as they are known to USS.

Any responsive information that is available to USS but is not identified and produced in accordance with this order will not be accepted by the board if it is later sought to be introduced into evidence by USS in support of its assertions as to infeasibility.

ENVIRONMENTAL HEARING BOARD

Joanne R. Denworth

JOANNE R. DENWORTH
Member

DATED: February 4, 1977

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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(717) 787-3483

WEST PENN POWER COMPANY : Docket No. 73-330-D

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

This opinion relates back to and is explanatory of the order of the board issued October 27, 1976, which denied the Department of Environmental Resources' (department's) motion to dismiss this appeal and set forth a schedule for hearings to proceed in this matter. That order stated that an opinion would follow. The opinion has not followed until now because at the opening hearing in this matter held November 3, 1976, and in subsequent briefs, letters, and discussions, the parties have raised additional issues and asked that the board address those issues in this opinion, as well as the issues related to the department's motion to dismiss. We are not prepared to resolve finally all of the issues raised in the various memoranda filed by the parties since we do not believe that some of them can be resolved preliminarily—at least at this point in the proceedings. However, we will attempt in this opinion to set forth all of the issues resolved or unresolved as we perceive them and, where unresolved, to suggest what in our opinion would be helpful to their resolution.

On August 27, 1976, the department moved to dismiss West Penn Power Company's appeal from variance order No. 73-708-V issued to the company on September 19, 1973. The variance order was issued in response to West Penn's amended petition for variance in which it essentially asked for a 12-year variance from the department's regulation §123.22 governing allowable emissions of sulfur dioxide for boiler No. 33 at its Mitchell Power Station. West Penn's petition for variance also included requests for extensions of time in which to meet particulate and sulfur dioxide standards at boilers Nos. 1, 2 and 3 at the Mitchell Power Station and particulate matter emission standards for boiler No. 33. The

department's variance order granted West Penn's requests with respect to all of those emissions, and the emission standards as to those emissions have since been complied with. West Penn's appeal relates only to the sulfur dioxide emission limitation applicable to boiler No. 33.

In its amended petition for variance West Penn discussed alternate plans for controlling the sulfur emissions from boiler No. 33. Alternative I proposed installation of a tall stack to disperse boiler emissions some 700 feet above ground level, as well as ground level monitoring stations. Under this alternate, appellant stated no plan to reduce the quantity of emissions to the levels required by 25 Pa. Code §123.22, and it requested a "ten-year variance from existing emission standards to amortize the cost of new equipment". In Alternative II, appellant stated it would investigate sulfur removal processes, and "if any such processes not presently being tested, have, in petitioner's (appellant's) estimation, a sufficiently high chance for success," appellant would install such a system. Under Alternative II, appellant stated that it would require approximately 53 months to engineer, construct and install such a system.

With respect to the sulfur-compound variance for boiler No. 33, the amended petition summarized appellant's request as follows:

> "Therefore, under Alternate I, Petitioner would comply with all applicable ground-level concentration standards by April 1, 1977, but would require a variance from existing emissions regulations until June 30, 1985, in order to amortize the cost of the facility. Under Alternate II, Petitioner would require a variance from existing emission standards and ground-level concentration standards at least until April 1, 1978, and possibly for an extended period thereafter, dependent upon the development of technology and future supply conditions."

In the department's order granting a temporary variance the department made the following determinations with regard to the sulfur dioxide emissions from boiler No. 33:

> "Upon a review of the petition (a copy of said petition is attached hereto and marked Exhibit "A"), and accompanying materials, testimony (if any) received at public hearing, and upon other information available to the Department dealing with the availability of technology to control sulfur dioxide emissions, the Department finds that:
>
> "1. The granting of such a variance may prevent or interfere with attainment or maintenance of ambient air standards within the time prescribed by the Federal Clean Air Act and Rules and Regulations promulgated thereunder.
>
> "2. Alternate I does not provide for compliance with Section 123.22 in a reasonable time period and is therefore not acceptable to the Department.
>
> "3. The granting of the variance, as requested, for implementation of Alternate II is not reasonable inasmuch as the intermediate dates, and the completion date set forth in the petition do not indicate that the company intends to effect the control of the source as quickly as is reasonably practicable."

With respect to boiler No. 33 the department's order to West Penn provided that West Penn should:

> "(a) on or before June 30, 1976 complete the implementation of Alternate II of the control plan set forth in the aforementioned amended petition for a variance, which plan is hereby incorporated herein and made a part hereof;
>
> * * *
>
> "(e) on and after June 30, 1976 operate its aforementioned Boiler No. 33 in such a manner as to maintain the emissions of sulfur compounds to within the limits specified in Chapter 123 of the Rules and Regulations of the Department of Environmental Resources; . . ."

In its notice of appeal West Penn challenged the department's conclusion that ambient air quality standards in the Monongahela Valley air basin will not be met without the installation of flue desulfurization equipment. Primarily, however, the appeal challenged the validity of regulation 123.22 as establishing an emission limitation for sulfur dioxide that is economically and technically infeasible of attainment, and the validity of the variance regulations themselves as unreasonable in that they allow insufficient time to meet the standard of §123.22.

The hearing in this matter has been delayed because of the possibility of settlement between the department and West Penn and because of litigation initiated in the federal courts by West Penn attempting to have those courts declare the sulfur dioxide emission in Pennsylvania's regulations invalid. The federal courts have in various opinions concluded that they have no jurisdiction to consider West Penn's claim in the contexts in which West Penn has sought to have the sulfur dioxide standard reviewed.[1] Here again (see *Bethlehem Steel Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-107-D, Opinion issued August 2, 1976) the relationship between federal and state standards and enforcement is a critical part of the situation in this case. Pennsylvania's sulfur dioxide standard found in regulation 123.22 is part of Pennsylvania's state implementation plan (SIP), which has been approved by the federal administrator of the Environmental Protection Agency (EPA) as sufficient to meet national ambient air quality standards established under the federal Clean Air Act.[2] Under the federal act, EPA can take enforcement action

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1. See *West Penn Power Company v. Train*, 6 ERC 1722 (W.D. Pa. 1974); *West Penn Power Company v. Train*, 7 ERC 2178 (3rd Circuit 1975); *West Penn Power Company v. Train*, 9 ERC 1206 (3rd Circuit 1976).

2. Regulation 123.22 does not appear per se in the federal regulations at 52 C.F.R. §2020 *et seq.* However, according to counsel for DER it was in fact part of Pennsylvania's submission that was approved by 52 C.F.R. §2023 (a).

against a source for violation of the state's standards that are in the federally approved implementation plan. In 1973 EPA issued to West Penn a notice of violation, which was followed in 1975 by a compliance order. In its first action in the federal court West Penn was attempting to get review of EPA's notice of violation, and a declaratory judgment that the Pennsylvania regulation was invalid. The federal district court concluded that it did not have jurisdiction to hear West Penn's suit in part on the theory enunciated in earlier third circuit decisions that any federal challenge to the validity of state implementation regulations could only be launched through an appeal from the administrator's approval of the state's SIP under Section 307 (b) (1) of the Clean Air Act. The circuit court affirmed. Both courts alluded to the fact that West Penn could get review of the validity of Pennsylvania's regulations through the variance appeal that had been timely taken to this board. Subsequently, West Penn filed an attempted appeal from the administrator's approval of the Pennsylvania SIP under §307 (b) in the circuit court of appeals. By this time the Supreme Court had decided *Union Electric Company v. EPA*, ___ U.S. _____ 49 L. ED. 474 (1976), which held that the administrator had no authority under §110 of the Clean Air Act to consider questions of economic and technological infeasibility in approving a SIP; and consequently such questions could not be raised in a §307 (b) (1) appeal. The Supreme Court in *Union Electric* suggested, although not in any detail, that such review to the extent that it was available would have to be obtained in a state forum. The Circuit Court's recent opinion (issued July 26, 1976) followed *Union Electric* and dismissed West Penn's §307 (b) (1) appeal, suggesting as it did so that West Penn might be able to obtain review of the sulfur dioxide standard in a review by the district court of the compliance order that had been issued by EPA. Since that time, EPA has withdrawn its compliance order. However, EPA will not, as the company has requested, agree to stay any federal enforcement proceeding pending the outcome of this state proceeding. Apparently, West Penn and the department were able to agree on settlement of this matter between themselves, but EPA would not agree to be bound by the terms of that settlement. Consequently, West Penn is now back in this forum seeking a review of the state's sulfur dioxide variance regulations on appeal from the department's variance order, and we are in the rather strange posture of beginning to decide whether or not the state order was valid some four months after the variance that the state granted to West Penn has expired.

The Commonwealth's motion to dismiss is based upon the notion that in asking for a variance, a source is accepting the validity of the regulations and

simply asking for more time to comply with them. The department argues that under Chapter 141 of the rules and regulations of the Department of Environmental Resources, a variance may only be granted for a three year period, and may only be granted if the department finds that the source emissions are likely to comply with the basic regulations at the end of the variance period. 25 Pa. Code §§141.2, 141.4. The Commonwealth points out that although West Penn's variance application did not conform to the department's requirements, the department granted West Penn the most it possibly would under the variance regulations by giving it until July 1, 1976, to comply with the sulfur dioxide limitation on boiler No. 33. We have to agree with the department that West Penn's variance application for boiler No. 33 did not comply with the requirements of the variance regulations and, as requested, could not be granted as a matter of law. *County Commissioners of Delaware County v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 74-261-D, opinions issued July, 1975 and October, 1975; *Bethlehem Steel Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-077-W, issued October 3, 1975. However, in neither of the cases cited was the validity of either the variance regulations or the underlying regulations attacked by the appellant. Here West Penn is challenging both the validity of the sulfur dioxide regulation and the validity of the variance regulations on the ground that they do not permit sufficient time, considering economic and technological factors, to bring the company into compliance with the underlying regulation.

The problem with the department's position, which has some appeal in logic, is first, that it has taken a totally inconsistent position in other forums (and in other cases before this board) where it has argued that the company will have a full opportunity to argue the validity of the standards in this variance appeal. More importantly, the Commonwealth Court has held in *St. Joe Minerals Corporation v. Goddard*, 14 Pa. Comm. Ct. 624 (1974) that a party may challenge the validity of regulations in a variance proceeding before the Environmental Hearing Board. In that case the Commonwealth Court refused to grant St. Joe's requested equitable relief to restrain the department from enforcing the regulations that it argued were unconstitutional. St. Joe claimed that it could not get adequate relief in its variance appeal to the EHB because the EHB could not consider the constitutional issues. The Commonwealth Court, in ruling that St. Joe had an adequate remedy of law through its variance appeal and did not need equitable relief, said that the EHB, while not able to determine the constitutionality of a statute, could determine the validity of regulations. The court did not deal

specifically with the question we have here as to whether a variance appeal is the proper place in which to question the validity of underlying regulations. However, the court said:

> "...Although EHB would not have the authority to pass upon the constitutionality of a statute, it does have the authority to review the validity of a regulation promulgated by EQB, and if, in its opinion, the regulation was improvidently promulgated or is arbitrary as to plaintiff's operation, it may reverse or modify the DER order granting a variance, the terms of which were more limited than sought by St. Joe."

This certainly suggests that this board can and must consider the issue of validity, at least as to the variance regulations themselves, in an appeal from any order granting or denying a variance. The court went further in *Commonwealth of Pennsylvania, Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corporation*, No. 529 C.D. 1975, issued December 10, 1975, where it ruled that Wheeling-Pittsburgh could not attack the validity of sections 123.13 and 123.41 of the department's rules and regulations when it was sued for enforcement in that court since it had failed to raise those issues by appealing the department's earlier grant of a variance conditioned upon the achievement of those standards within the variance period. Implicit in this decision is the conclusion that the company would have had a hearing on the validity of the standard in regulations 123.13 and 123.41 if it had appealed the variance order. That is exactly what West Penn has done here.

The real issue is whether a source is entitled to a determination of the validity of regulations prior to an enforcement proceeding. The Commonwealth takes the position (in this case anyhow) that West Penn cannot raise the issues of validity of the regulations until it is sued for enforcement. West Penn wants a determination of the validity of those regulations before it is sued for enforcement so that it does not run the risk of substantial penalties if its position should not prevail. The board is considering this question in another case where the department simply denied a request for a variance beyond the regulatory variance period, and the appellant appealed, attacking the validity of both the variance regulation and the underlying regulation. Although we are not sure the Commonwealth Court would agree with us, we are inclined to agree with the department that applicants should not be able to use the variance process simply as a tool for challenging the validity of the department's emission regulations by asking for what it knows cannot be granted under the applicable regulations. We do not doubt, however, that a source may challenge the validity of the variance regulations in terms of their time period by requesting a longer variance period and appealing from the denial of that request. Whether or not

an appeal from a variance denial should be allowed to be used as a vehicle for obtaining a declaratory judgment on the validity of the underlying regulations, the situation here is different because the department's variance order 73-708-V granted West Penn a variance and required West Penn to implement Alternative II to achieve the sulfur dioxide standard by the end of the variance period, June 30, 1976. Thus, the department's order is essentially a compliance order (from which West Penn is now in default) similar to the order in *Wheeling-Pittsburgh* from which an appeal challenging the underlying regulation must be permitted.

As to the department's argument that the appeal should be dismissed on account of mootness, since the variance that the department granted has now expired, we do not think this case is like *Silver Spring Township*, EHB Docket No. 73-116-W, issued March 10, 1976. Appellant there was not the recipient of the variance and was not challenging the validity of the variance regulations. Here West Penn's argument is that the variance regulations are invalid because they do not permit sufficient time to meet the underlying standard. That question is not moot.

Turning to the other issues raised by the parties and the board, we consider the question of burden of proof in these proceedings, which is a question that should be determined, to the extent possible, prior to the actual hearings in this matter.[3] We should stress that the only issues in this appeal are the validity of the variance regulations and the validity of the sulfur dioxide regulation itself. On these issues West Penn has the burden of proof since it is attempting to invalidate duly adopted regulations that are presumed to be valid. *Bethlehem Steel Corporation v. Commonwealth*, *supra*; *Department of Environmental Resources v. Metzger*, 22 Pa. Commonwealth Ct. 70 (1975); *Rochez Brothers, Inc. v. Commonwealth*, 18 Pa. Commonwealth Ct. 137, 334 A.2d 790 (1975). West Penn concedes that it has the burden of establishing that the department arbitrarily and unreasonably denied the variance for boiler 33 that West Penn requested; however, West Penn argues that since the variance order was not a denial, but an affirmative order to implement Alternative II by the end of the variance period, the department has the burden of sustaining this action as it

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3. In accordance with the board's order of October 27, 1976, hearings in this matter are to be resumed for purposes of additional direct testimony and cross-examination after a period, now occurring, for the exchange of discovery material and prepared direct testimony.

would any order requiring affirmative action to abate pollution. Rule 21.42. Although there may be some marginal area where the department would have the burden of sustaining specific details of this hybrid order if and when questions of validity are determined, the normal rules governing burden of proof on abatement orders do not apply where the primary basis for challenging the order is the invalidity of the regulations under which it was issued. Thus, for all present purposes, we conclude that West Penn has the burden of proof in this matter.

Insofar as the variance regulations are concerned, there are on the face of it very strong arguments for their validity. As the Commonwealth has pointed out, the variance regulations were, in effect, specifically approved by the legislature when it adopted §13.5 of the Air Pollution Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4015.5, which allows the department to grant temporary variances in accordance with regulations promulgated by the Environmental Quality Board. Section 13.5 (c) approved the variance regulations that had been adopted by the Environmental Quality Board before this provision was enacted as follows:

> "The rules and regulations with respect to variances adopted by the Environmental Quality Board prior to the effective date of this act shall continue in full force and effect..."

While this section provides a strong argument in favor of the validity of the variance regulations, we do not agree with the department that it makes them statutory and therefore exempt from attack before the EHB. The variance regulations provide that temporary variances shall be granted for a maximum of three years with a maximum two-year renewal period, and that they shall not be granted unless the department finds that ambient air quality standards will be met and maintained and that emission regulations will be complied with by the end of the variance period. As general rules designed to give temporary relief these regulations seem entirely reasonable and proper; although it is conceivable to us that the time limitations could be arbitrary and unreasonable in a particular case, where it was shown that a source could not feasibly achieve the regulation standard within the variance period and ambient air quality standards could be maintained in the relevant air basin even if the source were given a longer period to comply.[4]

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4. In such a situation, the federal law does appear to contemplate that variances, or "plan revisions" in federal terms, that extend beyond three years may be allowed. See *Train v. NRDC*, 421 U.S. 60, 7 ERC 1735 (1975); 40 C.F.R. §51.32 (f).

On the issue of the validity of regulation 123.22, we have ruled in *Bethlehem Steel Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources, supra,* that a source that seeks to challenge the validity of a regulation imposing an emission limitation must first establish that the standard applied to it is not necessary for the maintenance of national ambient air quality standards. Thus, the threshold question, which is critical to both questions of validity, and must be addressed first at the hearing in this matter, is whether NAAQS can be met and maintained without the requirement for flue desulfurization equipment on boiler No. 33 necessitated by regulation 123.22. Assuming that West Penn can show that ambient air quality standards can be maintained in the basin in which the Mitchell Power Station is located, West Penn will still have the burden of showing under state law that the sulfur dioxide regulation promulgated by the Environmental Quality Board is invalid in general or as applied to it. To do this West Penn offers to prove that the sulfur dioxide standard is economically and technically impossible of attainment. Even if West Penn establishes these claims they could not serve as a basis for invalidating a duly promulgated regulation of the Environmental Quality Board unless the regulation is shown not to serve any valid purpose in the state's exercise of its police power to protect health and welfare. *Rochez Brothers, Inc. v. Department of Environmental Resources, supra.* Thus, the burden of West Penn's case is considerable; however, we believe West Penn is entitled to question the validity of the regulations in this appeal.

We do not think it is appropriate to decide questions concerning the standard of proof prior to the hearings in this matter, as the parties, particularly the department, seem to want us to do. On the issue of whether or not ambient air quality standards are being met or can be maintained in the relevant air basin, there are a number of complex questions,which in our view will best be determined after the board has an understanding of all the material facts. West Penn claims to be able to demonstrate conclusively that ambient air quality standards are being met in the Monongahela Valley air basin without any reduction in present emission levels from boiler No. 33. The department claims that it can establish that ambient air quality standards cannot be met and maintained in the Southwest Pennsylvania Interstate Air Quality Control Region without positive controls for sulfur dioxide. Apparently, a major question is defining the extent of the relevant air basin, which is certainly a question that requires factual imput. We are not prepared at this point to accept the standard of proof that either party urges on us. We certainly would not agree

with West Penn that it will have carried its burden of proof on the ambient air question if it shows that its own sulfur dioxide emissions do not violate ambient air quality standards. On the other hand, we do not agree with the department that West Penn will not carry its burden unless it shows that it is not contributing *any* sulfur dioxide to the ambient air.

We do disagree with the department's assertion that West Penn is precluded by §307 (b) (2) of the Clean Air Act from challenging any of the methodology on which Pennsylvania's sulfur dioxide limitation was based. The department suggests because the administrator had to consider such methodology in determining whether or not Pennsylvania's plan was sufficiently stringent to meet ambient air quality standards, the methodology can never be questioned in relation to any extra stringency in the plan. This does not make sense. Obviously, the methodology is relevant to both questions—viz., whether the standard will be adequate to meet and maintain ambient air quality standards and whether the standard is more stringent than necessary to meet ambient air quality standards. The cases cited by the department, *South Terminal Corporation v. EPA*, 504 F.2d 646 (1st Circuit, 1974); *Texas v. EPA*, 599 F.2d 289 (5th Circuit, 1974) do not support the proposition that the methodology for determining emission limitations cannot be examined in any proceeding except a §307 (b) (1) appeal. Those cases, which were §307 (b) (1) appeals, were cases where the circuit courts were reviewing SIP regulations promulgated by the administrator after state regulations had been rejected as inadequate. These cases do not deal with the question of when and where economic and technological questions may be raised, but simply proceed with a careful review of the methodology used by EPA in those cases—a review that may be helpful in evaluating the state's action in the case before us.

At issue here is whether West Penn can challenge the "rollback analysis", which was used by EPA and Pennsylvania to determine what emission limitation for sulfur dioxide would be required to meet and maintain NAAQS. West Penn argues that more sensitive source specific emission limitations should have been adopted by Pennsylvania, like EPA regulations recently promulgated for Ohio, as they would be all that is necessary to meet ambient air quality standards. We appreciate the state's perception of the overlap of federal and state questions in that if we allow West Penn to challenge the rollback analysis, we might in some sense be second-guessing the administrator's approval of Pennsylvania's SIP insofar as he used the rollback analysis to approve Pennsylvania's plan as to sulfur dioxide.

We do not intend to second-guess the administrator, and reiterate that in evaluating regulation 123.22 our only question is whether or not it is more stringent than necessary to meet NAAQS. Although it will be appropriate, as the department suggests, to use the EPA methodology set forth at 40 C.F.R. §§51.12, 13 and 14 and referred to by §51.32 (f) relating to the criteria for granting extensions as a guideline for determining whether the §123.22 standard as applied to West Penn is more stringent than necessary to achieve and maintain ambient air quality standards, we do not believe we can refuse to consider West Penn's assertions that some other methodology would more accurately reflect the effect of an emission limitation on ambient air quality, since this methodology has a bearing on the validity of the state's action apart from any action EPA may have taken. Some duplication of federal and state questions is an inevitable consequence of the federal scheme under the Clean Air Act. In *Train v. N.R.D.C., supra,* the Supreme Court said:

> "...Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it d ems best suited to its particular situation."

In this case we are called on to evaluate the particular emission limitations that the state chose, and we agree that we may be called on to do so. We must point out however, that if it appears that Pennsylvania adopted the maximum emission limitations that would be accepted by EPA as sufficient to meet NAAQS, we doubt if there is much room for this board's evaluation of the state's standards.[5]

A fundamental question concerning West Penn's position is whether or not a regulation of the Environmental Quality Board could appropriately be invalidated on the ground that it is not source specific. Generally, it is reasonable and appropriate for a state to adopt a general regulation applicable to all like sources regardless of their situation, if that regulation is supportable in terms of health goals. Here the federal law injects a question of relativity because the issue under federal law, which we deem to be the threshold question in a state forum also, is whether ambient air quality standards can be met and maintained, and that requires an examination and determination with regard to particular sources in particular air basins. Once beyond that question, however, query whether a state regulation can be invalidated simply as applied to a

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5. We note that in *Texas v. EPA, supra,* the court upheld EPA's use of the straight rollback model as an imperfect but reasonable tool in determining appropriate hydrocarbon emission limitations for purposes of reducing photochemical oxident pollution.

particular source. This is a question that must be illuminated in the course of these proceedings.

Although most of the discovery questions that have been raised in the course of these proceedings seem to have been resolved by the parties, there are several outstanding. By motion for sanctions, West Penn has put at issue the department's refusal to answer West Penn's interrogatories 13, 14 and 15. We will give the department two weeks in which to file a memorandum in support of its position on these interrogatories, and we will give West Penn a further two weeks to reply to the department. Any other unresolved questions as to the limits of discovery—such as the extent to which West Penn is entitled to discover material related to the adoption of Pennsylvania's sulfur dioxide regulation—should be addressed in these memoranda.[6]

O R D E R

AND NOW, this 25th day of February, 1977, it is hereby ordered that the department shall file a memorandum in support of its position on outstanding discovery issues on or before March 11, 1977. West Penn shall then have until March 25, 1977, to file a reply memorandum.

ENVIRONMENTAL HEARING BOARD

JOANNE R. DENWORTH
Member

6. We would distinguish between the question of whether West Penn is allowed to challenge the methodology used in determining Pennsylvania's sulfur dioxide emission limitations from the question of the extent to which West Penn is entitled to discovery concerning the adoption of that regulation.

DATED: February 25, 1977
vf

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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(717) 787-3483

WEST PENN POWER COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 76-132-D

OPINION AND ORDER

West Penn Power Company has appealed from the department's issuance of a certification of certain effluent limitations, primarily as to thermal discharges into the Monongahela River at its Mitchell Power Plant, to EPA for inclusion in the federal NPDES permit. West Penn subsequently moved to stay the appeal on the ground that it had applied to EPA for the establishment of an alternative effluent limitation under §316 of the Federal Water Pollution Control Act, and notified the department of that application prior to the department's certification. Under regulation 40 C.F.R. §122.8 (a) (1) notice to the department of West Penn's application for alternative thermal effluent limitations pursuant to §316 (a) constitutes a "withdrawal of pending application for certification". It is true that EPA went ahead and issued the permit on December 8, 1976. However, the permit provides that the thermal effluent limitations are subject to change pending a successful 316 (a) demonstration on the part of the permitee, Special condition 9 of the permit required West Penn to submit information in support of its §316 request by February 1, 1976, which West Penn has done. It is clear that if the federal administrator determines upon its §316 review that the state's thermal standard is more stringent than necessary "to assure the protection and propagation of a balanced and indigenous population of shellfish, fish and wildlife in and on the body of water into which the discharge was to be made", the administrator may set an appropriate effluent limitation and that limitation will override any inconsistent state law provision so far as the federal permit is concerned. Sections

303 (g) and 510 of the Federal Water Pollution Control Act, and memorandum opinion from the acting deputy general counsel to EPA issued December 28, 1973.

The department's objections to West Penn's motion for stay based on the argument that this board cannot consider the effect of the federal law and regulations are not well taken. A state tribunal can certainly apply the federal law, and where it is controlling, it must do so. This is an appeal from a state's certification to the federal NPDES permit, not an appeal from enforcement action taken by the state in the administration of its own standards. Clearly, the department could, if it chose, take enforcement action against West Penn under its own regulations even though consideration of West Penn's obligations under the federal law was being reviewed by EPA. See *Commonwealth v. Bethlehem Steel Corporation*, ____ Pa. Commonwealth Ct. ____, 352 A.2d 563 (1976), affirmed _____ Pa. _____, A.2d _____ (November 24, 1976), and such a case would be ripe for review by this board. However, where the question on appeal is whether or not certain effluent limitations certified by the state can be included in the federal permit and that question is being reviewed at the federal level, and the federal determination will be determinative, it does not make sense for this board to consider the validity of the state's certification prior to the administrator's determination. *Sharon Steel Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-150-C (March 12, 1976) is not controlling on the question of whether this board should defer hearing this case until the completion of EPA's §316 review. In the circumstances, common sense and justice require that we do so.

O R D E R

AND NOW, this 30th day of March, 1977, West Penn's petition to stay further proceedings is granted until West Penn has received its requested determination for an alternative effluent limitation under §316 of the Federal Water Pollution Control Act from the federal Administrator of EPA. West Penn shall notify the board of receipt of such determination within 10 days of its receipt.

ENVIRONMENTAL HEARING BOARD

Joanne R. Denworth

JOANNE R. DENWORTH
Member

cc: Bureau of Administrative Enforcement
John P. Krill, Jr., Esquire
David T. Buente, Esquire
Lawrence A. Demase, Esquire

DATED: March 30, 1977
vf

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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

v. :

MEDUSA CORPORATION : Docket No. 76-085-CP-C

:

OPINION AND ORDER
SUR DEFENDANT'S OBJECTION TO THE
JURISDICTION OF THE BOARD

On July 7, 1976, the Department of Environmental Resources (DER) filed a complaint for civil penalties against Medusa Corporation, defendants herein, charging it with violations of the Air Pollution Control Act (APCA), Act of January 8, 1960, P. L. 2119, *as amended*, 35 P. S. §4001 *et seq*. In its answer, defendant, as is required under §21.18(c) of the rules governing practice and procedure before the board, raised, *inter alia*, objections to the jurisdiction of the board to entertain the complaint. For the reasons set forth below, we must overrule defendant's objection to our jurisdiction in this matter.

Defendant claims that we are strictly an appellate body with no power to entertain an original action for civil penalties. It is on this distinction--appellate v. original jurisdiction--that defendant's argument rests. Inasmuch as this board does have the authority to assess civil penalties after hearing, the question then becomes whether it is helpful to speak in terms of the appellate jurisdiction of the board in contrast to its "original jurisdiction". This particular dichotomy, urged upon us by defendant, does not appear to be anything but a semantic device which fails to illumine the issue very clearly. Admittedly, the board reviewed the actions of DER on appeal, but it reviewed these matters *de novo*. *DER v. Warren Sand & Gravel*, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975). Its functions are not strictly appellate in nature, but in an appropriate case, the board may exercise for the DER that discretion which the law confers upon that department. *DER v. Warren Sand & Gravel*, *supra*. Inasmuch as this board is not an appellate body in the strict sense of the

term, but an administrative agency governed by the requirements, *inter alia*, of the Administrative Agency Law, Act of June 4, 1945, P. L. 1388, *as amended*, 71 P. S. §1710.1 *et seq.*, it follows that distictions that may be appropriate in the context of court jurisdiction are not necessarily applicable to this board as an administrative agency, although quasi-judicial in nature.

Section 9.1 [35 P. S. §4009.1 (1976-1977 Supp.)] of the APCA provides:

> "In addition to proceeding under any other remedy available at law, or in equity, for a violation of a provisions of this act, or a rule or regulation of the board, or an order of the department, the hearing board, after hearing, may assess a civil penalty upon a person for such violation. Such a penalty may be assessed whether or not the violation was willful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000.00), plus up to two thousand five hundred dollars ($2,500.00) for each day of continued violation. In determining the amojnt of the civil penalty, the hearing board shall consider the wilfulness of the violation, damage or injury to the outdoor atmosphere of the Commonwealth or its uses, and other relevant factors. It shall be payable to the Commonwealth of Pennsylvania and shall be collectible in any manner provided at law for the collection of debt. If any person liable to pay any such penalty neglects or refuses to pay the same after demand, the amount, together with interest and any costs that may accure, shall be a lien in favor of the Commonwealth upon the property, both real and personal, of such person, but only after same has been entered and docketed of record by the prothonotary of the county where such is situated. The hearing board may, at any time, transmit to the prothonotaries of the respective counties certified copies of all such liens, and it shall be the duty of each prothonotary to enter and docket the same of record in his office, and to index the same as judgments are indexed, without requiring the payment of costs as a condition precedent to the entry thereof."

Clearly, this section authorizes the board, after hearing, to assess civil penalties for violations of the act, a rule or regulation of the Environmental Quality Board (EQB) or an order of the DER. Faced with the explicit languange of §9.1 of the act, defendant argues:

> "This section, however, is not 'jurisdictional' and must be read in conjunction with Section 6 which specifically enumerates the powers of the Board. Section 9.1 authorizes merely a remedy (i.e. civil penalties) that the Board may employ, if appropriate, in conjunction with a review of a Department order. Nothin in Section 9.1 permits the institution of an original action before the Board, and therefore the Department cannot use that section to sustain jurisdiction in this matter. The only reference in the Act to the Board's jurisdiction is in Section 6 and that limits the Board to reviewing, on appeal, orders made by the Department.
>
> "It is obvious that the instant case does not involve an appeal from an order issued by the Department. Rather, the Department has attempted to bring this original action in direct contravention of the clear and unambiguous procedures outlined in the Act. Rather than following those procedures and making an investigation and entering an order against Medusa, the Department has sought to expand drastically its authority and the Board's authority by the institution of this original action."

This argument fails to give effect to the first sentence of §9.1 of the APCA. That sentence authorizes this board to assess civil penalties for, *inter alia*, violations of an order of the DER. Under the interpretation urged upon us by the defendant, we could not assess a civil penalty for violation of a DER order unless a subsequent order was issued by that department to comply with the first order and was appealed by a defendant. To attribute to the General Assembly such an absurd result would be completely contrary to 1 Pa. C.S. §1922(1).

The clear grant of authority by the legislature for this board to assess civil penalties is sufficient, we think, to confer upon the board the power to hear a civil penalties action independent of an appeal from the DER action. We regard §9.1 of the APCA as supplementary to, and not in conflict with, §6 of that act and §1921-A of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, *as amended*, 71 P. S. §51 *et seq.*

Contrary to the contentions of defendant, nothing in the APCA compels the conclusion that the assessment of civil penalties by the board is ancillary to hearing appeals from actions of the DER. If the legislature had intended that the assessment of civil penalties by the board merely occur within the context of an appeal from a DER action, it could have so stated. It is instructive in this regard to refer to §10(b) of the APCA, wherein the legislature authorized a court to levy civil penalties in equity proceedings initiated by the Commonwealth to enforce the provisions of the act. Certainly, the legislature knew how to authorize the assessment of civil penalties as an ancillary to other proceedings. That it did not do so in §9.1 of the APCA strengthens our conviction that the assessment of civil penalties by the board was intended as an independent funtion of the board apart from its authority to review actions of the DER.

We are not persuaded that the authorities cited by defendant compels the conclusion that this board has no jurisdiction to entertain "original civil penalties actions" commenced by the DER. It is true that administrative agencies are creatures of statute and that their jurisdiction is limited by the statutory grant. However, the APCA confers upon this board the authority to assess civil penalties after hearing for violations of that act, the rules and regulations of the EQB and orders of the DER. We see nothing in the cases cited by defendant that is in any manner inconsistent with our conclusion in this regard. We have no difficulty with the principles set forth in these cases, but we fail to understand how they help the defendant. This is not a case in which the board is attempting to enlarge its statutory authority beyond that in the legislative grant, but, on the contrary, the board is only following the mandate of the APCA. In this regard, the board's action is significantly different from the facts of *Green, et al v.*

Milk Control Commission, et al, 340 A. 1, 16 A.2d 9 (1940) and *Federal Deposit Insurance Corp. v. Board of Finance and Revenue,* 368 Pa. 463, 84 A.2d 495 (1951).

If we accept the contentions of defendant, problems of procedural due process arise, both in terms of the Administrative Agency Law, Act of June 4, 1945, P. L. 1388, *as amended,* 71 P. S. §1710.1 *et seq.* and constitutional guarantees. On the assumption that civil penalties could be assessed only when a party would appeal an action of the DER, a party would lack reasonable notice of a hearing and an opportunity to be heard in regard to civil penalties. We think that §21.18 of our rules, which authorizes complaints for civil penalties and answers thereto, more reasonably complies with the requirements of procedural due process than does the suggestion of defendant.

Defendant also argues that the DER may not bring enforcement litigation, but that such is required to be brought by the attorney general at the request of the DER. This argument seems to speak more to the authority of the DER than to the jurisdiction of the board. However, actions for civil penalties are commenced by the Office of Enforcement for the DER, the attorney members of which are all assistant attorneys general. Thus, although we think it not relevant to the jurisdiction of this board to entertain civil penalties actions, we note that the bringing of such actions by authorized members of the attorney general's staff complies with the requirements of §10 of the APCA.

For the foregoing reasons, we enter the following:

O R D E R

AND NOW, this 1st day of April, 1977, the objections of defendant to the jurisdiction of this board to entertain an action for civil penalties under the provisions of the Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, *as amended,* 35 P. S. §4001 *et seq.*, is hereby overruled. An exception to this ruling in favor of defendant is hereby noted.

ENVIRONMENTAL HEARING BOARD

Joseph L Cohen

JOSEPH L. COHEN
Member

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DATED: April 1, 1977

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HELEN MINING COMPANY : Docket No. 76-120-D

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

The parties have sought a determination prior to hearing as to which party has the burden of proof in this proceeding. Appellant, Helen Mining Company, has appealed the Department of Environmental Resources' (department's) certification to the United States Environmental Protection Agency of an effluent limitation of total iron of 4 milligrams per liter to be included as a condition in appellant's federal NPDES permit. Appellant alleges that the department granted it a permit on August 26, 1970, in which the limitation for total iron is 7 milligrams per liter. Appellant contends that the board's rules governing burden of proof, 25 Pa. Code §21.42 do not cover this situation, but that the general rule cited at the beginning of those rules that the party asserting the affirmative of any issue shall carry the burden means that the department should have the burden in this case.

The department makes several arguments: that certification of a condition other than the one desired by appellant is like a denial of a permit where the applicant would have the burden of proof under the board's rules; that under the federal law an applicant for an NPDES permit has the burden of proof if he requests an adjudicatory hearing or a legal decision from EPA as to the terms and conditions of its NPDES permit, and consequently the state law must conform to the federal law; and that the applicant must show that the condition that it seeks to have included in the NPDES permit--namely 7 mg/l of total iron--will meet applicable state water quality standards, which the department asserts is 1.5 mg/l of iron for this particular stream under chapter 93 of the regulations.

We agree with the appellant that the board's rules governing the burden of proof do not specifically cover this appeal. Under the federal scheme set forth in the Federal Water Pollution Control Act, an applicant for a federal NPDES permit must provide EPA with a certification from the state that it "will comply" with applicable state water quality standards as well as federal requirements. 33 USCA §§1341 (a) (1); 1341 (d). Further, the Act clearly provides for the achievement (by July 1, 1977) of state effluent limitations that may be more stringent than federal requirements 33 USCA 1311 (b) (C) (1976 Supplement). The question here appears to be what is the state water quality standard that should be included in appellant's permit.[1]

In the circumstances of this case we believe that the proper procedure will be for the appellant first to establish on the record that it has a permit containing a discharge limitation of 7 mg/l for iron. The department would than have the burden of going forward to explain its action in certifying a limitation other than 7 mg/l to the federal government for inclusion in the NPDES permit. If the department establishes that the state water quality standards for the stream in question have changed since the permit was issued to appellant and that they clearly require the effluent limitations certified by the department, the burden of persuading the board that the department's action was unreasonable and arbitrary will be on the appellant. However, if the department does not demonstrate that the regulations clearly require this limitation, then the burden will be on the department to persuade the board that the limitation is justified.[2]

When the department imposes terms and conditions on a permittee, especially if there is an inconsistency between action taken at different times, it is incumbent upon the agency to come forward and explain the basis for its action when an appeal is taken. If it appears that that action is mandatory under the regulations governing the department's action than the burden must be on the applicant to show that the requirement is unreasonable or arbitrary. See *New Enterprise Stone & Lime Company, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 73-157-B, issued August 15, 1975; *Warren Sand & Gravel*

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1. The board has previously ruled that certification to EPA is an action of the department that is properly appealable to the board. *Sharon Steel Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-150-C, issued March 12, 1976.

2. It is not clear on the face of it that an effluent limitation of 4 mg/l is required to maintain a stream quality of 1.5 mg/l iron; although if seems likely that 4 mg/l might come closer to doing so than 7 mg/l. However, evidence as to dilution may be relevant to determining the appropriate limitation.

Company v. Department of Environmental Resources, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975). We would agree with the appellant that the department's imposition of conditions in a certification different from those in its permit is an affirmative action that requires explanation from the department; however, the burden may shift to the applicant if it is shown that the department's action is required by regulation.

We do not deem it necessary to consider the effect of federal rules governing procedure in front of EPA in this proceeding. Where state action such as certification is required for the federal permit and state review of that action is provided, the state's own rules governing burden of proof must apply. At any rate we do not believe they are inconsistent with the federal rules.

We will not comment at this point on appellant's contention that certification amounts to a revocation of appellant's permit. Apparently the permit was modified on October 29, 1975, although it is not clear from the record what this modification was. It will be time enough to label the action taken by the department after the facts have been set forth in the record.

O R D E R

AND NOW, this 1st day of July, 1977, it is hereby ordered that the burden of proceeding and the burden of proof in this proceeding shall be in accordance with the opinion entered above. The department shall file its prehearing memorandum on or before July 15, 1977.

ENVIRONMENTAL HEARING BOARD

Joanne R. Denworth

JOANNE R. DENWORTH
Member

DATED: July 1, 1977
vf

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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RICHMOND TOWNSHIP BOARD OF SUPERVISORS : Docket No. 76-142-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

After careful reconsideration of this matter, pursuant to the department's application for reconsideration and for oral argument before the board *en banc*, we continue to believe that dismissal of the appeal is proper--though admittedly it was not dismissed for the reasons urged upon us by the department in its motion to dismiss made at the hearing. However, the board's reasons for dismissing the appeal should perhaps be clarified.

The appeal of Richmond Township was from a refusal of the department to approve a plan division to the township's official sewage facilities plan to include a subdivision known as Gorton Woods. In the plan revision module submitted to the department, which is a part of the record, the subdivision is described as consisting of four single family residences on lots of 10 acres or more. The township appealed the department's refusal to approve the plan revision on the ground that the plan revision was unnecessary because the proposed houses come within the "rural residence" exemption that is authorized by §7 of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P. L. 1535, *as amended*, 35 P. S. §750.1 *et seq.*, which provides:

> "No permit may be issued by the local agency in those cases . . . where the department pursuant to its rules and regulations determines that such a permit is not necessary either for a rural residence or for the protection of the public health."

A rural residence is defined in the act, 35 P. S. §750.1 (13) as "a structure occupied or intended to be occupied by not more than two families on a tract of land of 10 acres or more." The department's regulations do recognize that an official plan may provide that no permits are required for rural residences. Section 71.41(b) provides:

"A permit shall not be required under this Subchapter for a rural residence provided, however, that a municipality or county may by ordinance require a permit for a rural residence since mere lot size will not in all cases or circumstances preclude the creation of a public health hazard or prevent pollution of the waters of the Commonwealth. In such cases the local agency administering the sewage facilities program within the jurisdiction of such a municipality or county may require a permit pursuant to this Subchapter and Chapter 73 of this Title."

Richmond Township's sewage facility ordinance, which was, according to the testimony, adopted as its official sewage facilities plan, provides in §2.1 that no[1] permits shall be required for rural residences as defined under the act, which meet the following restrictions:

"The sewage system, including all of its components, shall be at least one hundred and fifty (150) feet distance from neighboring boundaries, waterways or public roads. If these limitations and conditions cannot be met, or if the system fails, after it is installed under the 'rural residences' concept of the act and of this ordinance, to meet required legal standards for public protection, then the exemption excluding a rural residence by this ordinance from the necessity of obtaining a sewage disposal permit shall not apply or be available. A permit must, under such conditions then be secured even for such 'rural residences' as defined by the act and the standard rules and regulations adopted pursuant to the act shall be made applicable to such 'rural residences' within the Township of Richmond."

Since the proposed four subdivision houses fell within the definition of rural residences as provided for in the township's official plan, the township board of supervisors adopted a resolution on September 6, 1976, approving the Gorton Wood subdivision "in that it complies with the official sewage facilities plan of the township, in that each lot exceeds 10 acres in area, will be used for a single family residence, and therefore, does not need a sewage permit." Nonetheless, the township supervisors, inconsistently, submitted a plan revision module to the department (perhaps at its instigation) seeking to revise the plan to provide for the subdivision.

Even though the department acknowledges that the four residences in question can be built with on-lot systems without permits under the township official sewage facilities plan, the department argues that the township is required to revise its official plan by 25 Pa. Code §71.15(b) and (c) which provide:

"(b) Revisions to plans for new subdivisions.

(1) A municipality shall also revise its official plan whenever a single tract or other parcel of land, or part thereof, is subdivided into two or more lots or whenever any person applies for a permit to install the second or subsequent individual or community sewage system in a subdivision, or whenever any person applies for a permit required from the Department as provided by §71.45(e) of this Chapter, the municipality within which the subdivision or proposed individual or community sewage system is located shall revise its official plan except as provided for in subsection (c) of this section pertaining to supplements to official plans.

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1. Actually, the copy of the ordinance provided with appellant's pre-hearing memorandum and admitted into evidence by stipulation, omits the word "no" and reads that permits shall be required. However, we take that to be a typographical error since both parties state that the section requires no permits for rural residences and that section makes no sense unless it is so read.

(2) A revision shall not be required under this subsection where the official plan adequately meets the sewage disposal needs of a proposed subdivision. The Department shall make such determination upon submission to it in writing from the municipality of a letter indicating information required by subsection (c) of this section pertaining to supplements to official plans.

"(c) Supplements to plans. Supplements to plans shall conform with the following:

(1) If the official plan of the municipality 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); provided however that the following conditions apply:

(i) Plan supplements under this subsection shall be reviewed by the sewage enforcement officer for the local agency with jurisdiction where the subdivision is programming the use of subsurface absorption areas. 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.

(ii) The Department shall be the reviewing agency for any plan supplement for any subdivision where any person applies for a permit required from the Department as provided by §71.45(e) of this Chapter (relating to issuance of permits).

(2) The Department shall require a municipality to revise its official plan where any plan supplement or any number of plan supplements render the official plan inadequate to meet the sewage disposal needs of a municipality.

(3) The Department shall review supplements to plans and make its decision as to the adequacy of the plan supplement in writing to the municipality within 45 days of receipt of said supplement; provided however, if the proposed subdivision as defined in the Act is ten residential lots or less and is not part of an existing or other proposed subdivision and proposes to utilize on-lot sewage disposal systems, then said proposed subdivision shall be considered as an approved supplement to the plan of the municipality provided that the information prepared and submitted on the Planning Module for Land Development, Component 1, is reviewed and found acceptable for subsurface sewage disposal by the sewage enforcement officer and otherwise approved by the municipality."

The department's position is that even though the houses can be built without permits under the present plan, the fact of there being a "subdivision" requires that the plan be revised to allow for the houses. The department is apparently motivated by the fact that the soils in Tioga County are often unsuitable for on-lot systems and that there are malfunctioning systems even on 10 acre lots. The department points to the report of the sewage enforcement officer attached to the township's plan revision module, which shows that the lots in question are only suitable for alternate systems. Thus, the department argues that under the regulations quoted above, the official sewage facilities plan does not adequately meet the sewage disposal needs of the municipality and therefore a plan revision is required. The department points out that the exception for rural residences is as to permits as opposed to planning.

Our problem with the department's position is that we do not see how a plan revision could accord with reality when the department concedes that these four residences can be built with on-lot systems without permits. Is the department saying that the sewage facilties plans should provide for some treatment works even though

these residences would not have to use any treatment works unless they malfunction? It appears to us that the official plan does provide a remedy if an on-lot system does not meet "required legal standards for public protection". Therefore, the official plan does "adequately meet the sewage disposal needs of the proposed subdivision" so that a revision should not be necessary—unless the department means that the rural residence exemption should be eliminated by a plan revision. The department states that its concern is that there may be more dense development or commercial development as a continuation of this subdivision or the possible resale of lots to buyers who do not intend to use them as single family residences. Perhaps the nub of the department's worry is that plan revisions or supplements are called for on "subdivision" and not on any commercial use or further subdivision. However, we believe that if there were an attempt to use these lots as other than single family residences, the department would be empowered to order a revision of the township's official plan under 25 Pa. Code §71.16(2) which provides:

> "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."

The board would certainly be inclined to support such an order from the department if there were any use made of these properties that did not come within the rural residence exemption. We think, even, that the department might require such a plan revision for the rural residences themselves if the on-lot systems placed on these lots malfunction and do not meet "required legal standards for public protection". In sum, we think in the interest of consistency, this proposed subdivision should have been treated as a supplement to the official plan, if it was to be treated as anything, since it comes within the exemption for rural residences in the official plan at least until there is malfunctioning of any on-lot systems that are installed with these residences.

Consequently, we dismiss the appeal not on the ground the department urges, but on the legal conclusion that a plan revision was not necessary, and therefore, there is no underlying basis for appellant's appeal.

O R D E R

AND NOW, this 8th day of September, 1977, consistent with the foregoing, the board's prior order of August 4, 1977, is confirmed and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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Chairman

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Member

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DATED: September 8, 1977

ma

COMMONWEALTH OF PENNSYLVANIA

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DEPARTMENT OF ENVIRONMENTAL RESOURCES
COMMONWEALTH OF PENNSYLVANIA

Docket No. 77-026-CP-W

v

WHEELING-PITTSBURGH STEEL CORPORATION et al

OPINION AND ORDER
SUR PRELIMINARY OBJECTIONS

Plaintiff the Commonwealth of Pennsylvania, Department of Environmental Resources, filed a voluminous complaint against defendant Wheeling-Pittsburgh Steel Corporation and certain company officials seeking to have substantial civil penalties assessed for alleged violations of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119 *as amended* 35 P.S. 4001 *et seq.* The defendants then filed an answer, preliminary objection and new matter. DER has now filed preliminary objections to defendant's preliminary objections in the nature of a motion to strike. We will deal with both pleadings herein.

Although there is a great deal at stake in these proceedings, and they do raise a number of important new legal questions, we still feel constrained to mention at this point that the final outcome will be on the substantive issues, and fancy procedural footwork will, in the end, convey no real advantage to either party. To the extent that delay is deemed to be in anyone's interest, this board will make conscious efforts to make it an illusory or ephemeral advantage.

We do not deem it necessary to here deal with each and every issue raised by the pleadings at this stage of the proceeding, recognizing that any substantive matter will in any event be preserved for the final adjudication should either party desire to pursue it beyond this preliminary stage.

Turning first to the preliminary objections filed on behalf of defendant Wheeling-Pittsburgh, the most important contention appears to be its request for a jury trial.

Defendant has raised the question of jurisdiction and believes the board is not empowered to adjudicate the claim because it would be unable to provide a jury trial to which defendant deems itself entitled under our constitutions.[1] This argument need not detain us because it is based on the premise that this civil penalty action is actually a criminal penalty action. If the legislature intended this action to be a criminal action, it is inconceivable to us that it would have been designated a civil penalty action.[2] We, of course, agree that such actions do have some of the attributes of criminal actions but this, in our opinion, does not convert the nature of the action. *Department of Environmental Resources v. Froehlke*, EHB Docket No. 72-341 (issued July 31, 1973). This is especially true where no incarceration or other criminal sanction is involved *Commonwealth ex rel. Bashore v. Leinger*, 49 Northumberland 111. Certainly it cannot be doubted that there are tribunals and agencies which have constitutionally been given the power to impose civil penalties without trial by jury. The denial of a right to a jury trial under the Sixth Amendment to the United States Constitution has recently been upheld by the United States Supreme Court in *Atlas Roofing Company, Inc. v. Occupational Safety and Health Rev. Comm.*, 45 U.S. Law Week 4312. Defendant also suggests that if the action is civil, as we have concluded it is, then the jury trial rights must be extended under Article I, Section 6. We believe this position to be untenable under *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corporation*, ___ Pa. Commonwealth Ct. ___, 348 A.2d 765.

As to the question of whether in fact this board has authority to adjudicate such matters, we believe that it does. Recognizing that the final interpretation of our statutory powers in this regard does not rest with the board, we have no hesitation in overruling this preliminary objection of defendant. Although we agree with defendant that no civil penalty may properly be assessed against any individual defendant for any period during which he was not an officer of the defendant corporation, we have a contrary view for liability during the other periods. See *Froehlke, supra.*

With regard to the prior action pending between the same parties to No. 73-348-B, it is clear that the prior action cannot act to bar this civil penalty action on the election of remedy theory. The Air Pollution Control Act, Act of January 8, 1960, P. L. 2119, *as amended*, 35 P. S. §4001 *et seq.* could not be more explicit. It provides:

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1. United States Constitution Sixth Amendment; Pennsylvania Constitution, Article I, VI and IX.

2. *United States v. J.B. Williams Co., Inc.*, 498 F.2d 414.

> "In addition to proceeding under any other remedy available at law, or in equity, for a violation of a provision of this act, or a rule or regulation of the board, or an order of the department, the hearing board, after hearing, may assess a civil penalty upon a person for such violation. Such a penalty may be assessed whether or not the violation was wilful."
> 35 P. S. §4009.1

If, in light of this language the board would reach a contrary decision, one might wonder what our legislature could possibly do to obtain the result we now decide was intended.

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.

Finally, defendant has raised the defense of laches on preliminary objections. DER contends that this defense is not available to defendant in this proceeding. Without regard to the proper time and method by which this argument should be raised, it is clear that plaintiff is on notice that defendant intends to attempt to limit the period for which penalties may be assessed. This is all either party need properly do at this stage of the proceedings. The board will receive such evidence and entertain such arguments that defendant offers on this question as well as on the estoppel and waiver theory.

Both parties seek more specific pleadings. In this regard we only observe that both parties have the right to seek discovery and no doubt will.[3] The pleadings are generally sufficient to put anyone on notice of the kind of evidence or proof that will be needed to sustain the allegations contained therein. We are not disposed to protract the pleading stage .

The question of how strictly the board will follow the Pennsylvania Rules of Civil Procedure can unfortunately be answered only on a case by case basis--with the objective being at all times to give each party the opportunity for a full and fair hearing on the issues. It is clear that the rules provide a good vehicle to bring the issues before the board in orderly fashion, but it is still the issues that we are interested in and not technical niceties which only serve to sidetrack issues. It should not be necessary to remind the parties that the Environmental Hearing Board is not a court of law. Clearly its powers are quasi-judicial and even though we also seek as our goal the dispensation

3. See *Antonitis v. McCormick*, 67 Luzerne 125.

of justice, we refuse to become fettered with the Rules of Civil Procedure in such a way that they obscure rather than illuminate the real issues. The nature of this administrative agency demands that we be ever mindful of the differences between our function and a strictly judicial function. Although Rule 126 is an attempt by the courts to gain some ground against the procedural deluge, we have no intention of being led into the labyrinth, in which the courts frequently find themselves.[4]

The absurdity to which the failure to recognize this distinction can lead is found in the detailed discussion in the briefs regarding whether this is an action sounding in trespass or in assumpsit. In fact, it is neither. It is a hybrid action, an action for civil penalties before a quasi-judicial body. The rules of Civil Procedure were never meant to be strictly applied to such actions and we will not attempt to do so here. The issues, of which there are many, to which we have not specifically alluded will fall within the previous discussion and beyond that we find that they must await a final adjudication for resolution. We have, of course, discussed only those matters which we deemed merited it at this stage of the proceedings.

ORDER

AND NOW, this 4th day of August 1977, after due consideration of the Preliminary Objections filed on behalf of both plaintiff and defendants in the above matter, the same are hereby denied except to the extent hereinbefore indicated.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

4. This rule in part provides that "the court at every stage of such an action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties."

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DATED: August 4, 1977

COMMONWEALTH OF PENNSYLVANIA

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WHEELING-PITTSBURGH STEEL CORPORATION

Docket No. 73-348-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Appellant, Wheeling-Pittsburgh, has filed a motion for a hearing *de novo* in this appeal because of the tragic death of Robert Broughton, the hearing examiner who was killed in a mountain climbing accident in July of 1977. Prior to his death, Robert Broughton had concluded the hearings in this appeal. Those hearings, which have addressed the validity of nearly every aspect of the abatement order issued to Wheeling-Pittsburgh in 1973, have continued over a period of several years and have amounted to more than 12,000 pages of testimony.

Wheeling-Pittsburgh bases its request for a new hearing on rule 21.32(e) of the board's rules which provides:

> "(e) The board may, at its discretion, hear matters before it as a whole or by individual board members sitting as hearing examiners. Hearings held by hearing examiners not members of the board will be decided by the board based upon its review of the record and the Examiner's proposed adjudication. All decisions shall be decisions of the board decided by majority vote except on petitions for supersedeas which may be decided by the board member hearing such petition."

Wheeling-Pittsburgh contends that the conjunctive *and* in the phrase "will be decided by the board based upon its review of the record and the Examiner's proposed adjudication" requires that the board have a proposed adjudication from the examiner who heard the testimony. Appellant argues that that is particularly true in this case because of the complexity of the subject, the importance of the credibility of the witnesses, and the expertise of Dr. Broughton, who was knowledgeable on the questions involved and had taken several views of the plant.

We certainly are reluctant to grant appellant's onerous request; and we are convinced on a review of the relevant law and regulations that due process does not require that we grant Wheeling-Pittsburgh's motion.

We believe that the board's rules do not contemplate or provide for the unusual situation that has occurred in this case. Consequently, the general Rules of Administrative Practice and Procedure are applicable. EHB Rule 21.1(c). Section 35.203 of the general Rules of Administrative Practice and Procedure provide:

> "§35.203. Unavailability of presiding officer.
>
> If a presiding officer becomes unavailable to the agency, the agency head will either designate another qualified officer to prepare a proposed report or will cause the record to be certified to it for decision, as may be deemed appropriate, giving notice to the parties."

This provision would allow the board to appoint a substituted examiner to prepare an adjudication or to review the record itself without such a proposed adjudication. In this case, for reasons of time and economy, the board chooses to have the record certified to it for decision.

While we would obviously prefer that the hearing examiner, who was so thoroughly familiar with this case both factually and technically, were here to prepare a proposed adjudication, we are satisfied, after reviewing the cases cited to us by the parties that due process does not require that a proposed adjudication be submitted by one who has heard the case. See *Morgan v. United States*, 298 U. S. 468 (1936); *Foley Brothers, Inc. v. Commonwealth*, 400 Pa. 584, 163 A.2d 80 (1960); *National Labor Relations Board v. Dixie Shirt Co.*, 176 F.2d 9/69 (4th Cir. 1949); *National Labor Relations Board v. Stocker Mfg. Co.*, 185 F.2d 454 (3rd Cir. 1950); *Jones & Laughlin Steel Corporation v. Wilder*, 8 Pa. Commonwealth Ct. 505, 303 A.2d 537 (1973); *Duquesne Brewing Co. v. Workmen's Compensation Appeal Board*, 8 Pa. Commonwealth Ct. 531, 303 A.2d 541 (1973); *National Labor Relations Board v. Mackay Radio & Telephone Company*, 303 U.S. 333 (1938); *John Hancock Mutual Life Insurance Company of Boston v. Pennsylvania Labor Relations Board*, 45 D. & C. 169 (1942); 2 AM JUR 2d ADMINISTRATIVE LAW §§429-431.

It is true as Wheeling-Pittsburgh argues that a number of these cases dealt with the substitution of a hearing examiner under various circumstances rather than the preparation of an adjudication by one who has not heard the evidence. However, the principals announced in these cases appear to us to support the validity of the procedure set forth in Rule 1 Pa. Code §35.203. Several of the cases do stand directly for the proposition that the board may review the record and render a decision even though no member of the board has heard the evidence or received a report from one who has. *Stocker Mfg. Co., supra; National Labor Relations Board v. Mackay, supra,* and see *Morgan v. United States, supra.*

The only issue raised by appellant that we deem to be significant is the question of credibility determined in part by the demeanor of witnesses. (Appellant stresses Dr. Broughton's special expertise and knowledge of the plant and its problems that go back to 1973; however, these could not be replaced even by a substituted hearing examiner. Due process cannot require what is impossible.) On the issue of credibility, Professor Davis does s a y that where demeanor is a substantial element in a case, a decision should not be made by officers who have not been present at the hearing unless those officers have the benefit of a report by the officer who saw and heard the witnesses. DAVIS, 2 ADMINISTRATIVE LAW TREATISE, §11.18 at 113-114 (1958). The question in our mind is whether the demeanor and credibility of the witnesses is a significantly "substantial element" of this case to require a new hearing. We believe that it is not. While credibility may be the most important factor when the question is what are the facts, or what has in fact occurred, we do not believe that credibility is as significant on matters of expert opinion. We are prepared, however, after receiving the post-hearing briefs and reviewing the record, to take limited testimony from expert witnesses if, upon the board's review of the record, it appears to us that there are factual questions that depend upon credibility for their resolution. If appellant believes that there are specific questions upon which demeanor or credibility is critical, it should so specify in its post-hearing brief.

After several confe: ices with counsel for the parties, the board has decided for the present to limit the question to be resolved by the board to the issue of the desulfurization of by-product coke oven gas required by the 1973 order. The board has made this decision because it does appear that many of the questions in the coke oven emission aspec- of the case are mooted by the new coke oven regulations adopted by the Environmental :ality Board on July 26, 1977, or at least would only be relevant in an enforcement proceeding. Also, although Wheeling-Pittsburgh sought a continuance of this matter for 90 days to c ncide with the department's agreement to refrain from prosecuting the civil penalties action at EHB Docket No. 77-026-CP-W, the department was opposed to a continuance of this case, but agreed that it could be limited as the board suggested.

In view of the foregoing, we enter the following:

O R D E R

AND NOW, this 20th day of October, 1977, it is hereby ordered that on or before October 31, 1977, the parties shall file post-hearing briefs limited to the question of the validity of the flue gas desulfurization requirements of the department's regulations and the 1973 abatement order.

Between now and November 11, 1977, counsel for the parties shall meet with Mrs. Sue Broughton or her designated representative at the Duquesne University Law School to review, compile and certify to the board the record in these proceedings. The parties shall either by stipulation, or if that is impossible, individually, specify the portions of the record that are germane to the resolution of the question to be addressed by the board.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: JOANNE R. DENWORTH
Member

cc: Bureau of Litigation Enforcement
512 Executive House
101 S. Second Street
Harrisburg, PA 17120

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For Appellant/Respondent/Defendant:

David Olds, Esquire
Reed Smith Shaw & McClay
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DATED: October 20, 1977

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